

**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)

To: The Commission

COMMENTS OF PACIFIC WIRELESS TECHNOLOGIES, INC.

Pacific Wireless Technologies, Inc. (“Pacific”), by its counsel and pursuant to the provisions of section 1.415 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), 47 C.F.R. § 1.415 (2000), hereby submits its comments responsive to the *Notice of Proposed Rule Making* (“*Notice*”)¹ in the above-captioned proceeding. For the reasons set forth more fully below, Pacific urges the Commission to adopt regulations or policies permitting spectrum leasing. Adopting a spectrum leasing regime will ensure that licensees and non-licensees have the flexibility to meet their respective spectrum requirements in the most efficient manner possible.

I. Background.

Formed in late-1999, Pacific is new entrant in the commercial mobile radio service (“CMRS”). Pacific provides 800 MHz Specialized Mobile Radio (“SMR”) two-way mobile telephony, data, and dispatch services using Motorola’s digital iDEN technology. Pacific is the third iDEN carrier in the United States. Pacific serves approximately 15,000 customers, with a current coverage area covering most of northern and southern California’s coastal areas (from Santa Rosa to

¹ *Notice of Proposed Rule Making*, WT Docket No. 00-230, FCC 00-402, rel. Nov. 27, 2000.

Santa Barbara), as well as California's central valley (from Bakersfield to Redding). Pacific uses a unique version of iDEN service, employing a "high tower-high power" design to offer coverage in the more remote areas of California. High tower-high power works well in the mountainous and coastal areas served by Pacific, and also reduces its infrastructure costs so that it can compete with entrenched wireless competitors.

Like many wireless carriers, Pacific is concerned that there may be insufficient spectrum for it to meet the needs of its customers. Spectrum leasing is an ideal mechanism to address spectrum shortages and inefficiencies. In the past, Commission rules and policies may have either unnecessarily or unintentionally restricted a licensee's ability to engage in spectrum leasing. Because Pacific may wish to use the excess capacity (whether full or partial) of licensees who do not require all of the capacity of their systems, Pacific strongly supports the Commission's efforts to make spectrum leasing available. Pacific is, therefore, pleased to have this opportunity to submit these comments.

II. Discussion.

A. *Pacific Strongly Supports the Commission's Proposed Spectrum Leasing Policies*

As the Commission recognizes, spectrum leasing policies will promote more efficient use of the spectrum and facilitate the deployment of new technologies and services "while ensuring that the needs of the public are served." *Notice at ¶ 19*. Successful spectrum leasing regimes already exist in other services. *Notice at ¶ 16*. As evidenced in a similar proceeding, many wireless industry licensees support flexible spectrum leasing policies.² Accordingly, the Commission should act quickly to create a secondary market for spectrum in all wireless services.

² See *Request for Clarification of De Facto Control Policy and Proposed Spectrum Lease Agreement*, Public Notice DA 00-1953, rel. Aug. 24, 2000. The overwhelming majority of comments submitted in that proceeding endorsed spectrum leasing.

The Commission asks whether it is necessary to license “band managers” to lease spectrum. *Notice at ¶ 22.* Pacific disagrees with this approach and recommends that the Commission allow all licensees to lease their unused spectrum. Pacific agrees that, except as discussed below, the general rules applied to band manager leasing should be applicable to the spectrum leasing arrangements contemplated by the Commission in this proceeding. However, all licensees can comply with the procedures applicable to band managers. Requiring the creation of a new class of licensee (particularly for already allocated spectrum) would cause needless regulatory burdens, as well as unnecessary delay in implementing a spectrum leasing policy.

B. *The Commission Should Adopt Minimal Restrictions on Spectrum Leasing Arrangements*

The Commission proposes allowing licensees to lease all or a portion of their spectrum subject to certain restrictions. *Notice at ¶ 79.* Under the Commission’s proposed restrictions, a licensee must (1) retain full responsibility for a lessee’s compliance with the Commission’s rules and the Communications Act of 1934, as amended (“the Act”); (2) certify that the lessee meets the Commission’s eligibility requirements, as well as complies with service and technical rules; and (3) reserve the authority to take “enforcement” action in the event of non-compliance with the Commission’s rules or the Act. *Notice at ¶ 79.* Pacific generally supports these restrictions, but urges the Commission to take an expansive approach to permitting entities to lease spectrum for which they may not be eligible for licensing.

1. Licensees Should Have the Ultimate Authority for Lessees’ Compliance with the FCC’s Rules. Under the Commission’s proposal, a licensee would retain ultimate responsibility for ensuring that lessees comply with the Commission rules, in addition to the requirements of the Act. These rules include interference, frequency coordination, and other technical regulations. Pacific supports this requirement. Applying the Commission’s rules directly to lessees would cause an

enormous administrative burden, especially for short-term leases or arrangements. These administrative burdens may discourage carriers from entering leasing arrangements, thus undermining the Commission's goals. Moreover, as explained below, formulating a spectrum leasing procedure under which the licensee retains responsibility for the lessee's actions also reduces concerns that the lessee has assumed *de facto* control of the leased facilities, in potential violation of the FCC's regulations and the Act.

2. The Commission Should Not Require Lessees to Comply With All the Rules Applicable to the Leased Spectrum. The Commission would also require a licensee that leases spectrum to certify that each lessee meets the Commission's technical and service rules and the applicable eligibility requirements. *Notice at ¶ 79.* By requiring that lessees meet all applicable requirements, the Commission asserts that there would be a reduced possibility of carriers using spectrum leases to evade other Commission's policies,³ especially the Commission's ownership limitations. However, as the Commission notes, this proposal may impede the development of spectrum leasing arrangements. *Notice at ¶ 43.* While Pacific supports applying the appropriate technical rules to lessees as a means to avoid the degradation of the operations of co-channel and adjacent channel licensees, it believes that the Commission should not necessarily require a lessee to comply with all of the eligibility and service rules of the original licensee. The Commission particularly notes that licensee of channels in the 800 and 900 MHz Business and Industrial/Land Transportation ("B/ILT") pools would not, under its proposal, be able to lease their spectrum to SMR licensees, who would otherwise not be eligible to secure licensing for B/ILT spectrum. *Notice at ¶ 46.*

³ Examples of such situations include: (1) a small business auction winner that secured auction benefits that intends to lease spectrum to an entity that does not qualify for those benefits or the same level of benefits; (2) an entity leasing spectrum that has associated eligibility restrictions to an entity that does not meet those requirements; and (3) an entity leasing spectrum to an entity that would otherwise exceed the spectrum cap or other similar limitation if directly licensed the spectrum.

The Commission's concerns regarding eligibility are better addressed during the initial licensing process than as a limitation on leasing. For example, if the FCC wishes to ensure that entities do not secure B/ILT licenses for the purpose of leasing that spectrum for commercial purposes, the Commission should examine a licensee's qualification at the time it submits an application for B/ILT channels. Once a properly authorized B/ILT licensee secures an authorization, it should not be impeded from leasing spectrum for which it no longer has a requirement.⁴ Moreover, as the Commission notes, it has more recently adopted flexible service rules, allowing licensees to provide the type of service that they believe most appropriate. *Notice at ¶¶ 90, 91.* Accordingly, the Commission should permit spectrum leasing without regard to service restrictions.

However, a lessee should be required to comply with the service rules of the licensing category in which it (and not the licensee) is authorized. Accordingly, if an SMR licensee that was also regulated as a CMRS provider leased B/ILT spectrum, it should not be able to avoid the obligations associated with being a CMRS carrier simply because some of the spectrum over which it offers CMRS capability is licensed to a private mobile radio service ("PMRS") licensee.

The Commission should impose minimal, if any, requirements on licensees to verify their lessees' compliance with the applicable regulatory and statutory requirements. Rather, the licensee should be permitted to use its leasing agreement to ensure the lessee's compliance. A lease agreement containing provisions that require the lessee to comply with the Commission's rules and accept Commission "oversight and enforcement" or lease provisions specifying the technical

⁴ Similarly, the Commission should examine carefully whether entities are qualified as small business when they seek FCC authorizations. If, after they seek authorization (and it is clear that there is no pre-existing arrangement), they wish to lease spectrum, it would certainly be in the public interest for an entity to be able to use the spectrum, rather than having the spectrum remain unused.

parameters of using the license should alleviate the Commission's concerns regarding a lessee's compliance. Ultimately, licensees should be allowed to accept, and rely upon, certifications of compliance from their lessees. Requiring a licensee to conduct "due diligence," *Notice at ¶ 30*, would increase the burdens associated with spectrum leasing, thus decreasing the likelihood of carriers entering into spectrum leasing arrangements.

3. A Licensee Should Have Full Authority to Take Enforcement Action in the Event of Non-Compliance with the FCC's Rules. Pacific agrees that a licensee must retain the "full authority to take all actions necessary in the event of [a lessee's] noncompliance." *Notice at ¶ 79*. Pacific supports the proposal that licensees be permitted to suspend or terminate the lessee's operations, or the entire leasing arrangement, if the lessee does not comply with the applicable rules and statutory provisions. Moreover, as the Commission recognized, *Notice at ¶ 32*, the best method of accomplishing this capability is to add such language to the lease agreement. Pacific agrees that any contractual disputes arising out of the lease agreement should be resolved in the same manner as other commercial disputes arising under contracts, and not before the FCC. *Notice at ¶ 34*.

C. *The Intermountain Microwave Criteria are Inapplicable to Spectrum Leasing*

As the Commission correctly recognizes, the criteria set forth in the *Intermountain Microwave*⁵ decision should not apply in the spectrum leasing context. *Notice at ¶ 74*. The Commission's proposal, as outlined above, is "sufficient to ensure that a licensee retains control of the license for purposes of Section 310(d)."⁶ *Notice at ¶ 80*. In general, lease agreements do not constitute a transfer of control and should not require prior approval under the Act. If the licensee retains ultimate control of the licensee, as Pacific suggests that it does, a spectrum lease does not constitute a transfer of control because the licensee retains the "title" to the license.

⁵ *Intermountain Microwave*, 12 FCC 2d 559, 25 RR 983 (1963).

⁶ 47 U.S.C. § 310(d).

If the Commission nevertheless decides that Section 310(d) requires licensees to obtain Commission approval before entering into spectrum leasing arrangements, it should make a blanket determination that such “transfers” are in the public interest. *Notice at ¶ 81*. Moreover, these “transfers” should be granted automatically, provided that the licensee has complied with the restrictions set forth above.⁷ In addition, the Commission should refrain from requiring the use of “short form” notification procedures, *Notice at ¶ 81*, as this extra regulatory burden may impede the use of spectrum leasing.

III. Conclusion.

Pacific urges the Commission to adopt its spectrum leasing proposal subject to the recommendations specified herein. Spectrum leasing will ultimately ensure that wireless providers have the additional spectrum needed to meet their customers’ demands both today and in the future.

Respectfully submitted,

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CERTIFICATE OF SERVICE

⁷ As the Commission notes, this type of procedure has been used in other circumstances. *Notice at ¶ 81, n.121.*

I, Angela Collins, of Mintz, Levin, Ferris, Glovsky & Popeo, P.C., certify that I have, this 9th day of February, 2001, caused a copy of the foregoing "Comments" to be served upon the following by prepaid U.S. mail:

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