

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Strategic Plan for FY 2006-2011)
)

COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby responds to the July 5, 2005 Public Notice seeking comment on the Federal Communications Commission’s (“FCC” or “Commission”) draft Strategic Plan for fiscal years 2006-2011.¹ The draft Strategic Plan sets forth six general goals in the areas of broadband, competition, spectrum, media, public safety and homeland security. The draft Strategic Plan also lists multiple objectives for accomplishing each of these goals, but the Commission would be better served by instead using the following guiding principles:

- Imposing regulations only when there is an identifiable market failure and the imposition of the regulation would serve the public interest;
- Providing regulatory certainty by guaranteeing incumbent licensee rights and providing consistent protection from harmful interference; and
- Protecting public safety and homeland security by ensuring that safety-related communications systems have access to dedicated public safety spectrum and protecting the ability of commercial services to provide important public safety services such as E-911 and Wireless Priority Service (“WPS”).

Although each of these principles is identified as an objective in the draft Strategic Plan, they potentially conflict with other identified objectives. The Commission should eliminate any confusion by identifying these three principles as the paramount objectives of the Strategic Plan.

¹ *Public Invited to Review Draft Strategic Plan, Public Notice* (rel. July 5, 2005) (“Notice”).

I. REGULATIONS SHOULD BE IMPOSED ONLY WHERE THERE IS AN IDENTIFIABLE MARKET FAILURE

The Commission identifies the need to “harmonize the regulatory treatment of competing broadband services” as one of its broadband policy objectives.² Notably absent from the broadband portion of the draft Strategic Plan, however, is a statement that the harmonization process will be deregulatory in nature.

The Telecommunications Act of 1996 (“1996 Act”) was adopted to ensure that a “pro-competitive, de-regulatory national policy framework” was applied to the communications industry.³ This congressional mandate recognized that the operation of market forces better serves the public interest than regulation and is embodied in the Commission’s first objective for competition policy: “the Commission shall . . . place primary reliance on market forces to stimulate competition, technical innovation, and development of new services for the benefit of consumers.”⁴ To promote the deregulatory Congressional mandate and to avoid establishing potentially conflicting objectives within the Strategic Plan (harmonization versus deregulation), the Commission should clarify that the harmonization process will not increase the level of regulation imposed on any competitive service. Services should be subject to new regulations only when there is an identifiable market failure and imposition of the regulation would serve the public interest.⁵

² *Notice* at 6. The need for harmonization is not limited to broadband services. As formerly disparate services converge into competing services, there should not be differing regulatory schemes applicable to the services.

³ See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996).

⁴ Draft Strategic Plan, Competition Policy, Objective 1.

⁵ See *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 15 F.C.C.R. 9219, 9230-31 (1999) (finding that the “operation of market forces generally better services the public interest than regulation”); *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*,

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The Strategic Plan also should declare that all state regulations that potentially undermine the national, deregulatory environment will be preempted to the maximum extent permitted. Under this policy, any state efforts to regulate interstate communications will be preempted. The deregulatory focus of the Communications Act of 1934, as amended (“the Act”), would be undermined if states are permitted to re-impose regulations on competitive services that were eliminated as part of the FCC’s harmonization process.

The Commission unquestionably has the legal authority to preempt the regulation of interstate services. The United States Constitution, through the Supremacy Clause (Article VI, paragraph 2) and the Commerce Clause (Article I, section 8, clause 3), authorizes Congress to regulate interstate commerce and to preempt state regulations in this area. Under this constitutional scheme, states may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.⁶

In adopting the Act, Congress established a system of dual federal-state regulation whereby the Federal government is granted *exclusive* jurisdiction over interstate communications and state jurisdiction over intrastate services is preserved.⁷ In situations where a transmission

(footnote continued)

Second Report and Order, 9 F.C.C.R. 1411, 1478 (1994) (“in a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power”); *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, Memorandum Opinion and Order*, 14 F.C.C.R. 19898, 19902 (1999) (stating the Commission’s general preference that the competitive market, rather than government regulation, govern the CMRS industry).

⁶ See *Operator Services Providers of America, Memorandum Opinion and Order*, 6 F.C.C.R. 4475, 4476 (1991).

⁷ See 47 U.S.C. § 152(a), (b); see also 47 U.S.C. § 332(c)(3). The Supreme Court long ago recognized the Congressional intent to occupy the field of interstate communications regulation. *Benanti v. United States*, 355 U.S. 96, 104-06 (1957); accord *Operator Services Providers of*

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includes both intra- and interstate components, the Federal government retains exclusive jurisdiction over the transmission if it is not possible to separate the intra- and interstate components.⁸

When the Act was amended in 1996, Congress clarified the Commission's regulatory authority over intrastate services to the extent that regulation of such services would stand in the way of federal objectives.⁹ The Supreme Court determined that, after the 1996 Act, Section 2(b) of the Act, which excluded intrastate wireline communications from the Commission's jurisdiction, "may have less practical effect[,] ... because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."¹⁰

With this background, state regulations applicable to wireless and broadband services should clearly be preempted. Broadband services utilize the dispersed networks that comprise the Internet. These services must be considered interstate because the communications can be accessed or sent from anywhere in the world. For example, it is impossible to determine where a VoIP call originates or terminates. If a call is placed from an office in Washington, DC and directed to a resident of Virginia, the call may be received virtually anywhere. The recipient

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America, Memorandum Opinion and Order, 6 F.C.C.R. 4475 (1991) (finding that Congress intended interstate communications to be regulated exclusively by the Commission).

⁸ See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order*, 19 F.C.C.R. 3307, 3320 (2004) ("*Pulver*").

⁹ See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996); Omnibus Budget Reconciliation Act of 1993, Pub. Law No. 103-66, 107 Stat. 312 (largely codified at 47 U.S.C. § 332 *et seq.*).

¹⁰ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 381, n.8 (1999).

may access the call from her home in Virginia, from a laptop at an airport in California, from an office in DC, or from a beach house in Maryland. Likewise, a VoIP call could be placed from any of those locations and the actual originating location would be unknown to the telephone network, with the call simply appearing to be made from a Virginia number. Once a broadband transmission enters the Internet, it can be accessed anywhere. As the Commission has noted:

The Internet is a distributed packet-switched network of interconnected computers enabling people around the world to communicate with one another, invoke multiple Internet services simultaneously and access information with no knowledge of the physical location of the server where that information resides. The Internet represents a paradigmatic shift in network technology: intelligence in the system no longer resides, as it did in the legacy circuit-switched network, primarily in the network itself, but has instead migrated to the edge of a vastly different type of network – to the end user’s CPE. . . . Pulver’s [broadband] service *bears no geographic correlation to any particular underlying physical transmission facilities*. [The Service] depends on whether a user can establish a presence on the network at some point, not whether the user can access the network from a specific geographically defined end point. *Internet applications . . . separate the user from geography* and the application enabling voice or other types of communication from the network over which the communication occurs.¹¹

Thus, broadband services are interstate in nature and subject to the FCC’s exclusive jurisdiction.

The FCC’s authority to regulate *wireless* services is even clearer. Because “[n]o state lines divide the radio waves,” the federal government concluded early on that “national regulation is not only appropriate but essential to the efficient use of radio facilities.”¹² Thus, in the late 1970s, the FCC exercised “federal primacy over the areas of technical standards and competitive market structure for cellular service,” noting that “state and local regulations might

¹¹ *Pulver*, 19 F.C.C.R. at 3309 (emphasis added) (citations omitted). This ability to send or receive traffic from virtually *any* location precludes use of the Commission’s traditional “end-to-end” analysis for determining whether communications sent via the Internet or IP-enabled services are intra- or interstate in nature. *See id.* at 3320-21.

¹² *See Federal Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933).

conflict with and thereby frustrate” the federal goal of nationwide compatibility for CMRS.¹³ The FCC has made clear that there is no room for state “improvement” upon these standards.¹⁴

Accordingly, to protect the “de-regulatory *national* policy framework” mandated by Congress, the Strategic Plan should expressly state that (i) regulations will only be imposed where there is a market failure, (ii) regulations governing competing services will be harmonized in a deregulatory manner, and (iii) any state regulations imposed on broadband and wireless services will be preempted.

II. THE COMMISSION SHOULD ESTABLISH REGULATORY CERTAINTY WITH REGARD TO THE RIGHTS HELD BY INCUMBENT LICENSEES

The draft Strategic Plan identifies the need for regulatory certainty as a key objective. Regulatory certainty is critical to ensure that market forces, rather than regulation, stimulate competition and technical innovation.¹⁵ There can be no regulatory certainty, however, if the Commission intends to reduce the rights of existing licensees in order to force shared usage of their spectrum. Compromising the rights of incumbent licensees to facilitate spectrum sharing is inconsistent with the Congressional preference for reliance on market forces, rather than regulation, to shape the communications landscape. Yet, the draft Strategic Plan indicates that the Commission will be developing rules to force spectrum sharing.¹⁶ The Commission should

¹³ *Cellular Communications Systems, Report and Order*, 86 F.C.C.2d 469, 503-05 (1981). *See also id.* at 503 (holding that federal government has “fully and exclusively occupied the field of radio licensing and regulation”).

¹⁴ *Id.* at 504-05 (preempting any additional requirement imposed by states that could conflict with FCC standards and frustrate the federal scheme for the provision of nationwide cellular service).

¹⁵ *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996); Draft Strategic Plan, Competition Policy, Objective 1.

¹⁶ *See* Draft Strategic Plan at 11-13.

clarify that spectrum sharing principles will apply *only to new spectrum allocations established specifically for shared use* and that existing licensees will be entitled to clear and expansive interference protection. Such a clarification will promote reliance on market forces and the establishment of regulatory certainty.

The marketplace approach to spectrum management only works where the rights of each licensee are clearly understood and maintained consistently over time. This clarity increases auction value, facilitates the creation of secondary markets, facilitates the development of equipment, and provides certainty to the capital markets. Congress recognized this fact when it granted the FCC authority to award licenses via a competitive bidding process. In discussing the need for competitive bidding authority, it declared that:

*Spectrum is a scarce resource, and thus every exclusive license granted denies someone else the use of that spectrum. This is what give[s] spectrum a market value.*¹⁷

Regulatory certainty cannot be achieved if the rights of licensees are subject to significant erosion of rights by regulators in the future. Unfortunately, that is the very environment the Commission has created over the last few years. For example, uncertainty currently exists because the Commission recently amended Part 15 to expand the types of unlicensed operations permitted in previously exclusive bands. Similarly, the Commission has threatened to adopt an interference temperature concept that would require “exclusive” licensees to share their spectrum.¹⁸

Further regulatory uncertainty has been created by the Commission’s recent interpretations of “harmful interference.” CMRS providers vigorously compete on the basis of

¹⁷ H.R. Rep. No. 103-111, at 249 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 576 (emphasis added).

¹⁸ *See, e.g., Spectrum Policy Task Force, ET Docket No. 02-135, Report* (rel. Nov. 2002).

service quality.¹⁹ Thus, any interference that degrades service quality is harmful. Yet, the Commission has concluded that interference to CMRS operations that is “objectionable, . . . resulting in noisy calls that would be annoying” does not constitute harmful interference.²⁰ This interpretation seriously undermined the expectations of incumbent CMRS licensees and their incentives to invest in technologies designed to improve service quality. There is no incentive to make substantial investments in service quality if the associated improvements are not protected. It is worth noting that the Commission did not follow this approach when addressing public safety interference. There, the Commission afforded public safety licensees protection from “unacceptable interference”²¹ which is different from the harmful interference definition.

To eliminate existing regulatory uncertainty, the Commission’s Strategic Plan should definitively state that (i) new opportunities for spectrum sharing will be limited to future spectrum allocations in frequencies specifically set aside for such sharing, and (ii) the Commission plans to revisit its harmful interference definition to ensure CMRS licensees are protected from interference that degrades service quality.

III. CMRS IS A CRITICAL COMPONENT OF THE NATION’S PUBLIC SAFETY SYSTEM AND HELPS ENSURE HOMELAND SECURITY

The draft Strategic Plan correctly identifies the pressing need to “develop policies that promote access to effective communications services in emergency situations by public safety, health, defense, and other emergency personnel, as well as consumers in need.”²² Cingular’s

¹⁹ See *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Ninth Report*, 19 F.C.C.R. 20597, 20657-58 (2004).

²⁰ *AirCell, Inc., Order on Remand*, 18 F.C.C.R. 1926, 1935 (2003).

²¹ *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 F.C.C.R. 14969, ¶19 (2004).

²² See Draft Strategic Plan at 16.

networks are a critical public safety link for citizens and government agencies alike. These networks provide public access to 911 services, as well as vital communications for first responders and other government officials in emergency situations. That is why the Departments of Defense and Homeland Security, along with other government agencies, have contracted for WPS in many Cingular markets and National Security/Emergency Preparedness users rely heavily upon wireless networks.²³ The CMRS industry's voluntary implementation of WPS demonstrates that important public safety and homeland security services can be expeditiously implemented without government mandates and strict requirements.

The Commission must ensure that appropriate procedures are in place for altering the operational status of CMRS systems, with their corresponding public safety and homeland security benefits, during emergency situations. CMRS carriers such as Cingular are not in the threat assessment business. They cannot be expected to balance the needs of public safety sectors relying on their networks for service against the demands of a different public safety agency to terminate service. Yet, this situation has already occurred and is likely to recur.²⁴ The Commission properly identifies the need for coordination and swift action in matters affecting homeland security and public safety.²⁵ Consistent with these objectives, Cingular urges the

²³ See The President's National Security Telecommunications Advisory Committee ("NSTAC"), *Wireless Task Force Report: Wireless Security* (January 2003); NSTAC, *Wireless Task Force Report: Wireless Priority Service* (August 2002).

²⁴ See, e.g., *Crossed Lines on Cell Service*, NY DAILY NEWS (July 12, 2005); *Cell Phone Service Disabled in New York Tunnels*, ASSOCIATED PRESS (July 12, 2005); *Cell Phone Links Disabled in New York Tunnels*, REUTERS (July 11, 2005); Leslie Cauley, *NYC River Tunnels Lose Cell Service*, USA TODAY (July 11, 2005).

²⁵ See Draft Strategic Plan at 17, Objectives 4 & 5.

Commission to work with federal, state, and local agencies to clarify the process for requesting the temporary discontinuance of CMRS facilities in potential emergency situations.²⁶

CONCLUSION

As stated above, the Commission should amend its draft Strategic Plan to reconcile potentially conflicting objectives. To avoid any confusion, the Strategic Plan should identify three paramount objectives: (i) to refrain from imposing regulations except when there is an identifiable market failure and the imposition of the regulation would serve the public interest; (ii) to provide regulatory certainty by guaranteeing incumbent licensees' rights and providing consistent protection from harmful interference; and (iii) to protect public safety and homeland security by ensuring that safety-related communications systems have access to dedicated public safety spectrum and protecting the ability of commercial services to provide important public safety services provided via CMRS systems.

Respectfully submitted,

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²⁶ *Id.*