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## TELECOMMUNICATIONS LAW UPDATES

### Spectrum Cap Decision Promises Future Debate

Last month, the FCC released its “spectrum cap” decision, which largely preserved the status quo for the broadband commercial mobile radio services (CMRS) industry. The FCC rejected, for now, carriers’ arguments that elimination of the cap is critical to the competitive needs of the wireless market. But this decision only sets the stage for what may be an even more difficult replay of spectrum cap issues as early as next year, in the broader context of the upcoming spectrum allocation for Third Generation (“3-G”) wireless services.

At present, the spectrum cap limits to 45 MHz the amount of spectrum that a single entity can own through attributable interests in broadband Personal Communications Service (PCS), cellular, and Specialized Mobile Radio (SMR) licensees within the same geographic area. In choosing to maintain the cap, the FCC stated that, despite the substantial increase in competition in CMRS markets since the cap first was imposed, the agency could not rely solely on its review of license transfers to ensure that these markets remain competitive. Thus, the agency continues to see the cap as a necessary tool to ensure diversity and competition in the CMRS market.

The FCC’s only significant change to the spectrum cap was to increase it to 55 MHz in Rural Service Areas (RSAs) to spur the deployment of CMRS in those regions. The FCC concluded that raising the cap in high cost/low-density rural areas might enable certain carriers to achieve greater economies of scale and explore partnering arrangements that

will increase competition. This approach is consistent with recent FCC initiatives – in both the wireless and wireline contexts – to promote increased service to traditionally underserved segments of the population. Critics of the FCC’s decision argue, however, that this modification has the perverse effect of providing the most relief in the least appropriate markets – rural areas in which demand for additional spectrum could be the slowest to develop.

Although the FCC made some additional minor modifications that are intended to help licensees meet the demands of an expanding market – for example, easing rules that govern passive investment in overlapping markets – the decision is hardly the last word on the compatibility of the FCC’s spectrum cap rules with an increasingly competitive, broadband wireless market. Indeed, the same issues are sure to arise again in the near future in the context of potentially even more difficult proceedings. This is because the decision ultimately does little to address the concerns of many wireless providers regarding access to the additional spectrum necessary to support business expansion and keep pace with technological developments. In particular, as many wireless providers look ahead to 3-G wireless telecommunications services, which will offer enhanced voice, video, Internet and other broadband capabilities, they view rules limiting access to spectrum as a threat to their ability to serve new customers and expand existing systems.

The FCC’s decision implicitly recognizes that there will be a need to revisit the cap in the very near

future. First, the FCC indicated that it will reconsider the spectrum cap during the agency's year 2000 biennial review of its regulations, as required by Section 11 of the Communications Act. Second, it suggested that if a carrier demonstrates that the spectrum cap is impacting its ability to provide 3-G or other advanced mobile services in a particular geographic area, the FCC will consider waiving the spectrum cap for that carrier in that market. Finally, it stated that further consideration of the need for a spectrum cap would be part of a forthcoming spectrum allocation proceeding. FCC staff have indicated that such a proceeding could commence in early 2000, with the FCC seeking comment on proposed spectrum bands and service and licensing rules for 3-G and other advanced services.

The domestic and international wireless landscape has changed dramatically since the FCC laid out the initial bandplan and licensing scheme for PCS ("second generation") earlier this decade. The first local and regional wireless carriers have evolved into a smaller number of large carriers with nationwide calling plans and established "brand" identities. A growing number of national and international telecommunications mergers are being structured around wireless services, in recognition of the fact that wireless is an essential element of the bundle of products that the telecommunications giants need to offer if they are to thrive in the next millennium. Wireless carriers and handset manufacturers have begun to market new products that allow wireless access to the Internet — rudimentary versions of the services that will be available in 3-G. The introduction of these new products, however, has demonstrated that the United States is currently behind the cutting edge of wireless developments in Europe and Japan.

Thus, the FCC's next review of the spectrum cap will take place in the context of a much broader tableau. In addition to the artificial constraints of the cap, the FCC faces some very real spectrum constraints. Expectations already are that the FCC will be unable to fully align domestic 3-G allocations with the worldwide allocations that will be set at the World Radiocommunications Conference next year (WRC-2000). Additionally, the FCC may not be able to identify enough spectrum to completely satisfy the anticipated 3-G needs of current domestic wireless providers, as well as allow for the prospect of new wireless entry. Notably, some preliminary estimates for the years 2005-2010 suggest that as much as 309 MHz of additional spectrum will be needed in addition to the 190 MHz already assigned for existing PCS, cellular and enhanced SMR services.

If the FCC's spectrum allocation and assignment options do not permit it to meet the perceived 3-G needs of all current domestic broadband CMRS carriers, it faces some difficult policy decisions. Should it attempt to divide the spectrum pie equitably among existing and new entrants and thus risk a result where no domestic carrier can obtain enough spectrum to offer worldwide quality 3-G services? Should it limit eligibility for 3-G spectrum to existing carriers and effectively foreclose new entry? Or should it abandon any implicit efforts to preserve a certain number of carriers in the same market, and permit some carriers to aggregate all the CMRS spectrum they need from other wireless licensees? The spectrum cap is a critical variable in all of the FCC's 3-G policy choices.

The FCC clearly would prefer that market forces, not its regulatory policies, determine the winners and the losers in future generations of wireless services. It is very possible, however, that the FCC may find itself in that unwelcome role when it next addresses the spectrum cap.

**This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:**

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