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FCC UNDERTAKES TO REVISIT BROADBAND SPECTRUM CAP

The FCC's rules limiting common ownership of cellular, broadband PCS, and SMR spectrum in the same market have been subject to considerable scrutiny by the courts over the past several years. Now the FCC itself has initiated a proceeding to revisit these rules. The outcome of that proceeding may prove significant for the future structure of the U.S. market for wireless voice services, which has continued to grow exponentially. Some observers warn that relaxation of the common ownership rules would reduce in-region competition and make it harder for small carriers to survive. On the other hand, others advocate it as a means of permitting efficient consolidation and the provision of multi-faceted, emerging broadband services.

The FCC's existing "spectrum cap" for broadband commercial mobile radio services (CMRS) was adopted in 1994. This rule prevents anyone from holding an attributable interest (generally, 20% or more of the equity, as well as certain types of management agreements) in two licensees that collectively hold more than 45 MHz of cellular, PCS, or SMR spectrum, if they serve substantially overlapping areas. For example, under current rules, no one can own (or have an attributable interest in) two overlapping cellular licenses (each of which represents 25 MHz), or a cellular license and an overlapping 30 MHz (A, B, or C Block) PCS license. The rule does not apply to narrowband spectrum, which has its own spectrum cap (also currently under review).

Since its inception, the CMRS spectrum cap rule has been the subject of controversy. Although the FCC has enforced radio and television local ownership caps for over 40 years, the Sixth Circuit concluded in 1995 that the FCC had failed adequately to justify imposing an analogous ownership rule with respect to joint ownership of cellular and PCS licenses. On remand, the FCC did decide to abandon its cellular-PCS cross-ownership ban, but only because the 45 MHz CMRS cap — which had not been challenged — provided sufficient protection. In reaffirming the importance of the cap, the FCC stressed the potential for concentration of control, the significant barriers to entry in the wireless industry, and Congress's mandate in its 1993 budget legislation to encourage diversification of ownership in licenses awarded at auction.

While the CMRS cap remained in force, it did so against the backdrop of the Telecommunications Act of 1996, which takes a deregulatory view of ownership limits generally, and which requires the agency to conduct a biennial review to determine whether its rules warrant relaxation. The FCC accordingly undertook to monitor the continued need for the 45 MHz cap. Nevertheless, it later refused to grant BellSouth a waiver of the cap with respect to SMR spectrum dedicated exclusively to data rather than voice services. Last month, the D.C. Circuit affirmed that denial.

However, late last year the FCC responded to advocacy by some segments of the wireless industry and proposed to reevaluate the CMRS spectrum cap (and its rule banning cross-ownership of cellular licenses in the same market).

The agency's decision to revisit the matter cited the view that the wireless market is now far more competitive than it was five years ago, when the spectrum cap was established, and the fact that there have been significant developments even in the past two years: Many PCS licensees and one nationwide SMR company are now offering competition to established cellular carriers; competition also is emerging from providers of paging services, data services, wireless e-mail, and other services. As FCC Chairman Kennard also noted, third-generation (3G) wireless services promise additional competitive choices.

The FCC's notice does not indicate precisely what the agency's current inclination is, though the emphasis on changes in the marketplace and the extensive discussion of various means of relaxing the spectrum limits suggest support for some type of modification. The notice indicates that the cap could be retained, eliminated, sunset, or modified. Proposed modifications include increasing the size of the cap, expanding permissible geographic overlaps, or relaxing the attribution rules to permit greater equity investments in wireless carriers who are triggering the cap. The FCC has warned, however, that even if it eliminates the spectrum cap, it may choose instead to make case-by-case determinations of the potential anti-competitive impact of proposed acquisitions of additional spectrum or interests in licensees. Chairman Kennard and Commissioners Ness and Powell all appear inclined to support some type of case-by case competitive analysis; Commissioner Tristani has particular concerns, however, about the lack of wireless competition in rural markets. Commissioner Furchtgott-Roth has said only that he generally supports any reduction of unnecessary regulatory burdens.

Industry groups are divided on the agency's proposals. CTIA, which represents most cellular and larger, established PCS licensees, has sought to abolish the CMRS cap. CTIA supports review of spectrum acquisition based on antitrust principles. In its view, now that most PCS licenses have been issued, eliminating the cap would be procompetitive. CTIA argues that the cap could interfere with deployment of advanced data services and 3G services by failing to provide sufficient flexibility to accommodate additional spectrum requirements for these applications. Many cellular carriers and larger PCS licensees have filed comments advocating views similar to those of CTIA. In contrast, PCIA, which represents paging and start-up PCS operators, urges the FCC to retain the spectrum cap. PCIA believes that it would be premature to change the rule, because the agency has yet to complete its auctions, PCS operators are only now gaining market share, and cellular operators still control more than 87% of two-way voice subscribers nationwide. PCIA also argues that the administrative costs and delays inherent in any case-by-case antitrust review would be enormous. Sprint Spectrum, unlike other large PCS licensees, also supports retention of the cap.

While the outcome of this proceeding is impossible to predict, the agency likely will relax the spectrum cap in some manner. Some of the options under consideration arguably could address concerns raised to date; they could be tailored to take into account situations and markets — especially rural markets — where competition is not yet fully developed or remains uneven. Overall, however, it seems likely that increased competition and the deregulatory principles of the Telecommunications Act of 1996 will lead to greater flexibility in spectrum ownership for wireless carriers.

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