

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

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

COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY OF COMMENTS

SBC believes that many of the proposals in the *FNPRM* continue the work begun in the *Report and Order* to remove unnecessary barriers to the development of secondary markets in spectrum usage, thereby maximizing public benefits that flow from spectrum-based services and devices. A few proposals, however, would work against the Commission's admirable goals and should be rejected.

The Commission should not create additional reporting requirements for spectrum leases. Substantial information must already be reported and, to the extent additional information is necessary to facilitate leasing, private parties can be expected to step in and provide the necessary brokerage services.

The Commission should not attempt to create or facilitate brokerage or similar arrangements to make spectrum available. Market forces can determine whether spectrum brokers or spectrum exchanges are needed and how they will operate.

The Commission should not yet implement spectrum leasing policies that accommodate "smart" or "opportunistic" technologies, such as software defined radio, frequency-agile radio and spread spectrum technologies. While such smart technologies offer great promise, their deployment is still at least a few years away, and it would be premature to promulgate detailed spectrum leasing rules for them now. The Commission, however, should make clear that smart technologies will be permitted to use licensed spectrum only with the voluntary consent of incumbent licensees.

SBC generally endorses the *FNPRM*'s proposal to forbear from the requirements of the Act to the extent necessary to authorize notification filings for *de facto* transfer leases, transfers of control and assignments. Implementing these proposals would make

the spectrum marketplace more efficient by reducing delay and decreasing transaction costs.

A transaction's eligibility for notification filings should not be premised on the transaction resulting in the lessee, transferee or assignee holding less than a benchmark amount of CMRS spectrum. Any such benchmark would function as a new *de facto* CMRS spectrum cap, and this is not an appropriate proceeding in which to consider CMRS aggregation issues. In addition, other restrictions proposed in the *FNPRM* should be sufficient to prevent transactions that pose spectrum aggregation issues from being processed through notification filings.

The notification filing procedures should be carefully designed to achieve the Commission's goal of processing uncontroversial transactions quickly. As proposed in the *FNPRM*, however, the notification filing procedures could create uncertainty as to the finality of any closing, thereby making the proposed notification procedures a slower process than the existing prior consent procedures.

The Commission should extend the policies adopted in the *Report and Order* to ITFS, MDS and MMDS licensees, as well as to other appropriate services to maximize public benefits that are derived from spectrum-based services and devices. However, there is not yet a sufficient record to conclude that such policies can be extended to public safety spectrum without endangering public safety, so the Commission should decline to do so at this time.

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COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (“SBC”) commends the Commission for its forward-looking efforts to make more efficient use of the spectrum by allowing licensees to lease spectrum to others under regimes that minimize regulatory burdens. SBC encourages the Commission to continue the work begun in the *Report and Order*¹ to remove unnecessary barriers to the development of secondary markets in spectrum usage, thereby maximizing public benefits that flow from spectrum-based services and devices. Such efforts can play an important role in easing the shortage of spectrum and making new wireless services and technologies available to consumers.

SBC believes that many of the proposals in the *FNPRM* will promote the development of secondary spectrum markets. However, as explained below, SBC also believes that a few proposals would impose unnecessary regulatory burdens on licensees and lessees and will work against the Commission’s admirable goals. SBC offers the

¹ Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 00-230, FCC 03-113 (rel. Oct. 6, 2003) (“*Report and Order*” or “*FNPRM*”).

following comments on the *FNPRM*, in an order that parallels that of the *FNPRM*, as the Commission requested.

I. ACHIEVING A MORE EFFICIENT SPECTRUM MARKETPLACE

A. Existing disclosure requirements are sufficient for the spectrum leasing marketplace to function efficiently

In its *FNPRM*, the Commission asks whether additional information, beyond that mandated in the *Report and Order*, should be filed with the Commission in order to facilitate an efficiently functioning spectrum leasing marketplace.² SBC does not believe that such reporting requirements are necessary or will advance the Commission's goals. Under the *Report and Order*, lessees will report, and the Commission will make available in ULS, information about each spectrum lease, including the identity of the spectrum lessee, contact information for the lessee, the lessee's eligibility to lease spectrum, the specific spectrum leased, and the term of the lease.³ With this information and the information in ULS concerning the licensed spectrum, any potential lessee will be able to contact potential lessors to ascertain whether it is interested in leasing spectrum and on what terms.

To the extent additional information is necessary to facilitate leasing, SBC believes that private parties will step in and provide the necessary brokerage services. The Commission does not have to undertake that task. Indeed, requiring parties to file information concerning the availability of spectrum for leases may well prove

² *FNPRM* ¶¶ 224-25.

³ *Report and Order* ¶¶ 124, 153.

counterproductive. As the Commission recognizes in its *FNPRM*,⁴ some detailed information concerning spectrum available for lease may well be confidential. Given the Commission's limited ability to protect the confidential nature of any such information,⁵ parties may be reluctant to provide the Commission with the additional information. Private brokers are not subject to any such constraints and can operate more freely, with more information, to make spectrum available for lease.

Further, any Commission requirement to file the lease agreement or other additional information – such as pricing, greater detail about the geographic area covered, or greater detail about the frequencies used – could prove burdensome, without any countervailing benefits. As distinguished from private arrangements, technical expertise could be required to assure that geographical coverage and frequency use are properly described. Any FCC filing requirements also would pose the need for legal review and analysis of the filing to determine whether disclosures were sufficient to meet Commission requirements and to assure that, to the extent confidentiality was requested, the Commission's procedures were followed properly. In addition, requiring the filing of additional information is unnecessary because the most crucial information – how to contact any potential lessor, the amount of spectrum licensed and any prior lease – is already on file.

Rather than requiring additional information, the Commission should continue its ongoing efforts to enhance the functionality of ULS so that potential lessees can more

⁴ *FNPRM* ¶ 226.

⁵ 47 C.F.R. §§ 0.453-0.457 (records routinely available and not available for public inspection); *id.* § 0.459 (confidential treatment requests).

easily use ULS to locate potential lessors. Improving searching capabilities and maintaining accurate and fully updated data would be far more useful than providing additional data. So long as participation is voluntary, there would be no harm in creating a place in ULS for potential lessors to state their interest in leasing spectrum and to provide additional details regarding the spectrum available. However, such information should not be required.

B. Market forces are sufficient to regulate spectrum brokers and exchanges

Similarly, SBC does not believe the FCC should attempt to create or facilitate brokerage or similar arrangements to make spectrum available, as the *FNPRM* proposes.⁶ Market forces can determine whether spectrum brokers or spectrum exchanges are needed and how they will operate. The information available in ULS may be sufficient for potential lessees to contact potential lessors efficiently without any intermediaries. If not, the market will determine what sort of spectrum brokers or spectrum exchanges are needed. Brokerage firms exist in a variety of markets, from real estate, to the sale of broadcast stations, to the sale of advertising time, to name a few, without any government intervention. If spectrum leasing is a viable and valuable business model, and SBC believes it is, the market will assure that brokers or leasing facilitators will fill any void that might otherwise exist. Government intervention is unnecessary and could stifle private initiatives.

Moreover, because spectrum leasing is new, no one can be certain what efficient market-making mechanisms would look like. The Commission should not interfere with the working of market forces by creating rules that presuppose a particular structure for

⁶ *FNPRM* ¶¶ 226-29.

market making or by designating approved market makers. This would only hinder the emergence of efficient market-making mechanisms, whose particular structure cannot yet be known with certainty.

Finally, SBC does not believe that regulation of spectrum brokers and spectrum exchanges will be necessary, but if it is, it is premature to decide on the kind of regulatory supervision that would be necessary. Most potential spectrum lessors and lessees likely will be highly sophisticated and capable of protecting both their financial interests and their privacy through contractual mechanisms. Regulation would be a barrier to the efficient operation of the spectrum marketplace, particularly regulations developed without any experience as to the potential limits of a market-driven brokerage system. If brokers or markets lack transparency, or engage in self-dealing or discrimination, lessors and lessees can be expected to shun them, which should create an incentive to avoid such misconduct. To the extent that additional information is required for spectrum brokers to function effectively, or for spectrum exchanges to function effectively, lessors and lessees should be allowed to make voluntary decisions about whether to disclose such information. If market failures or informational deficiencies emerge in the future when spectrum brokers and spectrum exchanges exist, then the Commission can always address those concrete and defined issues at that time.

C. Detailed rules for “smart” technologies would be premature

In the *FNPRM*, the Commission asks what steps can be taken to implement spectrum leasing policies that accommodate “smart” or “opportunistic” technologies, such as software defined radio, frequency-agile radio and spread spectrum technologies.⁷

⁷ *FNPRM* ¶¶ 233-36.

SBC believes that, while such smart technologies offer great promise, their deployment is still at least a few years away. It is thus premature to promulgate detailed spectrum leasing rules for them now. As deployment gets closer, and the details of the technology become better understood, the Commission will be able to create a more appropriate regulatory structure. Any rules that were written now might end up being incompatible with the technology that ultimately emerges or might discourage the emergence of potential technologies.

At this time, however, the Commission should state one bedrock principle – smart technologies will be permitted to use licensed spectrum only with the voluntary consent of incumbent licensees.⁸ Licensees thus will be able to exclude smart technologies from using their spectrum without the licensees’ express consent, and licensees will not be required to lease their spectrum for use by smart technologies.

A licensee’s “exclusive use” of spectrum must mean the licensee’s right to exclude others from using the spectrum and not merely the licensee’s ability to use the spectrum whenever the licensee desires to do so.⁹ In other words, smart technologies must not be allowed to squat on temporarily unused spectrum. Such use would be incompatible with a licensee’s legitimate expectations and could leave the licensee vulnerable to interference from smart technologies. In addition, if smart technologies are permitted to use spectrum without the licensees’ consent, licensees will be unable to

⁸ *Cf. FNPRM* ¶ 235.

⁹ *Cf. id.* ¶ 236.

fulfill their duty to the Commission under the spectrum leasing rules to assure that users have the requisite qualifications, that any use does not cause interference, and that any use complies with service-specific restrictions.

The Commission also should make clear that it will not require incumbent licensees to lease spectrum for smart technologies. If a smart technology does not cause interference, incumbent licensees should be eager to permit smart technologies to use their spectrum and reap the revenue that would come from doing so. Thus, it is highly unlikely that licensees will refuse to lease spectrum in order to exclude competition – such a course of action would be unrealistic because spectrum is licensed to so many parties. With such incentives for leasing, there is no need to require leasing in order to make room for smart technologies.

II. FORBEARANCE FROM INDIVIDUALIZED PRIOR COMMISSION APPROVAL FOR CERTAIN CATEGORIES OF SPECTRUM LEASES AND TRANSFERS OF CONTROL/LICENSE ASSIGNMENTS

SBC endorses the *FNPRM*'s proposal to forbear from the requirements of the Act to the extent necessary to authorize notification filings for *de facto* transfer leases.¹⁰ SBC likewise endorses the *FNPRM*'s proposal to authorize such notification filings for transfers of control and assignments, so as not to distort the marketplace in favor of spectrum leases and against transfers or assignments.¹¹ Implementing these proposals would make the spectrum marketplace more efficient by reducing delay and decreasing

¹⁰ See *FNPRM* ¶¶ 241-274. Specifically, the Commission has proposed to forebear from enforcing provisions of Section 308, 309 and 310(d) that require the filing of applications for consent and provide for the filing of petitions to deny. Instead, the Commission would allow post-closing notification within 14 days of the execution of any *de facto* transfer lease.

¹¹ *Id.* ¶¶ 278-87.

transaction costs. In implementing these proposals, however, the Commission should not inadvertently create a new spectrum cap or introduce new delays.

- A. In authorizing notification filings, the Commission should not inadvertently create a new spectrum cap

The *FNPRM* proposes to permit notification filings for spectrum leases only where the lessee will control less than a benchmark amount of CMRS spectrum.¹² The *FNPRM* suggests that the same benchmark would apply for notification filings for transfers of control and assignments.¹³ While the *FNPRM* is careful to say that this benchmark would not be a new CMRS spectrum cap, as a practical matter, the benchmark would be exactly that. Since the CMRS spectrum cap was eliminated on January 1, 2003, the Commission has provided little guidance on how much CMRS spectrum aggregation it believes is consistent with the public interest. Thus, any benchmark that the Commission adopts here might weigh heavily in any future analysis of CMRS spectrum aggregation. CMRS spectrum aggregation policies should be considered in a proceeding more directly related to that issue and not in this proceeding.

Other restrictions proposed in the *FNPRM* should be sufficient to prevent excessive aggregation of CMRS spectrum, at least until the Commission provides additional guidance on spectrum aggregation in a more appropriate proceeding. The *FNPRM* proposes to prohibit notification filings where the spectrum lease would result in the loss of service in any geographic area by an independent, facilities-based CMRS provider.¹⁴ With most Americans living in counties in which there are six or more

¹² *FNPRM* ¶¶ 257-62.

¹³ *Id.* ¶ 281.

¹⁴ *Id.* ¶ 258.

facilities-based CMRS providers,¹⁵ transactions that do not result in the loss of a facilities-based CMRS provider are unlikely to result in excessive spectrum aggregation.

The Commission also should not prohibit notification filings for non-CMRS spectrum leases, transfers of control, or assignments, except where the lessee will control less than a benchmark amount of non-CMRS spectrum. There is no record in this proceeding on which to base such a benchmark. No evidence has been introduced about who holds how much spectrum, how the spectrum is being used, what level of spectrum concentration is potentially excessive, and in which services excessive spectrum concentration is a potential threat. With the competitive landscape still uncharted, the Commission is not in a position to establish benchmarks or to determine whether different benchmarks should be established for different services.

Further, this proceeding is not the appropriate proceeding in which to consider spectrum aggregation issues. Any “benchmarks” that the Commission adopts here might become *de facto* non-CMRS spectrum caps, especially if the Commission implements its suggestion to relax its review of transfers of control or assignments of wireless authorizations. The Commission generally has not imposed restrictions on the

¹⁵ Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eighth Report*, WT Docket 02-379, FCC 03-150 (rel. July 14, 2003) at ¶ 84 (“270 million people, or 95 percent of the total U.S. population, have three or more different operators . . . offering mobile telephone service in the counties in which they live. . . . Over 236 million people, or 83 percent of the U.S. population, live in counties with five or more mobile telephone operators competing to offer service, while 72 million people, or about 25 percent of the population, live in counties with seven or more mobile telephone operators competing to offer service. . . . More than 200 million people, or 71 percent of the population, can now choose from among six or more different mobile telephone operators providing service somewhere in their counties.”).

aggregation of non-CMRS spectrum, and, given the complexity of the issues posed by any such proposal, this proceeding is not the place to start.

B. In authorizing notification filings, the Commission should not introduce new delays

The Commission observes that allowing notification filing for *de facto* transfer leases may result in such leases being used to avoid the more burdensome prior consent process required for a transfer of control or assignment. The Commission seeks comment on whether it should establish regulatory parity by allowing notification filing for transfers of control and assignments, just as it proposes to do for *de facto* transfer leases.¹⁶

While SBC fully supports the reduction in regulatory burdens that would result from the Commission's proposal for notification filings, SBC is concerned that the proposal will not achieve the Commission's goal of expediting the processing of spectrum-based transactions because of the uncertainty created by the prospect of a petition for reconsideration or other after-the-fact proceedings. Under the proposal in the *FNPRM*, a notification that spectrum had been leased, transferred, or assigned would be deemed approved upon the release of the public notice announcing the filing.¹⁷ However, anyone could petition for reconsideration within 30 days, and the Commission could reconsider on its own motion within 40 days. The threat of such petitions or action by the Commission will make parties reluctant to rely on this proposed expedited process. At best, the proposal is likely to delay consummation of the transaction until the period for

¹⁶ *FNPRM* ¶¶ 278-87.

¹⁷ *Id.* ¶ 283.

reconsideration is passed. Indeed, it is entirely conceivable that parties will feel compelled to seek approval in order to obtain the necessary certainty to allow closing. As such, the proposal will not achieve the objectives the Commission is seeking.

Currently, the issuance of a public notice announcing the filing of an application for a *de facto* transfer lease triggers a 14-day public comment period, which is followed by a 7-day period during which the Commission may consent to the application.¹⁸ Although a petition for reconsideration is always possible afterwards, there is little likelihood of such a petition succeeding if nothing was filed in the original 14-day public comment period, if only because of the requirement for a petition to “show with good reason why it was not possible . . . to participate in the earlier stages of the proceeding.”¹⁹ Thus, if nothing is filed in the 14-day public comment period and Commission approval is received on the 21st day after the public notice, many parties may conclude that there is sufficient finality to proceed to closing.

Under the *FNPRM*'s proposal, while Commission approval is concurrent with the issuance of the public notice announcing the filing of an application, few parties would feel comfortable proceeding to closing for 30 days, or perhaps 40 days, because of the threat of a petition for reconsideration or Commission reconsideration on its own motion. Potential petitioners would not be constrained by the requirement to show with good reason why they failed to participate in the proceeding earlier because there was no opportunity for them to participate earlier. The *FNPRM*'s proposal will therefore have the perverse effect of, at best, delaying the consummation of uncontroversial transactions

¹⁸ 47 C.F.R. § 1.9030(e)(2).

¹⁹ *Id.* § 1.106(b).

from 21 days after the public notice to 30 or 40 days after the public notice. At worst, the Commission will still receive requests for approval, the very step the Commission is hoping to avoid.

To remedy this, the Commission could use its forbearance authority to narrow the period in which it will consider petitions for reconsideration. A 14-day period might be appropriate, as it is now for commenting on *de facto* transfer leases. Alternatively, the Commission could attempt to narrow the circumstances under which it will accept petitions for reconsideration. Without such changes, the *FNPRM*'s notice filing proposal will be of little help in speeding the consummation of uncontroversial transactions and will only create the regulatory uncertainty the Commission has said that it is seeking to minimize.

III. EXTENDING THE POLICIES ADOPTED IN THE *REPORT AND ORDER* TO ADDITIONAL SPECTRUM-BASED SERVICES

The Commission should extend the policies adopted in the *Report and Order* as widely as possible to further its goal of maximizing public benefits that are derived from spectrum-based services and devices. In particular, the policies adopted in the *Report and Order* should be extended to ITFS/MDS/MMDS licensees. However, there is not yet a sufficient record to conclude that such policies can be extended to public safety spectrum without endangering public safety, so the Commission should decline to do so at this time.

A. ITFS/MDS/MMDS licensees should be allowed to use the new spectrum leasing rules

The spectrum leasing policies in the *Report and Order* should be extended to ITFS/MDS/MMDS licensees. While such licensees historically have been allowed to

lease spectrum, the framework in which they have done so is different from that in the *Report Order*. There is no justification for continuing the disparate treatment of these services.²⁰

The same spectrum leasing rules should apply across the various services, unless inconsistent with the purpose of the service, so as not to unduly complicate the regulatory landscape. Spectrum leasing as envisioned by the *Report and Order* would not be inconsistent with the educational purpose of ITFS – spectrum leasing would not impede educational programming of 20 hours per week (or 5% of capacity). Spectrum leasing, together with a reorganization of the band to separate high and low power services, could allow much more intensive use of this spectrum, both for educational programming and other services, such as fixed wireless and 802.16 related services, and thereby advance the public interest.

B. Public safety licensees should not yet be allowed to lease spectrum

A sufficient record has yet to be developed to justify the leasing of public safety spectrum to third parties. Technologies that would allow licensees to reclaim such spectrum in the event of an emergency are unproven, and the possibility of third parties interfering with public safety users cannot be ignored. To protect public safety, the Commission should not consider the possibility of allowing the leasing of this spectrum until such questions have been definitively resolved. Because of the seriousness and complexity of these issues, the Commission should consider instituting a separate proceeding in which to consider them.²¹

²⁰ Cf. *FNPRM* ¶¶ 307-08.

²¹ Cf. *id.* ¶¶ 290-98.

CONCLUSION

For the reasons set forth above, SBC urges the Commission to relax further its rules concerning spectrum leasing as proposed in the *FNPRM*, subject to the suggestions made above. Just as the Commission has concluded that relaxing its prior transfer of control rules will permit a market to develop for the leasing of spectrum, the Commission should allow the marketplace to develop the mechanisms to make spectrum leasing a reality. Freed of unnecessary and burdensome regulatory constraints, the marketplace will find the optimally efficient mechanisms to make unused spectrum available to entities other than the licensees. The Commission should not attempt to cabin that process except where necessary to assure compliance with its rules and the efficient operation of its licensed services.

Respectfully submitted,

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