

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

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based)	
Services to Rural Areas and Promoting)	WT Docket No. 02-381
Opportunities for Rural Telephone Companies)	
To Provide Spectrum-Based Services)	
)	
2000 Biennial Regulatory Review)	WT Docket No. 01-14
Spectrum Aggregation Limits)	
For Commercial Mobile Radio Services)	
)	
Increasing Flexibility To Promote Access to and)	
The Efficient and Intensive Use of Spectrum and)	WT Docket No. 03-202
The Widespread Deployment of Wireless Services,)	
And To Facilitate Capital Formation)	

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

As the Commission has recognized in several different contexts, the build out of wireless carrier services in the United States has been highly successful. As the Commission evaluates proposals intended to spur further development of spectrum-based services in rural areas, it should first identify what it is trying to accomplish and next consider whether the proposals contained in the *Notice* will, in fact, advance the Commission's stated goals. Several of the proposals, including mandatory spectrum easements, spectrum audits and take backs, would not encourage additional rural build out. One idea that would address the economic barriers to rural service in underserved markets would be an explicit subsidy program, but the Commission specifically declined to consider that as an option. Another option is to require rural ILECs to honor their obligations to interconnect and reciprocally exchange traffic with wireless carriers, as required already under the Communications Act and existing Commission rules.

The Commission's own studies demonstrate that rural consumers benefit from wireless service and competitive wireless prices that include nationwide calling plans. Thus, the problem that the Commission seeks to solve is not readily apparent and several of the proposals put forward in the *Notice* and by several commenters are out of step with the Commission's historic and highly successful reliance on market forces in the wireless industry to create and sustain competition. A chief characteristic of these policies has been the Commission's light regulatory touch -- providing CMRS licensees the crucial flexibility needed to operate in a competitive marketplace. In particular, geographic area licensing and the alternative of a substantial service build-out showing have allowed wireless carriers effectively to serve their rural customers. The need for a more relaxed substantial service showing for rural areas is not obvious.

Another concern related to several of the proposals contained in the *Notice* is that they prejudice the effectiveness of new secondary market policies on spectrum leasing. As many commenters correctly observed, these new policies have to become effective and have to have time to mature before the Commission introduces a range of radical “spectrum access” options.

The Commission must have a reasoned basis to depart from its historically successful wireless policies; *i.e.*, more is required than a general statement in favor of additional wireless rural service and spectrum access. The Commission must specifically identify its goals for rural wireless service and explain whether the goals includes having a certain number of competing carriers in particular markets. The need for, much less adopting effective rules, requires specifically identifying these goals and articulating strategies that allow parties to invest the funds necessary to build-out viable service with reasonable confidence.

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking seeking comment on ways to facilitate the deployment of spectrum-based services in rural areas.¹ Nextel, together with Nextel Partners, offers Commercial Mobile Radio Service (“CMRS”) in 293 of the top 300 markets nationwide. Increasingly Nextel and Nextel Partners are expanding service from secondary to tertiary markets, and increasing

¹ Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Notice of Proposed Rulemaking*, FCC 03-202, WT Docket Nos. 02-381 and 01-14 at ¶7 (rel. Oct. 6, 2003) (*Notice*).

coverage in existing markets. Thus, both have a perspective on the challenges facing parties seeking to build-out and operate on both a nationwide basis and in rural markets.

I. INTRODUCTION

Nextel supports the Commission's efforts, through the *Notice*, to facilitate the deployment of spectrum-based services everywhere they can be viable, including in rural America. Before the Commission can take action, however, it must first enumerate its specific objectives, including identifying with some specificity the real life problems that can be resolved by Commission implementation of a number of the *Notice's* proposals. For example, while the *Notice* acknowledges that it is too early to determine whether the Commission's recently adopted spectrum leasing rules have been successful, the *Notice* nevertheless seeks comment on several measures that effectively prejudge the success of the not-yet-effective spectrum leasing rules to expand service and spectrum access in rural and non-rural areas. The bottom line is that neither the *Notice* nor the comments herein demonstrate any pervasive "access to spectrum" problem in rural markets requiring new regulations, particularly those that might limit the flexibility and discretion of wireless licensees.

The Commission's own findings indicate that the deployment of wireless services in rural areas has been a success and has allowed rural America to benefit substantially from the deployment of wireless technologies. Thus, what would appear to be the stated objective of this proceeding already has been or is being achieved primarily through the operation of free markets. Market driven competition and consumer demand has fueled licensees to acquire spectrum and make facilities-based wireless competition a reality in much of rural America. As a number of commenters observed, it would ignore economic reality for the Commission to

mandate a certain minimum number of CMRS providers in rural markets or to use artificial build-out benchmarks, automatic revocations and inflexible “use or lose” spectrum take-back triggers, to achieve more spectrum “use” in rural and in non-rural markets.²

Fundamentally, there may be no economically rational means for rural markets to support as large a number of facilities-based wireless competitors as urban markets. If the Commission ultimately determines that it wants more wireless service deployment, it should consider providing explicit subsidies to wireless carriers as an inducement to enter markets with challenging service economics.³ In the competitive, non-rate regulated wireless market, carriers simply cannot build and operate where they do not have a reasonable prospect that their

² Comments of the Cellular Telecommunications and Internet Association (“CTIA”) at 2-3; Comments of Dobson Communications Corporation at 3-5; Comments of AT&T Wireless at 3-5; Comments of Cingular Wireless LLC (“Cingular”) at 2-9.

³ Nextel is not specifically advocating here the use of universal service subsidies as a policy approach to spur wireless service build-out in rural markets. The availability of subsidies, however, can create additional incentives to provide service where it might not otherwise be economic. As Christopher McClean, Acting Administrator, United States Department of Agriculture, Rural Utilities Service (“RUS”) told Congress, the “RUS telecommunications program has helped close the digital divide in rural areas. The telecommunications program has maintained an unprecedented level of loan security over the history of the program.” *Prepared Testimony of Christopher McClean, Acting Administrator, United States Department of Agriculture, RUS, before the House Commerce Committee, Subcommittee on Telecommunications, Trade and Consumer Protection, 106th Congress, Federal News Service (Mar. 16, 2000)*. Similarly, the Commission’s Schools and Libraries program has provided development funding for rural America as well as non-rural areas. *See The Success of the E-Rate in Rural America, Center for the Study of Rural America, Federal Reserve Bank of Kansas City, (Feb. 2001)* (concluding that “at this point the E-rate must be considered a success for rural America. Millions of dollars in discounts have flowed to remote areas, and advanced services are now available in small communities that might otherwise never have seen them”). Fundamentally, however, there are economic limits to the number of facilities-based wireless competitors any market can sustain. The Commission cannot change that basic reality merely by requiring build-out and service standards that cannot be sustained over the long term.

investment can be recovered. This behavior is economically rational, as the Commission has recognized in other contexts.⁴

An approach that could facilitate wireless service in rural areas is to require rural incumbent local exchange carriers (“ILECs”) to interconnect with wireless carriers to exchange traffic reciprocally on terms consistent with the Communications Act and with the Commission’s existing interconnection rules. For example, the Commission has before it a Petition for Declaratory Ruling on the practice of rural ILECs filing non-reciprocal wireless termination tariffs.⁵ Some rural ILECs even challenge their obligation to interconnect with wireless carriers

⁴ In reviewing the scope of its unbundled network element rules, the Commission recently recognized as relevant to a carrier’s decision to enter a market the economics of providing service:

In conducting our impairment analysis, we recognize that decisions on whether to enter are based not just on the cost of entry but also on the revenues to be gained. Thus, we will consider, where provided, evidence of the revenue opportunities available to those carriers that provide services over the relevant facilities, keeping in mind that competitors are able to choose which markets to enter and to avoid unattractive markets. We consider all the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell, taking into account limitations on entrants’ ability to provide multiple services, such as diseconomies of scope in production, management, and advertising.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 ¶100 (2003).

⁵ See *Petition for Declaratory Ruling* of Western Wireless Corporation, Nextel Communications, Inc., Nextel Partners, Inc., T-Mobile USA, Inc., CC Docket Nos. 01-92, 95-185, 96-98 (filed Sep. 6, 2002). This petition has been associated with the Commission’s Intercarrier Compensation Proceeding.

at all.⁶ The Commission can encourage rural wireless deployment by promptly clarifying ILEC obligations.

As the Commission considers new ways to promote the deployment of spectrum-based services in rural areas it must continue to make flexibility the hallmark of its spectrum management policies. A flexible spectrum policy would permit, but not require, licensees to allow operation of unlicensed devices on their networks. This is a far superior approach to the proposed use of “spectrum easements” that could potentially inhibit wireless broadband deployment. As several other commenters pointed out, given the currently unresolved interference issues involved in using spectrum easements, and/or unlicensed services on licensed spectrum, the Commission should not require spectrum “easements.”⁷ Given that the Commission only recently released a *Notice of Proposed Rulemaking* and *Notice of Inquiry* seeking comment on establishing an interference temperature metric to quantify and manage such interference, requiring spectrum easements would be premature.⁸

⁶ See, e.g., Petitions of Cellco Partnership d/b/a Verizon Wireless, Docket Nos. P-00021995-P-00022015 (PA Public Utility Comm’n) (setting forth the issues to be determined including whether the reciprocal compensation requirements of 47 U.S.C. §251(b)(5) and the related negotiation and arbitration process in §252(b) apply to traffic being exchanged indirectly by a CMRS provider and a rural telephone company through a third party tandem provider).

⁷ Comments of CTIA at 8; Comments of Cingular at 8-9; Comments of AT&T Wireless at 8-9.

⁸ Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, *Notice of Inquiry and Notice of Proposed Rulemaking*, ET Docket No. 03-237, FCC 03-289 (rel. Nov. 28, 2003).

II. THE COMMISSION SHOULD NOT ABANDON ITS MARKET-DRIVEN SPECTRUM POLICIES.

In evaluating what new policies would further promote the deployment of wireless services in rural areas, the Commission must first consider which of its wireless policies have a successful track record. As the Commission recognizes, “the history of the commercial mobile radio services (“CMRS”) is a positive story of technological advances making possible even greater capabilities, and increasing public demand for wireless services.”⁹ The Commission’s “hands-off” policies in the area of technical and service standards have been integral to the development and amazingly rapid deployment and consumer acceptance of wireless services. The Commission’s flexible licensing procedures and existing substantial service standards should be maintained because both allow wireless carriers to tailor their network infrastructure planning to meet the unique needs of rural consumers and rural markets.

A. Flexible Geographic Area Licensing Promotes the Public Interest.

The *Notice* appropriately recognizes that the assignment of wide area geographic licenses has enabled wireless service providers to compete in a manner that directly benefits consumers. Flexible geographic area licensing allows carriers the ability to develop innovative services and pricing plans in both urban and rural areas.¹⁰ Geographic area licensing provides the basic

⁹ Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Notice of Proposed Rulemaking*, 17 FCC Rcd 24135, ¶ 3 (2003).

¹⁰ As the *Eighth Competition Report* determined, the market for wireless services in rural areas is competitive. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eighth Report*, 18 FCC Rcd 14783, ¶¶ 12, 13 (2003) (*Eighth Competition Report*).

building blocks for regional and national service offerings as well as the flexibility for licensees to offer services where and when they are demanded.

The Commission and the public have learned much over the last 20 years about creating rational incentives for geographic area licensees to build and operate viable systems that provide licensees with some discretion on where to build facilities and what territory to serve within a licensed area. The Commission evolved its policy to become more flexible as additional service providers built facilities and began to compete more intensely with one another.

Initially, the Commission started from a duopoly market structure for cellular service, which featured site-by-site licensing and a “use it or lose it” build out requirement.¹¹ Responding to the plain demand for additional, competing commercial mobile services, the Commission provided flexibility for SMR operators to transform their site-by-site operations to digital, cellular configurations.¹² As the Commission allocated additional geographic area-based commercial wireless spectrum in the Personal Communications Services and assigned licenses through the spectrum auction process, it continued the trend towards loosening the regulatory reigns on geographic area licensee build-out obligations. The Commission wisely understood

¹¹ The Commission’s rules provided that if a licensee failed to provide 75% coverage of the CGSA within 36 months of the initial license grant the licensee would be required to reduce the CGSA to meet the 75% coverage requirement. 47 C.F.R. § 22.43(c)(5) (1991).

¹² In initially adopting a substantial service requirement, for example, the Commission concluded that such a standard “was appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services.” Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool; Implementation of Section 309(j) of the Communications Act - Competitive Bidding; Implementation of Sections 3(n) and 322 of the Communications Act, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6884, ¶ 41 (1995).

that stepping back and primarily allowing competition - and competitor self-interest - to determine the timetable and locations for service provision is a superior means to achieve service than an inflexible “use it or lose it” policy.¹³

The resulting ubiquity of facilities-based wireless services, even in rural markets, illustrates the wisdom of the Commission’s evolution to trust market forces, rather than rigid regulation, as the mechanism to determine the “right” number of competitors in a given market. This is particularly important for rural markets -- the Commission has recognized that, due to economies of scale in wireless networks and lower population densities, the efficient number of providers in rural areas is naturally fewer than the number of providers in urban areas.¹⁴ Nevertheless, studies indicate that the average price of mobile telephone service in rural areas appears to be very similar to the average price in urban areas, despite the smaller number of competing providers.¹⁵

Given the enormous success of licensed wireless services in rural areas, the Commission must make plain what further objectives it seeks to achieve in rural areas before it can craft well tailored policies. The Commission should consider carefully whether what it is trying to achieve

¹³ Only a single commenter, the National Telecommunications Cooperative Association (“NTCA”), advocated a “keep what you use” approach for large geographic areas. Comments of NTCA at 9-10. This approach would be at odds, however, with the free market and competitive principles that have allowed CMRS providers to expand their service offerings to consumers. The Commission should be working toward reducing such heavy-handed regulations, not creating new ones.

¹⁴ *Notice* at ¶ 7.

¹⁵ *Eighth Report* at ¶ 13. This would appear to satisfy one of the central goals of the Commission’s universal service policy – that rural consumers have the same access to services at comparable rates as urban consumers.

is realistic and be sure that any new policies do not unwittingly erode the necessary investor confidence so critical to continued licensed service deployment in rural markets. As Cingular correctly observed in its comments, “[r]ather than adopt regulations that may require carriers to act inefficiently, the Commission should eliminate barriers to the effective functioning of the marketplace.”¹⁶

B. A New Spectrum Take-Back Policy Could Freeze Investment.

As noted above, the *Notice* reviews the evolution of the Commission’s commercial wireless wide area licensee construction criteria and notes that its cellular rules featured a “use it or lose it” approach to build-out. Under this later-discarded regime, the cellular licensee lost the license area that it failed to cover with a particular signal strength within an appointed time after the Commission had awarded the cellular license. While the licensee still could apply to participate in a later lottery to regain the “fill-in” rights to the lost area, new parties could come in, build a nonviable small system, and the existing operators had, as a practical matter, to accommodate it by co-channel coordination procedures and roaming arrangements.

The “use it or lose it” model of taking back spectrum does not convince licensees or investors that the licensee has a reasonable period of time and opportunity to “protect” unserved areas from encroachment by third parties. In designing any new spectrum use policy, the Commission should recall the cellular “fill-in” experience and not encourage the deployment of “nuisance” non-viable systems that are built solely to be acquired. Similarly, and as many commenters noted, the proposal to audit rural spectrum use seems to be misplaced.¹⁷ Because

¹⁶ Comments of Cingular at 4.

¹⁷ Comments of CTIA at 7-8.

basic economics drives the use of spectrum in rural areas, spectrum will not be used as intensively as in non-rural markets. Thus, audits coupled with a take-back program, if appropriate anywhere, would appear to be better suited for use in non-rural markets.¹⁸

The current regime, which in many cases already provides carriers with a substantial service alternative to the more rigid build-out performance benchmarks, provides licensees with flexibility and greater spectrum access certainty. If a licensee cannot build out over time, leasing, partitioning or disaggregation are all strategies that allow it to transfer the spectrum use rights that it presumably paid for via a spectrum auction to another willing licensee. The Commission should trust the market, and not micromanage by mandating a range of “spectrum access” options that look more like the type of “forced access” that the Commission rejected in the context of multiple Internet Service Providers (“ISPs”) access to cable modem transmission capacity.¹⁹ A regime that effectively forces carriers to make spectrum available to particular uses or users would diminish the incentives of carriers to deploy and exploit their services.

¹⁸ There is no real spectrum shortage in rural America, only an economic challenge to sustaining numerous facilities-based competitors. Thus, spectrum audits would serve no useful purpose. They could well spur providers to demonstrate temporary coverage to pass an audit, rather than allow providers the flexibility they need to grow their coverage in rural markets over a reasonable period of time.

¹⁹ See, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd 9816 (2002) (finding insufficient evidence to support the imposition of an “open/forced access” requirement on the merged cable entity given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband services over the cable infrastructure).

C. Infrastructure Sharing Arrangements Can be Beneficial, But New Commission Policies Are Not Necessary at This Time.

The *Notice* observes that rural areas may be prime markets for forms of infrastructure sharing and asks what, if anything, the Commission should do to streamline its rules or processes that affect infrastructure sharing.²⁰ From Nextel's perspective, the Commission's rules and policies do not impede the formation or implementation of infrastructure sharing arrangements and thus, no change in the Commission's basic approach or philosophy is necessary. Infrastructure sharing arrangements may promote deployment of wireless services in rural markets. However, when such arrangements are beneficial, the Commission can rely upon carriers to determine that for themselves.

Nextel's experience is that infrastructure sharing arrangements are entirely market-driven. It is challenging for carriers to work through complex logistics to reach an agreement to support sharing and that is the reason that infrastructure sharing arrangements are not more widespread today. Commission pronouncements making plain that infrastructure sharing arrangements are not antithetical to Commission competition policies may assist parties in understanding what might be an acceptable arrangement. However, the Commission should not seek to redefine existing wireless business models solely to encourage sharing. Rather, it should allow evolution in that direction if that is where the market is leading. Ultimately it is the market that will dictate the circumstances in which infrastructure sharing arrangements would be prudent.

²⁰ *Notice* at ¶¶ 100-108.

D. The Commission Should Reject the Wholly Self-Serving Proposals of Millry and UTStarcom.

In their comments, the Millry Corporation (“Millry”) and UTStarCom, Inc. (“UTStarcom”) respectively argued that the FCC should dictate the terms of roaming and spectrum leasing arrangements so that rural ILECs and small operators have greater leverage over larger providers and thus greater access to spectrum or more favorable roaming terms. Millry argued that rural carriers cannot invest substantial dollars in rural infrastructure build-out only to see their facilities predominantly utilized by roamers from nationwide carriers.²¹ Thus, Millry stated, without much explanation, that the FCC should ensure that roaming agreements are designed to ensure that rural ILECs can offer wireless services comparable to nationwide wireless carriers. UTStarcom suggested that the Commission should require rural wireless licensees to lease certain portions of their spectrum because, as UTStarcom argued, certain CMRS carriers refuse to “relinquish spectrum easily.”²²

Any such additional regulatory requirements would not only be a departure from the very free-market and competitive policies that helped to make wireless service a reality for millions of rural Americans, but they would also hinder the very objective of this proceeding – the further deployment of spectrum-based services in rural areas. Millry and UTStarcom have jumped to entirely self-serving regulatory solutions before identifying any real problem. Roaming agreements have historically been, and should continue to be, market driven.²³ The terms of

²¹ Comments of Millry at 2.

²² Comments of UTStarcom at 9.

²³ In deciding to eliminate its analog compatibility requirement, the Commission noted that “[t]he choice to switch from analog to digital technology, as well as the rate at which the

(continued...)

roaming agreements are arrived at by the negotiating carriers. Without concrete evidence of market failure, no Commission action to prescribe the terms of roaming or leasing agreements appears to be necessary.

III. THE COMMISSION'S NEW SECONDARY MARKET POLICIES MUST BE IMPLEMENTED FULLY BEFORE NEW POLICIES CAN BE CONSIDERED.

The Commission is in the midst of a very significant endeavor to inject new life into the market for spectrum through its new leasing and flexible use policies.²⁴ Its new rules will take effect in February and April and parties then will have opportunities to enter *de facto* control leasing arrangements that would have put CMRS licenses in jeopardy under the prior *Intermountain Microwave* regime. Given the very recent adoption of these rules and the pendency of the *Further Notice* in Secondary Markets, however, it is far too early to determine the success of the new secondary market policies and whether the Commission reasonably should take additional steps, such as the introduction of spectrum easements for new licenses, to encourage more intensive spectrum use. As the Spectrum Policy Task Force Report recommended, the Commission should first focus on the results of its secondary markets policies

(..continued)

transition occurs, are business decisions made by the individual carrier. *Such determinations, as well as any decisions regarding roaming, are today being market driven. . . a carrier's choice of digital technology is a business decision and any roaming problems that arise are a result of business decisions.*" Year 2000 Biennial Regulatory Review--Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, 17 FCC Rcd 18401, ¶ 15 (emphasis added).

²⁴ Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Deployment of Secondary Markets, *Further Notice of Proposed Rulemaking*, WT Docket No. 00-230, FCC 03-113 (rel. October 6, 2003). See Comments of Nextel Communications, Inc., WT Docket No. 00-230 (filed Dec. 5, 2003).

as its primary vehicle to increase spectrum access before seriously considering any easement requirement.²⁵

The goal of more intensive spectrum use should be left to the parties that have the greatest interest in developing and exploiting the spectrum resource they hold – that is the wireless licensee. The process of carving out spectrum easements could directly undermine the interest and perhaps the ability of rural as well as non-rural licensees to secure financing and a business base to support build-out and viable operation. The Commission should not be seeking to inject itself into carriers’ decisions about how they provide service and effectively to compel carriage of unlicensed users. That is not flexibility, it is over-regulation that smacks of the resale regulation and other regulations of that type that the Commission very deliberately phased out in the CMRS market based upon the competitiveness of the market.²⁶

IV. CONCLUSION

Rural wireless service deployment is a great success story and there is no obvious and persistent underservice of rural markets by licensed wireless carriers. As the Commission considers new alternatives to promote access to spectrum-based services in rural areas, it should be careful not to depart from the flexible construction and operation rules it has applied to CMRS

²⁵ Notice at ¶ 30.

²⁶ The Commission eliminated its wireless resale rule, formerly Section 20.12, which prohibited CMRS providers from unreasonably restricting resale of their services. The rule sunset on November 24, 2002. See Notice Commencement of Five-Year Preceding Termination of Resale Rule Applicable to Certain Covered Commercial Mobile Radio Service Providers, *Public Notice*, 13 FCC Rcd 17427 (1998). When the Commission’s sunset of this rule was appealed, the court agreed that the rule was properly sunsetted because the prohibition of resale restrictions would no longer be required to ensure competition as competitive market forces took hold, thereby eliminating the need for the policy. *Cellnet Comm., Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998).

operators in rural and non-rural markets. This policy has delivered demonstrable public benefits, including the current effective wireless competition and aggressive pricing plans that are available in rural as well as urban markets. Unnecessary restrictions on or curtailments of a licensee's ability to deploy and operate would not serve any of the stated objectives in the *Notice*.

The Commission cannot ignore the economics of rural service deployment; it cannot reasonably expect that licensees can or should build out and operate in markets that are not economically viable for more than a few competitors. Creating mandatory spectrum easements, as opposed to permitting licenses to strike deals with unlicensed users as to the terms of spectrum access, would discourage new licensee investment and undermine investor confidence and financing to permit continued build-out of licensed service in rural areas.

Respectfully submitted,

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