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

In the Matter of	)	
	)	
Partitioning, Disaggregation, and	)	WT Docket No. 19-38
Licensing of Spectrum	)	

To: The Commission

COMMENTS OF THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

The Wireless Internet Service Providers Association ("WISPA")[1] hereby responds to the Commission's March 15, 2019 *Notice of Proposed Rulemaking* seeking comment on questions "related to the partitioning or disaggregation of spectrum licenses and spectrum leasing as a potential means to increase availability of advanced telecommunications services in rural areas and spectrum access by small carriers."[2]

WISPA has a keen interest in promoting efforts to make licensed spectrum available on in rural and unserved areas, appropriately sized to allow smaller providers access to both the amount of spectrum and the coverage area required to meet consumer demand. To this end, WISPA generally supports the Commission's objectives, and offers specific recommendations to provide incentives for partitioning, disaggregation and leasing in combination with consequences for licensees that do not deploy service throughout their licensed areas.

Introduction

[1] WISPA represents more than 800 providers of fixed wireless broadband service to millions of American consumers, largely in rural and underserved areas of the United States, using both unlicensed and licensed spectrum. Almost all of its members are a "covered small carrier" as defined in the MOBILE NOW Act. Pub. L. 115-141, Sec. 616, Mar. 23, 2018, 132 Stat. 1110 (codified as 47 U.S.C. § 1506) (not more than 1,500 employees).

[2] *Partitioning, Disaggregation and Leasing of Spectrum*, Notice of Proposed Rulemaking, WT Docket No. 19-38, FCC 19-22 (rel. March 15, 2019) ("*NPRM*").

In broadening the coverage footprint of wireless services in rural areas, it is critical that there be opportunities for providers to use both licensed and unlicensed spectrum to provide fixed broadband access. In part due to the need to attract investment capital for network buildout into new areas, there is increasing interest among WISPs in gaining access to spectrum for exclusive use on a longer-term basis. The greater certainty inherent in having assigned bandwidth in a defined area is significantly more attractive for outside investors who can provide financial support critical to accelerating service to the unserved and underserved. One key advantage of fixed wireless broadband is its substantially lower capital cost – about one-seventh the cost of fiber and one-fourth the cost of other wireline technologies.[3]

Currently, rural broadband and other wireless communications providers are suffering from a "double-whammy" of lenient build-out restrictions that enable spectrum warehousing by license holders coupled with the lack of effective incentives for large companies holding wide-area spectrum licenses to make unused spectrum available to smaller providers on the secondary market. In a December 2017 survey of WISPA members, fewer than ten percent of respondents reported that they had been successful in leasing spectrum from the large mobile carriers.[4] Absent policies and effective rules encouraging spectrum leasing, especially in rural areas, large companies may never launch service in less lucrative significant portions of their licensed markets. In effect, licensed spectrum is in some cases treated as a financial asset for market valuation purposes, but not as a resource for deploying service to rural areas where the financial return may be many years in the future. As a result, larger carriers serve the urban "holes" and

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[3] *See* The Carmel Group, *Ready for Takeoff: Broadband Wireless Access Providers Prepare to Soar with Fixed Wireless*, at 12 & Fig. 6 (2017) *available at* http://www.wispa.org/Portals/37/Docs/Press%20Releases/2017/TCG's_2017_BWA_FINAL_REPORT.pdf (last visited June 1, 2019).

[4] Comments of WISPA, GN Docket No. 17-258 (filed Dec. 28, 2017, at 43-44 & Appendix A at A-3.

leave the rural "donuts" unserved because of the lower population density and corresponding higher per-customer deployment cost. Because rules do not appropriately encourage buildout to these areas, fallow spectrum is kept away from smaller service providers who would have both the incentive and the capability to deploy in the remote and unserved "donuts."

The circumstances outlined above diverge markedly from what would be expected under more modern spectrum access schemes, especially given this Commission's commitment to solving the digital divide.[5] A "keep what you use" approach may incentivize licensees with large spectrum portfolios, but as currently implemented it may actually be counterproductive as standards based on population coverage encourage licensees to satisfy the requirement for a large-footprint license by covering only the most populated areas – the "donut holes." In fact, some licensees may actually be more inclined to return unserved rural areas to the Commission rather than retain such areas and be required to provide service there. Likewise, a standalone "use it or share it" approach does make some spectrum available opportunistically, but this provides only a basis for interim unlicensed use, and not more reliable exclusive licensed use for a definitive period. Nonetheless, in combination with other incentives that both provide benefits and impose costs based on a lack of buildout, these tools can be part of an effective overall regulatory framework. Promoting a more incentive-based and active secondary market can enable more licensed spectrum use and quicker deployment, especially in rural areas.

[5] *See, e.g.*, Letter from Chairman Ajit Pai, FCC Chairman, to The Hon, Jerry Moran (R-KS) (May 23, 2019) ("Closing the digital divide is my top priority.").

Discussion

I. THE COMMISSION HAS THE AUTHORITY TO ADOPT RULES TO PERMIT PARTITIONING, DISAGGREGATION AND LEASING TO PROMOTE BROADBAND ACCESS IN RURAL AREAS

Section 616 of the MOBILE NOW Act provides that a ‘‘covered small carrier’’ permitted to obtain spectrum through secondary market transactions is "a carrier … *as defined in section 3 of the Communications Act of 1934*" that meets certain size parameters (*i.e.*, not more than 1,500 employees) and provides services using its own facilities.[6] In carrying out its public interest mandate, however, the Commission need not limit the scope of its inquiry and its fashioning of new secondary market incentives to "common carriers" alone. Indeed, it would be entirely consistent with the stated Congressional objectives underlying Section 616 to apply the rules more broadly as a means of better fostering "the availability of advanced telecommunications services" in "rural areas."[7] Strictly limiting the benefits and build-out incentives to established "carriers" would exclude many broadband providers that are not deemed at this time to be "common carriers," and would provide fewer options for larger carriers wishing to disaggregate, partition, or lease spectrum to rural providers. As Midcontinent Communications explained in an *ex parte* letter filed prior to the *NPRM*'s adoption, its own "patchwork" of jurisdictions where it has been granted Eligible Telecommunications Carrier status would significantly limit its ability to obtain benefits if the Commission limited those benefits solely to those providers designated "common carriers," but "[t]here is no legitimate policy reason to favor 'common carriers' over other rural providers that are not—and cannot be—'common carriers.'"[8]

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[6] 47 U.S.C. § 1506.
[7] *NPRM* at 7 (¶20).
[8] Letter from Nicole Tupman, Assistant General Counsel, Midcontinent Communications, to Marlene H. Dortch, Secretary, FCC, WT Docket 19-38(March 7, 2019) at 1.

The Communications Act of 1934, as amended (the "Act") provides the Commission ample authority to adopt broader benefits extending to any service provider capable of bringing the benefits of "advanced telecommunications" to unserved and underserved rural consumers. The Commission can rely on the same array of statutory authorities that it used to adopt the initial secondary markets regulations in 2003 to expand the intended benefits outlined in the MOBILE NOW Act.[9] In particular, Section 7(a) of the Act establishes that "it shall be the policy of the United States to encourage the provision of new technologies and services to the public."[10] The Telecommunications Act of 1996 further highlights the desire to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies*."[11] And the 1997 Balanced Budget Act affords the Commission explicit authority to allocate electromagnetic spectrum to promote the most efficient use of the spectrum, which would include such measures as permitting the creation of smaller geographic areas and spectrum assignments through secondary market transactions to facilitate improved service to the public.[12] The Commission also can rely on the recodification of Section 257 of the Act in RAY BAUM's Act, which is intended to support investment by small companies and entrepreneurs generally, a category that would include rural broadband providers.[13]

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[9] *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, 20631-32 (¶56) (2003).
[10] 47 U.S.C. §157(a),
[11] *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (emphasis added).
[12] *See* 47 U.S.C. §925 (Section 3002 of the Balanced Budget Act of 1997).
[13] *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. P, title IV, §§ 401, 402(f), 132 Stat. 1087-89 (2018) (codified at 47 U.S.C. § 163). Likewise, Section 706 of the 1996 Act emphasizes repeatedly the goal of ensuring the availability of "advanced telecommunications capability" "without regard to any transmission media or technology." 47 U.S.C. § 1302.

Requiring all providers covered by Section 616(b)(1)(A)(ii) of the MOBILE NOW Act to be Title II "carriers" would artificially limit the number and areas where the benefits of secondary market transactions contemplated by the *NPRM* could be provided. There is no public policy reason for there to be a legal distinction between small and rural providers able to benefit from rule changes and those who are not able to do so. Limiting new rules only to "common carriers" would arbitrarily limit the pool of eligible providers, decrease the vibrancy of the secondary market for larger licensees, and increase the possibility that rural areas will remain unserved. Conversely, extending the scope of the benefits afforded by enhanced secondary market rules would be consistent with he MOBILE NOW Act's overall mandate.

Accordingly, rather than limiting itself to the narrow scope of entities explicitly identified in Section 616, the Commission should establish inclusive definitions of "unaffiliated covered small carrier" and "unaffiliated carrier to serve a rural area" as follows:

- An "unaffiliated covered small carrier" is an entity that (1) has filed an FCC Form 477 for census blocks that overlap or are adjacent to the license area to be disaggregated, partitioned or leased for at least the two calendar years preceding the transaction,[14] and (2) together with its controlling interests, affiliates, and the affiliates of its controlling interests has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers.[15]

- An unaffiliated carrier to serve a rural area" is an entity that (1) has filed an FCC Form 477 for census blocks that overlap or are adjacent to the license area to be disaggregated, partitioned or leased for at least the two calendar years preceding the transaction, and (2) serves predominantly rural areas as defined in Section 616(a)(2) of the MOBILE NOW Act.

These criteria are commonly used and understood in auction contexts, can be easily verified by the Commission in part through review of Form 477, and will ensure that the provider has an established track record of providing service in either nearby or rural areas. To give meaning to

[14] *See* 47 C.F.R. § 54.315(a)(7).
[15] *See* 47 C.F.R. § 1.2110(f)(4)(i).

the term "unaffiliated" and ensure that the rule is not misused in contravention to the MOBILE NOW Act, the Commission should make clear that the parties to any applicable transaction are not affiliated with each other and are not affiliated with another large nationwide carrier.[16]

II. THE COMMISSION SHOULD AFFORD LICENSEES THE FLEXIBILITY TO REDUCE THEIR BUILDOUT OBLIGATIONS IN A LIMITED FASHION

The Commission asks "what, if any, incentives may be appropriate" "that might encourage licensees to lease or sell spectrum," suggesting that such benefits might include license term extensions or modified performance requirements.[17] The Commission should tread cautiously to avoid awarding outsized benefits to licensees in an effort to spark greater secondary market activity. After all, a significant aspect of the problem being addressed is the reluctance of these licensees to engage in secondary market transactions at all, thereby limiting opportunities for smaller rural providers. Accordingly, spectrum licensees engaging in secondary market transactions with eligible rural providers should be subject to both a "carrot" and a "stick."

Licensees that partition, disaggregate or lease spectrum should be afforded some additional time to meet buildout obligations for the retained portion of their licensed areas, but also should be subject to both "use it or share it" *and* "keep what you use" mechanisms. This approach will enhance the incentives for license holders to monetize unused spectrum through the secondary market option rather than risk losing spectrum that remains fallow at the end of a license term. It also will provide major incentives for deployment, especially in rural areas that large carriers typically leave undeveloped for long periods while they concentrate on buildout efforts in the urban "donut hole" areas. The "use or share" requirement will provide some

[16] As discussed *infra*, the Commission also should prohibit reaggregation of the partitioned, disaggregated or leased spectrum.
[17] *NPRM* at 8 (¶25).

opportunistic, unlicensed use that may encourage the licensee to extend service more quickly, in addition to encouraging transactions permitting exclusive use.

The Commission also seeks comment on whether and to what extent eligible rural service providers engaging in secondary market transactions with large carriers should be afforded additional time to complete buildout or relaxed buildout obligations.[18] An optimal approach might be to give these secondary market licensees the option of either two additional years to construct *or* to use non-population-based performance requirements to demonstrate substantial service. Also, any interim construction requirements should not apply to partitioned or disaggregated licenses.

In addition, the Commission should impose a minimum holding period for licenses obtained via partitioning or disaggregation. The small or rural provider obtaining a license should be required to hold the partitioned/disaggregated license at least until it has met the applicable buildout requirement for the service. This requirement will incent faster buildout and curb the potential for license-flipping from an initial purchaser to another service provider.

Finally, the Commission should reject the idea of allowing reaggregation of separated license areas or spectrum blocks into newly constituted wide-area licenses where such "reaggregated" licenses would be assigned or transferred to any large carrier.[19] The objective of secondary market transactions should be to create new opportunities for smaller and rural service providers to obtain licensed spectrum that permits new service to targeted areas that are unserved or underserved, and where the large provider has determined that the benefits of alienating a portion of the license exceed the benefits of retaining it or returning it to the Commission. Allowing larger carriers to reabsorb these right-sized licenses would defeat a critical benefit of

[18] *See NPRM* at 7-8 (¶¶ 16-17).
[19] *See id.* at 9-10 (¶¶ 28-29).

encouraging secondary market spectrum transactions and would potentially lead to gamesmanship by larger carriers, *i.e.*, using an unaffiliated small or rural provider as a middleman to convey spectrum indirectly from one large carrier to another.

III. THE COMMISSION SHOULD STREAMLINE SECONDARY MARKET TRANSACTION PROCEDURES

In order to streamline the current process governing secondary market transactions, the Commission should relax its filing requirements and adopt provisions that are similar the notification and immediate application procedures that currently apply to spectrum manager and short-term leasing arrangements.[20] The Commission can require parties to certify that they are either an "unaffiliated covered small carrier" or an "unaffiliated carrier to serve a rural area" and that the transaction complies with Commission rules, but it is not necessary for these transactions to appear on public notice and be subject to a full 30-day comment period prior to Commission action. As a practical matter, there are very few petitions to deny transaction applications, which results in the overwhelming majority of these filings being granted on a routine basis.

In the rare instance where a significant, substantive objection may exist to the assignment of spectrum rights to a purchaser or lessee, the Commission's rules will continue to allow for reconsideration of the grant.[21] If warranted under appropriate circumstances, the Commission could immediately rescind grant of an assignment either in response to serious concerns raised in a petition or on its own motion.[22] Allowing the vast majority of routine secondary market transactions to move forward without delay will reduce transactional costs and burdens on

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[20] *See* 47 C.F.R. §§ 1.9020 & 1.9035. The Commission should streamline its procedures for partitioning, disaggregation and leasing of all licensed spectrum, not just those involving "eligible rural providers."
[21] 47 C.F.R. § 1.9020(e)(2)(iv) (indicating that spectrum manager lease notifications are subject to the Commission's reconsideration rules); 47 C.F.R. §1.9035(e)(3) (same for applications for consent to short-term leasing arrangements).
[22] *See* 47 C.F.R. § 1.108 (reconsideration on Commission's own motion).

licensees, lessees and purchasers alike, as well as reducing administrative burdens on Commission staff. Moreover, rapid approval will allow those acquiring spectrum rights to begin build-out activities sooner, providing more time for actual construction and very likely bringing new service to rural consumers on an expedited basis by substantially reducing the lag time between agreement to sell or lease spectrum and administrative approval of such transactions.

Conclusion

For all of the foregoing reasons, WISPA urges the Commission to expand the scope of eligibility for updated rules governing partitioning, aggregation and leasing to small and rural providers of advanced telecommunications capability. The Commission should also afford licensees on both sides of a secondary market transaction some flexibility to reduce their performance requirements to incent such activity. Finally, the Commission should streamline secondary market transaction approval procedures to base them on notification rather than approval following public notice in a manner similar to the procedures that apply to spectrum manager and short-term lease agreements.

Respectfully submitted,

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