DOCKET FILE COPY ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

RECEIVED
FEB 9 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of the	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
Tel. (202) 785-0081

Philip L. Verveer
David M. Don
James M. Assey
Sophie Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street
Washington, D.C. 20036
Tel. (202) 328-8000

Its Attorneys

No. of Copies rec'd 0+4
List ABCDE

February 9, 2001

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY. 1

II. ADOPTION OF INCENTIVES TO FACILITATE VOLUNTARY SPECTRUM LEASING ARRANGEMENTS FOR CERTAIN WIRELESS LICENSEES WOULD SERVE THE PUBLIC INTEREST. 3

III. SPECTRUM AGGREGATION RULES SUCH AS THE CMRS SPECTRUM CAP SHOULD NOT APPLY TO SECONDARY MARKET TRANSACTIONS; IF APPLIED, APPLICATION OF THE CMRS SPECTRUM CAP SHOULD NOT RESULT IN DOUBLE COUNTING OF CMRS SPECTRUM. 6

IV. RESPONSIBILITY FOR COMPLIANCE WITH COMMISSION RULES SHOULD LIE WITH THE ENTITY THAT IS ACTUALLY ENGAGED IN OPERATING THE TRANSMISSION EQUIPMENT ON THE SPECTRUM. 8

V. THE INTERMOUNTAIN MICROWAVE FACTORS SHOULD NOT BE APPLIED TO SPECTRUM LEASING ARRANGEMENTS AND SHOULD BE REPLACED WITH A MORE FLEXIBLE STANDARD APPLICABLE TO SPECTRUM LEASES UNDER SECTION 310(d). 11

VI. THE CONTINUED APPLICATION OF USE RESTRICTIONS IS NECESSARY TO PROTECT LICENSEES FROM INTERFERENCE AND TO ENSURE THE SMOOTH FUNCTIONING OF THE COMMISSION'S SPECTRUM MANAGEMENT POLICIES. 17

VII. CONCLUSION. 20

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of the	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Comments in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY.

CTIA supports the Commission's initiatives to permit wireless licensees to participate in voluntary secondary market arrangements for their spectrum. By removing barriers to the leasing of spectrum rights, adoption of the proposals contained in the Notice will foster competition and maximize efficient use of spectrum. The Notice, however, raises unique and challenging issues for the wireless industry. By addressing these issues in the initial stages of

---

1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 In re 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").

development of a voluntary secondary spectrum market, the wireless industry and the FCC will have the opportunity to facilitate a prudent, long-term spectrum management policy that will contribute to the further development of competition and the efficient use of spectrum resources.

Consistent with the flexible, market-based approach of the Notice, the Commission should not extend the CMRS spectrum cap rule to spectrum lease arrangements given current competitive market conditions and the availability of alternative means to alleviate concerns about market concentration. However, to the extent the spectrum cap continues to apply, the Commission should not "double count" under the cap by attributing leased spectrum to both the licensee/lessor and the lessee. Double counting leased spectrum pursuant to the current spectrum cap would impede realization of the Commission's stated goal of promoting the development of a secondary market for spectrum usage rights because it would reduce incentives for licensees to lease their unused spectrum

Moreover, in order to promote a robust secondary spectrum market, Commission rules governing secondary market arrangements must ensure that the entity that actually operates the transmission equipment on the spectrum is subject to the Act and to the Commission's interference, frequency coordination, technical, and other relevant rules. Otherwise, spectrum leasing arrangements could introduce serious problems with respect to enforcement in the small number of cases in which serious violations occur. Similarly, the Commission should replace the Intermountain Microwave[3] criteria with a more flexible standard for determining whether a licensee has retained "control" for Section 310(d) purposes. Finally, the Commission must also

---

[3] 12 FCC 2d 559 (1963).

ensure that lessees of spectrum are only permitted to provide services that are consistent with the service rules governing the leased spectrum.

II. ADOPTION OF INCENTIVES TO FACILITATE VOLUNTARY SPECTRUM LEASING ARRANGEMENTS FOR CERTAIN WIRELESS LICENSEES WOULD SERVE THE PUBLIC INTEREST.

As the Commission recognizes in the Notice, "permitting wider use of spectrum leasing would promote the public interest by increasing the efficiency of spectrum use."[4] Facilitating spectrum lease arrangements by reducing transaction costs and regulatory uncertainties will fulfill the Commission's spectrum management responsibilities under the Act to "generally encourage the larger and more effective use of radio in the public interest."[5] Most importantly, liberal spectrum leasing policies will ensure that spectrum is put to its highest and best use, reaping the greatest benefits for consumers.

There are several obstacles which limit the efficient distribution of spectrum in secondary markets. In its Policy Statement setting forth guiding principles for the development of secondary spectrum markets, the Commission stated that "[a]s with any scarce resource, there are incentives for licensees to hold on to their right to use spectrum, especially when there may be no established mechanism to offer spectrum usage rights for a limited time period."[6] In

---

4 Notice ¶ 18.

5 47 U.S.C. § 303(g). See Gregory L. Rosston and Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 FED. COMM. L. J. 87, 88-89 (1997) ("A principal reason that Congress established the Commission more than sixty years ago was to manage the radio spectrum so that the public could receive maximum benefits from its use.") ("Rosston and Steinberg").

6 In re Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, FCC 00-401 ¶ 15 (rel. Dec. 1, 2000) ("Policy Statement").

addition, licensees may be reluctant to lease spectrum because they are unsure whether such arrangements would be prohibited by Section 310(d).[7] Licensees also may be unwilling to enter into spectrum leases because they could be held responsible for the actions of the lessee, even if the licensee has required the lessee to comply with the Commission's rules and policies as a condition of the lease.[8] As a result of these disincentives to spectrum leasing, spectrum that could otherwise be leased to potential users may remain underutilized or lie fallow. By increasing the transferability of spectrum through competitive market forces, the general spectrum leasing model proposed by the Commission will promote the efficient use of spectrum and allow more entities to gain access to spectrum.

In adopting rules to allow wireless licensees to lease portions of their spectrum to third parties, the Commission should ensure that licensees are afforded flexibility to structure these arrangements in the manner that best suits their business needs.[9] This view is consistent with the Coase Theorem, which posits that, in the absence of transaction costs imposed, for example, by government regulation, market forces will reallocate resources, such as spectrum, to ensure that they are put to their best and highest use.[10] Therefore, the Commission should not limit the term

---

7 Id.

8 See id. ("Licensees may also believe that administrative requirements create transaction and opportunity costs that exceed potential benefits that may accrue from making all or part of their spectrum license available to others.").

9 Rosston and Steinberg at 99 (discussing the importance of flexibility in increasing users' incentives to expand spectrum capacity, the diversity of potential service offerings, and the number of competing providers).

10 R. H. Coase, The Federal Communications Commission, 2 J.L. & ECON. 1, 30 (1959) ("Once the rights of potential users have been determined initially, the rearrangement of rights could be left to the market.").

of the lease or the amount or geographic coverage area of the spectrum that may be leased. So long as a clearly identified party is ultimately responsible for compliance with the requirements of the Act and the FCC's rules, the details of the spectrum lease should left to the parties.

Of course, as the Commission has recognized in the context of band manager licensing, while leasing-type arrangements "can yield efficiencies in existing spectrum use, . . . this is a complement to rather than a substitute for pursuing new spectrum allocations."[11] Although adoption of the Commission's secondary market initiatives will increase the amount of spectrum available through competitive forces, it is not an alternative to the requirement that the Commission make available additional radio spectrum for third generation ("3G") wireless systems to facilitate the deployment of advanced mobile telecommunications services. Spectrum leasing does not increase the overall supply of spectrum, it simply allows it to be transferred more efficiently between parties. Thus, the Commission must continue to allocate new spectrum for the development of 3G services.

---

[11] In re Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, *Report and Order and Further Notice of Proposed Rule Making*, FCC 00-403 (rel. Nov. 20, 2000) (discussing the potential benefits of band manager licensing in the 700 MHz band) ("BBA Report and Order").

III. SPECTRUM AGGREGATION RULES SUCH AS THE CMRS SPECTRUM CAP SHOULD NOT APPLY TO SECONDARY MARKET TRANSACTIONS; IF APPLIED, APPLICATION OF THE CMRS SPECTRUM CAP SHOULD NOT RESULT IN DOUBLE COUNTING OF CMRS SPECTRUM.

The Commission should not apply outdated "spectrum cap" rules[12] to secondary market transactions. In general, such aggregation limits are vestiges of traditional monopoly-style regulation that are unnecessary given today's competitive market for mobile wireless services[13] and the availability of sufficient, alternative enforcement options to restrain anticompetitive conduct.[14] Moreover, such rules are not only superfluous but also impede the rapid deployment of advanced wireless services such as 3G technologies that promise numerous consumer benefits.[15] Accordingly, CTIA welcomes the Commission's recently announced review of the

---

12 47 C.F.R. § 20.6.

13 In re 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Notice of Proposed Rule Making*, FCC 01-28, ¶ 14 (rel. Jan. 23, 2001) (noting that currently six nationwide or near-nationwide carriers offer CMRS services in the United States, as well as a large number of local and regional providers) ("CMRS Spectrum Cap Notice").

14 Instead of the spectrum cap, case-by-case enforcement options are sufficient to prevent transactions that might result in anticompetitive behavior. In addition to protections provided by the Department of Justice and Federal Trade Commission Hart-Scott-Rodino review, the FCC retains enforcement authority under anti-monopolization provisions in Sections 313 and 314 of the Communications Act as well as the public interest requirements in Section 310(d) that apply to license transfers and transfers of control. 47 U.S.C. §§ 310(d), 313 & 314.

15 Notably, the Commission has cited its desire to promote the introduction of 3G services in two recent actions related to loosening the CMRS spectrum cap. First, in connection with the reauction of broadband PCS C and F block licenses, it removed entrepreneur auction eligibility restrictions and divided each 30 MHz C block license into three 10 MHz licenses to increase the ability of larger carriers to obtain additional spectrum. Second, in connection with the auction of spectrum in the 700 MHz band, the Commission decided to completely exclude such licenses from counting against spectrum aggregation limits. CMRS Spectrum Cap Notice ¶¶ 27-28.

CMRS spectrum cap and intends to demonstrate in that proceeding the harmful inefficiencies that these artificial restrictions have created.

Regardless of the merits of continued applicability of CMRS spectrum caps, the proposal contained in the Notice to "double count" radio spectrum by attributing the same band of spectrum to both licensee and lessee is clearly in error.[16] At its creation, "the CMRS spectrum cap was designed to discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[17] By arbitrarily limiting the amount of capacity that any one licensee could control, the Commission sought through bright-line limits to avoid the difficulties of evaluating actual market conditions. In so doing, the Commission relied on the amount of spectrum held by each licensee as a rough substitute for the amount of market power that any one actor should exercise in a competitive market where a necessary input, spectrum, is controlled by the government.

Given that the purpose of "counting" spectrum is to approximate a carrier's relative productive capacity, the "double counting" of leased spectrum is irrational and without justification. By incorrectly attributing leased spectrum to licensees, "double counting" distorts market realities. Though the licensee retains the underlying license to any leased spectrum, its general inability to control the lessee's use of such spectrum deprives it of the ability to engage

---

16 Notice ¶ 49 (explaining that under such a scheme, "if an entity leases any licensed spectrum that falls under the CMRS spectrum cap rule, the amount of spectrum leased is attributable under current rules both to the licensee and to the spectrum lessee for the purpose of determining compliance with the cap") (internal footnotes omitted).

17 See In re 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*, 15 FCC Rcd 9219 ¶ 21 (1999).

in anticompetitive behavior.[18] Accordingly, it makes no sense to attribute spectrum, for purposes of the spectrum cap, to parties that lack the ability to use such spectrum to exercise market power.[19] Moreover, such a rule runs counter to the Commission's stated goal of promoting the development of a secondary market for spectrum usage rights because it reduces incentives for licensees to lease their unused spectrum. Thus, should the Commission find it necessary to apply spectrum cap rules to secondary market transactions, it must, at a minimum, eliminate "double counting" and ensure that spectrum leased in secondary markets is attributed (if at all) to lessees only.

IV. RESPONSIBILITY FOR COMPLIANCE WITH COMMISSION RULES SHOULD LIE WITH THE ENTITY THAT IS ACTUALLY ENGAGED IN OPERATING THE TRANSMISSION EQUIPMENT ON THE SPECTRUM.

The Notice proposes that, in authorizing spectrum leases, "the licensee [would] retain ultimate responsibility for ensuring that the spectrum lessee complies with the Act and the Commission's applicable technical and service rules."[20] The Notice requests comment as to whether the licensee should be required to engage in "due diligence" to ensure the lessee's

---

18 For example, were an entity to hold licenses totaling 60 MHz of radio spectrum, it would clearly run afoul of the spectrum cap. However, were it to lease all 60 MHz to various third parties, the licensee would have no ability to use these assets, much less to use them in an anticompetitive manner.

19 For the same reason, short-term leases of an appropriate duration (e.g., less than 60 days) should not be attributed to lessees. In such circumstances, a lessee is likely obtaining additional spectrum in response to short-term market demand, rather than as an effort to increase its market share. Thus, supply-side concerns that lessees would use their assets to restrict supply or otherwise behave in an anticompetitive manner do not exist in a short-term supply contract.

20 Notice ¶ 27. Thus, "in the event of licensee or lessee non-compliance, the Commission would hold the licensee directly responsible and may take any action against the licensee provided for under [its] rules." Id. ¶ 29 (emphasis added).

compliance or "in some way verify its lessees' compliance," or whether the same result could be achieved through required contractual provisions in leases.[21] With respect to enforcement, the Notice proposes that "if a lessee operates outside the parameters of the licensee's authorization, the licensee would be subject to license revocation or other enforcement action."[22] This approach is not feasible and would discourage parties from entering into spectrum leases, the exact result the Notice seeks to promote. Instead, the Commission should make responsibility for compliance with its rules dependent on which entity is actually operating the transmission facilities on the spectrum pursuant to its authority under Section 2(a) of the Act.[23]

If the licensee/lessor must "guarantee" the lessee's compliance with the rules through due diligence or verification procedures as a prerequisite to entering into a lease, it likely would be quite reluctant to lease spectrum at all. In effect, such a requirement could result in licensees indemnifying all lessees for FCC compliance. While a licensee would expect generally to be able to rely on a lessee to comply with the rules, the possibility of being held to a strict liability standard for the actions of the lessee, which could result in sanctions such as forfeitures and even license revocation, would discourage spectrum leases. Moreover, while parties should be free to allocate liability and include indemnification provisions in their leases, the Commission must not rely on contractual terms to require a lessee's compliance with the Act or the rules. In the case

---

21 Id. ¶ 30.

22 Id. ¶ 32.

23 47 U.S.C. § 152(a) (making the provisions of the Act applicable to "all interstate and foreign communication by . . . radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States," and "all persons engaged within the United States in such communication or such transmission of energy by radio").

of long-term leases of raw spectrum, for example, in which the lessee is actually operating the spectrum, it is not practical -- especially in cases of interference -- to rely on the enforcement of contractual obligations between the licensee/lessor and the lessee to expeditiously deal with rule violations.[24] Resorting to judicial enforcement of contractual terms could introduce significant delay before, for example, an interference problem is remedied. Such delay is inconsistent with the Commission's obligation to protect the public and licensees providing service to the public from harmful interference.

The Notice presupposes that "spectrum lessees are individually responsible for adhering to the Commission's rules and regulations and should be subject to sanctions for noncompliance."[25] It is clear that the Commission has jurisdiction over spectrum lessees pursuant to its authority under Section 2(a) of the Act over "all interstate and foreign communication by . . . radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States," and "all persons engaged within the United States in such communication or such transmission of energy by radio."[26] A lessee that is

---

24 If the lessee is in charge of day-to-day operations using the spectrum, inclusion of contractual provisions in the lease would be the only means that the licensee would have to ensure the lessee's compliance with technical, service, and other relevant rules. In the extreme case in which the lessee is unwilling to cooperate with the licensee to remedy a rule violation, the licensee would be forced to take legal action through the courts or other agreed upon methods of dispute resolution to enforce the terms of the lease. Such a lengthy and litigious course of action is not in the public interest.

25 Notice ¶ 32.

26 47 U.S.C. § 152(a) (emphasis added). Section 3(33) of the Act defines "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." Id. § 153(33).

using leased spectrum to transmit wireless traffic of any sort would clearly be engaged in "radio communication" under the Act and subject to the plenary jurisdiction of the Commission.

The Commission should hold the party actually operating the spectrum responsible for immediate compliance with the rules. In order to accomplish this, the Commission should require the licensee/lessor to submit contact information to it for the entity that will be operating the spectrum and hold this entity directly accountable for rule violations. If a licensee/lessor is involved in the operation of the facilities, it can opt to remain ultimately responsible for compliance with the Commission's rules governing such issues as interference and frequency coordination. However, where the licensee/lessor leases to a third party the right to use all of its capacity under its license, it is preferable to have the lessee be directly responsible to the Commission for compliance with the relevant rules unless the parties expressly contract otherwise. By relying on its direct authority over a spectrum lessee, the Commission will enable secondary markets to develop in a flexible regulatory environment while at the same time ensuring that a single party is clearly responsible for rule violations and other wrongdoing associated with the use of the spectrum.

V. THE INTERMOUNTAIN MICROWAVE FACTORS SHOULD NOT BE APPLIED TO SPECTRUM LEASING ARRANGEMENTS AND SHOULD BE REPLACED WITH A MORE FLEXIBLE STANDARD APPLICABLE TO SPECTRUM LEASES UNDER SECTION 310(d).

CTIA supports the Commission's conclusion that "a set of criteria different from those set forth in Intermountain Microwave can and should be applied when interpreting whether the types of spectrum leasing arrangements discussed in the NPRM would involve an unauthorized transfer of control under Section 310(d)."[27] "Although developed as an application of Section

---

[27] Notice ¶ 74.

310(d) requirements, none of the Intermountain Microwave factors are statutorily required, nor [is the Commission] required to apply them in all situations."[28] This is the case because "Congress left the task of defining 'control' to the Commission, understanding that it would have to be defined within the context of the particular circumstances involved."[29]

Judicial precedent also suggests that the Commission abandon the Intermountain Microwave factors with respect to spectrum leases. In Bechtel v. FCC,[30] the D.C. Circuit held that, in instances such as this one, where a previous policy decision is no longer relevant, the Commission is obligated to reconsider that decision.[31] Significantly, the court stated "[t]he Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would."[32] In Section 11 of the Act, requiring the Commission to review certain of its regulations every two years and to modify or repeal those regulations that are "no longer necessary in the public interest," Congress enshrined this

---

28 Id.

29 Id. ¶ 71.

30 957 F.2d 873 (D.C. Cir. 1992).

31 Id. at 881; see also Geller v. FCC, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (stating that the Commission must reexamine its regulations to determine whether they still contribute to the public interest).

32 Bechtel, 957 F.2d at 881.

important function of the Commission.[33] Accordingly, the Commission should reexamine the Intermountain Microwave factors.

The Commission has permitted wireless licensees to enter into a variety of arrangements with non-licensee third parties without prior Commission approval to promote more efficient use of spectrum.[34] Indeed, "the Commission has developed different criteria for different sets of licenses when determining whether control has been transferred."[35] In reviewing the specific applications of the Commission's standards for control, courts have upheld the Commission's flexibility to develop and apply different standards for determining whether a transfer of control has occurred under particular circumstances.[36] Of course, courts have required that the Commission apply its standards consistently.[37] Thus, the Commission may define "control" in

---

33 47 U.S.C. § 161.

34 Notice ¶¶ 15-17; Policy Statement ¶ 14; see, e.g., BBA Second Report and Order ¶ 43 ("We believe that the approach taken in the 700 MHz Guard Band proceeding demonstrates that band manager licensing can be implemented consistently with the requirements of Section 310(d).").

35 Notice ¶ 71.

36 See Lorain Journal Co. v. FCC, 351 F.2d 824, 828-29 (D.C Cir. 1965) (agreeing with the Commission that the "broad terms" of Section 310(d) are "to be implemented in accordance with the agency's interpretation that passage of control need not 'be legal control in a formal sense, but may consist of actual control by virtue of special circumstances presented.'") (internal citations omitted)

37 See Telephone and Data Sys., Inc. v. FCC, 19 F.3d 655, 658 (D.C. Cir. 1994) ("The Commission's piecemeal picking and choosing of 'relevant' criteria, and its uneven application of these criteria is not 'reasoned decision-making, but the very sort of arbitrariness and capriciousness we are empowered to correct.'") (internal citations omitted).

Section 310(d) in a manner that accommodates spectrum leases, so long as it applies this standard consistently.[38]

The Notice's proposed standard for determining whether a licensee has retained control for purposes of Section 310(d) in the context of a spectrum lease is too restrictive and thus diminishes licensees' incentives to enter into lease agreements. The Notice proposes that a wireless licensee entering into spectrum lease arrangements be required to: (1) "retain full responsibility for compliance with the Act and [the FCC's] rules"; (2) "certify that each spectrum lessee (or sublessee) meets all applicable eligibility requirements and complies with all applicable technical and service rules"; and (3) "retain full authority to take all actions necessary in the event of noncompliance, including the right to suspend or terminate the lessee's operations if such operations do not comply with the Act or the Commission's rules."[39] The proposed standard fails to provide licensees with sufficient flexibility to structure marketable lease arrangements and should be replaced with a standard that is more conducive to the establishment of secondary spectrum markets.

As an initial matter, it is neither practical nor necessary to place ultimate responsibility for compliance with technical, service, and other rules on the licensee/lessor, especially as the Commission has direct jurisdiction to enforce its rules on spectrum lessees and sublessees pursuant to Section 2(a) of the Act. Secondly, a certification requirement would require licensees to engage in extensive and unwarranted due diligence to independently determine

---

38 See Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding that a court must give deference to an administrative agency's reasonable interpretation of a statutory provision).

39 Notice ¶ 79.

whether a lessee was complying with the Commission's rules. The need to effectively provide a "guarantee" for the actions of another party -- i.e., the spectrum lessee/sublessee -- would discourage licensees from entering spectrum leases, possibly making such arrangements prohibitively expensive. Similarly, requiring licensees to retain full authority to take action if the lessee's operations are inconsistent with the rules would be unduly onerous and would deter the overall policy objectives of the Notice.

The Commission should determine that spectrum leases are consistent with Section 310(d). To maintain control pursuant to Section 310(d), it should be sufficient for licensees to retain ownership of their license and to notify the FCC that a lessee/sublessee is using the spectrum. To the extent that the licensee must "certify" to the lessee/sublessee's qualifications and compliance with the rules, the licensee should be held to an appropriate standard of care. For example, if the licensee knows or should know that the lessee intends to make improper use of the spectrum, such as for criminal purposes or for a use that would cause harmful interference to other operators, yet entered into the lease, the licensee could be found to have violated the rules. In other words, if the licensee has entered into a lease with a party that it knows or should know will violate the rules, or becomes aware of a rule violation by a lessee but does nothing to stop it, the licensee could be seen as having transferred de facto control of its license to the lessee, as it has relinquished its responsibility as a licensee to comply with the rules. If the licensee reasonably believes that the lessee intends to use the spectrum in good faith and in accordance with the rules, the licensee should not be held accountable for violation of the rules by the lessee. Accordingly, if the licensee does not know and could not reasonably be expected to know of the rule violation, it should not be deemed to have relinquished control of its license.

Alternatively, the Commission should forbear from enforcing Section 310(d) for spectrum leases. Under Section 10, the Commission has the responsibility to forbear from applying any provision of the Act to a telecommunications carrier if (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, and services are just and reasonable and are not unjustly discriminatory;[40] (2) enforcement is not necessary for the protection of consumers;[41] and (3) forbearance is consistent with the public interest.[42] With respect to the first prong of the forbearance test, application of Section 310(d) to spectrum leases is not necessary to ensure that carriers engage in just, reasonable, and nondiscriminatory conduct because the market for wireless services -- both mobile and fixed -- is already competitive, thus ensuring market-driven charges and practices. Moreover, the Commission has direct authority over lessees and sublessees in order to prevent unreasonable or discriminatory conduct by such entities. With respect to the second prong, the Commission should not be concerned about the impact on consumers of its spectrum leasing proposal, as the more efficient and wider use of spectrum unquestionably will benefit consumers. Finally, with respect to the last prong, the Commission has correctly determined that permitting wider use of spectrum leasing will promote the public interest by encouraging efficient spectrum use and allowing more entities to gain access to spectrum.[43] Thus, forbearance from enforcing Section 310(d) to spectrum leases is justified.

---

40 47 U.S.C. § 160(a)(1).

41 Id. § 160(a)(2).

42 Id. § 160(a)(3).

43 Notice ¶ 18; see also Section II, supra.

A more flexible standard under Section 310(d) (or forbearance from enforcing this provision with respect to spectrum leases) would encourage licensees to lease spectrum. The Commission has recognized in other pending proceedings that "[w]ith increasing demand for radio services, our spectrum management activities must focus on promoting more efficient use of spectrum as well as increasing the amount of spectrum available for new services while continuing to ensure access to adequate spectrum for essential incumbent services."[44] A functioning system of secondary markets is critical if the United States is to appropriate the benefits available in advanced wireless systems.[45]

VI. THE CONTINUED APPLICATION OF USE RESTRICTIONS IS NECESSARY TO PROTECT LICENSEES FROM INTERFERENCE AND TO ENSURE THE SMOOTH FUNCTIONING OF THE COMMISSION'S SPECTRUM MANAGEMENT POLICIES.

The Notice requests comment on "revisions that should be made to [the FCC's] service rules that could promote the development of secondary markets while also continuing to serve the public interest objectives upon which service rules are based."[46] For example, the Notice asks "whether the Commission should in some circumstances modify its service rules to allow

---

44 In re Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, *Notice of Proposed Rule Making and Order*, FCC 00-455, ¶ 33 (rel. Jan. 5, 2001) ("Third Generation Notice").

45 CMRS Spectrum Cap Notice ¶ 43 (recognizing that most European countries have allocated more total spectrum for mobile telecommunications services than currently is allocated in the U.S.); see also Third Generation Notice ¶ 18 ("To ensure that the United States remains at the forefront of the development of wireless technology and the provision of wireless services, the Commission must implement policies that continue to foster new developments.").

46 Notice ¶ 92.

spectrum to be used for services other than that for which it was licensed."[47] While flexible policies that allow market forces to spur vigorous growth of the wireless industry are preferable to regulatory obligations that unnecessarily burden service providers, use restrictions that are intended to protect licensees from harmful interference continue to serve important public interests. Parties seeking to introduce technologies that do not comply with existing technical and service rules must continue to employ the appropriate procedures, such as filing petitions for rulemaking, waiver requests, and requests for declaratory rulings. Application of these procedures where the Commission has determined that use restrictions are necessary will ensure that existing operators are given the opportunity to comment on or, if necessary, oppose proposed new uses.

The continued application of use restrictions is necessary to minimize post-licensing interference problems that can be costly and complicated to resolve. For example, the Commission's Policy Statement stresses that "[l]icensees should have clearly defined usage rights to their spectrum, including frequency bands, service areas, and license terms of sufficient length, with reasonable renewal expectancy, to encourage investment."[48] Licensees must be confident that their spectrum will not be subject to interference by new uses that do not comply with technical and service rules. While it is theoretically possible to permit lessees to use spectrum for uses not contemplated by the Commission's rules on a non-interference basis, in practical terms it is not feasible in all cases. The Commission has forestalled such a result on other occasions. For example, in adopting service rules in the 700 MHz Guard Bands, the

---

47 Id. ¶ 95.

48 Policy Statement ¶ 20.

Commission restricted operations to entities that did not use a cellular system architecture to protect public safety licensee from interference concerns.[49] This concern for non-interference is equally applicable to commercial operations. Thus, the Commission should ensure that its procedures to facilitate spectrum leases do not create the potential for disruption of its service rules by granting licensees and lessors "rights" to introduce uses that do not comply with technical, service, or procedural rules.[50]

---

49 In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd. 5299, ¶ 19 (2000) ("Although coordinating frequencies for each and every one of these [cellular] base stations with the various public safety systems operating in the area would not be impossible as a theoretical matter, as a practical matter it would be a complex, uncertain, and resource-intensive task for both commercial and public safety users.").

50 Notice ¶ 97.

VII. CONCLUSION.

For the foregoing reasons, CTIA respectfully requests that the Commission adopt a flexible regulatory approach to secondary spectrum markets that ensures that wireless spectrum is put to its highest and best use.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

By: Michael F. Altschul SK

Michael F. Altschul
Vice President, General Counsel

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
Tel. (202) 785-0081

Philip L. Verveer
David M. Don
James M. Assey
Sophie Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street
Washington, D.C. 20036
Tel. (202) 328-8000

Its Attorneys

February 9, 2001

CERTIFICATE OF SERVICE

I, Sophie Keefer, do hereby certify that on this 9th day of February 2001, copies of the foregoing Comments of the Cellular Telecommunications & Internet Association were delivered by hand, to the following parties:

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Chairman Michael Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8B201
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8B115
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8C302
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A302
Washington, DC 20554

Paul Murray
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4B-442
Washington, DC 20554

Donald Johnson
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4A-332
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20037

Sophie Keefer

Sophie Keefer