Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Promoting the Efficient Use of Spectrum	)	**WT Docket No. 00-230**
Through the Elimination of Barriers to the	)	**FCC 00-402**
Development of Secondary Markets	)	

COMMENTS OF THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative (NTCA)[1] hereby submits these comments in response to the Federal Communications Commission's ("Commission's" or "FCC's") Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.[2]

I LEASING MAY PROMOTE AND IMPROVE THE DEPLOYMENT OF SPECTRUM-BASED SERVICES TO RURAL AMERICA.

NTCA applauds the Commission's efforts to remove regulatory barriers to the development of secondary markets in spectrum usage rights. As the FCC recognizes, spectrum often lies fallow, particularly in rural areas. Large carriers with spectrum covering large geographic service territories tend to concentrate their build out efforts on the profitable urban centers. Small and rural carriers that are interested in obtaining spectrum to provide service to the neighboring rural areas are often stymied in their efforts.

NTCA believes that leasing has the potential to improve the development of spectrum-based services in rural areas. Simple leasing rules, however, are needed to

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1 NTCA is a national association of more than 500 rural incumbent local exchange carriers (ILECs). These ILECs provide telecommunications services to end-users and interexchange carriers (IXCs) throughout rural and small-town America. NTCA members are typically small carriers that serve no more and 50,000 access lines. All of NTCA's members are included in the definition of a "rural telephone company" as defined by the Telecommunications Act of 1996 and many hold wireless licenses.

accomplish this. Previous small carrier experiences with partitioning spectrum demonstrates that the well-heeled licensees of large geographic areas are not interested in negotiating with smaller carriers where there is no financial penalty attached to their retaining uncultivated spectrum in sparsely populated areas.

Recent policies and rules adopted by the Commission governing spectrum auctions have made it increasingly difficult for small and rural carriers to obtain spectrum. Large geographic service territories are usually out of economic reach of small carriers and the large carriers that obtain the geographic areas are reluctant to partition or disaggregate the rural portion of the their license to a small carrier. The large carrier may hold on to the unused spectrum because it feels that the spectrum will be needed in the future, that the investment is worth keeping because the value will increase over time or that the benefits of a deal with small carriers is not worth pursuing despite the absence of service to rural consumers. The small carrier is left without an opportunity to provide service in the rural territory and since the large carrier is interested only in serving the profitable urban population, much of the spectrum covering rural territory lies fallow.

While the FCC's proposed rules on leasing spectrum do not relieve the Commission of its duty to provide spectrum-licensing opportunities to small and rural carriers under the Communications Act of 1934,[3] it may help to promote the deployment of spectrum-based service to rural and underserved populations. If leasing rules are straightforward

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[2] In the Matter of Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of the Secondary Markets, WT Docket No. 00-230, FCC 00-402 (rel. November 27, 2000) (*Secondary Markets NPRM*).

[3] Section 309(j)(4)(D) of the Communications Act of 1934, as amended, requires the Commission to prescribe regulations to ensure that small businesses and rural telephone companies are given an opportunity to participate in the provision of spectrum-based services. A lease arrangement, however, is merely a short-term arrangement and this goal will only be accomplished if large carriers are willing to lease out spectrum. Nothing in the FCC's current rules requires large carriers to lease their spectrum. The

and flexible, easy to administer, and allow the FCC to efficiently identify third party lessees for enforcement purposes, large carriers are likely to be less reluctant to lease out usage rights for the unused portion of their spectrum compared to their reluctance to partition or disaggregate their licenses.

In addition to providing carriers with an opportunity to lease spectrum covering rural territories, new leasing rules should be written in a way that provides rural carriers with new incentives to participate in the spectrum auctions. In view of the trend to license only large areas beyond the reach of small entities, small carriers are unable to participate in most auctions unless they are part of a consortium or obtain substantial backing from larger entities. Some individual small carriers or bidding consortiums of small carriers may have the financial capability to compete with a larger carrier at auction, but then lack the finances to build out a system covering the entire geographic service territory. Or, they may be only interested in serving a rural portion of the service territory, and cannot justify spending the money to purchase rights to the entire large geographic territory.

Leasing may allow competition and participation in the auctions by small and rural carrier groups with financial ability to purchase the right to spectrum covering their rural territories. These carriers can then concentrate their build out efforts on providing service to the rural territories, and lease out the remaining spectrum. This scenario has the added advantage of possibly providing rural carriers with much needed additional capital to contribute to their build out efforts, while preserving their flexibility to move into the non-rural portion of the service territory at a future date, should they so desire. The FCC

Commission should therefore also be looking at additional ways to provide licensing opportunities to rural telephone companies.

should allow parties to freely apportion the responsibilities, obligations, and restrictions associated with leased spectrum.

Moreover, spectrum leasing may benefit small or rural carriers with neighboring licenses and similar system design plans. A group of small carriers that lacks the ability to build out and operate several individual systems may be able to band together and create one managing company to operate the individual licenses as one system, leasing spectrum to that company. The individual companies may thus take advantage of economies of scale and create a much more efficient operating system. There could be one manager, one set of employees and one set of equipment. Additionally, the larger system would have more purchasing power and influence and may get the manufacturer to address its particular needs to provide service to a rural area on a timely basis than would a few very small rural carriers.

II THE LICENSE HOLDER SHOULD BE FREE TO NEGOTIATE THE RESPONSIBILITES, OBLIGATIONS, AND RESTRICTIONS ASSOCIATED WITH LEASED SPECTRUM KNOWING THAT THE FCC MAY HOLD THE LESSEE LIABLE FOR NONCOMPLAINCE.

License holders should be allowed to execute leasing agreements that require both the lessor and lessee to comply with all applicable rules and regulations, including interference, frequency coordination, and other technical rules. License holders should also be free to negotiate the responsibilities, obligations and restrictions associated with spectrum leasing knowing that the FCC may hold the lessee liable for non-compliance. The FCC needs to recognize that if it intends to only hold the license holder liable, large companies that are license holders will not lease their fallow spectrum to smaller entities. Many carriers will not allow themselves to be held completely accountable for the actions of a lessee using their spectrum, particularly when the lessee is another carrier under the Commission's jurisdiction.

The Commission proposes that the license holder retains the ultimate responsibility for a lessee's compliance with applicable laws and FCC rules. The Commission further proposes that a license holder be subject to revocation of its license for a lessee's violations of rules or laws of which the license holder was unaware.[4] The FCC's approach to compliance would create a new barrier to leasing that would neither facilitate leasing nor increase the opportunities for small businesses and rural telephone companies to participate in the provision of spectrum-based services. License holders should not be held accountable for the acts of lessees if the Commission seriously seeks to develop an active and robust secondary market.

If the Commission has jurisdiction over the lessee, it has the authority to enforce compliance of the spectrum under the lessee's control.[5] The Commission could track carriers using spectrum, by allowing license holders to file a one page report listing the name of the license holder, lessee, the portion of the license holder's spectrum operated by the lessee, and the term of the lease agreement. Upon learning of an act of non-compliance, the Commission could quickly check its lease database to determine which entity is currently in control of the spectrum at issue. If it is determined that a lessee is in control of a non-compliant portion of spectrum, then the Commission could initiate compliance action directly against the lessee, while concurrently notifying the license holder that such action is taking place. Upon learning of an act of non-compliance by a lessee, the lessee should be given a reasonable period of time to cure any non-

[4] *Secondary Markets NPRM* at ¶¶ 27 and 32.
[5] *Id.* at ¶¶ 32.

compliance. The Commission should only take acts such as reclaiming spectrum or issuing a forfeiture if after the FCC determines that the lessee has failed to cure non-compliance within a reasonable time and the license holder through its leasing arrangement is unable to take control of the leased spectrum and bring it into compliance. In any instance where the Commission does not have authority to bring an enforcement action against a lessee, the FCC should allow the license holder a reasonable opportunity to bring the leased spectrum into compliance before facing any penalties for non-compliance. NTCA submits that this type of proposal will likely lead to a vibrant secondary market for spectrum with the proper incentive for carriers to use leased spectrum in accordance with the law.

III SMALL CARRIERS THAT ENTER INTO LEASE ARRANGEMENTS SHOULD NOT BE REQUIRED TO PAY BACK THEIR BIDDING CREDITS.

The Commission proposes reimbursement if a license holder that received bidding credits wishes to lease its rights to unused portions of its licensed spectrum to an entity that would not meet the eligibility standards for a similar bidding credit. NTCA urges the FCC to abandon this proposal. The benefit of bidding credits should follow the license holder as long as the license is in force.

The FCC's proposal to require small businesses that obtain bidding credits to repay them upon leasing is contrary to the Commission's stated goal in this proceeding. The FCC claims that it does not want spectrum to lie fallow, and yet requiring small businesses, such as rural telephone companies, to repay bidding credits would serve as a significant disincentive for carriers to be inventive about using spectrum. For example, as described above, rural carriers that individually qualify for bidding credits may band together to create third party businesses to manage all of the portions of their spectrum as a single system because of economic advantages of such arrangement. However, the economic advantages may be lost if the carriers are required to repay tens of thousands of dollars in bidding credits. The carriers are thus better served by providing the minimal amount of service necessary to retain their spectrum license or selling it to a large carrier.

The Commission is considering permitting lease arrangements, not transfers of rights in the license. Lease arrangements will not *per se* reward the license holder with greater economic benefits. Any given designated entity could reap less rather than more economic profits from leasing than from operating the license itself. The Commission should not therefore presume unjust enrichment. Lease arrangements may also end at either a pre-determined moment in time, or upon the breach of the lease contract by either party. At that point, the spectrum usage rights for the leased portion of the spectrum would revert back to the license holder that remains eligible for the original bidding credit. Under the FCC's proposal, the bidding credit would have already been refunded to the federal government. Consequently, it would be the government, not the license holder, who would be unjustly enriched.

Section 309(j) directs the Commission to prescribe regulations to ensure that small businesses, and specifically rural telephone companies, have the opportunity to participate in the provision of spectrum-based services. Requiring these small businesses to repay bidding credits is hardly encouraging participation. It would be nothing more than another roadblock in the way of small and rural carriers' efforts to provide wireless service to rural communities throughout the United States. The injection of the FCC's proposed unjust enrichment rules in this context works directly against the policy of accommodation and flexibility that the Commission is seeking to promote. If the FCC really wants to encourage designated entities to aggressively seek leasing arrangements, it should allow them to retain the benefit of the bidding credits otherwise permitted by the Commission's rules.

IV CONCLUSION

NTCA urges the Commission to allow license holders to freely negotiate the responsibilities, obligations and restrictions associated with spectrum leasing knowing that the lessee may be held liable for non-compliance. In addition, the FCC should not require small carriers that enter into leasing arrangements to pay back their bidding credits. While the FCC's proposed rules on leasing spectrum do not relieve the Commission of its duty to provide spectrum-licensing opportunities to small and rural carriers under the Communications Act of 1934, if done properly, the rules can help to promote the deployment of spectrum-based service to rural and underserved populations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in WT Docket No. 00-230, FCC 00-402 was served on this 9th day of February 2001 by first-class, U.S. Mail, postage prepaid, to the following persons

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