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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:)

WT Docket No. 19-38

)
Partitioning, Disaggregation, and)
Leasing of Spectrum)
_____)

COMMENTS OF THE R STREET INSTITUTE

In this proceeding, the Federal Communications Commission (“FCC” or “Commission”) seeks to further the Commission’s goals of closing the digital divide and increasing access to spectrum by small and rural carriers through reforms of its partitioning, disaggregation, and leasing rules.¹ Secondary-market transactions such as these are essential to the functioning of the wireless marketplace. Therefore, the Commission can best accomplish its goals by removing regulatory barriers to these transactions for all spectrum users.

I. Secondary markets promote productive spectrum use

The goal of the Commission’s spectrum policy should be productive allocation and use of radio frequencies. This goal is best served by relying on markets for flexible rights.² Markets tend to direct spectrum to productive uses by allowing parties that can put them to more profitable uses to buy them

¹ Federal Communications Commission, *Partitioning, Disaggregation, and Leasing of Spectrum*, Notice of Proposed Rulemaking, WT Docket No. 19-38, March 15, 2019, ¶ 1 [hereinafter “NPRM”].
<https://ecfsapi.fcc.gov/file/0315246489735/FCC-19-22A1.pdf>.

² Joe Kane, *The Role of Markets in Spectrum Policy*, The R Street Institute, June 2018.
<https://2o9ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Final-No.-146-for-posting.pdf>.

from those with less-profitable business models. However, transaction costs can hamper this process and reduce the number of mutually beneficial deals that would otherwise enhance the productive use of spectrum.³ While the Commission has taken positive steps to implement more market-based assignments of spectrum rights, transaction costs remain a major barrier to parties seeking to engage in secondary-market transactions.

In some cases, the Commission's own rules are the source of these transaction costs. The current rules import the legacy of government control over radio-operating rights, which we now know was overbroad from the start.⁴ Spectrum rights can be allocated by markets just like any other scarce resource, and regulatory overhead on market transactions usually serves only to make that process less efficient. To the extent permitted by statute, therefore, the Commission should allow licensees to enter contracts to partition, disaggregate, or lease their rights without having to obtain permission from the FCC.

II. Secondary-market transactions should not require Commission approval

The central question of this proceeding is the extent to which the FCC should intervene in the market for spectrum licenses. Currently, the Commission requires long and arduous proceedings to take place before many secondary-market transactions can be approved.⁵ These processes dramatically increase transaction costs and reduce the ability of secondary-market deals to direct spectrum rights to more productive users. Reducing these costs would encourage private deals and invite more players into the market—including small and rural carriers who do not currently have the resources to pursue an FCC proceeding to its conclusion. Therefore, the Commission should declare that secondary-market transactions are presumptively approved and only impose regulatory barriers where there is substantial

³ Joe Kane, *How to Reduce Transaction Costs in Secondary Spectrum Markets*, The R Street Institute, March 2019, pp. 1–2. <https://www.rstreet.org/wp-content/uploads/2019/03/Final-166-Updated1.pdf>.

⁴ That legacy is one of using scarcity as a justification for government control. However, scarcity exists in all markets for economic goods and does not necessitate government intervention. Ronald H. Coase, “The Federal Communications Commission,” *The Journal of Law and Economics* 2 (October 1959). https://www.jstor.org/stable/724927?seq=1#page_scan_tab_contents.

⁵ E.g., NPRM, ¶ 9.

likelihood of tangible harm. If the Commission does not decide to remove itself entirely from review of secondary-market deals, it should nonetheless set a threshold—either in bandwidth or licensee revenue—below which secondary-market deals do not require FCC review.⁶

This approach not only encourages efficient use of spectrum, it comports well with the Commission’s desire that reforms be administratively feasible,⁷ since allowing more secondary-market transactions to take place without involving the Commission would reduce the burden on administrative resources.

III. Modifying performance requirements would reduce transaction costs

The Commission asks about potentially reducing the extent to which performance requirements attach to spectrum rights acquired through the secondary market.⁸ Performance requirements currently represent a substantial transaction cost because they arbitrarily attach external requirements to private deals. The Commission should note the mere fact that spectrum is not being used at a given time is not proof of inefficiency or market failure; there may be good reason to delay deployment to some areas based on factors such as investment cycles, economic conditions, or approaching technological evolutions. But if spectrum that an original licensee does not wish to use and that another provider wishes to buy continues to remain fallow, transaction costs are likely obstructing efficient allocation, since secondary-market transactions would result in more productive use if transaction costs are sufficiently low.⁹ Commission rules that dictate when and how deployment must take place provide an example of such unnecessary transaction costs and are, therefore, counterproductive to the goal of efficient allocation and deployment in rural areas. Relaxing these rules and allowing private parties to negotiate on the basis of on-the-ground realities will be more likely to result in a productive outcome.

⁶ This threshold would be akin to that set by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

⁷ NPRM, ¶ 14.

⁸ *Ibid.*, ¶¶ 15–19.

⁹ Ronald H. Coase, “The Problem of Social Cost,” *The Journal of Law and Economics* 3 (October 1960). <https://econ.ucsb.edu/~tedb/Courses/UCSBpf/readings/coase.pdf>.

IV. Allowing reaggregation is essential to well-functioning markets

The Commission also seeks comment on allowing reaggregation of licenses that have previously been disaggregated.¹⁰ Allowing market transactions, in any reasonable sense, means allowing these transactions to go both ways. Permitting free reaggregation alongside disaggregation would not only allow more flexibility in the use of spectrum over time, it would also incentivize initial licensees to participate in the secondary market in the first place. Incumbents may hesitate to sell or lease part of their license if they will never be able to reacquire it, and this reticence may result in spectrum remaining trapped in unproductive uses. However, if licensees know they can buy back pieces of a license that they have previously disaggregated, this reduces the expected cost of disaggregating it in the first place.

The Commission expresses concern that, if allowed, reaggregation may be used to evade construction requirements.¹¹ But, as explained above, these requirements are themselves detrimental to productive spectrum use and should be reduced or eliminated anyway. If the Commission is committed to keeping construction requirements, it could avoid this difficulty by allowing reaggregation only after the original construction requirements for the aggregate license area have been met.

V. The Commission should take a broader look at transaction costs in secondary markets

While the Notice of Proposed Rulemaking (“NPRM”) takes positive steps toward allowing greater flexibility in secondary markets, it is unnecessarily narrow in its approach. Instead, the Commission should take a broad look at its rules for secondary-market transactions for all types of current and potential licensees and bands.

For example, the NPRM mistakenly focuses on small carriers and rural geographic areas to the exclusion of others.¹² The same logic that makes the proposed reforms beneficial in rural areas also applies in non-rural areas. While urban areas may not typically suffer from completely unused spectrum

¹⁰ NPRM, ¶ 28.

¹¹ *Ibid.*, ¶ 29.

¹² *Ibid.*, ¶ 1.

to the same extent as rural areas, inefficiencies do not always manifest as disuse. The high transaction costs of secondary markets are equally as likely to result in spectrum remaining caught in less productive uses as they are to result in rural areas not being served at all.¹³ While more difficult to see, this opportunity cost is no less real than the more visible costs of completely fallow spectrum. Lowering transaction costs in all spectrum markets will open up the possibility of profitable deals driving spectrum rights to more productive users, thus benefiting consumers.

In a broader examination of secondary-market reform, the Commission might seek to balance the reduction in licensees' performance requirements with increased allowance for opportunistic use of spectrum that is not currently in use by a licensee. Licensees have a legal right not to be interfered with, but if another operator can make use of a band without interfering with the licensee, then no violation of that right has occurred. Expanding opportunistic use, however, depends on technological advancements, such as those being attempted in the 3.5 GHz band. The Commission should encourage such efforts but refuse to allow opportunistic use if it is not possible to consistently protect the rights of licensees in doing so.

The Commission may also consider a common ownership self-assessed tax approach—such as that which was proposed for the 3.5 GHz proceeding¹⁴—in which the licensees must declare a dollar value for their licenses and be compelled to sell or lease the license to others at that price.¹⁵ The valuation would require licensees to pay a small percentage of the offered price to the Commission. A similar mechanism could also be applied to interference thresholds such that licensees are rewarded for building more fault-tolerant networks that will accept more interference, thus allowing more intensive use of

¹³ For example, satellite spectrum may be better used for mobile data, as will likely be the outcome of the 3.7-4.2 GHz proceeding. Federal Communications Commission, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Notice of Proposed Rulemaking, GN Docket No. 18-122, July 12, 2018, <https://docs.fcc.gov/public/attachments/FCC-18-91A1.pdf>.

¹⁴ Paul Milgrom et al., "Redesigning Spectrum Licenses," *Regulation*, Fall 2017. https://milgrom.people.stanford.edu/sites/g/files/sbiybj4391/f/milgromweyl_zhang.fnl_.pdf.

¹⁵ Kane, *How to Reduce Transaction Costs in Secondary Spectrum Markets*, pp. 4–6. <https://www.rstreet.org/wp-content/uploads/2019/03/Final-166-Updated1.pdf>.

licensed spectrum.¹⁶ While the net benefits of this approach are still unclear in practice, it is worthy of additional study and experimentation by the Commission.

Lastly, the Commission should create a more user-friendly database of spectrum licenses that clearly identifies licensees, the frequencies to which they have rights, and geographic and other details about the licenses they own. These data are currently difficult to access, which imposes barriers on potential buyers and sellers—particularly small and rural carriers who may have less experience with the Commission’s databases. A more useful database would allow potential buyers and sellers to find each other and conclude deals that are beneficial to both parties and, in turn, to American consumers.¹⁷

The Commission should continue its efforts to allow markets to allocate spectrum rights in all areas of the country and should seek to remove the regulatory barriers that now hamper that process.

Respectfully submitted,

_____/s/_____
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¹⁶ Ibid., p. 5.

¹⁷ Publicly available records of tradeable rights have been essential in markets for other goods, such as land. See, e.g., the case of the Georgia land lottery. Ibid., p. 2.