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FEDERAL COMMUNICATIONS COMMISSION
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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D. C. 20554

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| In the Matter of | ) | |
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| Promoting Efficient Use of Spectrum | ) | |
| Through Elimination of Barriers to the | ) | WT Docket No. 00-230 |
| Development of Secondary Markets | ) | |
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**COMMENTS OF THE**
**LAND MOBILE COMMUNICATIONS COUNCIL**

The Land Mobile Communications Council ("LMCC") hereby submits its Comments on the *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding.[1]

## I. INTRODUCTION

The LMCC is a non-profit association of organizations representing virtually all users of land mobile radio systems, providers of land mobile services, and manufacturers of land mobile radio equipment. The LMCC acts with the consensus, and on behalf of the vast majority of public safety, business, industrial, private, commercial, and land transportation radio users on the several frequency bands regulated by the Commission. Membership includes the following organizations:

- Aeronautical Radio, Inc. (ARINC)
- American Association of State Highway and Transportation Officials (AASHTO)

[1] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000) ("*Notice*").

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List A B C D E

- American Automobile Association (AAA)
- American Mobile Telecommunications Association, Inc. (AMTA)
- American Petroleum Institute (API)
- Association of American Railroads (AAR)
- Association of Public Safety Communications Officials-International, Inc. (APCO)
- Central Station Alarm Association (CSAA)
- Forest Industries Telecommunications (FIT)
- Forestry-Conservation Communications Association (FCCA)
- Industrial Telecommunications Association, Inc. (ITA)
- Intelligent Transportation Society of America, Inc. (ITSA)
- International Association of Fire Chiefs (IAFC)
- International Association of Fish and Wildlife Agencies (IAFWA)
- International Municipal Signal Association (IMSA)
- MRFAC, Inc. (MRFAC)
- National Association of State Foresters (NASF)
- Personal Communications Industry Association (PCIA)
- Taxicab, Livery, and Paratransit Association (TLPA)
- Telecommunications Industry Association (TIA)
- United Telecom Council (UTC)

## II. DISCUSSION

By its *Notice*, the Commission proposes to take actions necessary to promote the development of secondary markets in spectrum. The *Notice* thus seeks to further the three goals articulated by the Commission in its companion *Policy Statement*.[2] First, the *Notice* proposes to clarify Commission rules and policies, and revise them where appropriate, to remove regulatory barriers that may inhibit the trading of spectrum in secondary markets and, in particular, to promote the use of spectrum leasing. Second, the *Notice* inquires about ways in which the Commission may revise its rules to promote technical flexibility and encourage the use of emerging spectrally-efficient technologies.

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[2] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, FCC 00-401 (rel. Dec. 1, 2000).

Third, the *Notice* addresses the development of information sources on spectrum usage that may facilitate the development of an open and competitive secondary market.

## A. The LMCC Generally Supports the Commission's Goals and Principles For Spectrum Leasing

The LMCC generally supports the Commission's initiative in promoting the development of secondary markets in spectrum and the specific goals of the *Notice*. By taking action to promote spectrum leasing and enhanced licensee flexibility, the Commission will foster the more efficient use of spectrum, consistent with its obligations under the Communications Act. The LMCC commends the Commission for its leadership in this area.

Specifically, the LMCC supports the use of rules similar to those adopted recently by the Commission in the 700 MHz "guard band" proceeding[3] as a model for its actions here. In particular, the LMCC agrees that Commission licensees may fulfill their obligations under Section 310 of the Communications Act by providing for contractual recourse and remedies with spectrum lessees.[4] *Intermountain Microwave*, decided over thirty-five years ago, simply has outlived its relevance in today's marketplace.[5]

The LMCC also agrees with the FCC's proposals that neither licensees that "share" spectrum nor public safety licensees are suitable spectrum lessors at this stage. As noted by the Commission, "radio services in which licensees share the use of

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[3] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report & Order*, FCC 00-90, WT Docket No. 99-168 (rel. March 9, 2000).

[4] 47 U.S.C. § 310(d).

[5] *Intermountain Microwave*, 12 FCC 2d 559, 24 RR 983 (1963).

spectrum raise interference and frequency coordination issues that are more complex than for licensees that have exclusive rights to use their licensed spectrum."[6]

### B. LMCC Members Are Severely Hampered in their Quest to Obtain New Private Radio Spectrum

The private wireless industry is unique in that it employs "shared use" of the spectrum to satisfy much of its spectrum needs; *i.e.*, the industry applies engineering techniques in order to allow multiple licensees to operate on the same frequency within a given geographic area. Despite this efficiency, however, there remains a drastic shortage of private radio spectrum. In fact, the private mobile radio service industry has long been on record with regard to its very pressing need for new private radio spectrum.[7]

Despite the good faith efforts of the Commission to create incentives for the development of secondary spectrum markets, the LMCC nonetheless reiterates its concern that failure to directly address the lack of private radio spectrum will likely have a destructive impact on the continued competitiveness of American industries that rely on such spectrum. In turn, the reliable and timely delivery of products and services to the American public will also be negatively affected. The LMCC cautions, therefore, that facilitating greater spectrum leasing should not be regarded by the FCC as a substitute for the allocation of critically-needed land mobile spectrum, including the creation of a Land

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[6] *Notice* at ¶ 65.

[7] *See, e.g.*, Comments of the American Automobile Ass'n, *1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Mobile Radio Services*, WT Docket No. 98-182, RM-9222, filed Dec. 14, 2000; Comments of Central Communications, Milbank Communications, Personal Communications Industry Association, and Tosco Corporation, *An Allocation of Spectrum for the Private Mobile Radio Services*, RM 9267, filed Aug. 3, 1998.

Mobile Communications Service ("LMCS").[8] The potential for more efficient use of spectrum due to the creation of secondary markets will not serve as an adequate substitute for the actual allocation of new spectrum for private radio and public safety users.

### C. The FCC Should Consider Creating Incentives to Ensure Greater Licensee Interest in Leasing Spectrum

Given that spectrum leasing maximizes the use of radio spectrum, the Commission should consider various incentives that would encourage licensees to lease their unused or underutilized spectrum. The LMCC is concerned that, absent targeted incentives, a substantial number of commercial wireless licensees may choose not to participate in the secondary markets even though they may have substantial excess capacity. Regulatory incentives, when coupled with the possibility of increased revenues, would enhance the prospects for the development of a robust secondary market as licensees consider spectrum leasing as a viable business option. The LMCC advocates two such incentives: first, to extend the amount of time given to licensees to build out their licensed spectrum under the applicable FCC construction requirements; and second, to allow licensees to count the facilities that lessees have constructed towards the build-out requirements for their licensed spectrum.

The LMCC's first proposed regulatory incentive will encourage the development of secondary markets by allowing licensees more time to build out their systems if they lease a portion of their spectrum to an unaffiliated entity. Such an incentive is consistent with the underlying purpose of the Commission's build-out requirements - - to encourage the development and use of spectrum and avoid non-competetive "spectrum

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[8] *See generally* Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, ET Docket No. 00-221, *Notice of Proposed Rulemaking*, FCC 00-395 (rel. Nov. 20, 2000).

warehousing." Licensees could use this additional time to meet their build-out requirements for a variety of purposes, such as evaluating a particular technology before deploying a larger system, assessing market development, or focusing resources on a particular niche market. Under this approach, the licensed spectrum would be utilized by the spectrum lessee rather than lying dormant. The LMCC urges the Commission to carefully tailor such an incentive to ensure it is not abused by licensees, or otherwise leads to inadvertent spectrum warehousing.

The LMCC's second proposed regulatory incentive will encourage spectrum leasing by allowing licensees to count the facilities that lessees have constructed toward their own build-out requirements. Licensees that are required to meet certain build-out requirements could partner with other entities that need spectrum on a temporary or longer-term basis. As the Commission itself recognized in the *Notice*, this proposal enables build-out to be achieved in the most economic fashion and thus promotes more rapid build-out.[9]

The LMCC recognizes that there may be other regulatory incentives that the Commission may consider that will encourage licensees to lease part or all of their spectrum, and we encourage other parties - especially potential lessors - to contribute to the discussion of such incentives. The LMCC strongly believes that such incentives, if they are meaningful to potential lessors, will bolster the viability of secondary spectrum markets.

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[9] *Notice* at ¶ *50*.

## D. Eligibility Issues and Other Potential Obstacles

In its *Notice,* the Commission proposes to permit most Wireless Radio Services licensees with exclusive use spectrum rights to lease access to all or portions of their licensed spectrum under the condition that the spectrum lessees "comply with the technical and non-technical service rule requirements" applicable to the licensee.[10] Under the Commission's proposal, licensees would retain responsibility for ensuring that spectrum lessees comply with the Communications Act and the Commission's technical and service rules, citing the recently adopted guard band rules as precedent.[11]

As indicated previously, the LMCC supports the Commission using its band manager rules as implemented in the 700 MHz guard band proceeding as a blueprint for this broader application. The LMCC believes those rules provide sufficient flexibility to accommodate a wide range of licensee and lessee relationships while clearly articulating the obligation of licensees to ensure compliance with applicable rules. Rather than developing new procedures, the LMCC recommends that the Commission apply policies consistent with the guard band decision until experience dictates that changes are warranted.

The Commission tentatively concludes that spectrum lessees must comply with the interference rules applicable to the licensee as well as other technical requirements such as antenna height and power output, equipment authorizations, emissions mask

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[10] *Notice* at ¶ 25.

[11] *Id.* at ¶ 27.

requirements, RF safety standards and spectral efficiency standards.[12] Similarly, the Commission seeks comment on whether certain service rules applicable to licensees should equally apply to lessees, such as qualification, eligibility, and use restrictions.[13]

The LMCC believes that, ultimately, the success of the secondary markets initiative will depend greatly on how the Commission decides these issues. Unbridled flexibility could frustrate Federal allocation goals while too much regulation will impede activity in all but the simplest of cases. Obviously, the Commission will need to strike a careful balance.[14]

To this end, the LMCC believes that blind application of the licensee's technical and operational requirements on lessees may discourage Private Mobile Radio Service ("PMRS") users to seek spectrum sharing solutions with certain Commercial Mobile Radio Service ("CMRS") licensees. For example, the *Notice* considers a requirement that would limit "designated entity" PCS C-block licensees to entering into lease arrangements only with other designated entities.[15] While such a policy may be appropriate for lessees intending to provide CMRS services,[16] the LMCC suggests that different considerations should apply in the case of PMRS lessees. Allowing designated entity PCS licensees to provide capacity to entities seeking to use the spectrum for private

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[12] *Id.* at ¶ 40.

[13] *Id.* at ¶ 44.

[14] The LMCC supports the adoption of any rules or restrictions necessary to prevent interference from spectrum lesees to other radio users.

[15] *Id.* at ¶ 47.

[16] The LMCC does not offer a position on this point.

dispatch services would not threaten the federal goal of setting commercial spectrum aside for small and very small businesses, regardless of whether the lessee qualified as a designated entity.

In addition to qualification and eligibility restrictions, the Commission needs to be careful to not apply all CMRS rules and obligations to lessees intending to use the spectrum for strictly non-CMRS purposes. For example, requiring potential lessees of 800 MHz cellular spectrum to provide automatic roaming, E-911 functionality or analog AMPS service would prevent leasing for any use other than cellular service. Nor should non-CMRS lessees be required to participate in the funding and contribution programs such as the Universal Service Fund and Telecommunications Relay Services. If the secondary market approach is to provide a viable solution for spectrum starved users – such as private wireless users – greater flexibility in the lease arrangement is necessary. For years, the FCC has administered policies where parties could lease use of a broadcast station's subcarrier and provide either broadcast, common carrier or non-common carrier services.[17] Similar flexibility should apply here.

## III. CONCLUSION

LMCC commends the Commission for its efforts to promote the development of secondary spectrum markets. We believe such markets could serve as a welcome source of much needed spectrum for private wireless users. Therefore, LMCC respectfully requests that the Commission act in accordance with the views expressed herein.

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[17] *See, e.g.*, 47 C.F.R. §73.295

Respectfully submitted,

**LAND MOBILE COMMUNICATIONS COUNCIL**

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/s/ Michele C. Farquhar

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February 9, 2001

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