

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

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

**Comments**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) respectfully submits comments in the above-referenced proceeding, designed to encourage the development of secondary wireless markets.<sup>1</sup> Advocacy supports the FCC’s efforts, and believes a thriving secondary market may provide opportunity for small businesses and may help reduce fallow spectrum. Advocacy encourages the FCC to require licensees to maintain control over licenses they lease to other parties, and agrees that the standards for defining control developed in *Intermountain Microwave* and its progeny should not apply to the leasing of wireless spectrum.<sup>2</sup> Advocacy opposes applying unjust enrichment provisions<sup>3</sup> to the leasing of spectrum by designated entity licensees: leasing spectrum is fundamentally different from selling it and does not evidence a motive to speculate in spectrum markets.

Advocacy urges the FCC to continue to hold wireless licensees responsible for the proper use of the spectrum by lessees. The FCC also should pursue means of holding lessees

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<sup>1</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking*, WT Docket 00-230, FCC No. 00-402, released November 27, 2000 (“NPRM”).

<sup>2</sup> A series of cases beginning with the FCC’s decision in *Intermountain Microwave*, 12 FCC 2d 559 (1963), laid forth a series of criteria for judging whether a licensee in fact controls its license.

<sup>3</sup> The FCC’s rules require the repayment of designated entity bidding credits in certain circumstances, such as transfer of control of the spectrum license to an entity that is not itself eligible for designated entity status. See 47 CFR § 1.2111(d).

responsible for compliance with FCC rules and policies governing the spectrum they use. This could involve requiring due diligence by licensees and should involve contractual lease terms that require lessee compliance with FCC rules. Advocacy agrees that the *Intermountain Microwave* standards for defining control should not apply to leasing wireless spectrum, in light of the FCC's policy to promote flexible use of spectrum.<sup>4</sup> In this context, control should contemplate something short of day to day management, but any number of the FCC's ideas on the subject might work, including due diligence requirements, specific contractual language, even limits on lease duration.

Advocacy urges the FCC to avoid applying unjust enrichment provisions to the leasing of spectrum by small business licensees, even if the lessee would not have qualified for small business bidding credits. Leasing spectrum is fundamentally different from selling a license. In leasing, the licensee maintains ultimate control of the license and is using the spectrum for legitimate business purposes. The licensee that has no continued interest in its spectrum would be more apt to sell its license, an arrangement likely to yield more profit. In instances where the licensee is using some portion of its spectrum to provide service, leasing excess capacity is even less likely to involve the kind of unfair "cashing in" that the FCC's unjust enrichment provisions guard against. In leasing, the licensee may regain operational control of the spectrum, and the FCC is free to set limits on lease duration and lease renewal to assure this occurs. The FCC also can define control, to assure the licensee maintains an appropriate continuing interest in the license and does not affect an unauthorized transfer of control.<sup>5</sup>

An analogy to the leasing of Instructional Television Fixed Service ("ITFS") spectrum

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<sup>4</sup> See *NPPM*, paragraph 76.

<sup>5</sup> The Communications Act of 1934, as amended, requires licensees to seek FCC permission to assign a license or transfer control of a license, usually in the context of acquisition of radio properties. Unauthorized transfers of control may be penalized. See 47 U.S.C. § 310(d).

may be instructive, in terms of maintaining licensee control over the spectrum and in terms of preserving licensee obligations and privileges. The FCC imposes programming obligations on ITFS licensees, which must use their spectrum for educational purposes.<sup>6</sup> Yet ITFS licensees routinely lease their excess capacity, in many cases the lion's share of their spectrum, to "wireless cable operators" to use for commercial non-educational purposes. This relationship does not jeopardize the licensee's legal ability to hold the license, however, because the licensee is still able to meet its minimum programming obligations and maintains a level of control over the spectrum that prevents improper use by the wireless cable operator.<sup>7</sup>

The lease of wireless spectrum by a small business licensee can be viewed similarly. The small business received FCC assistance, in the way of bidding credits, in obtaining the valuable spectrum. The small business is expected to use this spectrum to provide competitive wireless services, thus upholding its end of a bargain that fulfills Congress's intent that the FCC disseminate licenses among a wide variety of entities.<sup>8</sup> The small business is not expected to speculate in the wireless spectrum market, waiting for its license to increase value, and then sell it for a windfall profit made possible by the spectrum's originally 'discounted' price. If a small business engages in such behavior, the FCC can justly require return of its bidding credit.

A licensee's choice to lease its spectrum rather than sell it likely involves motives other than a desire to speculate. This licensee is likely in a different circumstance, and is probably planning to use its spectrum in the development of a wireless business. Perhaps initially this licensee is unable to use all or even most of its spectrum. Perhaps it can better afford to provide service in combination with other businesses. Perhaps the licensee can ease high start-up costs

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<sup>6</sup> See 47 CFR §§ 74.931 and 74.932.

<sup>7</sup> See 47 CFR § 74.931(e).

<sup>8</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, PP Docket No. 93-253 (1994).

associated with operating portions of its spectrum to serve the public by initially leasing unused portions. The licensee's choice to retain the license in these circumstances will be motivated by the long-term desire to provide service, and probably by a short-term desire to provide service as well. This is fundamentally different from the decision to cash in on increased spectrum value, and the FCC should treat it differently.

Rather than inquire into each situation, the FCC's policy toward leasing should be to forego unjust enrichment treatment of leases, so long as the licensee retains sufficient control as to evidence continuing interest in the spectrum license and as to avoid an unauthorized transfer of control. Licensees, including small businesses, should be expected to control their licenses and satisfy any other obligations the FCC imposes, in order to continue to enjoy the privilege that comes with holding the licenses. If the licensee maintains control of its license and satisfies its other licensing obligations, a spectrum lease will not affect a transfer of control that should be subject to unjust enrichment limitations.

### **Conclusion**

In the absence of a transfer of control, the small business licensee choosing to lease a portion of its spectrum is not "cashing in", but is using its spectrum for a legitimate business purpose entirely consistent with its continued interest in the license. This is not unjust enrichment and the FCC should not treat it as such. Rather, the FCC should encourage the development of secondary wireless markets, through spectrum leasing. This may reduce the instances in which licensees permit spectrum they are not using to lie fallow and may encourage provision of service to the public.

Respectfully submitted,

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