

ORIGINAL

RURAL TELECOMMUNICATIONS GROUP

advocate of rural wireless telecommunications providers

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To: Magalie Roman Salas, Secretary
Federal Communications Commission

From: Caressa D. Bennet, General Counsel
Brent Weingardt, Senior Counsel

Date: November 29, 2001

Re: *Ex Parte* Presentation – November 28, 2001

In the Matter of Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)
GN Docket No. 01-74

In the Matter of Service Rules for the 746-764 and 776-794 Bands, and Revisions to Part 27 of the Commission's Rules
WT Docket No. 99-168

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

On November 28, 2001, Caressa D. Bennet and Brent Weingardt of Bennet & Bennet, PLLC, representing the Rural Telecommunications Group ("RTG"), participated in a meeting with Commissioner Kathleen Q. Abernathy and Bryan Tramont, the Commissioner's Legal Advisor, concerning the above-referenced proceedings. In addition to the materials set forth below, the attached document summarizes this discussion.

In regards to the upcoming Lower 700 MHz decision, RTG supports the Federal Communications Commission's proposal to recover underutilized analog broadcast spectrum. However, RTG noted that the Upper 700 MHz auction will result in large amounts of unused spectrum because the Commission has decided to auction this band in large geographic areas, six regional Economic Area Groupings ("EAGs"), and the FCC has proposed to do the same in the Lower 700 MHz band. RTG reiterated that it should license the Lower 700 MHz in the smallest possible geographic areas, such as Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs").

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Millions of rural Americans are not receiving the benefits of advanced wireless services. The Commission's recently released commercial mobile radio service ("CMRS") Report to Congress drastically overstated the amount of "coverage" in rural counties for cellular and personal communications services ("PCS"), arguably the most widely available wireless services. Even using the Report's charitable definition of "coverage," 42 percent of rural Americans do not have access to cellular or PCS alternatives.

To date, the Commission's spectrum allocation policies are not working for rural America. Auctioning spectrum in large geographic areas results in large unserved or under served populations. The FCC's liberal build-out requirements promote spectrum warehousing in violation of 309(j)(4)(B) of the Communications Act. Congress clearly concluded that rural telephone companies have a record of providing service in isolated communities and should receive advantages in competing for radio spectrum to bring advanced wireless services to these communities. Rural telephone companies are entitled to auction benefits as designated entities under Section 309(j)(4)(D), but the Commission has simply ignored this mandate. The FCC must do more to meet the mandate of Section 309(j)(3)(A) to speed the delivery of wireless services to rural areas of the United States.

Rural and small companies must have access to spectrum in the primary auction markets, but RTG supports the Commission's proposal to create a more vibrant secondary market for spectrum. The Commission must ensure that proper incentives are in place to promote voluntary spectrum leasing. RTG believes that licensees cannot be held responsible for the actions of spectrum lessees nor should licensees monitor the day-to-day activities of lessees. RTG stressed that leasing, as commonly understood, does constitute a partial transfer of control of the rights and obligations that accompany a radio license. However, the Communications Act grants the Commission with unquestioned authority to enforce its rules against "any person" who uses radio spectrum. The Commission can ensure day-to-day compliance with its rules by adopting RTG's proposed "Functional Leasing Approach."

Under this approach, a licensee must follow the Commission's checklist for determining the initial eligibility of a lessee to qualify for the use of spectrum; a licensee must inform each lessee of the lessee's service, technical and operational obligations within the language of a lease; a licensee must require that the lessee acknowledge and submit to Commission jurisdiction through a certification process in the lease that it will comply with the Commission's rules, policies, and laws and that it recognizes the authority of the FCC to cancel a lease for failure to comply; a licensee must require that all lease terms be committed to writing; a licensee must retain a record of all leases, FCC filings and coordination/interference agreements reached by its lessees; a licensee must make these records available to the Commission upon request; for each lease, a licensee must submit identifying information to the Commission that allows the Commission to identify and contact each lessee; and a licensee must commit to assist the FCC in identifying non-complying lessees and to take all reasonable steps to halt non-compliance brought to its attention.

RTG also discussed alternative approaches regarding spectrum leasing with the Commissioner. RTG suggested that the FCC adopt a streamlined procedure similar to Section 214 applications for spectrum leasing. The FCC could adopt a notification process similar to *pro forma* wireless assignment and transfer notifications. Lastly, RTG suggested that the Commission completely forbear from passing on leases in accordance with Section 160, 161 or 332 of the Communications Act.

If you have any questions regarding this filing, please contact the undersigned at (202) 371-1500.

Sincerely,

/s/

Brent Weingardt
Senior Counsel, Rural Telecommunications Group

Enclosure

cc: Commissioner Kathleen Abernathy
Bryan Tramont, Legal Advisor

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Advocate for Rural/Wireless Telecommunications Providers

EX PARTE PRESENTATION OF THE RURAL TELECOMMUNICATIONS GROUP (RTG)¹

- **RURAL AMERICA IS NOT RECEIVING THE BENEFITS OF ADVANCED WIRELESS SERVICES**
 - The FCC's recent CMRS Report drastically overstated "coverage" in rural counties for cellular and PCS services, the most widely available wireless products; 42% of rural Americans do not have access to even these wireless services according to the CMRS Report.
 - Analog cellular service predominates in rural America while digital services are all but non-existent.

- **RURAL TELEPHONE COMPANIES, WITH A LONG TRADITION OF SERVING THE LEAST PROFITABLE PORTIONS OF THE COUNTRY, ARE UNABLE TO BRING ADVANCED WIRELESS SERVICES TO THEIR COMMUNITIES**
 - The recent National Telephone Cooperative Association member survey points to rural telephone companies' real concern with the process of gaining access to spectrum:
 - Funding for wireless projects and rural demand for wireless are not impediments.
 - 77% of rural telephone companies will not be participating in future auctions because of the cost of bidding head-to-head with large companies for huge geographic areas that are not relevant in size to the rural areas they seek to serve.
 - Rural telephone companies have had little success in the secondary market through partitioning and disaggregation and also fear that the FCC's leasing proposal will not open doors to unused rural spectrum

¹ The Rural Telecommunications Group is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service ("LMDS") licenses and have started to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. Other RTG members seek to acquire spectrum or to be able to utilize the spectrum of others. They have found it difficult to acquire spectrum through auctions or to structure management or lease arrangements due to existing FCC rules, policies and case precedent. RTG's members are all affiliated with rural telephone companies or are small businesses.

- **RTG BELIEVES THAT THE FCC MUST CHANGE SPECTRUM ASSIGNMENT PROCEDURES AND WIRELESS SERVICE RULES THAT RESULT IN WIRELESS SERVICE GAPS IN LARGE SWATCHES OF THE U.S.**

1. Large Geographic Service Areas Result in Unserved Populations

- Spectrum purchasers have no intention of serving the less-populated portions of their license areas while rural telephone companies and small businesses cannot afford to purchase licenses that contain hugely populated areas in order to serve their smaller rural markets.

- Cellular telephone service, licensed in both MSAs and RSAs, is widely available in both urban and rural areas.

- Companies should not be forced to purchase both urban and rural populations, but should be able to do so if they wish through combinatorial bidding.

2. The FCC's Liberal Buildout Requirements Promote Spectrum Warehousing in Violation of 309(j)(4)(B)

- Requiring that only a percentage of a service area's population receive coverage or that a licensee offers "substantial service" ensures that spectrum will not be put to use in a rural area.

- Liberal buildout requirements create incentives for companies to buy larger territories than their business plans require.

- Liberal buildout requirements lessen licensees' interest in secondary market transactions.

- The cellular requirement to "use it or lose it" is the proper approach.

3. Rural Telephone Companies Are Entitled to Auction Benefits as Designated Entities

- The FCC provides rural telephone companies with auction incentives only if they qualify separately as a "small business" in accordance with revenue tests.

- Section 309(j)(4)(D) expressly defines rural telephone companies as entities entitled to auction benefits irrespective of their revenues.

4. The FCC's Approach to Auctions Ignores the Congressional Mandate of 309(j)(3)(A) to Speed Delivery of Wireless Services to Rural Areas of the United States

- Excessive focus on potential auction revenues and auction simplicity will result in tangible harm to the productivity and quality of life for rural Americans.

- **THE COMMISSION MUST ENSURE THAT PROPER INCENTIVES ARE IN PLACE TO PROMOTE VOLUNTARY SPECTRUM LEASING**

- Licensees Cannot Be Held Responsible For the Actions of Spectrum Lessees or Monitor Lessees' Day-to-Day Activities.

- Instead, the FCC Should Require the Actual Spectrum User to Comply With its Rules by Adopting a Version of RTG's "Functional Leasing" Approach:

- a licensee follows the Commission's checklist for determining the initial eligibility of a lessee to qualify for the use of spectrum;

- a licensee informs each lessee of a lessee's service, technical and operational obligations within the body of a lease;

- a licensee requires that the lessee acknowledge and submit to Commission jurisdiction through a certification by the lessee in the lease that it will comply with Commission rules, policy, and laws and that it recognizes the authority of the Commission to cancel a lease for failure to comply;

- a licensee requires that all lease terms be committed to writing;

- a licensee retains a record of all leases, FCC filings and coordination/interference agreements reached by its lessees;

- a licensee makes these records available to the Commission upon request;

- for each lease, a licensee submits identifying information to the Commission that allows the Commission to identify and contact each lessee; and

- a licensee commits to assist the Commission in identifying non-complying lessees and to take all reasonable steps to halt non-compliance brought to its attention.

- **THE FCC MAY INVOKE STREAMLINED PROCESSING OF LEASES THAT COMPORTS WITH SECTION 310(d) OF THE COMMUNICATIONS ACT**

- Adopt a Streamlined Procedure Similar to Section 214/Cable Landing License Applications;

- Adopt a Notification Procedure Similar to Pro Forma Wireless Assignments and Transfers; or

- Forbear Completely From Passing on Leases in Accordance With Sections 160, 161 or 332 of the Communications Act.