

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

In the Matter of
1998 Biennial Regulatory Review
Spectrum Aggregation Limits for
Wireless Telecommunications Carriers
Cellular Telecommunications Industry
Association's Petition for
Forbearance From the 45 MHz
CMRS Spectrum Cap
Amendment of Parts 20 and 24 of the
Commission's Rules—Broadband PCS
Competitive Bidding and Commercial
Mobile Radio Service Spectrum Cap
Implementation of Sections 3(n) and
332 of the Communications Act
Regulatory Treatment of Mobile Services
WT Docket 98-205
WT Docket No. 96-59
GN Docket No. 93-252

REPORT AND ORDER

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

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I. INTRODUCTION

1. In this Report and Order, the Commission completes our re-assessment of the 45 MHz Commercial Mobile Radio Service (CMRS) spectrum cap and cellular cross-interest rules initiated as part of our 1998 biennial review of the Commission's regulations pursuant to section 11 of the Communications Act, as amended (Act).¹ After careful analysis and extensive review of the rules and the record in this proceeding, we conclude that at this time the spectrum cap and cellular cross-interest rules continue to be necessary to promote and protect competition in CMRS markets. However, we find that it is appropriate to modify both rules to allow some greater cross-ownership at this time. We also adopt a modest increase in the spectrum cap's current aggregation limit in rural areas to reflect the differing costs and benefits of limits on spectrum aggregation in rural areas.

2. The CMRS spectrum cap, set out in section 20.6 of the Commission's rules,² governs the amount of CMRS spectrum that can be licensed to a single entity within a particular geographic area. Pursuant to section 20.6, a single entity may acquire attributable interests in the licenses of broadband Personal Communications Service (PCS), cellular, and Specialized Mobile Radio (SMR) services that cumulatively do not exceed 45 MHz of spectrum within the same

¹ 47 U.S.C. § 161. This proceeding is part of our comprehensive review of existing Commission regulations to determine whether our rules continue to make economic and regulatory sense, pursuant to section 11. In the Telecommunications Act of 1996, Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), Congress sought to enhance competition in local and other telecommunications markets and recognized that the achievement of that goal would lessen the need for regulation of the industry. For that reason, Congress charged the Commission with reviewing regulations it applies to providers of telecommunications services on a biennial basis 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." 47 U.S.C. § 161(a)(2); *see also* section 202(h) of the 1996 Act, 110 Stat. 56 (1996). If we find that a regulation is no longer in the public interest, we have an affirmative obligation to repeal or modify that regulation. 47 U.S.C. § 161(b).

² 47 C.F.R. § 20.6.

geographic area.³ We recognize the substantial increase in competition in CMRS markets since the adoption of the spectrum cap in 1994. However, we do not find that we can rely solely on case-by-case review of transfers of control and assignments to ensure that competition in these markets continues to develop. We find that, as a general matter, the aggregation limit should be maintained at 45 MHz at this time. We believe, however, that the cap can be raised to 55 MHz in rural areas, which should facilitate the deployment of service, particularly PCS, to rural areas without presenting a significant risk to competition in those areas. We also find that the establishment of a separate, higher attribution benchmark for passive institutional investors will increase the availability of capital to all CMRS carriers.

3. The cellular cross-interest rule, set out in section 22.942 of our rules,⁴ limits the ability of a party to have ownership interests in both cellular carriers in overlapping cellular geographic service areas (CGSAs). Although the two cellular carriers are no longer the only providers of mobile voice service in most areas, they still have the predominant share of subscribers in every one of these markets. Based on the cellular carriers' continuing disproportionate market presence, we find that at this time the cellular cross-interest rule is still necessary to protect and promote competition. We believe, however, that the attribution benchmarks used in the cellular cross-interest rule may be relaxed without significant risk to competition.

4. We will continue to reassess CMRS markets periodically and determine if it is appropriate to modify further or eliminate the spectrum cap and the cellular cross-interest rules. CMRS markets are rapidly changing. PCS and digital SMR are becoming available in more and more areas, both services are attracting more and more subscribers, and market share differences between these new competitors and cellular carriers are narrowing. We will continue to track these changes and report on the evolving level of competition in CMRS markets as part of our annual reports on the state of CMRS competition.⁵ We will review the need for the spectrum cap and cellular cross-interest rules as part of our year 2000 biennial regulatory review, pursuant to section 11 of the Act.⁶

II. EXECUTIVE SUMMARY

5. In this Report and Order, we conclude that the spectrum cap and cellular cross-interest rules are currently necessary and efficient means to promote and protect competition in

³ 47 C.F.R. § 20.6(a).

⁴ 47 C.F.R. § 22.942.

⁵ See 47 U.S.C. § 332(c)(1)(C) ("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 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.").

⁶ 47 U.S.C. § 161.

CMRS markets. After extensive review of the level of competition in these markets, we find that at this time the public interest is better served by the continued use of bright-line levels of acceptable ownership, rather than relying solely on case-by-case review of proposed ownership arrangements. We find, however, that the spectrum cap and cellular cross-interest rules should be modified in certain respects as described below.

6. We make the following changes to our rules:

- We adopt a 55 MHz spectrum aggregation limit for licensees serving rural areas, defined as Rural Service Areas (RSAs).
- For purposes of the spectrum cap, we establish a separate attribution benchmark of 40 percent for passive institutional investors.
- We amend the spectrum cap rule to attribute ownership interests held in a trust to the grantor, the beneficiary, and the trustee of the trust. We will continue to allow short-term trusts to be used as part of an approved divestiture plan to come into compliance with our rules.
- We amend the cellular cross-interest rule to allow a party with a controlling interest or an otherwise attributable interest in a cellular licensee to have a non-controlling or otherwise non-attributable direct or indirect ownership interest of up to 5 percent in another cellular licensee in overlapping CGSAs.
- We amend the cellular cross-interest rule to allow a party to have a non-controlling or an otherwise non-attributable direct or indirect ownership interest of up to 20 percent in both cellular licensees in overlapping CGSAs.

7. As part of this proceeding, the Commission also reviewed a petition to forbear from enforcement of the CMRS spectrum cap filed by the Cellular Telecommunications Industry Association (CTIA).⁷ Based on the record and our analysis of CMRS markets, we find that the spectrum cap serves the public interest and is necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with telecommunications carriers or telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory, and to protect consumers. Consequently, we deny the CTIA request that we forbear from enforcing the spectrum cap at this time.

⁷ Petition for Forbearance From the 45 MHz CMRS Spectrum Cap, Petition for Forbearance of the Cellular Telecommunications Industry Association, filed Sept. 30, 1998 (CTIA Forbearance Petition).

III. BACKGROUND

A. CMRS Spectrum Cap

8. The CMRS Spectrum Cap. Under the CMRS spectrum cap, “[n]o 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.”⁸ A “significant overlap” of a PCS licensed service area and CGSA(s) and SMR service area(s) occurs when at least ten percent of the population of the PCS licensed service area is within the cellular geographic service area and/or SMR service area(s).⁹ Therefore, a carrier’s spectrum counts toward the spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the designated service area. Under the CMRS spectrum cap, ownership interests of 20 percent or more (40 percent if held by a small business or rural telephone company), including general and limited partnership interests, voting and non-voting stock interests or any other equity interest, are considered attributable.¹⁰ 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.¹¹ Stock interests held in trust are attributable only to those who have or share the power to vote or sell the stock.¹² Debt does not constitute an attributable interest for purposes of the spectrum cap, and securities affording potential future equity interests (such as warrants, options, or convertible debentures) are not considered attributable until they are converted or exercised.¹³

9. History of the Spectrum Cap. The CMRS spectrum cap was established in 1994 in the *CMRS Third Report and Order* as part of the implementation of the deregulated CMRS regime enacted by the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act).¹⁴ Prior to

⁸ 47 C.F.R. § 20.6(a). Under the current rule, no more than 10 MHz of SMR spectrum in the 800 MHz service will be attributed to an entity when determining compliance with the cap. 47 C.F.R. § 20.6(b).

⁹ 47 C.F.R. § 20.6(c).

¹⁰ 47 C.F.R. § 20.6(d)(2). In addition, ownership interests held by an entity with a non-controlling equity interest up to 40 percent in a broadband PCS licensee or applicant that is a small business are not attributable. 47 C.F.R. § 20.6(d)(2). Ownership interests held through successive subsidiaries are calculated by using a multiplier. 47 C.F.R. § 20.6(d)(8).

¹¹ 47 C.F.R. § 20.6(d)(7), (9), (10).

¹² 47 C.F.R. § 20.6(d)(3).

¹³ 47 C.F.R. § 20.6(d)(5).

¹⁴ Implementation Of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment Of Mobile Services, GN Docket No. 93-252, Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems In The 800 MHz Frequency Band PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use Of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz And 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool PR Docket No. 89-553, *Third Report and Order*, 9 FCC Rcd. 7988, 7992 (1994) (*CMRS Third Report and Order*) (citing

the adoption of the CMRS spectrum cap, the Commission had imposed service-specific limitations on aggregation of broadband PCS spectrum and on cellular/PCS cross-ownership.¹⁵ In adopting a general, multiple service cap in addition to the PCS/cellular ownership rules, the Commission explained that an overall spectrum cap for CMRS would add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.¹⁶ The Commission found 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. The Commission concluded that the imposition of a cap on the amount of spectrum that a single entity can control in any one geographic area would limit its ability to increase prices artificially.¹⁷ The Commission also found that a cap on broadband PCS, SMR, and cellular licensees, would “prevent licensees from artificially withholding capacity from the market.”¹⁸ The Commission found 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.¹⁹ The Commission adopted a 20 percent cross-ownership attribution rule for the CMRS spectrum cap in order to be consistent with the attribution rules in the PCS/cellular cross-ownership rule.²⁰ The Commission also adopted a ten percent population overlap threshold, consistent with the standards used in the PCS/cellular cross-ownership rule.²¹

10. In the *CMRS Fourth Report and Order*, the Commission further clarified that certain business relationships could give rise to attributable ownership interests for purposes of the CMRS spectrum cap. The Commission found that management agreements that authorize managers of cellular, broadband PCS or SMR systems to engage in practices or activities that determine or significantly influence the nature and types of services offered, the terms on which

Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993)).

¹⁵ Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7728 ¶ 61, 7745 ¶ 106 (1993) (*Broadband PCS Second Report and Order*) (limited broadband PCS licensees to 40 MHz of the total spectrum allocated to broadband PCS; limited cellular licensees to no more than 10 MHz of PCS spectrum in their cellular service areas); Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4984 ¶ 67 (1994) (*Broadband PCS Reconsideration Order*) (revised the PCS/cellular cross-interest rule to allow cellular licensees to increase their holding of PCS spectrum from 10 MHz to 15 MHz after January 1, 2000).

¹⁶ *CMRS Third Report and Order*, 9 FCC Rcd at 8100-8107.

¹⁷ *Id.* at 8104 ¶ 248.

¹⁸ *Id.* at 8108 ¶ 258.

¹⁹ *Id.* at 7999 ¶ 16.

²⁰ *Id.* at 8114 ¶ 276.

²¹ *Id.* at 8116-17 ¶ 281.

services are offered, or the prices charged for such services, give the managers an attributable interest in that licensee.²² The Commission also concluded that joint marketing agreements that affect pricing or service offerings are attributable.²³

11. In 1996, the Commission reaffirmed the basic tenets of the CMRS spectrum cap and provided additional economic rationale for its use in the *CMRS Spectrum Cap Report and Order*.²⁴ Specifically, the Commission analyzed potential market concentration using the Herfindahl-Hirschman Index (HHI) and found that a 45 MHz spectrum cap was necessary to prevent CMRS markets from becoming highly concentrated.²⁵ The Commission found that such a spectrum cap would help ensure competition and would address concerns about potential anticompetitive behavior in CMRS markets.²⁶ Based on that analysis the Commission found that the 45 MHz CMRS spectrum cap provided sufficient means to promote and protect competition and that it therefore could eliminate the PCS/cellular cross-ownership rule and the 40 MHz PCS spectrum cap.²⁷

12. The Commission also reconsidered the ownership and geographic attribution provisions of the CMRS spectrum cap in the *CMRS Spectrum Cap Report and Order*. Although the Commission decided not to alter the 20 percent ownership attribution standard, it did adopt a four-pronged test under which it would review requests for waiver of the standard.²⁸ The Commission also eliminated the 40 percent attribution threshold for ownership interests held by minorities and women, but maintained it for small businesses and rural telephone companies.²⁹ In considering changes to the geographic attribution standard, the Commission declined to alter the 10 percent overlap definition because it found “that an overlap of 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight.”³⁰ In addition, the Commission expanded the divestiture provisions by allowing parties

²² Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Fourth Report and Order*, 9 FCC Rcd 7123, 7128 ¶ 25 (1994) (*CMRS Fourth Report and Order*).

²³ *Id.* at 7129-30 ¶ 30.

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

²⁵ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869-73 ¶¶ 96-100.

²⁶ *Id.* at 7875 ¶ 104.

²⁷ *Id.* at 7875 ¶ 105.

²⁸ *Id.* at 7887 ¶ 131.

²⁹ *Id.* at 7828 ¶ 4, 7880 ¶ 117.

³⁰ *Id.* at 7876 ¶ 107.

with non-controlling, attributable interests in CMRS licensees to have an attributable or controlling interest in another CMRS application that would exceed the 45 MHz spectrum cap so long as they followed our post-licensing divestiture procedures.³¹

13. The Commission has also clarified that the CMRS spectrum cap is not limited to real-time, two-way switched telephone service, but covers a variety of services within the definition of CMRS. In the *BellSouth MO&O* in 1997, the Commission explained that because SMR technology potentially enables SMR licensees to offer services that are nearly identical to those offered by broadband PCS and cellular licensees, all SMR services are subject to the CMRS spectrum cap to guard against spectrum aggregation that could confer undue market power.³² The D.C. Circuit affirmed this position, and declined to impose a distinction between voice and non-voice SMR in the context of spectrum acquisition. The court instead found the inclusion of all SMR spectrum in the cap, including those frequencies used to provide data services, to be reasonable.³³ The court approved the Commission's view that the cap served to guard against the excessive accumulation of CMRS spectrum, regardless of the use to which spectrum currently was dedicated. Further, the court found that “[a] spectrum cap, unlike many other regulations, might actually require a bright-line rule to be effective” and upheld the Commission’s denial of BellSouth’s waiver request.³⁴

B. Cellular Cross-Interest Rule

14. The Rule. Section 22.942 of the Commission’s rules prohibits any person from having a direct or indirect ownership interest in licensees for both cellular channel blocks in overlapping CGSAs.³⁵ A party with a controlling interest in a licensee for one cellular channel block may not have any direct or indirect ownership interest in the licensee for the other channel block in the same geographic area.³⁶ A party may, however, have a direct or indirect ownership interest of five percent or less in the licensees for both channel blocks so long as neither of those interests is controlling.³⁷ Divestiture of interests as a result of an assignment of authorization or transfer of control must occur prior to the consummation of the transfer or assignment.³⁸

15. History of the Cellular Cross-Interest Rule. The cellular cross-interest rule was

³¹ *Id.* at 7886 ¶ 130.

³² *BellSouth MO&O*, 12 FCC Rcd at 14037 ¶ 10, 14040 ¶ 14.

³³ *BellSouth v. FCC*, 162 F.3d at 1222-24.

³⁴ *Id.* at 1225.

³⁵ 47 C.F.R. § 22.942.

³⁶ 47 C.F.R. § 22.942.

³⁷ 47 C.F.R. § 22.942(a).

³⁸ 47 C.F.R. § 22.942(b).

adopted in 1991.³⁹ At that time cellular licensees were the predominant providers of mobile voice services. In adopting the cross-interest rule the Commission stated that “in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block in the same market.”⁴⁰ Consequently, “[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems” the Commission adopted restrictions on a party's ability to hold ownership interests in both cellular licensees in the same geographic area.⁴¹

C. Notice of Proposed Rulemaking

16. In the Notice of Proposed Rulemaking (*NPRM*) in this proceeding,⁴² we initiated this re-evaluation of the CMRS spectrum cap as part of our 1998 biennial regulatory review. The *NPRM* also sought comment on whether to retain, modify, or repeal the cellular cross-interest rule. In addition, the *NPRM* incorporated a petition filed by CTIA on September 30, 1998, requesting that the Commission forbear from enforcing the CMRS spectrum cap pursuant to section 10 of the Communications Act.⁴³

17. The *NPRM* requested comment on whether the Commission should retain, modify or repeal the spectrum cap. The *NPRM* discussed the changes occurring in CMRS markets, and sought comment on whether the CMRS spectrum cap in its current form continues to make economic and regulatory sense given those changes. Specific options set forth in the *NPRM* included: (1) modification of the significant overlap threshold;⁴⁴ (2) modification of the 45 MHz limitation;⁴⁵ (3) modification of the ownership attribution thresholds;⁴⁶ (4) forbearance from enforcing the spectrum cap;⁴⁷ (5) sunseting the spectrum cap;⁴⁸ and (6) elimination of the

³⁹ Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket Nos. 90-6, 85-388, *First Report and Order and Memorandum Opinion and Order On Reconsideration*, 6 FCC Rcd 6185, 6628-29 (1991) (*Cellular First Report and Order*). The rule initially was codified at 47 C.F.R. § 22.902(b)(5), but subsequently was moved, without revision, to 47 C.F.R. § 22.942. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket 92-115, *Report and Order*, 9 FCC Rcd 6513, 6574 (1994).

⁴⁰ *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 103.

⁴¹ *Id.* at ¶ 104.

⁴² 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications carriers, WT Docket No. 98-205, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132 (1998) (*NPRM*).

⁴³ *Id.* at 25134-35 ¶ 5, 25147 ¶ 29.

⁴⁴ *Id.* at 25156-57 ¶¶ 50-53.

⁴⁵ *Id.* at 25157-59 ¶¶ 54-58.

⁴⁶ *Id.* at 25159-61 ¶¶ 59-62.

⁴⁷ *Id.* at 25161-63 ¶¶ 63-70.

spectrum cap.⁴⁹

18. In the *NPRM* we stated our intent to consolidate in this proceeding certain spectrum-cap-related issues pending in other proceedings, and accordingly incorporated the records of those proceedings into this one. We therefore also consider here certain issues raised by: (1) a petition for reconsideration of the *CMRS Third Report and Order* filed by SMR Won;⁵⁰ (2) a petition for reconsideration of the *CMRS Fourth Report and Order* filed by McCaw Cellular;⁵¹ (3) petitions for reconsideration of the *CMRS Spectrum Cap Report and Order* filed by Omnipoint and Radiofone;⁵² (4) the pending *Third FNPRM* in GN Docket No. 93-252;⁵³ and (5) a CTIA petition seeking forbearance from applying section 20.6 of the Commission's rules.⁵⁴ We also noted that there were three pending requests for waiver of the spectrum cap filed by Western PCS I License Corporation, Western PCS II License Corporation, and Triton Communications.⁵⁵

19. Twenty-five parties filed comments on the *NPRM*, and fifteen parties filed reply comments. Those parties, and the abbreviated names used in this Order, are set forth in Appendix A.⁵⁶

IV. DISCUSSION

A. Assessment of the Need for the Spectrum Cap and Cellular Cross-Interest Rules

20. We conclude that bright-line spectrum cap and cellular cross-interest rules remain

⁴⁸ *Id.* at 25163-64 ¶¶ 71-73.

⁴⁹ *Id.* at 25164-66 ¶¶ 74-78.

⁵⁰ *Id.* at 25142-43 ¶ 20. SMR Won's petition also raised other issues regarding the *CMRS Third Report and Order*. Those issues will be addressed in a separate proceeding.

⁵¹ *NPRM* at 25143 ¶ 21.

⁵² *Id.* at 25143-44 ¶¶ 22-24. Radiofone's petition also raised other issues relating to the *CMRS Spectrum Cap Report and Order*. Those issues will be addressed in a separate proceeding.

⁵³ *Id.* at 25146-47 ¶ 28. Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6880 (1995) (*Third FNPRM*).

⁵⁴ *NPRM* at 25147, 25161-63 ¶ 29, 63-70 (citing CTIA Forbearance Petition).

⁵⁵ *NPRM* at 25144-46 ¶¶ 25-27. After release of the *NPRM*, five parties filed requests for waiver of the spectrum cap in conjunction with winning bids in Auction No. 22. See Pioneer Telephone Association, Inc. *et al*; Requests for Waiver of Section 20.6 of the Commission's Rules, *Order*, DA 99-1823 (CWD rel. Sep. 8, 1999).

⁵⁶ Donald R. Newcomb and Southeast Telephone filed informal comments. In addition, Cellular Communications of Puerto Rico, Inc. (CCPR) filed an *ex parte* letter. Letter from Sara F. Seidman, counsel for CCPR, to Thomas J. Sugrue, FCC, dated Apr. 22, 1999.

necessary to serve the public interest at this time. When the Commission first decided to introduce additional competition in CMRS markets in 1994, it formulated the spectrum cap rule in part to ensure that licenses would be distributed among a diverse group of entities. The Commission also indicated that it sought to “maximize the number of opportunities for new viable competitors to emerge.”⁵⁷ In the *CMRS Third Report and Order*, the Commission stated that it devised a spectrum cap rule out of concern “that excessive aggregation by any one or several CMRS licensees could reduce competition by precluding entry [of] other service providers and might thus confer excessive market power on incumbents.”⁵⁸ In declining to eliminate the spectrum cap and cellular cross-interest rules, we agree with commenters in this proceeding who express concern that such aggregation could result in consolidation among current or future CMRS competitors and, particularly, that the number of facilities-based providers operating in individual markets could decline.⁵⁹ We also determine that both our spectrum cap and cellular cross-interest rules are appropriate and effective tools to be used in conjunction with our section 310(d) case-by-case reviews as we evaluate proposed mergers and acquisitions.

1. Public Policy Objectives

21. At its inception, the CMRS spectrum cap was designed to “discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.”⁶⁰ The Commission also determined that the rule “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.”⁶¹ In its reaffirmation of the rule in the *CMRS Spectrum Cap Report and Order*, the Commission also found that the cap “furthers the goal of diversity of ownership that we are mandated to promote under section 309(j)” of the Act.⁶² In adopting the cellular cross-interest rule, the Commission found that the rule was needed “[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.”⁶³

⁵⁷ Amendment of the Commission’s Rules to Establish New Personal Communications Services, RM-7140, RM-7175, RM-7618 FCC 94-144, GN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4979 ¶ 53 (1994) (*PCS Memorandum Opinion and Order*).

⁵⁸ *CMRS Third Report and Order*, 9 FCC Rcd at 8101 ¶ 240.

⁵⁹ As PCIA notes, we have recognized that “while aggregation of spectrum allows efficiencies and economies, there is a point at which aggregation results in less innovation and higher prices.” PCIA comments at 5 (citing *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 95). See also Northcoast comments at 4; TRA comments at 4-5.

⁶⁰ *CMRS Third Report and Order*, 9 FCC Rcd at 8105 ¶ 251.

⁶¹ *Id.*

⁶² *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd. at 7873 ¶ 102 (citing 47 U.S.C. § 309(j)).

⁶³ *Id.* at ¶ 104.

22. As stated in the *NPRM*, our re-evaluation of the need for CMRS spectrum aggregation limits and cellular cross-interest limits is guided by four central principles.⁶⁴ First, the operation of market forces generally better serves the public interest than regulation. As a general matter of principle, we prefer to place ultimate reliance on the market, rather than on regulation, to direct the course of development in the CMRS and other markets. Second, we intend to foster vigorous competition in all telecommunications markets, consistent with the central Congressional mandate of the 1996 Act. In particular, we wish to ensure that there are no regulatory impediments to the evolution of wireless carriers into more effective competitors vis-à-vis the local wireline telephone companies. Third, we seek to secure the benefits of modern telecommunication services, including wireless services, for all areas of our Nation, including high-cost and rural areas. Finally, our regulations must promote, rather than impede, the introduction of innovative services and technological advances.

2. Current State of CMRS Competition and the Spectrum Cap

23. As we described in the *Fourth Annual CMRS Competition Report*, there is considerable evidence that competition is steadily growing in many CMRS markets.⁶⁵ Newer broadband PCS licensees continue to inaugurate services while operational carriers expand their footprints. Most cellular carriers are upgrading their networks by converting to digital technology and thereby expanding their network capacity. Growth is also accelerating in the provision of data services as part of CMRS. As a consequence, prices are falling, usage is expanding, and service options are growing. In some cities, as many as seven independent facilities-based providers are now competing for business in mobile voice markets.⁶⁶

24. Commenters generally agree that considerable progress has been made in recent years toward more competitive CMRS markets.⁶⁷ There is also general agreement that further progress toward competitive CMRS markets can be anticipated.⁶⁸ Nevertheless, commenters remain sharply divided in their assessments of the current state of competition in these markets. Commenters express disagreement with respect to appropriate product market definition, barriers to entry, and the dynamic effects of technological change in these markets. Those favoring retention of a spectrum cap typically distinguish among the various wireless product markets and

⁶⁴ *NPRM*, 13 FCC Rcd at 25135 ¶ 5.

⁶⁵ 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*, FCC 99-136 (rel. June 24, 1999) at 20-23, 25 (*Fourth Annual CMRS Competition Report*).

⁶⁶ See D&E comments at 5, 9; Digiph comments at 2.

⁶⁷ See, e.g., Digiph comments at 2,4; North Coast comments at 3; Omnipoint comments at 3-4; Radiofone comments at 5; RTG comments at 5; SBCW comments at 4; Crandall & Gertner at 5-6.

⁶⁸ Digiph comments at 3; TDS comments at 3.

highlight barriers to entry over the near term, most notably, the need to secure spectrum rights before they can enter these markets.⁶⁹ Commenters favoring elimination of the cap tend to define markets broadly, raise *de novo* entry prospects associated with future spectrum auctions,⁷⁰ and predict dramatic changes from the adoption of third generation (3G) wireless network technologies, such as IMT-2000.⁷¹

25. Although we agree that competition is increasing in CMRS markets, we find that there remain significant reasons to be concerned about the effects of undue concentration of CMRS spectrum. Even in major metropolitan markets, where numerous competitors are offering mobile voice services, in almost all markets the two cellular carriers still have in excess of 70 percent of the customers.⁷² In addition, the amount of CMRS spectrum is fixed, and the discipline of market forces is tempered by the reality that would-be market entrants must obtain spectrum rights, which in practical terms requires that they find willing sellers.

26. We also observe that, by and large, the current 45 MHz spectrum aggregation limit does not appear to be constraining carriers. Generally, PCS carriers have not yet deployed capacity up to the limits of their licensed capacity. In addition, very few cellular carriers have acquired spectrum up to the permissible limit.⁷³ We also have received only a handful of waiver requests to exceed the cap.⁷⁴ Consequently, at least for now, we determine that our spectrum cap rule has not significantly constrained carriers in their ability to provide service at low cost, deploy new services, or commit to innovation. Recognizing the speed with which the industry is changing and the biennial review mandate of the 1996 Act, however, we will revisit these issues as part of our year 2000 biennial review.⁷⁵

⁶⁹ See, e.g., D&E Communications comments at 8.

⁷⁰ Crandall & Gertner at 4 ¶ 15, 16 ¶ 49.

⁷¹ See, e.g., BellSouth comments at 10; GTE comments at 19-22; SBCW comments at 9-10.

⁷² See letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, FCC, dated Aug 25, 1999, Attachment (Telecompetition, Market Data Report, Aug. 23, 1999)(in all but 15 of the top 203 MSAs the two cellular carriers have 70 percent or more of subscribers); PCIA reply comments, Attachment A (Telecompetition). See also *Fourth Annual CMRS Competition Report* at 9 (at end of 1998, cellular carriers had approximately 86 percent of mobile telephone subscribers nationwide).

⁷³ See Sprint PCS comments at 14.

⁷⁴ See *NPRM*, 13 FCC Rcd at 25144-46 ¶¶ 25-27. Subsequent to release of the *NPRM*, five parties have filed requests for waiver of the spectrum cap in conjunction with winning bids in Auction 22. See Pioneer Telephone Association, Inc. *et al*; Requests for Waiver of Section 20.6 of the Commission's Rules, *Order*, DA 99-1823 (CWD rel. Sep. 8, 1999).

⁷⁵ We decline to adopt a sunset for either the spectrum cap or the cellular cross-interest rule at this time. See *NPRM* at 25162-63 ¶ 67. As we discuss in this Order, competition in CMRS markets is changing rapidly. We do not believe that at this time we can accurately predict when it would be proper to eliminate either of these two rules. We believe it is more appropriate at this time to reassess the state of CMRS markets, and the continuing need for these rules, as part of our year 2000 biennial review.

3. Assessment of the State of CMRS Competition and the Effects of Possible Spectrum Consolidation

27. In general, we find, based on the evidence we discuss below, that the provision of CMRS remains concentrated among relatively few providers, even in urban markets. We recognize that this situation is changing as new entrants into these markets begin offering services and competing for customers. Nevertheless, many firms that have been awarded licenses recently have not yet begun, or still are in the early stages of, their network build-out. As a consequence of the concentration currently prevailing in the CMRS sector, and the risks we associate with concentrated markets, we seek to foster more vigorous competition in markets in which adequate competition has not yet been realized, and to inhibit the erosion of competition from undue consolidation of spectrum in markets in which competitive conditions may have advanced significantly.

a. Analytical Framework

28. In determining whether to eliminate, sunset, or modify the spectrum cap and cellular cross-interest rules we take into consideration several factors. One factor that must be considered is the ease or difficulty with which competitors can enter CMRS markets. The *Merger Guidelines*,⁷⁶ which provide a framework for evaluating prospects for entry into a particular market, deem a merger unlikely to create or enhance market power or facilitate its exercise, if entry into the relevant market “is so easy that market participants . . . could not profitably maintain a price increase above pre-merger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.”⁷⁷ In this respect, we are mindful that CMRS markets differ from certain other telecommunications markets with respect to ease of entry because of the need to obtain a governmentally-granted spectrum license to provide CMRS. This and other barriers that limit the ability of firms to respond with adequate certainty, timeliness and sufficiency to undermine anticompetitive behavior over the near term.

29. Our assessment must also take into account the effect of the relevant rules on the long-term prospects for competition in CMRS markets. From its initial consideration of a spectrum cap, the Commission has focused on the long-term objective of fostering competition. Moreover, because the Commission’s emphasis in considering the prospects for CMRS competition was on the allocation of a scarce resource, spectrum, rather than on market share, we used economic analysis to examine alternative scenarios for the distribution of CMRS spectrum among licensees. By using allocated spectrum, rather than current productive capacity, as

⁷⁶ [1992] Department of Justice – Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) (*Merger Guidelines*).

⁷⁷ *Merger Guidelines* at § 3.0.

measures for market share, we examined conditions of potential competition in these markets rather than actual competition. In conducting this analysis, the Commission found acceptable the prospect of some post-auction spectrum aggregation in any one market, so long as no single entity held an attributable interest in more than 45 MHz of CMRS spectrum.⁷⁸ Particularly given the deployment of new broadband PCS licenses as of 1996, the *CMRS Spectrum Cap Report and Order* appropriately addressed the long-term objectives of fostering competition, since most mobile phone users at that point had only two service providers from which to choose. Even today, the state of competitive development in CMRS markets requires that we remain focused on the longer term in pursuing our competition objectives.

30. Finally, when evaluating the spectrum cap and cellular cross-interest rules, we must consider the potential risk of re-concentration in CMRS markets. We are particularly concerned about the possibility of coordinated behavior among CMRS carriers. The economic literature offers some guidance in assessing the likelihood of coordinated interaction among competitors. For example, one author, Reinhard Selten, employs game theory and a simple model of cooperative behavior to explore the boundary between too few and many competitors.⁷⁹ Under his assumptions, he finds that the probability of cartel behavior is 100 percent for up to four competitors. If there are five competitors, the likelihood of a cartel falls to 22 percent. For six or more competitors, the probability declines further to about 1 percent or less. Without endorsing it as being fully applicable to CMRS, we note that Selten's study points up the risks to competition were we to change our policy to permit a reduction in the number of carriers in any particular market.

b. Discussion

31. *Market Entry.* Applying the above criteria, we conclude that our spectrum cap and cellular cross-interest rules continue to be necessary to ensure long-term competition within the CMRS sector. First, with respect to market entry, "entry is . . . easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern."⁸⁰ In particular, we note that antitrust authorities "will consider timely only

⁷⁸ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 95. We noted that "[u]p to a point, horizontal concentration can allow efficiencies and economies that would not be achievable otherwise, and can therefore be pro-competitive, pro-consumer, and in the public interest." *Id.* For purposes of identifying this point, we even found "useful" measures of market concentration, notwithstanding the absence of data on the actual performance of broadband PCS carriers, which were then "under construction in almost all markets." *Id.* at ¶ 96. Thus, we calculated market concentration based on allocated spectrum, rather than on any then current measures of productive ability. *Id.*

⁷⁹ Reinhard Selten, "A Simple Model of Imperfect Competition, where 4 Are Few and 6 Are Many," *International Journal of Game Theory* (1973), at 141-201, cited by America One Communications in *ex parte*. See attachment to letter from Henry Goldberg, counsel for America One, to Magalie Roman Salas, FCC, in CC Docket No. 94-54, dated August 5, 1999.

⁸⁰ *Merger Guidelines* at § 3.0.

those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.”⁸¹ Because a license for use of government spectrum is required to provide CMRS, we must conclude that entry into CMRS markets is not “easy.” 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.⁸² Commenters generally recognize that there are numerous entry barriers relating to the provision of CMRS, including acquisition of spectrum rights, financing, and access to tower sites,⁸³ although there is debate over the magnitude of these barriers.⁸⁴ In any event, we believe that barriers to entry are significant, and that the current state of competition requires continued vigilance over at least the near term.

32. *Prospects for Long-Term Competition.* Turning to the second factor, long-term prospects for competition, there is little dispute in the record that considerable progress has been made toward the goal of promoting competition in CMRS markets, but many commenters question whether an adequate array of competitive options is now available to all of the nation’s wireless consumers.⁸⁵ While commenters generally agree that the creation of the spectrum cap rule helped competition in mobile voice markets develop out of a duopoly environment, disagreement exists regarding the extent to which competition has been achieved.⁸⁶ Several commenters contend that with the initial licensing of PCS spectrum now largely completed, our objectives have essentially been accomplished.⁸⁷ Some commenters argue that with the completion of the recent supplemental auction of C-block licenses, even further progress toward our goals has been achieved. We cannot agree, however, that merely making spectrum available completes the task of promoting competition.

⁸¹ *Id.* at § 3.2.

⁸² *Id.* at § 3.0.

⁸³ GTE comments at 16; D&E comments at 7 n.21; PCIA comments at 7; PCIA reply comments at 15 n. 39.

⁸⁴ PCIA argues that “there is no doubt that barriers to entry in this market are high,” since it may take years for equipment to be designed, tested and commercially available that would enable a new entrant to provide services not already being offered in the spectrum band in which it is licensed. PCIA reply comments at 15 n. 39. Sidak and Teece contend that the incremental cost of cell sites and tower siting are both on the decline, but do not address the absolute level of those costs or the costs of spectrum rights. GTE comments at 16; GTE reply comments at 12-13. Moreover, at least one wireless analyst believes that these costs will rise for new entrants, as growing demand for wireless connectivity generally and for wireless data in particular increases demand for tower and cell sites. *See* John Bensch, “Seizing the Narrows,” Lehman Brothers (July 30, 1999).

⁸⁵ TDS comments at 3-4. *See also* BellSouth comments at 11; Western Wireless comments at 4.

⁸⁶ North Coast comments at 4; Wireless One comments at 3; SBA reply comments at 4. However, AirTouch contends that the Commission should avoid overstating the extent to which the rule has contributed to the successful growth of the CMRS sector. Instead, it attributes industry growth to the allocation and auctioning of more spectrum, rapid technological advances, and narrowly focused regulation such as build-out benchmarks. AirTouch comments at 10. *See also* Western Wireless comments at i.

⁸⁷ Bell Atlantic Mobile comments at 15-16; Omnipoint comments at 4.

33. The Commission has had prior occasion to point out the continuing need to promote competition and the entrance of new participants in the CMRS markets even after broadband licenses were awarded. In the *CMRS Spectrum Cap Report and Order*, for example, we stated that “the 45-MHz [spectrum] cap will continue to serve [our] objectives in future auctions and the post-auction market.”⁸⁸ In the *Broadband PCS Reconsideration Order*, we emphasized that our goal in crafting limitations on spectrum aggregation was not solely “to prevent anticompetitive behavior which may or may not materialize but rather to promote competition. . . . We conclude that the public interest would be best served by maximizing the number of viable new entrants in a given market.”⁸⁹ Given the ongoing impediments to entry into broadband CMRS markets, we believe that our spectrum cap and cellular cross-interest rules continue to serve our competition goals.

34. Moreover, despite enormous progress in the past few years, the broadband PCS sector remains in the early stages of deployment. While many carriers are offering service now, facilities-based coverage often is provided only to a portion of a new carrier’s potential market. Additionally, many licensees have yet to begin offering service at all, and some have yet to begin constructing their networks. In this regard, we find while our public interest standard and the Sherman and Clayton Acts can deal with potential rather than actual competition, the spectrum cap is a particularly effective way of addressing concerns related to the loss of potential competition.

35. Our concern that competition in CMRS markets is not fully developed is supported by the fact that, as conventional analyses of market concentration show, even the largest urban markets for mobile telephone services remain quite concentrated. We find persuasive the submissions by several commenters with data on market concentration in urban markets for mobile voice services. For example, HAI, on behalf of PCIA, calculated HHIs – using estimated shares of subscribers -- for eight markets within the nation’s 200 largest MSAs/CMSAs, two from each quartile.⁹⁰ In all eight markets, HHIs were found to exceed 3000, well above the Department of Justice threshold for highly concentrated markets. Moreover, PCIA’s data also show both cellular carriers have a combined market share exceeding 70 percent in almost every market.⁹¹

⁸⁸ *CMRS Spectrum Cap Report and Order* at ¶ 102.

⁸⁹ *Broadband PCS Reconsideration Order*, 9 FCC Rcd at 4998-4999.

⁹⁰ PCIA reply comments at 9-10.

⁹¹ PCIA reply comments at 10. While we are inclined to assume that the shares reported by PCIA and Telecompetition for individual markets may be subject to measurement error, when aggregated, these data covering the 200 largest urban markets comport well with data for the entire nation. See *Fourth Annual CMRS Competition Report* at 9. The PCIA data yield an 81.5 percent share for cellular carriers in these 200 markets, compared with 86 percent nationwide. Given the urban deployment strategy being adopted by most PCS carriers, we would expect to observe a lower cellular share in the PCIA sample.

36. On behalf of Sprint PCS, John Hayes of Charles River Associates (CRA) calculated HHIs for the nation's 25 largest markets using customer subscription data compiled in January 1998, July 1998, and January/February 1999.⁹² His analysis shows that HHIs in the largest metropolitan markets range between 2569 and 4511.⁹³ CRA also furnishes detailed data on market shares for the Chicago PMSA.⁹⁴ We summarize recent analyses of market concentration in the Chicago area in Table 1.

Table 1. Estimated HHIs for Mobile Voice Services in Metropolitan Chicago

Source (date)	HHI	Citation
Sprint PCS (January 1998)	4119	Comments, Hayes Attachment at 8
Sprint PCS (July 1998)	3862	Comments, Hayes Attachment at 8
Sprint PCS (January 1999)	3360	Aug. 13, 1999 submission ⁹⁵
PCIA ("early" 1999)	3331	May 6, 1999 submission ⁹⁶
Department of Justice (1999)	3200-4100	CIS, <i>USA vs. SBC and Ameritech</i> ⁹⁷

37. Finally, the Department of Justice recently examined several markets for wireless mobile telephone services in connection with three proposed telecom acquisitions: AT&T's acquisition of TCI, Inc., SBC's merger with Ameritech, and the acquisition by GTE of certain Ameritech properties. In their review of the SBC/Ameritech merger, DOJ found that market concentration in the fourteen markets in which SBC and Ameritech both control cellular licenses was "in the range of 3200 to 4100, well above the 1800 threshold at which the Department normally considers a market to be concentrated."⁹⁸

⁹² Hayes at 8, Table 1; letter from Jonathan Chambers, Sprint PCS, to Magalie Roman Salas, FCC, dated Aug. 13, 1999, Attachment (John B. Hays, HHIs in Top 25 MSAs & PMSAs).

⁹³ Letter from John Chambers, Sprint PCS, to Magalie Roman Salas, FCC, dated Aug. 13, 1999, Attachment.

⁹⁴ Hayes at Table 2. According to Donaldson Lufkin & Jenrette, entities controlling CMRS licenses in the Chicago market include SBC, Ameritech (sale pending to GTE), AT&T Wireless, PCS PrimeCo (accruing to Vodafone AirTouch), Sprint PCS (with two licenses), and Nextel. Other licensees are Cook Inlet and NextWave. Donaldson Lufkin & Jenrette, *The Global Wireless Communications Industry* (Summer 1999).

⁹⁵ Letter from John Chambers, Sprint PCS, to Magalie Roman Salas, FCC, dated Aug. 13, 1999, Attachment.

⁹⁶ Letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, FCC, dated May 6, 1999, Attachment (An Analysis of Market Concentration in the Cellular, PCS and ESMR Markets, dated May 5, 1999) at 2.

⁹⁷ Competitive Impact Statement, *United States v. Southwestern Bell Co. and Ameritech Corporation*, Civil No. 99-0715 (TPJ) at 9 (filed April 16, 1999).

⁹⁸ *Id.* DOJ reviewed the following markets: Chicago, IL MSA; St. Louis, MO-IL MSA; Gary-Hammond-East Chicago, IN MSA; Springfield, IL MSA; Champaign-Urbain-Rantoul, IL MSA; Bloomington-Normal, IL MSA; Decatur, IL MSA; Illinois RSA 2 – Bureau; Illinois RSA 5 – Mason; Illinois RSA 6 – Montgomery; Missouri RSA 8 – Callaway; Missouri RSA 12 – Maries; Missouri RSA 18 – Perry; and, Missouri RSA 19 – Stoddard.

38. The data in the record indicate that in most of the nation's 200 largest markets the two cellular companies together have in excess of 70 percent of mobile phone subscribers.⁹⁹ Given the limited deployment of PCS in less densely populated areas, one of these two firms, and in many cases both, likely command market shares in excess of 35 percent. CTIA itself acknowledges that concerns over market power begin to arise when firms hold 35 percent or more of the market.¹⁰⁰

39. Crandall and Gertner caution against using HHIs because the CMRS sector is such a dynamic industry.¹⁰¹ Even PCIA's expert notes that, "where competitors have entered markets recently and are expanding their share, such as in many wireless telephony markets, market share data will tend to understate the future competitive significance of recent entrants."¹⁰² In its recent review of competitive conditions in the CMRS sector, the Commission reported that in the last two quarters of 1998, one analyst found that new entrants account for more than 45 percent of the sector's subscriber growth.¹⁰³ This analyst expects that during 1999 combined PCS and digital SMR providers will account for 54 percent of total net additions of wireless subscribers, versus 46 percent for the cellular incumbents.¹⁰⁴ These data provide important evidence that static measures of market share—which currently would ascribe over 85 percent of the market to cellular firms¹⁰⁵—do not fully describe competitive conditions in these markets. As a result of these findings, we recognize that conditions are changing rapidly. Accordingly, as indicated above, we propose to re-examine the arguments for retaining the spectrum cap and the cellular cross-interest rule as part of our year 2000 biennial review. In the meantime, however, we believe that current levels of market concentration reinforce our view that increases in concentration could threaten competition and harm the public interest.

40. Similarly, we are not persuaded by the arguments of commenters who urge elimination of the cap based on information other than market shares or concentration as

⁹⁹ See letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, FCC, dated Aug. 25, 1999; Attachment (Telecompetition, Market Data Report, Aug. 23, 1999) (in 188 of the top 203 markets the two cellular carriers combined have 70 percent or more of total CMRS subscribers). See also PCIA Reply Comments at 2-3; Telecompetition at 19-24.

¹⁰⁰ CTIA comments at 5-6.

¹⁰¹ Bell Atlantic comments at 17.

¹⁰² Hayes at 5, as cited in Bell Atlantic reply comments at 6 ¶ 11.

¹⁰³ *Fourth Annual CMRS Competition Report* at 23.

¹⁰⁴ Donaldson Lufkin & Jenrette, *The Global Wireless Communications Industry* (Summer 1999) at 22, Table 6; see also 15, Table 2C.

¹⁰⁵ See *Fourth Annual CMRS Competition Report* at 9 (according to one estimate, at the end of 1998, cellular operators had approximately 86 percent of the mobile telephone subscribers); letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, dated Aug. 25, 1998, at 1 (Telecompetition report shows cellular has 88 percent market share in top 203 MSAs).

evidence of the competitive nature of CMRS markets. They point to pricing trends, customer churn (switching of vendors), and the incentives associated with carriers having excess capacity.¹⁰⁶ Many commenters point generally to falling prices as evidence of robust competition in the market for mobile telephone services.¹⁰⁷ Several other commenters argue that customers routinely switch carriers, and that this behavior constitutes evidence of vibrant competition.¹⁰⁸ However, the critical issue is whether these and other indicia of increased competition would be threatened by a reconsolidation of the industry. We agree with those commenters who contend that eliminating the spectrum cap at this time could pose such a threat, by enabling reconsolidation to occur.

41. Finally, while we agree with commenters who argue that the use of historical or contemporaneous data on market performance potentially understates the potential competitive impact of new entrants in a dynamic industry and overstates the risks of anticompetitive conduct,¹⁰⁹ we remain concerned about the effects of possible consolidation of CMRS spectrum over the next two years. We are concerned that if we abandon our ownership rules at this time, the competitive success we have seen in these markets may be reversed.

42. *Reconsolidation.* Given the current levels of market concentration discussed above,¹¹⁰ we are particularly concerned that any reconsolidation in the CMRS markets would either “potentially raise significant competitive concerns” or “create or enhance market power or facilitate its exercise.”¹¹¹ In mature industries, the typical indicia of market power being exercised would be curtailed usage, increased prices, or degraded service. Because of the dynamic nature of CMRS markets, however, we think it more likely that any exercise of market power would be evidenced by a slowing in the rate of growth of new customers and usage, prices falling less rapidly than would otherwise occur, or delays in the introduction of newer services.¹¹²

¹⁰⁶ See, e.g., AirTouch comments at 7; AT&T Wireless comments at 9; GTE comments at 13-16; Western Wireless comments at 5-6.

¹⁰⁷ America One comments at 4; TRA comments at 5; Western Wireless comments at i, 5; Western Wireless reply comments at i.

¹⁰⁸ AirTouch comments at i, 7; TRA comments at 7; Western Wireless reply comments at 10-11.

¹⁰⁹ See Bell Atlantic comments at 17; AirTouch comments at 7; Western Wireless reply comments at 10-11.

¹¹⁰ See *supra* ¶¶ 35-38.

¹¹¹ *Merger Guidelines* at §§ 1.51, 2.0. The guidelines describe these concerns with respect to acquisitions that increase post-merger HHIs increasing by at least 50 or 100 points, respectively.

¹¹² Competition in a particular market may be diminished through either the unilateral actions of one firm or coordinated interaction among a number of service providers. The fact that we conclude that no single CMRS carrier will likely be able to foreclose competition entirely does not alleviate our concerns about market concentration. We also recognize risks associated with unilateral exercise of market power in the provision of CMRS services by a single market participant. As firms acquire additional financial interests in other operators competing within a given market, their incentives will shift. We also believe that the risks to competition in CMRS markets may stem from the possibility of tacit or explicit collusion among market participants. In either

43. In this regard, we reject the view of commenters who suggest that consolidation of CMRS markets to as few as three competitors would not adversely affect CMRS competition. Economic consultants for Bell Atlantic contend that their analyses of cellular pricing data show that entry by a third competitor in each market prompted large price declines, but that subsequent entry by fourth and fifth carriers resulted in little or no appreciable further decline in prices.¹¹³ However, a study conducted by the Yankee Group, and submitted by PCIA, shows that the bundled price per minute for cellular service declined appreciably with the launch of the first PCS carrier in a market, and also declined significantly further when the second and third PCS carriers entered the market.¹¹⁴ In New York, for example, the study found that the average bundled price per minute dropped 18 percent after the first PCS carrier entered the market, and fell a further 30 percent after the second PCS carrier began providing service.¹¹⁵

44. We believe that significant benefits of competition are unlikely to be exhausted with the entry of a third carrier. First, the value of additional entry by fourth and fifth competitors need not be manifested solely through falling prices. The benefits of further entry may appear in the form of improved quality, product innovation, and product differentiation. DOJ has itself recognized the differentiated nature of wireless offerings by mobile voice operators.¹¹⁶ For example, entry by Nextel introduces a market to the benefits of group conferencing capability. Second, economic theory generally supports the view that additional entry, and the installation of additional capacity, will afford consumers additional benefits, whether through pricing or otherwise. We are persuaded, and PCIA appears to agree,¹¹⁷ that if mobile voice markets were to stabilize as three-firm oligopolies, recently observed price competition could be reduced or eliminated. Finally, we also draw upon our experience in other telecommunications markets, where consumers generally have benefited from their ability to

case, we are concerned that excessive concentration of the market might slow or halt the decline in prices, the increase in output, and the introduction of new services for consumers. Further, we are not persuaded by commenters' arguments that the Commission can forestall any adverse competitive impacts from spectrum concentration simply by making additional spectrum available. *See* Bell Atlantic comments at 2, 11, 32 (citing Crandall/Gertner at ¶ 39); Crandall & Gertner reply at 2-3; Bell Atlantic reply comments at 5; BellSouth comments at 10. While we are fully committed to making additional spectrum available, any resulting new market entry is unlikely to be sufficiently timely or sufficiently certain to discipline markets adequately in the near term.

¹¹³ Crandall & Gertner at 8-10. Crandall & Gertner also present data showing declining prices in the same markets where Hayes shows no change in HHIs. Crandall & Gertner reply at 7 ¶ 12, Table 1.

¹¹⁴ *See* letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, FCC, dated Sep. 3, 1999, Attachment (Yankee Group, *The Impact of PCS Service on U.S. Wireless Pricing*, Aug 18, 1999) at 6.

¹¹⁵ *Id.* at 14.

¹¹⁶ Competitive Impact Statement, *United States v. AT&T Corporation and Tele-Communications, Inc.*, at 6-7 (filed Dec. 30, 1998).

¹¹⁷ PCIA reply comments at 14.

choose from among more than three firms to obtain the services they desire.¹¹⁸

45. We are also not persuaded that, as one commenter argues, the existence of nationwide service and pricing plans “substantially eliminates any concern that carriers would amass spectrum in an effort to extract monopoly rents.”¹¹⁹ While nationwide plans are becoming an important element in the marketplace, carriers still conduct local marketing strategies that govern the terms on which most consumers obtain service. CMRS carriers retain the ability to conduct promotions on a localized level, and they do so regularly. Particularly in their negotiations with business customers, pricing can be tailored to local market conditions. The fact, therefore, that a major service provider may offer nationwide service and pricing plans does not, in our view, mean that we should be unconcerned about its level of spectrum accumulation in a particular market. To the contrary, we conclude that the control of excessive spectrum by any single market participant would be a matter of serious concern.

46. At this time, we also reject arguments by commenters for a more broadly defined product market.¹²⁰ Consumers obtain mobile phone services principally from cellular, PCS and digital SMR carriers.¹²¹ While consumers may be considering other services as alternatives, no evidence was provided suggesting that these alternatives are capable of constraining competitive behavior in this product market. In connection with various merger reviews, the Commission has previously defined interconnected mobile voice telephone services as a separate product market.¹²² In general, commenters appear to share the Commission’s view that our focus on competitive conditions in the market for mobile voice telephone services is appropriate. Most commenters focused their discussion on conditions in the market for this service. Several expressly affirmed a view that mobile telephone service constitutes a relevant product market.¹²³ We also take notice that, within the last year, DOJ has examined competitive conditions in mobile telephone markets in connection with their reviews of three large telecom mergers:

¹¹⁸ To cite just one example, we note the competition in the market for domestic interexchange (long distance) services.

¹¹⁹ Sidak & Teece at ¶ 20.

¹²⁰ CTIA comments at 16-17; Radiofone comments at 4; SBCW comments at 5; Economists, Inc. at 6.

¹²¹ In rural areas, some interconnected service is also available from analog SMR operators. *Fourth Annual CMRS Competition Report* at 34.

¹²² Craig O. McCaw and American Telephone and Telegraph Company, Application For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 9 FCC Rcd 5836 (1994) (*McCaw*), *reconsideration denied on other grounds, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11786 (1995), *aff’d sub nom. SBC Comm., Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995). In the AT&T/McCaw merger, the Commission defined relevant product and geographic markets as “interexchange services in U.S., local cellular service in each MSA or RSA, and the manufacture of cellular network equipment in North America.” *McCaw*, 9 FCC Rcd 5836, 5843-44 & n.25.

¹²³ Sprint PCS declares that “for purposes of the spectrum cap, the relevant market is the mobile telephony market, not the local telecommunications market generally.” Sprint PCS comments at 6 n. 17.

AT&T-TCI, SBC-Ameritech, and BA-GTE. In each case, DOJ determined that mobile telephone services constituted a relevant product market. In AT&T-TCI, DOJ found that cellular, PCS, and digital SMR firms compete against each other for business in these markets.¹²⁴

47. We share those commenters' optimism regarding the industry's innovative capabilities, and of its expectations of service convergence. Firms are undoubtedly expanding the range of services that they offer. However, in the case of mobile voice telephone service, for example, no commenter furnished evidence that consumers perceive any particular alternative communication service as sufficiently interchangeable, such that it could impede a hypothetical monopolist of mobile voice services from profitably elevating prices—the standard test for defining a market. In particular, no evidence was submitted that consumers are switching between mobile voice telephone services and other services in response to changes in relative prices.¹²⁵

48. In summary, we are concerned about the possibility that increased aggregation of spectrum, and the resulting consolidation among CMRS providers, could have adverse effects on competition. Generally, diminished competition tends to result in higher prices, reduced product quality, and less innovation. In the CMRS markets, we have seen substantial progress in competitive conditions as the result of the recent influx of new entrants. Our concern in this proceeding is that if these markets begin to re-consolidate this excellent progress may slow or cease altogether. We also recognize the potential for concentrated markets to facilitate the exercise of anticompetitive or collusive behavior by market participants. Competition, while growing steadily, is still developing as new licensees enter these markets. Ultimately, we do not want to place in jeopardy the substantial benefits of greater competition in CMRS markets just as they are beginning to be realized. At the present stage of development of CMRS markets, we find that these risks pose a significant threat to our goals of promoting and protecting competition in CMRS markets.¹²⁶

4. Benefits of Bright-Line Rules Over Alternative Regulatory Tools

49. We also conclude that the benefits of the bright-line spectrum cap and cellular cross-interest rules in addressing concerns about increased spectrum aggregation continue to

¹²⁴ Competitive Impact Statement, *United States of America versus AT&T Corp. and Tele-Communications, Inc.* at 5-6. While some commenters argued for a more broadly defined product market, they provided no evidence of the nature required to adequately support alternative market definitions.

¹²⁵ We recognize that some new services, such as two-way messaging, may provide sufficient functionality to compete effectively in this market. However, we received no evidence that the market for this service would be large enough to constrain a monopoly provider of mobile voice services from profitably elevating prices. Other services, such as satellite-based mobile voice telephone services, are at this time far too expensive in terms of airtime and equipment prices to deter anticompetitive pricing by mass-market mobile voice service providers.

¹²⁶ We note that CTIA recognizes that the risk of anticompetitive or collusive behavior grows as market concentration increases. CTIA comments at 7.

make these approaches preferable to exclusive reliance on case-by-case review under section 310(d).

a. Benefits of Regulatory Certainty and Regulatory Efficiency

50. We believe that the spectrum cap and cross-ownership rules are efficient means to promote and protect competition in CMRS markets, particularly in view of the competitive concerns discussed above. By setting bright lines for permissible ownership interests, the rules benefit the public, the telecommunications industry, and the Commission by providing regulatory certainty and facilitating more rapid processing of transactions.¹²⁷

51. Providing regulatory certainty is particularly important in an environment in which there is likely to be widespread restructuring of CMRS spectrum holdings, for example, in apparent efforts to create national footprints or as the by-product of larger mergers within the telecommunications industry. We also agree with numerous commenters who assert that regulatory certainty is critical to providing the industry with incentives to make investments, including in new technologies such as 3G service.¹²⁸ Moreover, we believe that continuing to provide bright-line guidance as to permissible ownership interests will assist CMRS service providers to structure their transactions and plan their investments efficiently, based on their knowledge of the relevant regulatory requirements. This, in turn, will facilitate obtaining financing for such transactions and investments.

52. Our bright-line rules also promote regulatory efficiency, both by speeding the processing of transfers of control and assignment of licenses and by conserving the resources of the Commission and of interested parties. Abandoning our spectrum cap and cross-interest rules inevitably would lengthen our review process. Given the rapid pace of developments in the telecommunications industry, we believe that any advantages that might accrue to market participants from individualized review of spectrum concentration are outweighed by the advantages to them of a shorter review period for their transactions.¹²⁹ We note in that regard that any party that believes that an individualized analysis is appropriate in its case may request a waiver of our spectrum cap and cross-interest rules.

53. Additionally, we agree with the concerns raised by several commenters as to the

¹²⁷ The D.C. Circuit also has recognized that a spectrum cap may be most effectively administered through a bright line rule. *BellSouth v. FCC*, 162 F.3d at 1225.

¹²⁸ BellSouth comments at 15, 19; BellSouth reply comments at 13; *see also* Chase comments at n.2; PCIA comments at 18; CTIA reply comments at 15; Omnipoint comments at 6; SBCW comments at 3; TDS reply comments at 2, 7, 9; Sprint PCS comments at 2.

¹²⁹ Thus we are not persuaded by CITA's argument that a case-by-case approach is more efficient and effective than reliance on a spectrum cap rule. *See* CTIA reply comments at 13.

burdens on the resources of the Commission and of interested parties that are inherent in case-by-case determinations regarding permissible ownership structures.¹³⁰ The SBA, for example, suggests that case-by-case analysis is especially expensive and time-consuming for small businesses, who often do not have the requisite resources.¹³¹ Similarly, PCIA urges that newer entrants do not have the resources of larger incumbents to fight protracted legal battles, which it contends are particularly characteristic of antitrust reviews.¹³²

b. Benefits of Preventing Spectrum Re-Concentration When Section 310(d) Review is Not Available

54. We further conclude that the spectrum cap serves important public interest goals that are not covered by section 310(d). The Commission does not have the opportunity to review under section 310(d) certain kinds of transactions that may result in re-concentration of spectrum. For example, our review authority under section 310(d) would not extend to a transaction in which less-than-controlling interest in a licensee was transferred, even if the holder of one cellular license in a particular service area obtained a substantial interest in the other cellular block in that market. Such a transaction nonetheless could give rise to competitive concerns, for the reasons that we discuss below.¹³³ Because certain types of transactions that may re-concentrate spectrum and reduce incentives to compete would not be reviewable under section 310(d), we disagree with commenters who suggest that section 310(d) is, by itself, an adequate substitute for our spectrum cap and cross-interest rules.¹³⁴

c. Benefits for Ongoing Spectrum Management

55. We also conclude that bright-line rules are useful for the Commission's ongoing spectrum management purposes. For example, bright-line rules greatly expedite the assignment of spectrum using auctions. They are considerably less costly from a public interest perspective than attempting to decide on a case-by-case basis whether a particular bidder's acquisition of a certain amount of spectrum in a service area would result in undue spectrum concentration. Making that decision with respect to each bidder for a particular service area before the start of an auction would significantly and unnecessarily delay auctions. Even making the decision only with respect to auction winners could delay substantially the assignment of licenses and, if undue concentration were found, presumably would require an entire re-auction. Accordingly, we do not believe that it would be efficient to allow auction bidders to acquire spectrum in excess of the

¹³⁰ See Wireless One comments at 5; Sprint PCS comments at 2.

¹³¹ SBA reply comments at 6.

¹³² PCIA comments at 16.

¹³³ See ¶¶ 90-98 *infra*. See also *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd 7882 ¶ 121.

¹³⁴ See AirTouch comments at 14-15; BellSouth comments at 14; CTIA comments at 22; GTE comments at 29-32; Radiofone comments at 5; SBCW comments at 8.

limits imposed by our rules, leaving resulting competitive concerns to be resolved by the Commission on an individual basis at some point in the bidding or licensing process.

d. Benefits Not Afforded By Antitrust Review

56. The availability on a case-by-case basis of antitrust review, which several commenters raise,¹³⁵ does not change our conclusions as to the benefits of our spectrum cap and cross-interest rules. We already have discussed the advantages in general of our bright-line rules over a case-by-case approach.¹³⁶ Additionally, we note that we typically have conducted a competitive analysis as part of our public interest analysis under section 310(d), notwithstanding any independent antitrust review. The courts have acknowledged our authority to engage in such an analysis.¹³⁷ We do not disagree with commenters that the availability of case-by-case antitrust review constitutes a valuable tool in furthering our competitive goals. We believe, however, that it is important for us to retain our ability to employ more than one regulatory tool, where necessary in the public interest, to protect and promote competition in those areas within our particular expertise, including spectrum management.¹³⁸

57. Moreover, for reasons related to resource constraints or procedural priorities, other agencies with antitrust authority may choose not to give detailed review to a particular merger that, from this Commission's perspective, may adversely affect competition in CMRS markets, or may otherwise be contrary to the public interest.¹³⁹ Our spectrum cap and cross-interest rules

¹³⁵ AirTouch comments at 14; Bell Atlantic Mobile comments at 14; Bell Atlantic Mobile reply comments at 9; Crandall & Gertner Reply at 3 ¶ 4; BellSouth comments at 14; CTIA comments at 3, 22-23; SBCW comments at 8. Several commenters also identified opportunities to seek private remedies. Bell Atlantic Mobile comments at 2, 14; Bell Atlantic Mobile reply comments at 9; GTE comments at 27, 31.

¹³⁶ *Supra* at ¶¶ 50-53.

¹³⁷ *See, e.g., SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1490-91 (D.C. Cir. 1995) (*SBC*); *see also United States v. FCC*, 652 F.2d 72, 81-82 (1980) ("competitive considerations are an important element of the 'public interest' standard") (citations and interior quotation marks omitted). Numerous commenters also pointed to the Commission's ability to conduct competitive reviews under its public interest authority. AirTouch comments at 14-15; BellSouth comments at 14; CTIA comments at 22; GTE at 29-32; Radiofone comments at 5; SBCW comments at 8.

¹³⁸ We do not accept the proposition that all transfers resulting in consolidation of spectrum below the spectrum aggregation limit should be exempt from section 310(d) review. We can envision circumstances under which a transfer could raise competitive concerns notwithstanding compliance with the spectrum cap. Accordingly, we reject proposals to adopt a processing threshold in lieu of our spectrum cap rule, whereby, for example, only transactions taking a firm's spectrum interests above a specified level would be subject to public interest review or where different standards of review would apply to different levels of concentration. *See, e.g., AT&T* comments at 13-14; BellSouth comments at 15. We note, however, as has been our practice in the past, if a licensee would continue to be in compliance with the spectrum cap after a proposed assignment or transfer of control, in reviewing the application we would generally presume that it does not cause an undue risk on market concentration unless specific evidence to the contrary is presented by either interested parties or through review by Commission staff.

¹³⁹ We also note that there may be a small class of transactions that would be covered by our spectrum cap and

were designed specifically for use in these markets. The spectrum cap rule, in particular, was expressly conceived to achieve long-term objectives that stressed the beneficial role of new entrants. By contrast, antitrust laws were written primarily to address concerns involving mergers that threaten to curtail actual competition.¹⁴⁰ Accordingly, we do not believe that the antitrust laws should be the exclusive tool for addressing competition issues of the nature we confront in CMRS markets.¹⁴¹

e. Benefits Not Afforded by Regulation of Market Behavior

58. Finally, we note that several commenters identified alternative regulatory tools that the Commission has at its disposal, in addition to its public interest authority under section 310(d). These include: (a) the Commission's build-out requirements, which, it is suggested, serve to thwart attempts to warehouse spectrum;¹⁴² (b) resale obligations, as a means for preserving service options in areas where spectrum aggregation results in fewer facilities-based competitors;¹⁴³ (c) sections 201 and 202, to ensure just, reasonable, and nondiscriminatory practices on the part of CMRS carriers;¹⁴⁴ and (d) the Commission's complaint and enforcement procedures under section 208 of the Act.¹⁴⁵ We agree with these commenters to the extent that we recognize the importance of retaining our flexibility to employ a variety of regulatory tools where particular circumstances may make alternative approaches useful. We are not persuaded, however, that the alternatives suggested by commenters, individually or collectively, constitute an adequate substitute for our spectrum cap and cross-interest rules as efficient means for promoting and protecting competition in the CMRS sector. Indeed, the greater competition that the spectrum cap promotes makes reliance on those other, arguably more intrusive, regulatory tools, which focus principally on controlling licensees' market behavior, less necessary and less

cross-interest rules but that would not meet the threshold requirements of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and thus would not receive routine antitrust review.

¹⁴⁰ Herbert Hovenkamp, *Federal Antitrust Policy* (1994), § 13.4, at 512. *See also* Applications of NYNEX Corporation and Bell Atlantic Corporation, *Order*, 12 FCC Rcd 19985, 20023 ¶ 67 (1997). Although the Supreme Court has theorized that two kinds of potential competition may be within the reach of section 7 of the Clayton Act, no court has yet decided whether section 7 authorizes a claim that a merger is illegal because it eliminated actual potential competition. *See U.S. v. Marine Bancorp.*, 418 U.S. 602 (1974); *see also, e.g., Tenneco, Inc. v. FTC*, 689 F.2d 346, 352-55 (2d Cir. 1982); *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 125, 1265 (5th Cir Unit A 1981); *FTC v. Atlantic Richfield*, 549 F.2d 289, 293-94 (4th Cir. 1977).

¹⁴¹ *See SBC*, 56 F.3d at 1490 (upholding Commission's approval of a merger based both upon antitrust principles and upon considerations "beyond the scope of antitrust law" including "the development of the telecommunications industry, technical innovation, . . . [and] investment in infrastructure").

¹⁴² Bell Atlantic reply comments at 3 ¶ 4; Western Wireless reply comments at 12.

¹⁴³ America One comments at 4.

¹⁴⁴ CTIA comments at 4-5.

¹⁴⁵ AirTouch comments at 15; BellSouth comments at 14; Western Wireless reply comments at 16.

frequent. As a general matter, we believe the better approach is to have rules that promote competition and let competition regulate market behavior, rather than rely in the first instance on this Commission to directly regulate such behavior even if we have the legal authority to do so.

5. Public Interest Costs

59. Background. In the *NPRM*, the Commission emphasized that our regulation must promote, rather than impede, the introduction of innovative services and technological advances.¹⁴⁶ We invited comment on whether the spectrum cap rule has promoted the ability of wireless providers to enter into and compete in markets other than mobile voice service.¹⁴⁷ Additionally, we asked whether the spectrum cap rule serves as a barrier to firms that wish to offer additional services.¹⁴⁸ We also asked whether relaxation of the cap might “allow efficient deployment of third-generation wireless services that would be prevented under the present cap.”¹⁴⁹ In addition, in the *NPRM*, we noted that a significant public interest factor in our decisionmaking on CMRS spectrum aggregation is the prospect for CMRS providers to compete against incumbent local exchange carriers (LECs), and invited comment on whether relaxing the spectrum cap rule would promote wireless competition in local exchange markets.¹⁵⁰ Finally, the *NPRM* invited comment on whether efficiency benefits would flow from changes in the rule that might counterbalance concerns regarding possible anticompetitive effects resulting from increased geographic concentration of ownership.¹⁵¹

60. Discussion. Some parties argue that there are potential public interest costs associated with the use of the spectrum cap and cellular cross-ownership rules and that such costs warrant the elimination of those rules. We conclude, however, that we can address adequately the concerns raised by these parties by resetting the parameters of the cross-interest and the spectrum cap rules in certain markets, through future spectrum allocations, and by other means.

61. New and Innovative Services. Some parties claim that the current cap impairs the ability of wireless carriers to use existing spectrum to develop 3G and other advanced services, such as high-speed internet access.¹⁵² While these possibilities are a concern to us, we do not believe these claims provide a basis for lifting the spectrum cap at the present time. Initially, we

¹⁴⁶ *NPRM*, 13 FCC at 25135 ¶ 5.

¹⁴⁷ *Id.* at 25155 ¶ 47.

¹⁴⁸ *Id.* at ¶ 48.

¹⁴⁹ *Id.* at 25153-54 ¶ 43.

¹⁵⁰ *See NPRM* at 25152-53 ¶ 43, 25154-55 ¶¶ 47-48.

¹⁵¹ *Id.* at 25152-53 ¶ 43.

¹⁵² GTE comments at 20; GTE reply comments at 16-19; CTIA comments at 3; SBCW comments at 4, 11; Omnipoint comments at 4; RTG comments at 9; Western Wireless comments at 9 n 16.

note that the assertions in the record along these lines are very general and do not provide any concrete evidence regarding the amount of spectrum that will be needed for 3G technologies or exactly when carriers will need access to that spectrum.¹⁵³ Our analysis shows that there are very few markets in which carriers have spectrum holdings that are approaching the cap, which suggests the cap is in most cases not a binding constraint, at least not at the present time. Moreover, as parties explain, there are numerous alternatives to CMRS spectrum that can be used to provide certain types of new services.¹⁵⁴ For example, Local Multipoint Distribution Service (LMDS), Digital Electronic Message Service (DEMS), 39 GHz, and Multichannel Lultipoint Distribution Service (MMDS) are suitable for delivering fixed access services. We also note that no party has submitted an application for waiver to enable it to use additional spectrum to implement a business plan for the development of 3G services.¹⁵⁵

62. In addition, in our view any disincentives toward the development of new services that arguably may be caused by the current spectrum cap must be weighed against the disincentives toward the development of new services that would exist in a regulatory world without the current spectrum cap. As the Commission recognized in the *CMRS Spectrum Cap Report and Order*, “[a]t some point, however, horizontal concentration starts to work against those goals [of efficiencies and economies] 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.”¹⁵⁶ Also, we believe that in many ways the spectrum cap rule has in fact encouraged innovations, such as the development of multi-modal handsets, the creation of partnerships resulting in better roaming packages, and the upgrading of networks and service offerings with the conversion to digital systems.

63. Finally, we expect to make available in the near future additional spectrum for the provision of 3G and other advanced wireless services.¹⁵⁷ We will be initiating proceedings to allocate spectrum for those services. We believe it is more appropriate to address spectrum requirements for 3G and other advanced services in the context of a spectrum allocation

¹⁵³ See, e.g., Crandall & Gertner Decl. at 21 ¶ 62.

¹⁵⁴ PCIA reply comments at 15 n 39.

¹⁵⁵ To the extent that a licensee can demonstrate that compliance with the spectrum cap limits its ability to implement 3G or other advanced services in a particular geographic area in an timely and efficient manner, we would consider grant of a waiver of the spectrum cap for that carrier in that geographic area.

¹⁵⁶ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 95.

¹⁵⁷ See Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, *Public Notice*, DA 98-1703 (rel. Aug. 26, 1998). We also note that there is potentially more spectrum available for CMRS in addition to the planned 3G allocation. For example, in the *Channel 60-69 (Commercial) NPRM* the Commission sought comment on whether to allow mobile, as well as fixed, services in those bands. Service Rules for the 746-764 and 776-794 MHz bands, and Revision to Part 27 of the Commission’s Rules, WT Docket 99-168, *Notice of Proposed Rulemaking*, FCC 99-97 (rel. June 3, 1999). That and other pending or contemplated proceedings may furnish additional sources of spectrum for 3G.

proceeding than in this proceeding. In the allocation proceeding we will consider whether any newly allocated spectrum should be included in the cap. If we decide to include the newly allocated spectrum under the cap, we will determine in that proceeding how the cap should be adjusted to reflect that additional spectrum.

64. *Competition with Wireline Services.* We find that the record does not indicate the need to raise the spectrum cap to realize the potential of wireless service as a source of competition to wireline service. Although some parties argue that the spectrum cap deters investment in technologies that may compete with wireline offerings,¹⁵⁸ we find that at least theoretically, it is equally plausible that the spectrum cap encourages that development of wireless services that can compete with wireline services. By guarding against the concentration of ownership in a market, the spectrum cap rule helps to ensure that a significant number of wireless licensees will compete in that market. We believe, as noted by TRA, that the likelihood of at least one licensee focusing on wireless local loop service increases with the number of wireless licensees.¹⁵⁹ Moreover, we note that without more CMRS carriers in each market, one of the few carriers with the ability to challenge the incumbent LEC would likely be the incumbent LEC's wireless arm, which also has the least incentive to compete.¹⁶⁰ Finally, we observe that, for purposes of providing services that can substitute for local wireline service (*e.g.*, fixed wireless services), there are numerous alternatives to the use of CMRS spectrum.¹⁶¹

65. *Additional Efficiencies.* We find that there is no showing in the record that raising the cap would allow the realization of significant additional efficiencies. First, we note that the record indicates that few carriers have accumulated as much as 45 MHz of spectrum in any one market and that, in general, carriers with 45 MHz are not currently using their entire spectrum allocation.¹⁶² Second, we find that raising the spectrum cap would not necessarily result in significant improvement in allocation of resources because digitalization and other capacity-enhancing innovations have permitted more efficient allocation by carriers of existing spectrum under the cap.¹⁶³

B. Modifications to the Cellular Cross-Interest and Spectrum Cap Rules

66. As we have just discussed, the spectrum cap and cellular cross-interest rules continue to be necessary to promote and protect competition in CMRS markets at this time. After careful analysis and extensive review of the rules and the record in this proceeding, however, we

¹⁵⁸ BellSouth comments at 8; Bell Atlantic comments at 33-34.

¹⁵⁹ TRA comments at 10.

¹⁶⁰ See MCI comments at 4; see also TRA comments at 9.

¹⁶¹ PCIA reply comments at 15 n 39.

¹⁶² See Sprint PCS comments at 5; see also GTE reply comments at 19.

¹⁶³ See, *e.g.*, Sprint PCS comments at 13.

believe that the rules can be relaxed to allow some additional cross-ownership interests without significantly increasing the risk of undue market concentration or anticompetitive behavior by licensees. Specifically, we amend the cellular cross-interest rule to allow greater cross-ownership between cellular carriers in overlapping CGSAs. We amend the spectrum cap to allow a licensee to have an attributable interest in up to 55 MHz in rural areas, and adopt a separate equity benchmark of 40 percent for holdings by passive institutional investors

1. Modifications to Cellular Cross-Interest Rule

67. Background. The cellular cross-interest rule is set out in section 22.942 of the Commission's rules and places limits on any person having certain direct or indirect ownership interest in licenses for both cellular channel blocks in overlapping cellular geographic service areas (CGSAs).¹⁶⁴ A party with a controlling interest in a license for one cellular channel block may not have any direct or indirect ownership interest in the license for the other channel block in the same geographic area. A party may, however, have a direct or indirect ownership interest of five percent or less in the licenses for both channel blocks so long as neither is a controlling interest.¹⁶⁵ Divestiture of interests as a result of an assignment of authorization or transfer of control must occur prior to the consummation of the transfer or assignment.¹⁶⁶

68. In the *NPRM*, we sought comment on whether we should retain, modify, or repeal the cellular cross-interest rule given the changes in mobile voice markets, and the fact that many markets no longer consist primarily of cellular duopolies, as they did in 1991 when the rule was first adopted.¹⁶⁷ More specifically, we sought comment on whether the CMRS spectrum cap rule provides sufficient protection from anticompetitive behavior by cellular licensees in the same market and whether we should eliminate the cellular cross-ownership rule if we decide to eliminate or raise the CMRS spectrum cap.¹⁶⁸ Because there are some markets in which no PCS provider has initiated service yet, we also sought comment on whether to apply the cellular cross-interest rules only in some, but not all, markets, and, if so, what would be an appropriate threshold for determining in which markets the rule would not apply.¹⁶⁹ We also sought comment on whether we should relax the current attribution rules related to this rule.¹⁷⁰

69. RTG and Western Wireless assert that the competitive advantages enjoyed by

¹⁶⁴ 47 C.F.R. § 22.942.

¹⁶⁵ 47 C.F.R. § 22.942(a).

¹⁶⁶ 47 C.F.R. § 22.942(b).

¹⁶⁷ *NPRM*, 13 FCC Rcd at 25167 ¶ 81.

¹⁶⁸ *Id.* ¶ 82.

¹⁶⁹ *Id.* ¶ 83.

¹⁷⁰ *Id.* at 25167-68 ¶ 84.

cellular providers that led to the adoption of the cellular cross-interest rule are being eroded by the addition of new service providers and increased competition in CMRS markets, and thus the rule is no longer necessary.¹⁷¹ GTE and TDS, however, argue that since there are still many cellular markets, particularly in rural areas, in which broadband PCS or digital SMR service has not been introduced, the rule should be retained, at least for an interim period.¹⁷² TRA and Wireless One support retention of the rule, arguing that the cellular cross-ownership rule promotes facilities-based competition and that competition would be seriously limited if the cellular carriers were allowed to join forces.¹⁷³ SBCW, on the other hand, cites to concerns of parity between CMRS services as justification for elimination of the cellular cross-ownership rule since there is no similar restriction on broadband PCS or SMR licensees.¹⁷⁴ Although TDS supports the retention of the rule, it argues that the attribution rules should be relaxed to match those used for the spectrum cap.¹⁷⁵

70. Discussion. We conclude that the cellular cross-interest rule is still necessary at this time, given the strong market position held by the two cellular carriers in virtually all markets. The two cellular carriers still have the vast majority of subscribers in all markets and are still the only providers of mobile telephone service in many markets. We recognize, however, that the cellular carriers' relative market position has diminished and continues to do so as PCS and digital SMR service providers initiate service in more areas of the country and attract more subscribers. We therefore will reassess the need for a separate cellular cross-interest rule as part of our year 2000 biennial review, by which time we expect that the market positions of the two cellular carriers and PCS and digital SMR service providers will have narrowed further. In the meantime, we believe it is appropriate now to relax the attribution benchmarks used with the cellular cross-interest rule.

71. Although the structure of mobile voice markets has changed since the Commission adopted the cellular cross-interest rule in 1991, and the market shares for the two cellular carriers are eroding with the introduction of competition by PCS and digital SMR, the two cellular carriers are still the predominant players in each market. As the Commission recently reported, "[w]hile non-cellular mobile telephone operators have made significant inroads into the mobile telephone sector, they are still a relatively small portion of the whole sector."¹⁷⁶ For example, we found that at the end of 1998, cellular operators had approximately 86 percent of the mobile telephone subscribers nationwide, while broadband PCS had about ten percent and

¹⁷¹ RTG comments at 13; Western Wireless comments at 16.

¹⁷² GTE comments at 30; TDS comments at 6; GTE reply comments at 24-25.

¹⁷³ TRA comments at 13; Wireless One comments at 7.

¹⁷⁴ SBCW comments at 14.

¹⁷⁵ TDS comments at 6-7.

¹⁷⁶ *Fourth Annual CMRS Competition Report* at 9.

digital SMR had just over four percent.¹⁷⁷ As the market data submitted by PCIA demonstrates, there are still many markets where broadband PCS is not yet being offered.¹⁷⁸ According to these data, even in the market where PCS has been most successful, PCS carriers have only about 30 percent of the subscribers.¹⁷⁹ Further, the Commission has found that there is a consensus of analysts that while the cellular carriers' subscribership share will continue to decline, it will likely still be near 70 percent in 2002.¹⁸⁰

72. Based on our review of the data on the market shares of the cellular carriers, we find that it is necessary to retain the cellular cross-interest rule at this time. Although the cellular carriers do not have the same market power that they did when the rule was adopted, we believe that most cross-ownership situations between the two cellular carriers would pose a substantial threat to competition in CMRS markets. We therefore believe that it is premature to remove the cellular cross-interest rule.

73. We also find that it is necessary to maintain a separate cellular cross-interest rule, and not rely solely upon the spectrum cap. The spectrum cap prohibits the two cellular licensees from having an attributable interest in each other because that would exceed the 45 MHz limitation. Reliance on the cap without the cellular cross-interest rule would allow a party to have an attributable interest in one of the cellular licensees, including control, and up to 20 percent equity ownership interest in the other cellular licensee in the same market. We find that such a high ownership interest by one cellular licensee in the other cellular licensee would pose a substantial threat to competition. It is also not appropriate for us to rely solely on the spectrum cap because we have today modified the spectrum cap to allow a licensee to have an attributable interest in up to 55 MHz in rural areas, defined as RSAs.¹⁸¹ Without a separate cross-interest rule, this new provision of the spectrum cap would allow a licensee to control both cellular licenses in an RSA. As we discuss below, the purposes of increasing the spectrum aggregation limit in rural areas are to allow licensees in those areas access to additional spectrum for enhanced or expanded services, and to partner with other carriers, particularly PCS, to better provide services to rural areas. Allowing the two cellular carriers to merge or have significant ownership interests in each other would not serve those purposes and would likely reduce the limited competition in those markets. We will, however, review the need for this rule as part of our year 2000 biennial

¹⁷⁷ *Fourth Annual CMRS Competition Report* at 9 (citing Dennis Leibowitz, et al., *The Wireless Communications Industry*, Donaldson Luftkin & Jenrette, Winter 1998/1999 at 18).

¹⁷⁸ PCIA reply comments, Attachment A. *See also Fourth Annual CMRS Competition Report* at (B-16)-(B-20).

¹⁷⁹ *See* letter from Brent H. Weingardt, PCIA, to Magalie Roman Salas, FCC, dated Aug. 25, 1999, Attachment (in only 4 of the top 203 markets do the PCS carriers have a combined market share in excess of 30 percent). *See also* PCIA reply comments, Attachment A at 24.

¹⁸⁰ 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, *Third Report*, FCC 98-91 (rel. June 11, 1998), at B-8.

¹⁸¹ *See* ¶ 84 *infra*.

review. Given the rapid ongoing changes in CMRS markets, the market position of the cellular carriers may have diminished by then to a point where there will no longer be a need for a separate cross-interest rule for cellular carriers.

74. Finally, although CMRS markets are not yet sufficiently competitive to eliminate the cross-interest rule, we believe that given increased competition it is appropriate to relax the attribution benchmarks used in the rule. Currently a party with a controlling interest in one of the cellular licensees may not have any direct or indirect ownership interest in the other licensee in that CGSA. We amend the rule to allow a party with a controlling or otherwise attributable interest in one of the cellular licensees to have a non-controlling or otherwise non-attributable direct or indirect ownership of up to five percent in the other cellular licensee in the CGSA. We do not believe that such a cross-ownership limit would generally pose a significant threat to competition. We continue to insist that a party with a controlling interest in one cellular licensee in a CGSA may not have a controlling interest, no matter how small, in the other licensee in that market.

75. Similarly, we amend the rule to allow a party to have a non-controlling or otherwise non-attributable direct or indirect ownership interest of up to 20 percent in both licensees in the same CGSA. The current rule allows a party to have up to a five percent non-controlling interest in both licensees. We believe that given the trend towards more competitive markets, we can relax this attribution level and use the general attribution benchmark set out in the spectrum cap.¹⁸² This is a first step towards reliance on the spectrum cap alone when the market position of the cellular carriers makes it appropriate to eliminate the cellular cross-interest rule altogether.

76. We also amend the attribution rules relating to the cellular cross-interest rule to bring them in line with the spectrum cap attribution rules in certain other respects. The spectrum cap attribution rules also apply to interests in the two cellular licensees. For example, the attribution rules of the spectrum cap would prohibit cellular licensees in the same CGSA from having joint officers or directors even though the cross-interest rule does not address that issue.¹⁸³ Due to our adoption of a 55 MHz spectrum limitation for RSAs, various attribution requirements set out in the cap would no longer apply to cellular cross-ownership interests in rural areas. Because we believe that allowing those types of interests, such as joint officers or directors or joint operating or marketing arrangements, would cause competitive concerns we amend the rule specifically to prohibit these types of ownership interests.

¹⁸² See 47 C.F.R. § 20.6(d)(2).

¹⁸³ See 47 C.F.R. § 20.6(d)(7).

2. Modifications to Spectrum Cap Rule

a. Overview

77. While we conclude that the spectrum cap should be retained, upon review of the record and re-evaluation of the various components of section 20.6, we further conclude that some modifications of the spectrum cap are warranted. As an initial matter, we find that the cap should not generally be raised above 45 MHz. We conclude, however, that an exception should be made in rural areas, defined as RSAs, where a 55 MHz cap will provide additional benefits to the carriers and consumers without substantial risk of anticompetitive conduct. We also amend the attribution provisions of the rule to establish a separate benchmark of 40 percent for equity interests held by passive institutional investors. Finally, we adopt other changes to the rule to clarify which SMR spectrum comes under the cap and to clarify the divestiture provisions of the rule.

b. Spectrum Aggregation Limit

78. Background. In the *NPRM*, we sought comment on whether, if we retain a spectrum cap, a 45 MHz limitation is appropriate given increased competition in the CMRS marketplace, or, if not, what would be an appropriate spectrum aggregation limitation in light of current and future prospects for competition in CMRS markets.¹⁸⁴ We also sought comment on whether to raise the 45 MHz limitation when competition in relevant markets reaches a particular level, possibly based on the number of competitors that would remain in a market after the transfer or control or assignment.¹⁸⁵ Similarly, we asked for comment on the benefits of allowing licensees serving rural, high-cost areas to hold more than 45 MHz of broadband CMRS spectrum in those areas and how we should define those areas.¹⁸⁶

79. Most commenters focused on whether to retain or eliminate the spectrum cap entirely and did not specifically address whether to adjust the 45 MHz limit. Omnipoint, however, supports retention of an aggregation limit but suggests raising the limit to 70 MHz.¹⁸⁷ It argues that while elimination of the cap could lead to anticompetitive results, raising the cap to 70 MHz would allow carriers to develop economies of scale and partnering arrangements while still ensuring at least three competitive carriers in each market.¹⁸⁸ RTG, while supporting elimination of the cap, states that at a minimum the cap should be raised to 90 MHz. A 90 MHz cap would allow a carrier to acquire two cellular and one 30 MHz PCS license, a combination, which

¹⁸⁴ *NPRM*, 13 FCC Rcd at 25158 ¶ 55.

¹⁸⁵ *Id.* ¶ 56.

¹⁸⁶ *Id.* at 25158-59 ¶ 57.

¹⁸⁷ Omnipoint comments at 5.

¹⁸⁸ *Id.* at 5-6.

according to RTG, would allow the provision of advanced voice and data services, including high-speed Internet access and teleconferencing to rural markets.¹⁸⁹ SBA concurs with raising the cap, but recommends an aggregation limit that would ensure at least three or four competitors would exist in every market.¹⁹⁰ Triton states that the cap should be raised to 55 MHz in rural areas, or the overlap standard increased to 50 percent, or both.¹⁹¹

80. Discussion. We conclude that the spectrum aggregation limit should remain at 45 MHz in most areas. This limitation strikes an appropriate balance between the benefits of spectrum aggregation, and the risk of undue economic concentration in the CMRS markets.¹⁹² 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 between the concern about undue market concentration and the benefits of spectrum aggregation.¹⁹³ No commenter has persuaded us that this economic analysis is not still valid. The current cap allows carriers to aggregate up to 45 MHz in a geographic area. This allows cellular carriers, who may be capacity constrained, to obtain up to an additional 20 MHz of PCS or SMR spectrum to provide expanded or enhanced services.¹⁹⁴ When the allocated spectrum is fully used, this aggregation limit allows for at least four mobile telephone service providers in each area. Such a market would have an HHI no greater than 2500 with four firms fully utilizing 45 MHz each.¹⁹⁵

81. We further conclude that in major markets any alleged detriments of a 45 MHz spectrum cap cited by some commenters do not outweigh the benefits of a 45 MHz cap. We are not persuaded that the cap has constrained the ability of carriers to provide services.¹⁹⁶ As we noted above, there are very few markets in which carriers have spectrum up to the cap, and we

¹⁸⁹ RTG comments at 11.

¹⁹⁰ SBA reply comments at 5.

¹⁹¹ Triton comments at 6.

¹⁹² As has been our practice in the past, if a licensee would continue to be in compliance with the spectrum cap after a proposed assignment or transfer of control, in reviewing the application we would generally presume that it does not cause an undue risk on market concentration unless specific evidence to the contrary is presented by either interested parties or through review by Commission staff.

¹⁹³ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869-73 ¶¶ 95-101.

¹⁹⁴ To the extent that a carrier can demonstrate that it requires more than 45 MHz of broadband CMRS spectrum – 55 MHz in rural areas – in a particular geographic area, we will consider waiving the spectrum cap for that carrier in that geographic area.

¹⁹⁵ This HHI is derived using allocated spectrum to measure market share. As discussed previously, revenues or subscribers may not be evenly distributed among market participants based on their allocated spectrum, so HHIs measured more appropriately may be higher. See *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7872 ¶ 100.

¹⁹⁶ See Bell Atlantic reply at 10; GTE reply comments at 19. But see SBCW comments at 10; US West reply comments at 4.

have received only a handful of requests for waiver of the spectrum cap.¹⁹⁷

82. Regarding the deployment of new, third-generation (3G) technologies, we will be initiating a proceeding in the near future to consider the allocation of spectrum for such services.¹⁹⁸ We believe that it is more appropriate to consider arguments relating to increasing the spectrum cap to provide additional spectrum for 3G or other advanced services in that allocation proceeding. At that time we will decide whether to include any newly allocated spectrum in the cap, and, if so, we will adjust the cap accordingly. We believe this is a better approach than the one suggested by some carriers of raising the cap now in anticipation of new 3G services being offered and 3G spectrum being allocated in the future.¹⁹⁹ However, some carriers assert that they have an immediate need to access additional existing CMRS spectrum to offer new services.²⁰⁰ Therefore, to the extent that a carrier can credibly demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse affect on its ability to provide 3G or other advanced services, 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 were waived, and why such services can not be provided without exceeding the cap. In evaluating a waiver request the Commission will also take into account any potential adverse affects of granting the waiver, such as diminution of competition, as well as the potential benefits from the provision of advanced mobile services.²⁰¹

83. We are also concerned that raising the cap to a higher level, as suggested by some commenters, could lead to unacceptable concentration of these markets. Adoption of a 90 MHz cap, as suggested by RTG, could lead to a market with only two competitors, both with 90 MHz. That would, in essence, re-institute the cellular duopoly that the Commission sought to eliminate by establishing PCS. As we have extensively documented, the introduction of new providers and the end of the cellular duopoly has led to substantial consumer benefits through reductions in the price of service and in new and enhanced services. We also reject Omnipoint's suggestion to raise the cap to 70 MHz, which would allow the re-concentration of the market to three carriers. While a third competitor in a market provides benefits relative to a duopoly, such a market would

¹⁹⁷ See *supra* at ¶ 26.

¹⁹⁸ See Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, *Public Notice*, DA 98-1703 (rel. Aug. 26, 1998). We also note that there is potentially more spectrum available for CMRS in addition to the planned 3G allocation. For example, in the *Channel 60-69 (Commercial) NPRM* the Commission sought comment on whether to allow mobile, as well as fixed, services in those bands. Service Rules for the 746-764 and 776-794 MHz bands, and Revision to Part 27 of the Commission's Rules, WT Docket 99-168, *Notice of Proposed Rulemaking*, FCC 99-97 (rel. June 3, 1999). That and other pending or contemplated proceedings may furnish additional sources of spectrum for 3G.

¹⁹⁹ See, e.g., AirTouch comments at 16; BellSouth comments at 10-11; GTE comments at 20-22.

²⁰⁰ See, e.g., letter from Ben G. Almond, BellSouth, to Magalie Roman Salas, FCC, dated Sep. 1, 1999; letter from Thomas E. Wheeler, CTIA, to FCC Chairman and Commissioners, dated Sep. 3, 1999.

²⁰¹ See 47 C.F.R. § 1.925 (1999) (63 Fed. Reg. 68904, 68926-27 (Dec. 14, 1998)).

still be highly concentrated,²⁰² and would be less competitive than many markets are today. Even a 50 MHz cap or 55 MHz cap, while maintaining at least four competitors, could lead to excessive concentration in most markets. For example, while a 55 MHz cap would allow for four carriers, in practice such a cap could lead to only three significant players in a market if 165 MHz out of 180 MHz is used by the three carriers, leaving only 15 MHz of spectrum for a fourth competitor.

84. We find, however, that the economics of serving rural areas are different, and adopt a 55 MHz aggregation limit for those areas. For purposes of the spectrum cap rule, we define rural areas as Rural Service Areas (RSAs).²⁰³ In the *NPRM*, we underscored our intention to secure the benefits of modern telecommunication services, including wireless services, for high-cost and rural areas.²⁰⁴ In such areas, competition among mobile phone service providers remains largely underdeveloped, and it appears that in many markets consumers are able to obtain facilities-based mobile phone services only from the two incumbent cellular carriers.²⁰⁵ A 55 MHz aggregation limit in rural areas will permit carriers serving these areas to achieve economies of scope and will allow greater partnering between PCS and cellular in those areas, thereby helping to make competition in rural areas more vigorous.²⁰⁶ Such partnering may enable carriers to reduce roaming charges that rural subscribers now incur when traveling to urban areas, and when urban residents travel to rural areas. Partnering may also allow further deployment of PCS and other broadband services to rural areas.²⁰⁷ In addition, the economics of serving high-cost and low-density areas makes it unreasonable to expect a large number of independent carriers to be viable.²⁰⁸ As a result, the opportunity cost of rural spectrum rights is likely near zero, and the risks of anticompetitive conduct by foreclosing entry through the monopolization of spectrum are low.

85. We decline to adopt a market-by-market approach. As discussed in the *NPRM*, under such an approach, the spectrum cap would not be enforced in certain markets, such as those with five or more operational competitors, but would be in place for other markets.²⁰⁹ Although a market-by-market approach may have initial appeal, as the commenters pointed out, there are potential difficulties in implementation, including determining the appropriate

²⁰² A market with two CMRS providers with 70 MHz each would have HHIs ranging upwards from 3148. A market with three CMRS providers with 60 MHz each would have an HHI not lower than 3333.

²⁰³ RSAs are defined in 47 C.F.R. § 22.909(b). Other market designations used by the Commission for CMRS, such as Economic Areas (EAs), combine urbanized and rural areas, while MSAs and RSAs are defined expressly to distinguish between rural and urban areas.

²⁰⁴ *NPRM*, 13 FCC at 25135 ¶ 5.

²⁰⁵ BellSouth comments at 11; D&E comments at 2, 5, 6; Western Wireless comments at 4; TDS comments at 6.

²⁰⁶ See, e.g., BellSouth comments at 13; Bell Atlantic comments at 18-21; RTG reply comments at 2.

²⁰⁷ See, e.g., BellSouth comments at 8; Triton comments at 10; RTG reply comments at 5-6.

²⁰⁸ See, e.g., Chariton reply comments at 2; RTG reply comments at 1.

²⁰⁹ *NPRM*, 13 FCC Rcd at 25164 ¶ 72.

geographic area to use since each service uses different market areas. Moreover, even with specific guidelines, this approach would likely result in numerous and time-consuming case-by-case reviews of proposed consolidations. In addition, a market-by-market approach may lead to a “first mover” environment in which the first consolidation may be permitted, whereas subsequent ones would likely be blocked. This could lead firms to seek to consolidate rapidly lest they be blocked by prior consolidation of rival firms.

c. Attribution

86. Background. Under the CMRS spectrum cap, ownership interests of 20 percent or more (40 percent if held by a small business or rural telephone company), including general and limited partnership interests, voting and non-voting stock interests or any other equity interest are considered attributable.²¹⁰ 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.²¹¹ Stock interests held in trust are attributable only to those who have or share the power to vote or sell the stock.²¹² Debt does not constitute an attributable interest, nor are securities affording potential future equity interests (such as warrants, options, or convertible debentures) considered attributable until they are converted or exercised.²¹³ The attribution rules also set forth a four-pronged test for waivers of the attribution for investors with non-controlling, minority interests where the licensee is controlled by a single majority shareholder or controlling general partner.²¹⁴

87. In the *NPRM*, we sought comment on whether we should modify any or all of the attribution criteria.²¹⁵ Specifically, we sought comment on whether to modify the 20 percent

²¹⁰ 47 C.F.R. § 20.6(d)(2). Ownership interests held through successive subsidiaries are calculated through use of a multiplier. 47 C.F.R. § 20.6(d)(8).

²¹¹ 47 C.F.R. § 20.6(d)(7), (9), (10).

²¹² 47 C.F.R. § 20.6(d)(3).

²¹³ 47 C.F.R. § 20.6(d)(5).

²¹⁴ “Waivers of § 20.6(d) may be granted upon an affirmative showing:

- (1) That the interest holder has less than a 50 percent voting interest in the license and there is an unaffiliated single holder of a 50 percent or greater voting interest;
- (2) That the interest holder is not likely to affect the local market in an anticompetitive manner;
- (3) That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and
- (4) That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.”

47 C.F.R. § 20.6, note 3.

²¹⁵ *NPRM*, 13 FCC Rcd at 25159 ¶ 59, 25160 ¶ 61.

ownership benchmark and the effect that a 20 percent attribution standard has on the ability of CMRS providers to obtain capital.²¹⁶ We also sought comment on whether we should increase the benchmark as it applies to the amount of non-voting equity interest, or interest held by a limited partner and whether to continue to have a separate 40 percent attribution standard for investments held by small businesses or rural telephone.²¹⁷ Finally, we sought comment on whether we should retain or modify the waiver test for single majority shareholder situations.²¹⁸

88. Only a few commenters specifically discussed possible modifications to the attribution rules. AT&T argues that current rules attributing equity ownership of 20 percent or more impose artificial barriers on competition by making it more difficult and costly to attract investment capital, which chills the timely roll-out of wireless services to unserved and underserved consumers.²¹⁹ It also contends that rules that make management agreements attributable deprive new entrants of management expertise.²²⁰ AT&T thus asserts that the attribution rules should be changed so that investments up to *de facto* control would not be attributable.²²¹ Triton agrees that the attribution rules tend to discourage investment, and supports the replacement of the current standards with a control test.²²² Sonera requests that an otherwise unaffiliated entity should not be attributed with the holdings of a licensee with which it holds minority, insulated interests in another geographic area.²²³ Chase requests that the Commission establish a rule that non-controlling interests held by institutional investors are not attributable.²²⁴ Chase also suggests that the CMRS attribution rules more closely conform to the broadcast attribution rules by (1) not attributing ownership interests of limited partners who are not materially involved with the licensee's activities, (2) adopting a single majority shareholder exception, and (3) allowing a single entity to have both an attributable interest in one company and a non-attributable interest of up to 33 percent in a licensee in the same geographic area.²²⁵

89. Discussion. In reviewing the attribution benchmarks used with the spectrum cap, we make several changes to clarify the rules and to increase the availability of capital to CMRS

²¹⁶ *Id.* at 25159-60 ¶ 60.

²¹⁷ *Id.*

²¹⁸ *Id.* at 25161 ¶62.

²¹⁹ AT&T comments at 12.

²²⁰ *Id.* at 11.

²²¹ AT&T comments at 10.

²²² Triton comments at 6; Triton reply comments at 1-2.

²²³ Sonera comments at 3. Sonera states that WTB staff have told Sonera and Aerial Communications that they would be attributed with the spectrum that the other holds in the Charlotte BTA because of a joint partnership they are both part of with a licensee in the Dallas BTA. *Id.* at 2.

²²⁴ Chase comments at 6-8.

²²⁵ Chase comments at 8-9 (citing *Roy M. Speer*, 11 FCC Rcd 18393 (1996)).

carriers. We note that the change in the aggregation limit to 55 MHz for rural areas adopted today will increase the availability of capital to CMRS carriers serving rural areas independent of the changes we make to the attribution rules.

90. *Control and Influence.* Attribution rules address the ability of an investor to control or influence the actions of a licensee in ways that may dampen competition in a market. They represent a balance between our concerns about an investor's ability to influence a licensee in an anticompetitive manner and the need of licensees to attract capital to build their systems and provide service to consumers. The Commission has historically found that an investor can influence a licensee with less than a controlling interest.

91. We therefore decline to adopt the control standard suggested by AT&T and Triton. These proposals do not take into account the variety of ways that an investor can exert influence or control over a licensee. An individual or firm does not need actual operational control over (or to be in the management) of a licensee in order to exert influence over that licensee. Further, our concerns about anticompetitive behavior are not limited to what influence the party may exert on the licensee, but also how another licensee may act in the market if it has a significant interest in one of the other providers in that market. A carrier may price its services differently if it has a substantial, yet non-controlling interest in another carrier in the same market. Under such circumstances, it may believe that it can recover some of the revenues it would otherwise lose by its actions through its partial ownership in the other carrier. That type of activity becomes even more fruitful to a carrier as its stake in the other carrier increases. Such actions would also restrict the competition between the two carriers and the resultant benefits to consumers from robust competition.

92. Another difficulty with use of a control test is the burden it would place on the Commission and industry. As we discussed in the context of the general spectrum cap rule, a bright-line test provides benefits to the Commission and industry, as well as the public. A control test, in contrast, would be highly inefficient and would not provide regulatory certainty. Under a control test, there are a multitude of variables that the Commission would have to weigh before a determination of non-control can be made. The Commission would have to engage in frequent case-by-case determinations of control that would be time-consuming, fact-specific, and subjective. We find that a bright-line attribution test avoids these administrative burdens.

93. Similarly, we decline to adopt an exception for insulated partners, as requested by Chase.²²⁶ As we just discussed, a party with a significant non-controlling ownership interest may have the ability and incentive to act in an anticompetitive manner. Although the fact that a partner is insulated may have an effect on the ability of that partner to directly influence the licensee, it does not address our concerns regarding unilateral action by the limited partner.

²²⁶ Chase comments at 8.

94. We also will not adopt a single majority shareholder exception, but will maintain our test for waiving the attribution rules in situations where there is a single majority shareholder. The fact that there may be a single majority shareholder does not change the ability or motive for a party with a significant non-controlling interest to engage in anticompetitive behavior. The non-controlling owner may still have ability to influence the licensee and may still have the ability to engage in undesirable unilateral conduct by recouping revenues through its ownership of another carrier in the market. We do recognize, however, that there may be instances in which a non-controlling interest in a licensee may not provide any incentive or ability for anticompetitive conduct. In the *CMRS Spectrum Cap Report and Order*, the Commission adopted a four-pronged test to determine when the existence of a single majority shareholder mitigates the competitive impact of common ownership and the ability of the non-controlling interest holder to influence the licensee.²²⁷ Under that test, if the non-controlling interest holder can show that there is an unaffiliated single majority shareholder, that the non-

controlling interest holder has no ability to influence the licensee, and that it is not likely to act in an anticompetitive manner, the Commission may waive the attribution rules.²²⁸

95. In balancing the need to facilitate capital flows to support deployment of service and our concerns about anticompetitive influences from cross-ownership interests, the Commission chose a 20 percent attribution level for broadband CMRS.²²⁹ This is significantly higher than the benchmarks used by the Commission in other contexts. For example, the Commission recently upheld the use of a five percent benchmark for equity ownership in our broadcast attribution rules.²³⁰ The Commission initially chose a 20 percent benchmark in

²²⁷ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7881-82 ¶ 120, 7886-87 ¶¶ 130-31.

²²⁸ 47 C.F.R. § 20.6 note 3.

²²⁹ See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 ¶ 119 (1994). See also *Third Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 6908 at n.64 (1994) (the attribution standard for cellular interests other than designated entities is set at 20 percent to account for our policy in the early days of the cellular industry to encourage the formation of settlement groups--a historic anomaly that has no counterpoint in the PCS context. Attributions levels are set higher for designated entities in accordance with our statutory mandate to promote opportunities in PCS for such entities); *Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 4957 at ¶¶ 107, 110 (1994) (The 20 percent ownership attribution standard for cellular operators was adopted, in part, because settlements during the initial phase of cellular licensing resulted in partial and often non-controlling interests in those licensees. In light of this history, it would be unfair and unduly restrictive to place the same 5 percent limit on cellular/PCS cross-ownership. For this reason, we decided to allow a 20 percent cellular ownership interest.); *Second Report and Order*, GN Docket No. 90-314, 8 FCC Rcd 7700 at ¶¶ 107-109 (1993) (settlements encouraged by the Commission during the initial phase of cellular licensing may have resulted in the creation of certain partial, often passive ownership interest in cellular licensees, and we were concerned that we not foreclose such partial owners from participating in PCS). The narrowband PCS rules use a 5 percent attribution level, with 10 percent permitted for institutional investors. See 47 C.F.R. § 24.101.

²³⁰ Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM

recognition of the large capital requirements in deploying a CMRS system. The attribution level was set at 20 percent also to account for the Commission's policy in the early days of the cellular industry to encourage the formation of settlement groups--a historic anomaly that has no counterpoint in the PCS context. In light of this history, the Commission found that it would be unfair and unduly restrictive to use a five percent limit for the spectrum cap. None of the commenters have demonstrated why the Commission should alter this general equity benchmark at this time.

96. We also decline to adopt Triton's suggestions that we change the spectrum cap attribution rules to more closely conform to the broadcast attribution rules.²³¹ Although the spectrum cap attribution rules find their roots in the broadcast attribution rules, they differ, in some respects, due to the different policy concerns that led to their adoption. The primary basis for the spectrum cap attribution rules is the Commission's concern with potential anticompetitive conduct by CMRS carriers. In broadcasting and cable, the Commission also has concerns regarding programming diversity. As a result, certain cross-ownership interests that may be acceptable in broadcasting are inappropriate for CMRS markets. For example, in the broadcast context, the Commission may be less concerned with significant non-controlling ownership when there is a single majority shareholder in charge of programming decisions. In a CMRS setting, the same situation with a non-controlling but significant owner may still be able to leverage its ownership to act anticompetitively in the market.

97. Additionally, we decline to accept suggestions that we modify the attribution rules with respect to directors.²³² We already have discussed our concerns about the ability of non-controlling interests to achieve influence and the potential effects of the non-controlling interest on the market behavior of the licensee holding such interest. We find that common directors can lead to the same types of concerns. Directors, in general, may possess the ability and incentive to use their positions of authority and influence to coordinate behavior of the licensees on whose boards they sit, and can be a conduit to pass non-public information between the licensees on whose boards they sit.²³³ The record in this proceeding specifically addressing director attribution is thin and certainly is not sufficient to justify any generally-applicable relaxation of our attribution rules in that regard. We would consider granting a waiver, however, in a particular case if the specific circumstances of a directorship allay the concerns that we have identified.

98. Finally, we address ownership interests linked through partnerships. Sonera

Dockets 94-150, 92-51, 87-154, *Report and Order*, FCC 99-207 (rel. Aug. 6, 1999) ¶¶ 8-15.

²³¹ Triton comments at 8-9.

²³² See AT&T comments at 10 n. 37; Chase comments at 6 (Chase only argues that directors from non-controlling institutional investors should not be attributed).

²³³ For that reason, the broadcast and cable attribution rules also attribute directors. See 47 C.F.R. §§ 73.3555 note 2(h), 76.501 note 2(h).

requests that we clarify this issue and argues that the rules should not attribute overlapping spectrum interests held by otherwise unaffiliated entities solely because those entities each hold minority, insulated interests in the same licensee elsewhere.²³⁴ As we discussed above, the attribution rules are meant to address multiple concerns. One of those concerns recognizes that a non-controlling interest holder may be able to influence the licensee. Even a limited partner has various avenues for influencing other partner(s), including the general partner, and may thereby direct the manner in which the license is operated. For those reasons, we attribute limited partnership interests.²³⁵ Any partnership can provide the means for one licensee to influence the actions of its partner in another market where both have interests. In particular, either partner could seize on the goals of their partner in one market to influence the actions of its partner in the other market to anticompetitive effect. Of course, not all partnerships will provide an opportunity for exercising such influence. Consequently, we believe that it is most appropriate to evaluate these ownership relationships on a case-by-case basis.²³⁶

99. *Waiver Test.* The spectrum cap rule also includes a four-pronged test for waiving attribution for investors with non-controlling, minority interests where the licensee is controlled by a single majority shareholder or controlling general partner.²³⁷ Although we retain the existing waiver test, and no parties specifically commented on the waiver test, we nevertheless find that it would be beneficial to parties that may seek such a waiver to discuss the analytical approach that we believe is appropriate for reviewing such a waiver request.

100. In considering whether a petitioner has met the second prong of the test, we will examine actual competitive conditions in the relevant markets at issue to determine whether an interest holder is likely to affect the market in an anticompetitive manner. In assessing competitive conditions in each relevant market, we believe that it is necessary to distinguish between spectrum that has merely been licensed, and spectrum that is currently in commercial

²³⁴ Sonera comments at 3.

²³⁵ See 47 C.F.R. § 20.6(d)(6).

²³⁶ Parties involved with joint ventures, even in other geographic areas, with another licensee in the same market should seek a determination from the Commission regarding whether such interests are permissible under the spectrum cap.

²³⁷ “Waivers of § 20.6(d) may be granted upon an affirmative showing:

- (1) That the interest holder has less than a 50 percent voting interest in the license and there is an unaffiliated single holder of a 50 percent or greater voting interest;
- (2) That the interest holder is not likely to affect the local market in an anticompetitive manner;
- (3) That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and
- (4) That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.”

47 C.F.R. 20.6, note 3.

use or will imminently be used to provide relevant services. In particular, we believe that relevant market participants consist only of those providers currently offering service and other licensees that have both announced plans to commence commercial operations and have declared their intentions of competing in the relevant product markets. Consequently, in arguing that its less-than-controlling minority interest should not be attributed, we expect petitioners to provide us with evidence documenting the carriers that are providing service in the relevant markets at issue or are anticipated to be providing service in a timely and sufficient manner in those markets.

101. Regarding the third prong of the test, in a situation involving a limited partner, we will look to the criteria set forth in the *Attribution Reconsideration Order* to determine whether the interest holder is involved in the licensee's operation and has the ability to influence the licensee on a regular basis.²³⁸ Such criteria include a condition that the interest holder cannot communicate with the licensee on matters related to the day-to-day operations of the business and cannot be an employee of the partnership.²³⁹ We also believe, however, that if the partnership agreement does not comply with the attribution criteria, the limited partner should be allowed to satisfy the third prong if it can show in other ways that it has no influence or control over the partnership.²⁴⁰

²³⁸ *Attribution of Ownership Interests*, 97 FCC 2d 997, 1023 (1984); see also *Attribution Reconsideration Order*, 58 Rad. Reg. 2d 604, ¶ 44 n.60 (attribution criteria may be incorporated in the certificate of limited partnership).

²³⁹ For a limited partner to be insulated under the attribution criteria, the partnership agreement should:

- specify that the exempt limited partner cannot act as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the [] enterprises of the company;
- bar an exempt limited partner from serving, in any material capacity, as an independent contractor or agent with respect to the partnership's [] enterprises;
- restrict the exempt limited partner from communicating with the licensee or the general partner on matters pertaining to the day-to-day operation of its business;
- permit the exempt limited partner to vote on the admission of additional general partners, but empower the general partner to veto any such admission;
- either prohibit the exempt limited partner from voting on the removal of a general partner or limit this right to situations where the general partner is subject to bankruptcy proceedings . . . or is adjudicated incompetent by a court of competent jurisdiction, . . . or where there is a finding by an independent party that the general partner has engaged in malfeasance, criminal conduct or wanton or willful neglect;
- with the exception of permitting a limited partner to make loans to, or act as a surety for the business, bar the exempt limited partner from performing any services for the limited partnership materially relating to its [] activities; and,
- state, in express terms, that the exempt limited partner is prohibited from becoming actively involved in the management or operation of the [] business of the partnership.

Attribution Reconsideration Order, 58 Rad. Reg. 2d at 619-20 (notes omitted); *Attribution Further Reconsideration*, 1 FCC Rcd 802, 803 (1986).

²⁴⁰ See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of

102. *Passive Institutional Investors.* Unlike our attribution rules for broadcast licensees and cable operators,²⁴¹ the current spectrum cap attribution rules do not distinguish between passive institutional investors and other investors. We find that allowing passive institutional investors to have a larger ownership interest in licensees should facilitate access to capital for licensees, and therefore we adopt a separate attribution benchmark for passive institutional investors. In connection with the broadcast and cable attribution rules, the Commission has found that passive institutional investors, such as banks or insurance companies, can have a greater interest in a licensee without incurring substantial risk that investors who should be counted for purpose of applying the ownership rules will avoid attribution. As the Commission has stated with regard to broadcast licensees:

passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest. To ensure these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation.²⁴²

We find the same reasoning supports a separate attribution benchmark for passive institutional investors in CMRS licensees.

103. We establish the benchmark for passive institutional investors at 40 percent of the outstanding voting stock of a corporation. This is higher than the 20 percent benchmark recently adopted in the broadcast attribution rules,²⁴³ but is an appropriate level for CMRS markets. We currently use a 40 percent benchmark for interest held by small companies and rural telephone companies,²⁴⁴ as defined in our rules,²⁴⁵ and believe that it is reasonable to treat passive institutional investors in a like manner. Institutional investors that choose not to comply with the requirements for a passive investment set out in the rule will still be able to hold up to 20 percent of the outstanding stock in a licensee without attribution under the general attribution

the Communications Act of 1934, as amended, *Declaratory Ruling*, 103 FCC 2d 511, 520-21, n.43 (1985) (*Wilner & Scheiner*).

²⁴¹ See 47 C.F.R. § 73.3555 note 2; 47 C.F.R. § 76.501 note 2.

²⁴² *Attribution of Ownership Interests*, 97 FCC 2d at 1012-14 (footnotes omitted).

²⁴³ Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Dockets 94-150, 92-51, 87-154, *Report and Order*, FCC 99-207 (rel. Aug. 6, 1999) ¶¶ 17-22.

²⁴⁴ 47 C.F.R. § 20.6(d)(2).

²⁴⁵ See 47 C.F.R. § 1.2110.

benchmark.²⁴⁶

104. *Trusts.* In reviewing the attribution rules used with the spectrum cap, we find it appropriate to adjust our rule regarding the use of trusts. As we discussed above, in establishing the attribution rules we are concerned not only with instances in which a party with a less-than-controlling interest can influence a licensee to act in an anticompetitive manner, but also with interests that may lead the interest holder to act unilaterally in an anticompetitive manner. In re-evaluating our attribution rules, we find that the beneficiary maintains an economic interest in the licensee, as well as potentially other interests in the same market. These overlapping interests could provide it with incentives to undertake actions that may impinge on competition in the relevant market, since its actions can affect the benefits it receives from the trust.

105. “[A] voting trust, as commonly understood is a device whereby persons owning stock with voting powers divorce the voting rights thereof from the ownership, retaining the ownership to all intents and purposes and transferring the voting rights to trustees in whom the voting rights of all depositors in the trust are pooled.”²⁴⁷ In other words, ownership comprises at least two parts: control of the asset, in this case voting rights, and economic benefit from the asset. In a voting trust the grantor gives up the control aspect of ownership, but maintains the economic benefit. By using a voting trust, a grantor retains an economic ownership of the license, as it receives profits or losses from the operation of the system through the trustee.

106. Consequently, we will amend our attribution rules so that stock interests held in trust will be attributable to both the trustee and the beneficiary. We will grandfather any trust agreements that meet the requirements of the old rule that were in effect on September 14, 1999. For any trust agreements entered into beginning September 15, 1999, stock interests held in trust will be attributed to the trustee, grantor, and the beneficiary of the trust. Those interests will still be subject to the general attribution benchmark, so that if the stock interests in the trust are less than 20 percent of the stock of the company, they will not be attributable.²⁴⁸

107. We will still allow the use of trusts for the purpose of divesting an otherwise impermissible interest. A trust used for divestiture must be of short duration (no longer than six months) and the terms of the trust must be approved by the Commission prior to the transfer of the assets to the trust. We delegate authority to the Wireless Telecommunications Bureau to review proposed trusts to ensure that they comply with our rules.

²⁴⁶ 47 C.F.R. § 20.6(d)(2).

²⁴⁷ 18A Am Jur 2d 928 (Corporations § 1124). *See also* 76 Am Jur 2d 43 (Trusts § 11).

²⁴⁸ If either the trustee or the beneficiary hold stock outside of the trust, those holdings will be combined with the holdings of the trust to determine if the 20 percent threshold has been met.

d. Significant Overlap

108. Background. The CMRS spectrum cap prohibits a licensee from having more than 45 MHz of spectrum in broadband PCS, cellular or SMR services with significant overlap in a geographic area.²⁴⁹ A “significant overlap” occurs when at least ten percent of the population of the PCS licensed service area is within the cellular geographic service area and/or SMR service area(s).²⁵⁰ Therefore, a carrier's spectrum counts toward the spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the designated service area.²⁵¹

109. In the *NPRM*, we sought comment on whether a geographic overlap standard of greater than a 10 percent overlap should be adopted, and, if so, what would be a more appropriate standard. We also sought comment on whether to permit carriers in high-cost and under-served markets to have a greater than 10 percent population overlap, and how we should define high-cost and under-served markets for purpose of the significant overlap threshold. We also sought comment on whether, in the alternative, there is a mechanism for triggering the application of a spectrum cap in given geographic areas that might be superior to our current significant overlap standard.²⁵²

110. Few commenters specifically discussed the geographic overlap threshold. SBCW argues that the concerns that led to the creation of the ten-percent standard never materialized, and that it is more appropriate to eliminate the cap than to change the overlap provision.²⁵³ It further argues that applying a different limitation to rural areas could result in uneven and unequal regulation.²⁵⁴ Triton, on the other hand, suggests that the Commission increase the overlap standard in rural areas or increase the aggregation limit, or both, in order to facilitate access to capital for carriers serving rural areas.²⁵⁵

111. Discussion. We will not alter the 10 percent overlap threshold for the CMRS spectrum cap. The Commission has found a 10 percent standard to be an appropriate demarcation point for circumstances where an overlap raises competitive concerns in several contexts concerning wireless service.²⁵⁶ In those decisions, as well as in the *CMRS Spectrum*

²⁴⁹ 47 C.F.R. § 20.6(c).

²⁵⁰ *Id.*

²⁵¹ If the significant overlap is between 10 and 20 percent, the divestiture provision of the CMRS spectrum cap allows the licensee up to ninety days from the final grant of license that causes the licensee to exceed the 45 MHz limit, to come into compliance with section 20.6. 47 C.F.R. § 20.6(e).

²⁵² *NPRM*, 13 FCC Rcd at 25157 ¶ 53.

²⁵³ SBCW comments at 11.

²⁵⁴ *Id.*

²⁵⁵ Triton comments at 6.

²⁵⁶ *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5

Cap Report and Order, the Commission stated that the potential for the exercise of such market power was slight with a 10 percent population overlap, but was concerned that a greater overlap might lead to anticompetitive practices.²⁵⁷ Neither of the parties that addressed this issue has shown that a greater attribution threshold would not raise competitive concerns given our retention of an aggregation limit. We also note that, as a general matter, it is preferable to have rules for wireless spectrum that are consistent to facilitate ease of compliance and administrative efficiency. Maintaining a 10 percent rule would be consistent with the threshold used in other areas.

112. We recognize, however, that there may be circumstances in which an overlap of 10 percent or greater would not raise competitive concerns, and may even facilitate the provision of new, enhanced or expanded services to consumers. To the extent that a party can show that in a particular context an overlap of 10 percent or greater would not adversely affect competition in the market at issue, we will consider a request for a limited waiver of the overlap threshold. Finally, as we discuss in other parts of this Order, we agree with Triton that steps are needed to facilitate access to capital for carriers serving rural areas. We believe, however, that the increase in the aggregation limit for rural areas to 55 MHz and the changes to the attribution rules adopted in this Order provide a more reasonable means to increase the availability of capital to carriers serving rural areas than altering the overlap threshold, which could allow for anticompetitive practices in substantial areas.

e. SMR Spectrum Aggregation Limits

113. Background. The spectrum cap requires that, in calculating the amount of attributable SMR spectrum an entity must count all 800- and 900-MHz channels located at any SMR base station inside the geographic area where there is significant overlap with PCS or cellular radio services. The rule also provides that all 800-MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired) and all 900-MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired). There is a limitation of 10 MHz of 800-MHz SMR spectrum to be attributed to an entity for purposes of determining compliance with the cap.²⁵⁸

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 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, FC 97-82 (1997) (*LMDS Second Report and Order*) at ¶¶ 186-88; *recon. Second Order on Reconsideration*, FCC 97-323 (1997); Amendment of the Commission's Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Report and Order*, 12 FCC Rcd 15668 ¶ 43 (1997) *recon.* FCC 99-102 (rel. June 30, 1999) *recons pending, appeal pending sub nom.* GTE of the Midwest Inc. v. FCC & USA, No. 98-3167 (6th Cir. filed Dec. 12, 1997).

²⁵⁷ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7876 ¶ 107.

²⁵⁸ 47 C.F.R. § 20.6(b).

114. In response to the *Third FNPRM* in GN Docket No. 93-252,²⁵⁹ Advanced MobileComm, Inc. (AMI) requests that the Commission revise the language regarding the calculation of SMR spectrum in two respects. First, AMI argues that the 10-MHz limit on attribution of SMR spectrum was intended to apply to both the 800- and 900-MHz bands combined, not to the 800-MHz band alone. AMI cites pertinent portions of the *CMRS Third Report and Order*, which adopted section 20.6(b), that state the Commission's intention to attribute to an entity "a maximum of 10 MHz of SMR spectrum, including both 800- and 900-MHz spectrum, for the purposes of determining compliance."²⁶⁰ Second, AMI asks that we clarify section 20.6(b) to remove any possible ambiguity concerning the multiple counting of SMR channels toward the spectrum cap in situations where a specific channel is licensed to the same licensee at more than one location within a relevant geographic area. AMI argues that in situations where an SMR licensee holds two or more licenses for the same frequency within a particular area, or obtains a wide area license and reuses the frequency within that market, this spectrum should only be counted once for the purpose of determining compliance with the spectrum cap. No parties filing comments on the *NPRM* addressed this issue.²⁶¹

115. Discussion. We agree with AMI that the wording of section 20.6(b) does not accurately reflect the Commission's intent in the *CMRS Third Report and Order*, and we will revise the language to clarify that the cap includes 800- and 900-MHz SMR spectrum combined. We are also revising section 20.6(b) of our rules to provide that any discrete 800- or 900-MHz channel shall be counted only once per licensee within the relevant geographic area, even if the licensee in question uses the same channel at more than one location.

f. Divestiture

116. Background. The spectrum cap limits the amount of attributable spectrum that a licensee may have in a geographic area. As a general matter, a licensee obtaining an attributable interest in spectrum, either through a transfer of control, assignment or other attributable event, that would cause it to exceed the aggregation limit, must divest sufficient interests prior to obtaining that additional interest so that it remains in compliance. The rule, however, sets out limited circumstances in which a licensee may have an additional 90 days from final grant of the license to come into compliance with the spectrum cap.²⁶² No parties addressed issues related to this divestiture provision in their comments.

²⁵⁹ Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6880 (1995) (*Third FNPRM*).

²⁶⁰ *CMRS Third Report and Order*, 9 FCC Rcd at 8000 ¶ 17. See also *id.*, at 8114-15, ¶ 275.

²⁶¹ In the *NPRM*, the Commission stated that it was incorporating the records of several pending proceedings concerning the spectrum cap, including the *Third FNPRM*, and would resolve those proceeding in this Order. *NPRM*, 13 FCC Rcd at 25142 ¶ 19, 25146-47 ¶ 28.

²⁶² 47 C.F.R. § 20.6(e).

117. Discussion. We are adopting several changes to the rule to clarify the divestiture provision. First, we clarify that a licensee must divest sufficient attributable interests to maintain compliance with the spectrum cap prior to consummation of the transaction or final grant of the assignment that would give them an attributable interest in excess of the cap, unless they qualify for the additional ninety-day divestiture period. Second, we also clarify that a licensee need meet only one of the three conditions set out in the rule to qualify for the additional ninety-day divestiture period. Third, in conjunction with our changes to the attribution rules regarding the use of trusts, we clarify that a licensee may use a trust for divestiture purposes if the trust is of limited duration (six months or less)²⁶³ and the terms of the trust are approved by the Commission prior to the transfer of the assets to the trust. The applicant must not have any interest in or control of the trustee. 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 must give the trustee authority to dispose of the license as the trustee sees fit. Consistent with section 0.5(c) of the Commission's rules,²⁶⁴ we delegate authority to the Wireless Telecommunications Bureau to review proposed trusts to ensure that they comply with our rules.

C. CTIA Forbearance Petition

1. Background

118. On September 30, 1998, the Cellular Telecommunications Industry Association filed a Petition for Forbearance (CTIA Forbearance Petition). CTIA requests that the Commission use its authority under section 10 of the Act²⁶⁵ to forbear from applying section 20.6 of the Commission's rules.²⁶⁶ CTIA urges the Commission to rely upon a case-by-case determination of permissible levels of horizontal ownership as part of the section 310(d)²⁶⁷ license transfer review.²⁶⁸

119. In the *NPRM*, we sought comment on the CTIA Forbearance Petition, particularly whether CTIA's arguments meet the standards of section 10 for forbearance from the spectrum cap.²⁶⁹ Because we are reviewing the CTIA Forbearance Petition in the context of our

²⁶³ If the license(s) are not transferred from the trust before the trust expires, the licenses will be cancelled.

²⁶⁴ 47 C.F.R. § 0.5(c).

²⁶⁵ 47 U.S.C. § 160(a)(1-3).

²⁶⁶ See 47 C.F.R. §20.6.

²⁶⁷ 47 U.S.C. 310(d) requires the Commission to find that a proposed license transfer or assignment would serve the public interest, convenience and necessity.

²⁶⁸ CTIA Forbearance Petition at 3.

²⁶⁹ *NPRM*, 13 FCC Rcd at 25163 ¶ 68.

comprehensive re-evaluation of the spectrum cap, we also sought comment on the advantages or disadvantages of forbearing from the cap rather than modifying, sunseting, or eliminating it.²⁷⁰

120. The commenters that specifically addressed the forbearance issue generally took the same position that they did on whether to eliminate the spectrum cap. Commenters that support retention of a spectrum cap oppose forbearance and argue that CTIA has not met the requirements of section 10.²⁷¹ The commenters that oppose the cap generally support forbearance.²⁷² In contrast, BellSouth opposes the cap but does not support forbearance. It is concerned that forbearance will create uncertainty in the market, and argues that if there is an adequate case to forbear, the rule should be eliminated.²⁷³ SBCW argues that if the Commission forbears from enforcement of the cap, it should also sunset the cap to lend certainty to forbearance.²⁷⁴

2. Discussion

121. Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding section 332(c)(1)(A),²⁷⁵ if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.²⁷⁶

²⁷⁰ *Id.* ¶ 69.

²⁷¹ *See, e.g.*, MCI comments at 6-7; Sprint PCS comments at 15; TRA comments at 13; Wireless One comments at 5-6.

²⁷² *See* Radiofone comments at 2-3; RTG comments at 6-9; Western Wireless comments at 12-13.

²⁷³ BellSouth comments at 18.

²⁷⁴ SBCW comments at 12.

²⁷⁵ 47 U.S.C. § 332(c)(1)(A) (Commission may not forbear from applying sections 201, 202 and 208 to CMRS providers).

²⁷⁶ 47 U.S.C. § 160(a)(1)-(3).

122. CTIA makes two arguments to support its claim that enforcement of the spectrum cap rule is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. First, CTIA contends that the CMRS market is sufficiently competitive that market forces will restrain carriers from acting anticompetitively.²⁷⁷ Second, CTIA argues that principles of antitrust law and economics provide adequate protection against the possibility of excessive concentration that the spectrum cap was designed to safeguard against.²⁷⁸

123. As we have discussed above, upon review of the record in this proceeding, we find that enforcement of the spectrum cap continues to be in the public interest. Thus, we will not forbear from enforcement of the spectrum cap rule at this time. While CMRS markets are becoming more competitive, we do not find, for the reasons discussed above, that we can rely on market forces alone to constrain anticompetitive practices by CMRS carriers. The spectrum cap still plays an important role in protecting and promoting competition within CMRS markets, and ensuring that rates and practices of CMRS carriers are reasonable. We also do not find, as we discussed above, that reliance on case-by-case review under antitrust law and our section 310(d) authority are an adequate substitute for the spectrum cap. Particularly under circumstances where a party is transferring unbuilt spectrum or a system that is not operational or lacks customers, antitrust review can be especially burdensome. Similarly, reliance on review under section 310(d) would not bring to the Commission's attention many cross-ownership situations comprising less than control yet raising competitive concerns. Consequently, we find that the spectrum cap rule is necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.

124. CTIA also relies upon the competitive forces in CMRS markets to argue that the second prong of the section 10 forbearance standard is met.²⁷⁹ CTIA argues that enforcement of the spectrum cap is not necessary for the protection of consumers.²⁸⁰ CTIA contends that the Commission's section 310(d) authority is an appropriate vehicle for the Commission to effectuate the "ideal approach [which] is to judge spectrum combinations on a case-by-case basis taking into account all of the relevant variables bearing upon competition and efficiency, including the service area overlap, the populations in the respective service areas, and the quantity of spectrum currently allocated to and ... sought to be acquired by the licensee."²⁸¹ CTIA continues, "the

²⁷⁷ CTIA Forbearance Petition at 7-8; CTIA comments at 4-5.

²⁷⁸ CTIA Forbearance Petition at 9-17; CTIA comments at 5-10.

²⁷⁹ CTIA comments at 10, 1-14. *See also* Radiofone comments at 2; RTG comments at 8.

²⁸⁰ 47 U.S.C. § 160(a)(2).

²⁸¹ CTIA Forbearance Petition at 19.

bright-line, inflexible nature of the cap should yield to a more tailored, case-by-case approach.”²⁸² CTIA considers this flexible approach to be less restrictive, and thus better able to serve consumers.²⁸³

125. We find the spectrum cap is necessary for the protection of consumers. As we discuss above in addressing the first prong of section 10, we find the spectrum cap is necessary to ensure that carriers do not act in a manner that could lead to the imposition of unreasonable rates or practices. Although CMRS markets are growing increasingly more competitive as more carriers enter the market, we do not find we can rely solely on market forces to protect consumers. Thus, we find the spectrum cap serves a necessary purpose in protecting consumers by promoting and protecting competition.

126. CTIA argues that the third prong of the section 10 forbearance standard is met because forbearance is consistent with the public interest.²⁸⁴ CTIA argues that the public interest is better served by a case-by-case determination of permissible ownership structures.²⁸⁵ According to CTIA, rigid ownership limitations endanger innovation and efficiency and outweigh the administrative burdens associated with reliance upon a case-by-case approach to market concentration issues.²⁸⁶

127. We find the spectrum cap serves the public interest. In evaluating whether forbearance is consistent with the public interest, the Commission considers whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.²⁸⁷ In making this assessment, the Commission may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision.²⁸⁸ Unlike CTIA, we believe that a bright-line test serves the public interest in this circumstance. As the D.C. Circuit Court recently recognized, “[a] spectrum cap, unlike many other regulations, might actually require a bright-line rule to be effective.”²⁸⁹ A bright-line test provides both the Commission and

²⁸² *Id.*

²⁸³ *Id.* at 18.

²⁸⁴ 47 U.S.C. § 160(a)(3).

²⁸⁵ CTIA Forbearance Petition at 21; CTIA comments at 17-21.

²⁸⁶ CTIA Forbearance Petition at 25; CTIA comments at 15-16.

²⁸⁷ 47 U.S.C. §§ 160(a)(3), (b).

²⁸⁸ See Biennial Regulatory Review -- Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134 (rel. July 2, 1998) at ¶ 27, *reconsideration pending*.

²⁸⁹ *BellSouth v. FCC*, 162 F.3d at 1225.

industry with regulatory certainty in dealing with possible cross-ownership situations. As such, it reduces burdens placed on both the Commission and industry. It gives industry advance notice of which types of cross-ownership situations the Commission finds would be anticompetitive. Use of a case-by-case review would eventually lead to an understanding of which types of cross-ownership interests the Commission believes are anticompetitive, but would require the Commission and industry to expend significant resources in reviewing individual cross-ownership proposals before sufficient precedent would be set to establish the line. Under the spectrum cap rule, a party that believes its proposed cross-ownership interest would not be anticompetitive and would serve the public interest is still able to make its case to the Commission through a request for waiver of the cap. On balance, we find that our use of bright-line tools better serve the public interest than a case-by-case approach.

V. OTHER ISSUES

A. Third FNPRM in GN Docket 93-252

128. Background. The spectrum cap only applies to spectrum for broadband PCS, cellular and SMR regulated as CMRS.²⁹⁰ In 1995, the Commission issued the *Third FNPRM* in GN Docket No. 93-252,²⁹¹ in which the Commission examined whether the spectrum cap should be extended to all cellular, SMR, and broadband PCS providers regardless of whether they are classified as Private Mobile Radio Services (PMRS)²⁹² or CMRS providers.²⁹³ The Commission questioned whether the applicability of the spectrum cap should turn on the CMRS/PMRS distinction, and proposed that the spectrum cap be revised to apply to all cellular, SMR, and broadband PCS licensees regardless of regulatory classification.²⁹⁴ The Commission also sought comments on when to apply the spectrum cap to SMR licensees that were then regulated as PMRS providers but would be treated as CMRS carriers starting in August 10, 1996, the end of the period for reclassifying certain PMRS providers as CMRS carriers.²⁹⁵

²⁹⁰ 47 C.F.R. § 20.6(a).

²⁹¹ *Third FNPRM*, 10 FCC Rcd 6880.

²⁹² PMRS is defined as a mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. PMRS includes, but is not limited to, not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in Part 90; mobile radio service offered to a restricted class of eligible users; 220-222 MHz land mobile service and automatic vehicle monitoring systems that do not offer interconnected service or that are not-for-profit; Personal Radio Services under Part 95; Maritime Service Stations under Part 80; and Aviation Service Stations under Part 87. *See* 47 C.F.R. § 20.3.

²⁹³ *Third FNPRM*, 10 FCC Rcd at 6881 ¶ 3.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 6880 ¶ 1, 6882 ¶ 4. *See also* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993); Implementation of Sections 3(n) and 332 of the Communications Act,

129. Ten parties filed comments or reply comments in response to the *Third FNPRM*.²⁹⁶ Several commenters support extending the spectrum cap to all cellular, SMR, and broadband PCS providers, regardless of their regulatory classification.²⁹⁷ These commenters contend that including PMRS operators utilizing cellular, SMR, and broadband PCS channels within the spectrum cap will assist in promoting the regulatory symmetry goals mandated by section 332.²⁹⁸ AMTA and CTIA, however, oppose the Commission's proposal to expand the spectrum cap to include PMRS.²⁹⁹ CTIA recommends that the Commission not impose additional limitations on CMRS providers who choose to provide their customers with supplemental and enhanced services through PMRS offerings.³⁰⁰ AMTA argues that PMRS services are not fully competitive with CMRS offerings under the Commission's regulatory framework, because PMRS offerings cannot be offered to the public or a substantial portion of the public, or cannot include interconnection with the Public Switched Telephone Network (PSTN).³⁰¹ No parties filing comments on the *NPRM* addressed this issue.

130. Discussion. We find that such a rule change is unnecessary at this time.³⁰² Under the definitions of CMRS and PMRS contained in the statute and our regulations, mobile service that is the functional equivalent of CMRS will be treated as CMRS.³⁰³ To the extent that a licensee provides service that is the functional equivalent of CMRS in the frequency bands included within the spectrum cap it will be treated as CMRS and thus subject to the cap.

Regulatory Treatment of Mobile Services, GN Docket 93-252, *First Report and Order*, 9 FCC Rcd 1056 (1994) (setting out transition for certain existing private carriers to CMRS status).

²⁹⁶ Comments were filed on June 5, 1995, by Advanced MobileComm, Inc.; AirTouch Communications, Inc.; American Mobile Telecommunications Association, Inc.; CTIA; GTE Service Corporation (GTE); McCaw Cellular Communications, Inc; Nextel Communications, Inc.; Pacific Telesis Mobile Services and Pacific Bell Mobile Services (PacTel/PacBell); and PCS PrimeCo, L.P. (PCS PrimeCo). Rural Cellular Association (RCA) filed Reply Comments on June 26, 1995.

²⁹⁷ See GTE comments at 1-2; PacTel/PacBell comments at 1; PCS PrimeCo comments at 1; AirTouch comments at 1-2; McCaw comments at 1-3; RCA's reply comments at 1-3.

²⁹⁸ See GTE comments at 2; and McCaw comments at 2.

²⁹⁹ AMTA comments at 4; CTIA comments at 2-3.

³⁰⁰ CTIA comments at 8-9.

³⁰¹ AMTA comments at 4.

³⁰² At the time the Commission issued the *Third FNPRM* the mobile telecommunications industry was in the midst of the transition to the new regulatory scheme for mobile services enacted in the Omnibus Budget Act Reconciliation Act of 1993. At that time certain carriers that had been previously treated as private service providers were undergoing reclassification to CMRS regulatory status. That transition has subsequently been completed. See Information for Part 90 Licensees Subject to Reclassification as Commercial Mobile Radio Service Providers on August 10, 1996 – Wireless Bureau Answers Frequently Asked Questions Regarding CMRS Status, *Public Notice*, 11 FCC Rcd 9267 (1996).

³⁰³ 47 U.S.C. § 332(d); 47 C.F.R. § 20.3.

Therefore, we will not include PMRS under the spectrum cap.

B. Separate Cap for SMR

131. Background. Southern contends that the CMRS spectrum cap is inadequate to protect competition in the SMR services and should be replaced by a narrowly tailored, service specific limitation that would address the market power problem in the SMR service.³⁰⁴ It cites to the Wireless Bureau's decision in *Pittencrieff* to show that dispatch service constitutes a distinct market and that Nextel is achieving market power in that market.³⁰⁵ Southern requests that the Commission adopt a Presumptive SMR Spectrum Cap of 15 MHz of 800 MHz frequencies that are subject to auction or authorized for commercial use in any Economic Area (EA).³⁰⁶ According to Southern, 15 MHz represents approximately 70 percent of the 800 MHz spectrum auctioned or scheduled for auction, and that limiting a single entity to no more than 15 MHz would ensure that the SMR market could benefit from competition.³⁰⁷ Southern suggests that at a minimum the Commission should condition participation in future auctions upon acceptance by participants of this presumptive SMR spectrum cap.³⁰⁸

132. Nextel takes exception to Southern's proposal and argues that a separate spectrum cap for SMR service would inhibit the ability of SMR providers to compete with cellular and broadband PCS providers. Nextel states that Southern has mischaracterized the findings in *Pittencrieff*, and that the Wireless Bureau actually found that the CMRS market, not solely the SMR market, is the appropriate product market for analysis.³⁰⁹ Nextel contends that the ability of SMR providers to aggregate 800 MHz spectrum makes it possible for them to provide competition to cellular and broadband PCS, not only on a local basis but also in regional and national markets.³¹⁰ It argues that a separate 800 MHz SMR spectrum cap would place SMR providers at a significant competitive disadvantage to other broadband CMRS providers by restricting them to a limited amount of spectrum, and thus a limited system capacity.³¹¹

133. Discussion. We decline to adopt a separate spectrum cap for SMR services using 800 MHz frequencies. We find that the appropriate service(s) for a spectrum cap are all

³⁰⁴ Southern comments at 3.

³⁰⁵ *Id.* (citing In Re Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8935 (WTB 1997) (*Pittencrieff*)).

³⁰⁶ *Id.* at 4.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Nextel reply comments at 9 (citing *Pittencrieff*, 13 FCC Rcd at 8945 ¶ 21).

³¹⁰ *Id.* at 14.

³¹¹ *Id.* at 12.

broadband CMRS, as CMRS carriers generally compete or have the potential to compete against each other. We can decide on a case-by-case basis under authority pursuant to section 310(d) whether a different market definition is appropriate in the context of a specific ownership situation.

C. Pending Petitions for Reconsideration

134. Background. As we set out in the *NPRM*, there are four petitions for reconsideration of previous Commissions Orders regarding the CMRS spectrum cap which are still pending.³¹² With one exception, no parties filing comments on the *NPRM* addressed any of these petitions. In its comments on the *NPRM*, Omnipoint states that the successful buildout of PCS systems and the level of competition in CMRS markets suggests that the re-imposition of the PCS/cellular cross-ownership rule would serve no useful purpose at this time, and thus its petition for reconsideration is largely moot.³¹³

135. Discussion. In this Report and Order we have conducted a comprehensive review of the spectrum cap. For the reasons discussed herein, we find that the use of a spectrum aggregation limit for broadband CMRS services serves the public interest and advances the goals of the Commission including the promotion of competition, the protect of existing competition, and provision of new and enhanced services to consumers throughout the country. Given our thorough re-examination of the cap and our findings regarding its public interest benefit, we find the petitions for reconsideration to be moot and consequently dismiss them.

VI. PROCEDURAL ISSUES

A. Regulatory Flexibility Analysis

136. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Paperwork Reduction Act Analysis

137. 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.

³¹² Those four petitions are: a petition for reconsideration of the *CMRS Third Report and Order* filed by SMR Won; a petition for reconsideration of the *CMRS Fourth Report and Order* filed by McCaw Cellular; and, two petitions for reconsideration of the *CMRS Spectrum Cap Report and Order* filed by Omnipoint and Radiofone respectively. *NPRM*, 13 FCC Rcd at 25142-44 ¶¶ 20-24.

³¹³ Omnipoint comments at 1-2 n. 2.

VII. ORDERING CLAUSES

138. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 11 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 161 and 332, this Report and Order is hereby 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.

139. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4, and 10 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154 and 160, the Petition for Forbearance filed by the Cellular Telecommunications Industry Association IS DENIED.

140. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration of the Third Report and Order in GN Docket No. 93-252 filed by SMR Won IS DISMISSED AS MOOT to the extent discussed herein.

141. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Fourth Report and Order in GN Docket No. 93-252 filed by McCaw Communications, Inc. IS DISMISSED AS MOOT.

142. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Report and Order in WT Docket No. 96-59 filed by Omnipoint Corporation IS DISMISSED AS MOOT.

143. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Report and Order in WT Docket No. 96-59 filed by Radiofone, Inc. IS DISMISSED AS MOOT.

144. IT IS FURTHER ORDERED pursuant to section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c), and sections 0.5(c), 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.5(c), 0.131, 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to review and approve proposals to hold ownership interests in broadband Personal Communications Service, cellular, and Special Mobile Radio services licenses regulated as Commercial Mobile Radio Services in a trust to ensure that the trust complies with the Commission's rules.

145. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, 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**PARTIES FILING COMMENTS IN WT DOCKET 98-205****A. Comments:**

1. AirTouch (AirTouch)
2. America One Communications Inc. (America One)
3. AT&T Wireless (AT&T)
4. Bell Atlantic Mobile (Bell Atlantic)
5. BellSouth Corporation (BellSouth)
6. Cellular Telecommunications Industry Association (CTIA)
7. Chase Capital Partners (Chase)
8. D&E Communications, Inc. (D&E Communications)
9. Digiph PCS Inc. (Digiph)
10. GTE Service Corporation (GTE)
11. MCI Worldcom (MCI)
12. Northcoast Communications (Northcoast)
13. Omnipoint (Omnipoint)
14. Personal Communications Industry Association (PCIA)
15. Radiofone (Radiofone)
16. Rural Telecommunications Group (RTG)
17. SBC Wireless, Inc. (SBCW)
18. Sonera Ltd. (Sonera)
19. Southern Communications Services (Southern)
20. Sprint PCS (Sprint PCS)
21. Telecommunications Resellers Association (TRA)
22. Telephone and Data Systems, Inc. (TDS)
23. Triton Cellular Partners (Triton)
24. Western Wireless Corporation (Western Wireless)
25. Wireless One Technologies (Wireless One)

B. Reply Comments:

1. Bell Atlantic Mobile (Bell Atlantic)
2. BellSouth Corporation (BellSouth)
3. Cellular Telecommunications Industry Association (CTIA)
4. Chariton Valley Wireless Services (Chariton)
5. D&E Communications, Inc. (D&E)
6. GTE Service Corporation (GTE)
7. Nextel Communications, Inc. (Nextel)

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8. Personal Communications Industry Association (PCIA)
 9. Rural Telephone Group (RTG)
 10. SBC Wireless, Inc. (SBCW)
 11. Telephone and Data Systems, Inc. (TDS)
 12. Triton Cellular Partners (Triton)
 13. U.S. Small Business Administration (SBA)
 14. US West Wireless (US West)
 15. Western Wireless Corporation (Western Wireless)

C. Economic Analysis submitted by commenters

1. Economists, Inc. (Economists Inc.) (attachment to AT&T comments)
2. Declaration of Robert W. Crandall and Robert H. Gertner (Crandall & Gertner) (attached to Bell Atlantic comments)
3. Declaration of Dr. Charles L. Jackson (Jackson) (attached to Bell Atlantic comments)
4. Declaration of J. Gregory Sidak and David J. Teece (Sidak & Teece) (attached to GTE comments)
5. John B. Hays, CMRS HHIs from Customer Data (Hays) (attached to Sprint PCS comments)
6. Reply Declaration of Robert W. Crandall and Robert H. Gertner (Crandall & Gertner reply) (attached to Bell Atlantic reply comments)
7. Telecompetiton Market Data Report for PCIA, revised 1-1-99 (Telecompetition) (attached to PCIA reply comments)

APPENDIX B**FINAL RULES****AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS**

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

PART 20 – COMMERCIAL MOBILE RADIO SERVICES

2. 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.

3. Section 20.6 is amended to read 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 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), as defined in 47 C.F.R. § 22.909, 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.

(b) SMR spectrum.

To calculate the amount of attributable SMR spectrum for purposes of paragraph (a) of this section, an entity must count all 800 MHz and 900 MHz channels located at any SMR base station inside the geographic area (MTA or BTA) where there is significant overlap. All 800 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired), and all 900 MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired); provided that any discrete 800 or 900 MHz channel shall be counted only once per licensee within the geographic area, even if the licensee in question utilizes the same channel at more than one location within the relevant geographic area. No more than 10 MHz of SMR spectrum in the 800 and 900 MHz SMR services will be attributed to an entity when determining compliance with the cap.

(c) *Significant overlap.*

(1) For purposes of paragraph (a) of this section, significant overlap of a PCS licensed service area and CGSA(s) (as defined in Sec. 22.911 of this chapter) or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area for the counties contained therein, as determined by the latest available decennial census figures as compiled by the Bureau of the Census, is within the CGSA(s) and/or SMR service area(s).

(2) The Commission shall presume that an SMR service area covers less than 10 percent of the population of a PCS service area if none of the base stations of the SMR licensee are located within the PCS service area. For an SMR licensee's base stations that are located within a PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population of the PCS service area, unless the licensee shows that its protected service contour for all of its base stations covers less than 10 percent of the population of the PCS service area.

(d) *Ownership attribution.*

For purposes of paragraph (a) of this section, ownership and other interests in broadband PCS licensees, cellular licensees, or SMR licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee if the ownership interest is held by a small business or a rural telephone company, as these terms are defined in Sec. 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business.

(3) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have an attributable interest only if they hold 40 percent or more of the outstanding voting stock of a corporate broadband PCS, cellular or SMR licensee, or if any of the officers or directors of the broadband PCS, cellular or SMR licensee are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

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- (4) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.
- (5) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until converted, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in Sec. 1.2110 of this chapter or other related provisions of the Commission's rules.
- (6) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.
- (7) Officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a broadband PCS licensee or applicant, a cellular licensee, or an SMR licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant, cellular licensee, or SMR licensee.
- (8) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%. If A owns 20% of B, and B owns 51% of licensee C, then A's interest in licensee C would be 20% because B's ownership of C exceeds 50%.]
- (9) Any person who manages the operations of a broadband PCS, cellular, or SMR licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,
- (i) The nature or types of services offered by such licensee;
 - (ii) The terms upon which such services are offered; or
 - (iii) The prices charged for such services.

(10) Any licensee or its affiliate who enters into a joint marketing arrangements with a broadband PCS, cellular, or SMR licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(e) *Divestiture.*

(1) Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment, except that a licensee that meets the requirements set forth in paragraph (e)(2) shall have 90 days from final grant to come into compliance with the spectrum aggregation limit.

(2) An applicant with:

(A) controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licenses where the geographic license areas cover 20 percent or less of the applicant's service area population;

(B) attributable interests in broadband PCS, cellular, and/or SMR licenses solely due to management agreements or joint marketing agreements; or

(C) non-controlling attributable interests in broadband PCS, cellular, and/or SMR licenses, regardless of the degree to which the geographic license areas cover the applicant's service area population,

shall be eligible to have its application granted subject to a condition that the licensee shall come into compliance with the spectrum limitation set out in paragraph (a) within ninety (90) days after final grant. For purposes of this paragraph, a "non-controlling attributable interest" is one in which the holder has less than a fifty (50) percent voting interest and there is an unaffiliated single holder of a fifty (50) percent or greater voting interest.

(3) The applicant for a license that, if granted, would exceed the spectrum aggregation limitation in paragraph (a) of this section shall certify on its application that it and all parties to the application will come into compliance with this limitation. If such an applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the spectrum aggregation limitation. A similar statement must also be included with any application for assignment of licenses or transfer of control that, if granted, would exceed the spectrum aggregation limit.

(4) (A) Parties holding controlling interests in broadband PCS, cellular, and/or SMR licenses 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 Secs. 24.839 of this chapter (PCS), 22.39 of this chapter (cellular), 90.158 of this chapter (SMR)) 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.

(B) Applicants that meet the requirements of paragraph (e)(2) must tender to the Commission within ninety (90) days of final grant of the initial license, such an assignment or transfer application or, in the case of less than controlling (but still attributable) interests, a written 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. If no such transfer or assignment application or certification is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the certification and the divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license or the assignment or transfer, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

Note 1 to Sec. 20.6: For purposes of the ownership attribution limit, all ownership interests in operations that serve at least 10 percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular or SMR ownership.

Note 2 to Sec. 20.6: When a party owns an attributable interest in more than one cellular or SMR system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

Note 3 to Sec. 20.6: Waivers of Sec. 20.6(d) may be granted upon an affirmative showing:

- (1) That the interest holder has less than a 50 percent voting interest in the licensee and there is an unaffiliated single holder of a 50 percent or greater voting interest;
- (2) That the interest holder is not likely to affect the local market in an anticompetitive manner;
- (3) That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and
- (4) That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.

3. Subpart H, of Part 22 of Title 47 of the Code of Federal Regulations is amended as

follows:

Subpart H – Cellular Radiotelephone Service

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

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

5. Section 22.942 is amended to read as follows:

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

(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 have an direct or indirect ownership interest of 5 percent or less 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.

(b) *Non-Controlling Interests.* A direct or indirect non-attributable interest in both systems is excluded from the general rule prohibiting multiple ownership interests.

(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.

(d) *Ownership attribution.*

For purposes of paragraphs (a) and (b) of this section, ownership and other interests cellular licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee shall be attributed.

(3) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(4) Debt and instruments such as warrants, convertible debentures, options, or other interests

(except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until converted.

(5) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(6) Officers and directors of a cellular licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a cellular licensee shall be considered to have an attributable interest in the cellular licensee.

(7) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%. If A owns 20% of B, and B owns 51% of licensee C, then A's interest in licensee C would be 20% because B's ownership of C exceeds 50%.]

(8) Any person who manages the operations of a cellular licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(9) Any licensee or its affiliate who enters into a joint marketing arrangements with a cellular, licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 98-205.¹ The Commission sought written comments on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis for the Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²

A. Need for and purpose of the action

The Report and Order in this docket concludes CMRS spectrum cap and cellular cross-interest rules continue to be an appropriate and effective tools to promote and protect competition in CMRS markets. The recent and rapid growth of competition in these markets – resulting from Commission decisions to allocate spectrum for PCS and assign licenses subject to the spectrum cap (thereby assuring multiple providers in most markets) – has been a great success. The Commission finds that undue consolidation of CMRS ownership would jeopardize the continued realization of these benefits. The Commission concludes that the public interest is better served by the continued use of a bright-line test of spectrum ownership rather than by exclusive reliance on case-by-case review of proposed ownership arrangements. The Commission finds that it is not sufficient to rely solely on case-by-case review of CMRS transactions, whether through the Commission's section 310(d) transfer of control process or antitrust review, to protect and promote competition in CMRS markets. Therefore, the Commission concludes that the spectrum cap and cellular cross-interest rules continue to play an important role in guiding the development of competition and services in CMRS markets.

Although the Commission concludes in the Report and Order that the spectrum cap and cellular cross-interest rules should be retained, it finds that the rules can be modified to allow certain additional cross-ownership interests without significantly increasing the risk of undue market concentration or anticompetitive behavior by licensees. Consequently, in the Report and Order the Commission makes the following modifications to the spectrum cap and cellular cross-interest rules: (1) adopts a 55 MHz spectrum aggregation limit for licensees serving rural areas, defined as Rural Service Areas (RSAs); (2) allows up to 40 percent investment for passive institutional investors (as opposed to 20 percent for other investors); and (3) amends the cellular

¹ 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, *Notice of Proposed Rulemaking*, 13FCC Rcd 25132 (1998).

² Pub. L. No. 104-121, 110 Stat. 847 (1996), Title II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), *codified at* 5 U.S.C. § 601 *et seq.*

cross-interest rule to allow a cellular investor to have a limited non-controlling interest in the other cellular license in the same market. Finally, the Commission states that it will reevaluate the continuing need for these rules as part of our year 2000 biennial review.

Finally, for the reasons outlined above, the Commission finds that enforcement of the spectrum cap continues to be in the public interest, and therefore denies a request to forbear from enforcing the spectrum cap filed by the Cellular Telecommunications Industry Association pursuant to Section 10 of the Communications Act, as amended.³

B. Issues raised in response to the IRFA

The Commission sought comment generally on the IRFA. No comments were submitted specifically in response to the IRFA.

C. Description and estimates of the number of small entities to which the rules adopted in this Report and Order will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁶ Nationwide, there are 275,801 small organizations.⁷ "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."⁸ As of 1992, there were 85,006 such jurisdictions in the United States.⁹

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.¹⁰ Under the Small Business Act, a "small

³ 47 U.S.C. § 160.

⁴ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

⁵ 5 U.S.C. § 601(6).

⁶ 5 U.S.C. § 601(4).

⁷ 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).

⁸ 5 U.S.C. § 601(5).

⁹ U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

¹⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹¹

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

Cellular Licensees. 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.¹² 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.¹³ 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 *Trends in Telephone Service* data, 732 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.¹⁴ 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 732 small cellular service carriers that may be affected by the policies adopted in this Report and Order.

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 revenues of less than \$40 million in the three previous calendar years.¹⁵ For Block F, an additional classification for "very small business" was added and is defined as an entity

¹¹ 15 U.S.C. § 632.

¹² 13 C.F.R. §121.201, SIC code 4812.

¹³ *1992 Census*, Series UC92-S-1, at Table 5, SIC code 4812.

¹⁴ *Trends in Telephone Service*, Table 19.3 (Feb. 19, 1999).

¹⁵ See Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, Report and Order, 11 FCC Rcd 7824, 7850-52 (paras. 57-60) (1996); see also Section 24.720(b) of the Commission's Rules, 47 C.F.R. §24.720(b).

that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁶ These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.¹⁷ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.¹⁸ Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 900 MHz SMR has been approved by the SBA.¹⁹ Approval concerning 800 MHz SMR is being sought. The rules adopted in this *Reconsideration* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the policies adopted in this Report and Order.

¹⁶ See *Id.* at 7852 (para. 60).

¹⁷ See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (paras. 114-20) (1994).

¹⁸ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released Jan. 14, 1997).

¹⁹ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the use of 200 Channels Outside the Designated Filing Areas in the 896-911 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this *Reconsideration* includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions adopted in this Report and Order.

D. Reporting, recordkeeping, and other compliance requirements:

The rules adopted in this Report and Order pose no additional reporting, record keeping or other compliance measures.

E. Steps taken to minimize burdens on small entities and significant alternatives considered

In the Report and Order, the Commission concludes that retention of the CMRS spectrum cap and cellular cross-interest rules serves the public interest. The Commission concludes that the benefits of these bright-line tests in addressing concerns about increased spectrum aggregation continue to make these approaches preferable to exclusive reliance on case-by-case review under section 310(d). By setting bright lines for permissible ownership interests, the rules benefit the public, the telecommunications industry and the Commission by providing regulatory certainty and facilitating more rapid processing of transactions.

The Commission finds that the CMRS spectrum cap and cellular cross-interest rule promote regulatory efficiency, both by speeding the processing of transfers of control and assignment of licenses and by conserving the resources of the Commission and of interested parties. Moving from the spectrum cap and cross-interest rules to case-by-case review inevitably would lengthen the review process. The Commission recognized the concerns raised by several commenters about the burdens on the resources of the Commission and of interested parties that are inherent in case-by-case determinations regarding permissible ownership structures. For example, case-by-case analysis is especially expensive and time-consuming for small businesses, which often do not have the requisite resources.

F. Report to Congress

The Commission shall send a copy of the Report and Order, including a copy of this Final Regulatory Flexibility Analysis, in a report to Congress pursuant to Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). In addition, the Commission shall send a copy of this Report and Order, including this Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Regulatory Flexibility Analysis will also be published in the Federal Register.

Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, GN Docket No. 93-252, Report and Order.

This Commission scarcely adopts an order on wireless matters these days that doesn't tout the remarkable growth of competition in this nation's wireless markets. Today's Report and Order is no exception.¹ Yet today's decision -- to leave largely intact several provisions of our CMRS regulatory framework -- runs the risk of paying mere lip service to these significant competitive trends. While parts of the Report and Order are modest steps in the right direction, and for that reason I support them, I must also dissent because I believe much more significant regulatory relaxation is justified.

Evidence supporting the increasingly bright CMRS competitive landscape continues to accumulate.² Yet, in today's decision, the Commission perpetuates largely unchanged its 45 MHz CMRS spectrum cap and cellular cross interest rules. These provisions have as their purported goals the promotion and protection of competition, and the prevention of undue concentration of CMRS spectrum. In my view, however, the facts and the data simply do not support the retention of these rules. I would have preferred that we simply eliminate them. Competition in the wireless sector is flourishing, and I continue to have great faith in the Department of Justice's ability to root out and protect consumers from anticompetitive behavior should it arise.

I share Commissioner Powell's view, as expressed in his separate statement in this proceeding, that there are several parts of this item that are worthy of support. First, today's action raises the cap in rural areas to 55 MHz, which should help accelerate the spread of wireless innovation to these areas.³ Second, the Commission makes explicit the availability of waivers of

¹ As today's order acknowledges, CMRS "prices are falling, usage is expanding, and service options are growing. In some cities, as many as seven independent facilities-based providers are now competing for business in mobile voice markets." Report and Order at ¶ 23.

² See, e.g., Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report, FCC 99-136 (rel. June 24, 1999) at 63 (noting that the mobile telephony market continues to make "steady competitive progress," and highlighting the results of one study showing that the average price per minute of mobile telephone service has declined over 40% between the end of 1995 and the end of 1998).

³ I would, however, note the irony that we have chosen to relax our rules in rural areas -- which generally have not benefited from the entry of additional competitors to the two cellular incumbents -- while other areas of the

the spectrum cap where carriers can demonstrate that the cap is seriously impeding their ability to roll out advanced services, including 3G services.

Finally, I welcome the commitment that we make today to review the spectrum cap and cellular cross interest rules as part of our year 2000 biennial regulatory review, under Section 11 of the Communications Act, as amended.⁴ At the same time, however, I must continue to point out that the Commission's 1998 biennial review (of which this order is a part) was not as thorough as I believe it should have been.⁵ I look forward to working with my colleagues on the Commission to ensure that our year 2000 biennial review is as thorough and effective in eliminating unnecessary regulation as Congress intended when it crafted Section 11.

country that have benefited from entry by PCS and SMR providers remain subject to the rule. Better to raise the cap to 55 MHz in all areas, or better still eliminate it altogether.

⁴ 47 U.S.C. § 161 (a).

⁵ See my report, Implementation of Section 11 by the Federal Communications Commission (Dec. 21, 1998), which can be found on the FCC web site at <http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html>.

Separate Statement of Commissioner Michael Powell

Re: 1998 Biennial Regulatory Review—Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*

When we commenced this proceeding in November of last year, I thought it was an excellent opportunity for the Commission to review whether market conditions justify continued prospective, prophylactic regulation of the wireless telecommunications industry. Here, we carry out part of the mandate from the 1996 Telecommunications Act to review our ownership rules every two years.

The Act, in section 11, further mandates that we repeal or modify any regulation that is "no longer necessary in the public interest as the result of meaningful economic competition." 47 U.S.C. §161 (emphasis added). At the time we adopted the Notice of Proposed Rulemaking, I applauded this effort to take a sober and realistic look at the CMRS ownership limitations in light of the current and foreseeable competitive environment in the wireless market.¹ I was expecting – in view of the public interest guidance in section 11 and the optimistic outlook for competition in the CMRS industry – a repeal or significant modification of the spectrum cap; at least a sunset. Truthfully, this item before us today is not what I expected.

I cannot imagine any other industry segment that can better laud their state of economic competition as “meaningful.” Prices are down and falling. Innovation, churn and penetration are up and still climbing. And, as this item points out, the newer PCS licensees are adding more new customers than the incumbent cellular carriers. All of this seems pretty “meaningful” to me. Yet, as the record in this proceeding reveals, there are still some lingering concerns left over from the vestiges of the original cellular duopoly, which – if you measure market share in terms of subscribers – still has the lion’s share. So, despite the positive state of competition in this segment, I had thought back when we started this review that, if we can meet the burden of showing that the cap is still necessary in the public interest, then we may keep it. I also said that this cap should not last forever, but if we do nothing this time, we would have to review it again.

Well, this time we are not doing much to modify or eliminate the rule and I do not necessarily agree with all of the findings and competitive analysis in the item. For example, I think that the barriers to “reconsolidation” (including searching for and finding a willing seller, capital constraints, technical compatibility issues, and FCC and antitrust review) are pretty high. Thus, I do not think that elimination of the cap will result in massive consolidation at the local level immediately. However, I believe that the Wireless Bureau has presented an economic

¹ See 1998 Biennial Regulatory Review-Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132 (1998) (Separate Statement of Commissioner Michael Powell).

analysis that does the best job possible of explaining why the rule should stay in place for the time being. The item meets the burden by clearly recognizing that, “at this time,” there are a few good reasons left for leaving the cap in place at least a little longer, including our continued, important role as the public’s spectrum manager.

Most importantly, in the spirit of compromise, the item recognizes three things that I find somewhat comforting in my decision today to support this item:

First, we expect to make available “in the near future” additional spectrum for the provision of third generation (3G) wireless services and other advanced mobile wireless services. I strongly encourage the prompt completion of any allocation and licensing proceedings, in coordination with international developments, so that carriers in the U.S. may offer our citizens such advanced, whiz-bang services very soon.

Second, since some carriers are likely to have spectrum needs that cannot wait for additional allocations, I am also encouraged by this Order’s invitation to carriers that are spectrum-constrained to seek waivers of the cap. Such waivers must be processed quickly and granted when carriers show that the spectrum cap adversely affects their ability to provide 3G or other advanced services. While this process may tend to make our bright line a little blurry, it is important to give carriers the opportunity to make their case for more spectrum immediately.

Third, I am pleased that our re-evaluation of this ownership rule will once again commence next year as part of the year 2000 biennial review. I hope that we can coordinate this review with our spectrum allocation activities and related proceedings, as well as next year’s report to Congress on CMRS competition. I also hope we can explore a little better the meaning of “meaningful competition,” which Congress intended to replace regulation.