

EXECUTIVE SUMMARY

El Paso Global Networks Company is an emerging new market maker in the telecommunications industry. Backed by the financial strength, expertise and experience of its parent company, El Paso Corporation (which today is a major player in various energy and related commodities trading), El Paso Global is developing a bandwidth merchanting platform to provide end-to-end liquidity in the broadband industry.

The rise of secondary bandwidth markets has been facilitated by the Commission's commitment to decreased regulation over time in competitive markets. Similar success in the wireless arena is possible if the Commission exercises restraint. El Paso Corporation's success in the energy trading arena and the successes in the secondary bandwidth market can serve as prototypes.

Critical to developing a robust secondary spectrum market will be allowing licensees and lessees maximum flexibility in entering into leasing arrangements. The band manager concept should be expanded for this purpose.

While it is appropriate for licensees to be responsible for compliance with the Act and Commission rules, licensees should be permitted to rely upon lessees' (and lessees, on their sub-lessees') contractual obligations to abide by applicable laws and rules. If the Commission determines to hold a licensee or sub-lessor directly responsible for a violation, the licensee (or sub-lessor, as applicable) should be afforded reasonable notice and an opportunity to cure. The Commission should be prepared to act expeditiously in resolving any resulting disputes. Pure intermediaries should not be responsible for ensuring compliance with the Act and the Commission's rules. They are not well positioned to do so.

Except for disputes involving the interpretation or application of the Act or the Commission's rules, disputes arising under spectrum leases should be resolved by the judicial system, arbitration and other mechanisms used to resolve ordinary commercial disputes, rather than by the Commission.

The rationales for the Commission's various use restrictions may no longer be valid. In the lease context, the Commission should eliminate or avoid applying them to the maximum extent

possible to allow maximum fungibility of bandwidth. The Commission should thoroughly review its other service rules with the same purpose in mind.

Lessees' construction, service and other activities should count towards fulfillment of a licensee's obligations. To do otherwise would encourage the inefficient use of spectrum. Moreover, if leasing is permitted and the requirements are being met, it should not matter that the licensee does not meet them directly.

Where a licensee has the flexibility to choose common carrier or non-common carrier status, lessees and sub-lessees should have the same flexibility.

Licenses should be deemed to retain control for Section 310(d) purposes if they contractually require lessees to abide by Commission rules and retain full authority to reclaim spectrum in the event of a breach. If the Commission determines that leasing arrangements do trigger Section 310(d), the Commission should either issue a blanket determination that transactions in the secondary market are in the public interest or forbear from applying Section 310(d) to secondary market transactions.

The Commission should continue its recent trend toward relaxing certain of its service rules, and in particular its use rules, to encourage efficient spectrum use.

Secondary markets will be more efficient if information is readily accessible. Private sector actors like intermediaries are best suited to the task and should be encouraged.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

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

**COMMENTS OF
EL PASO GLOBAL NETWORKS COMPANY**

El Paso Global Networks Company (AEl Paso Global@), by its undersigned counsel submits these comments in response to the Commission=s Notice of Proposed Rulemaking (ANPRM@) in the above captioned proceeding.

I. INTRODUCTION

A. Description of El Paso Global Networks Company

El Paso Global is an emerging new market maker in the telecommunications industry. Backed by the financial strength, expertise and experience of its parent company, El Paso Corporation (which today is a major player in gas and related commodities trading), El Paso Global has been developing a bandwidth merchanting platform to provide end-to-end liquidity in the broadband industry. El Paso Global=s end-to-end liquidity strategy includes (1) access to deep fiber within metro markets to aggregate supply in major U.S. cities, (2) utilizing fiber rings and key points of interconnection of major carriers and service providers to allow for liquidity to develop in major markets, and (3) a high capacity, fiber efficient national long haul backbone. El Paso Global intends to overlay against this asset base a merchant based operating support system and valuation models that will allow the Company to apply the merchant skills developed in El Paso Corporation=s energy business to the

telecommunications market. Since the beginning of 2000, El Paso Global has completed more than 260 point-to-point bandwidth transactions covering approximately two billion DS-0 miles, including the industry's first bandwidth option.

For some time, El Paso Global's parent company, El Paso Corporation, through its subsidiary El Paso Merchant, LP ("El Paso Merchant"), has been a major player in the energy marketing and trading business. Just this week, it announced the opening of its new 80,000 square foot energy trading arena in Houston where El Paso Merchant will manage the Company's marketing and trading activities in commodities including natural gas, power, natural gas liquids, crude oil, refined products, and weather derivatives. El Paso Merchant also trades futures contracts and options on the New York Mercantile Exchange and trades swaps and options in the over-the-counter financial markets with other major energy merchants.

B. Summary of Position

The rise of secondary markets in fiber capacity and landline services and the resulting increased efficient use of the involved facilities would not have been possible were it not for the Commission's commitment to moving in the direction of decreased regulation, over time, of landline services. Subject to such Commission vigilance as has been appropriate to ensure that the vestiges of an old monopolistic regime do not stand in the way of competitive progress, the Commission's inclinations to let market forces reign supreme have proven effective in ensuring the efficient use of resources in the landline sector.

Similar success in the wireless arena is possible if the Commission exercises as much regulatory restraint as possible, consistent with statutory requirements. El Paso Global emphatically supports the Commission's proposals to promote the leasing of spectrum and spectrum usage rights and urges the Commission to afford licensees and their lessees and sub-lessees if any, maximum

flexibility in entering into leasing arrangements. Further, El Paso Global would urge the Commission to, by and large, permit the contractual relationships entered into by the parties to govern, consistent with the public interest.

II. OVERVIEW OF HOW SECONDARY MARKETS FUNCTION

The success of El Paso Global's parent company, El Paso Corporation, in the energy trading arena can serve as a prototype to the development of a secondary wireless arena. El Paso Global believes that among the key elements that are necessary to make commodities trading effective and efficient are:

- § standardization of agreements;
- § standardization of product;
- § fungibility of the product in question;
- § ability to make trades quickly;
- § enforceability and certainty of agreements, backed with liquidated damages for non-delivery;
- § price transparency; and
- § the ready availability of information.

The emergence of a secondary market in bandwidth can likewise serve as a prototype for the Commission's efforts here. As the Commission has acknowledged, wireline bandwidth is now being actively traded like traditional commodities such as oil, gas and grains.¹ There are, today, a number

¹ *In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement (Released December 1, 2000) (APolicy Statement@).

of companies under a variety of structures trading bandwidth capacity. See, e.g., Capacity, Issue 02, Jan. 2001, at 6, 18, 21.

III. DEVELOPING A SECONDARY WIRELESS MARKET

A. Leasing Arrangements Should be Permitted with Maximum Flexibility

Allowing licensees and their lessees maximum flexibility in entering into leasing arrangements (including as to duration and geographic scope of the lease and as to the type and amount of rights leased) will facilitate the development of a robust secondary market in spectrum thereby leading to the more efficient use of spectrum. Licensees will lease out spectrum only if they believe that they either cannot use the spectrum directly themselves or that they cannot, through direct use of the spectrum, put the spectrum to as valuable a use as can someone else. This may be the case for the long term or the short term, as to a certain portion of the geographic area covered by a license or as to the area in its entirety, in connection with raw spectrum or only excess capacity. Whatever the case (and provided of course, that the spectrum will be used consistently with the Commission=s rules), it is in the public interest to ensure that the spectrum is most efficiently used, whether by the licensee or by another party.

Spectrum lessees should be afforded maximum flexibility to enter into sub-lease or downstream leasing arrangements.² Such arrangements would, of course, be subject to any contractual restrictions and/or obligations imposed upon the lessee by the licensee, including provisions requiring the lessee to comply with applicable laws and rules.

The band manager concept can be expanded and modified to facilitate this process. First, consistent with the Commission=s goal of promoting the most efficient use of spectrum in each

² Unless otherwise specifically indicated, all references herein to leases and lessees include any and all downstream sub-leases and sub-lessees.

circumstance, the Commission should avoid effectively tying band managers' hands by disallowing their use of spectrum for their own primary business purposes. Should a band manager conclude in a particular instance that retaining the use of some portion of the spectrum for its own direct business purposes reflects a more effective and efficient use of such spectrum, the band manager should not be prohibited by Commission rules from doing so. Second, it should be made clear that anyone along the leasing chain (be it a licensee, a lessee or a sub-lessee) is permitted to function as a band manager.

B. Responsibility for Compliance with the Act and Commission Rules

1. Licensees' and Sub-lessors' Responsibilities for Compliance with the Act and Commission Rules

While it is, of course, appropriate for licensees to be responsible for compliance with the Communications Act of 1934, as amended (the "Act") and Commission rules, they should be permitted to discharge such responsibility in a manner consistent with the workings of an effective market. Specifically, where a licensee is not the user of spectrum or specific spectrum rights, the licensee should, in connection with such spectrum or spectrum rights, be permitted to rely in the first instance upon its lessees' (and its sub-lessees') contractual obligations to abide by applicable laws and rules in the use of such spectrum or rights. Sub-lessors should, in turn, be able to rely in the first instance upon their sub-lessees' contractual obligations to abide by applicable laws and rules in the use of spectrum or rights. As between the actual user (be it a lessee or a sub-lessee) of spectrum or spectrum rights and a non-using licensee or sub-lessor, the user is clearly in the best position to avoid violations of the Act or the Commission's rules. Given that reality, El Paso Global believes that the Commission would be undermining the operation of the market it seeks to create if it enforces its rules in such a way as to afford users the rights but not the responsibilities inherent in the use of leased spectrum or spectrum rights. Furthermore, as a practical matter, if non-using licensees and

sub-lessors were required to bear the entire risk of and responsibility for violations arising out of circumstances which they could not directly control, they would be forced to reflect such risk allocation in the pricing and/or other material terms of such leasing arrangements. This, in turn, would make such arrangements less palatable to prospective downstream lessees, thereby undermining the development of the secondary wireless market.

To the extent that the Commission determines to hold a licensee or sub-lessor directly responsible for a violation of the Act or its rules by its downstream lessee, such licensee or sub-lessor should be afforded reasonable notice and an opportunity to cure the violation before any punitive Commission action is taken. In addition to being in the best position to avoid a violation of the Act or the Commission's rules in the first place, the user is also in a far better position than is the licensee or the sub-lessor to be aware of and to correct a violation if one occurs. By contrast, even the most vigilant of licensee or sub-lessor may not (and, in many instances, probably will not) learn of a violation until notified of the same by the Commission or another third party. While it is appropriate to require such licensee or sub-lessor to take reasonable steps once it receives such notice to try to put an end to the violation through the enforcement of contractual provisions, it would not be appropriate or reasonable to penalize the licensee or sub-lessor for a violation of which it has no prior knowledge and has had no reasonable opportunity to try to cure. To do otherwise would be to essentially require a licensee or sub-lessor to be its downstream lessee's guarantor. Such a strict liability standard would likely render too high the costs of entering into leasing relationships -- not only for the licensee or sub-lessor which would now be forced to undertake big-brother-like oversight of its downstream lessee's business operations, but also for the average law-abiding downstream lessee which would be faced with the prospect of enduring such unusual interference in its day-to-day operations.

In those instances in which a licensee or sub-lessor is or becomes aware of a violation of the Act or the Commission's rules and acts to cure such violation, the Commission should be prepared to rule with expedition on any contractual disputes that arise therefrom. As discussed in Section III.C., below, disputes concerning whether a lessee is complying with the Commission's rules and the Act are probably the only category of contractual disputes which the Commission should have a hand in resolving. The licensee or sub-lessor may have to take action under these circumstances which the downstream lessee will find objectionable -- including, where warranted, reclaiming the spectrum or otherwise disallowing the downstream lessee's access to the spectrum or spectrum rights. In instances in which the downstream lessee does not agree that a violation of the Act or rules is occurring, the downstream lessee is likely to claim breach of the agreement if the licensee or sub-lessor follows through with such action. It will therefore be important that the Commission be poised to act quickly to resolve such disputes to avoid placing the licensee or sub-lessor in this type of double bind.

2. The Commission Should Recognize That There is a Role for Intermediaries

Pure intermediaries should not be responsible for ensuring compliance with the Act and the Commission's rules. Instead, that responsibility should be placed, as discussed above, upon the licensees and users of the spectrum. As the Commission acknowledged in its Policy Statement, an important element of the effort to foster robust secondary wireless markets will be to encourage mechanisms, including information sources, spectrum exchanges, and brokers that bring together buyers and sellers and effect transfers of the right to use spectrum in a timely and cost-effective manner.³ Intermediaries in the wireless arena would have expertise in matching up spectrum (and/or

³ Policy Statement at para. 19.

spectrum rights) with lessees who will make efficient use of such spectrum or spectrum rights. Such intermediaries may, for example, be brokers, agents or electronic trading platforms. Intermediaries are in a position to greatly advance the development of a secondary spectrum market, but because of their purely intermediary functions are not in a position to ensure compliance with the Act and the Commission's rules.

C. Contractual Disputes Not Involving Compliance with the Commission's Rules Should be Decided in the Same Manner as Other Commercial Disputes, Not by the Commission

With limited exceptions, disputes arising under spectrum leases or sub-leases should be resolved in the same manner as disputes arising under any other commercial contract (that is, by resort to the judicial system, arbitration and the like). The one limited set of exceptions is the class of disputes, described in Section III.B.1 above, which turn on the interpretation or application of the Commission's rules and the Act. In those cases, the Commission, as the body best positioned to resolve such matters, should hear and rule on the dispute.

El Paso Global does not believe that the Commission needs to become involved in resolving other types of disputes merely because a party is unwilling or unable to resolve the dispute in a timely fashion. Other dispute resolution bodies are equipped to deal with such circumstances. The courts, for example, have mechanisms available to them to compel action (*e.g.*, the granting of injunctive relief, orders compelling specific performance and the like) as well as mechanisms to punish for inaction (*e.g.*, contempt proceedings and default judgements). The courts also have greater experience in resolving purely commercial disputes than does the Commission, as do many arbitrators. These forums should prove adequate to the task of solving purely commercial disputes in this area.

D. The Commission's Service Rules Should Be Reconsidered in Light of the Commission's Important Policy Objective of Encouraging the Development of a Secondary Wireless Market

The Commission has asked for comment generally on whether various types of its service rules should be reexamined or modified to minimize to the extent possible any adverse impact they may have on the effective working of the secondary market. El Paso Global supports this effort and believes it will be a key part of facilitating the market's development.

In particular, it appears that the rationale for many of the Commission's historic use restrictions on various parts of the spectrum may no longer be valid or may be outweighed by their adverse impact on the development of the secondary market.⁴ In the past, it has been the Commission which has divided the spectrum for use by the varying services. While this may have been an appropriate approach at the time that these rules were initially implemented, as the Commission is itself coming to realize, the oft-increasing and ever-shifting spectrum needs of existing and developing services and users requires a more flexible, market-based approach to spectrum usage.⁵

In reviewing its use restrictions, the Commission should keep in mind the fundamental reality that use restrictions inherently limit the fungibility of spectrum. Such fungibility is a key attribute necessary for the creation of an efficiently functioning secondary market, and it should therefore be maximized.

⁴ Many of the Commission's other rules, including its attribution, eligibility and other service rules, may also needlessly limit the efficient use of spectrum. Accordingly, El Paso Global urges the Commission to revisit those rules thoroughly to determine how they may be eased to further the development of the secondary market.

⁵ This is not inconsistent with the Commission's reservation of a certain amount of spectrum or its taking of other protective measures for public safety and similar important public policy purposes.

E. Licensees Should Be Permitted to Rely on the Activities of Lessees and Sub-lessees in Fulfilling Construction, Substantial Service and Similar Requirements

As the Commission has tentatively concluded, the construction, services and other activities of a licensee=s lessee(s) should count in considering whether a licensee has fulfilled its construction, substantial service and similar requirements. A contrary policy would create a disincentive for licensees to migrate to more efficient technologies and free up spectrum for alternative uses through leasing arrangements. Moreover, it would discourage licensees from leasing spectrum if there was any use at all that they could make of the spectrum. El Paso Global agrees with the Commission that allowing such flexibility will enable economic and, thus, more rapid build out, which is, of course, in the public interest.⁶ Finally, as a practical matter, it simply should not matter to the Commission which entity, as between the licensee, the licensee=s lessee(s) or, if applicable, sub-lessee(s), is meeting the requirements so long as the requirements are being met. The purpose of these requirements is, after all, to ensure that spectrum is not wasted by sitting idle for undue lengths of time – and allowing lessees’ construction and services to count towards these requirements will advance, not undermine, this purpose.

⁶ NPRM at para. 50.

F. In Cases in Which a Licensee Has the Flexibility to Choose Common Carrier or Non-Common Carrier Status, Lessees and Sub-lessees Should Have the Same Flexibility and Should Not Be Bound By the Licensee=s Choice

Lessees and sub-lessees in services in which the licensee has the flexibility to choose between common carrier and non-common carrier status should be afforded the same flexibility as the licensee in this regard and not constrained by the licensee=s choice. Such lessees or sub-lessees would, of course, be subject to the Commission=s rules applicable to their chosen designation. By enabling this flexibility, however, the Commission will be promoting the most efficient use of the spectrum by allowing the lessees to direct resources in the manner they perceive the market to prefer.

G. The Commission Should Not Apply the *Intermountain Microwave* Criteria in Determining Whether a Transfer of Control is Occurring for Purposes of Section 310(d) of the Communications Act

As a general matter, licensees should be deemed to retain control for Section 310(d) purposes if they contractually require lessees to abide by the Act and Commission rules⁷ and retain full authority to reclaim the spectrum in the event of a breach of such obligations. El Paso Global agrees with the Commission=s tentative conclusion that the paradigm set forth in *Intermountain Microwave*⁸ for determining whether a transfer of control has taken place is fundamentally inconsistent with the notion of spectrum leasing. In particular, *Intermountain Microwave*=s narrow focus on close, day-to-day control of particular operating facilities could impede efficient spectrum use. As the Commission notes, it has not in other contexts held that the *Intermountain Microwave* standards rigidly apply to

⁷ As discussed in Section III.B.1 herein, consistent with the workings of an effective market, licensees should be permitted to rely in the first instance upon lessees= contractual obligations to abide by applicable laws, including the Act and Commission rules.

⁸ *Intermountain Microwave*, 12 FCC 2d 599, 24 RR 983 (1963).

all transactions involving radio spectrum. Rather, it has used different sets of criteria in different contexts to determine whether a transfer of control has taken place. It should do so here as well.

Should the Commission nevertheless determine that some leasing arrangements do trigger Section 310(d), the Commission should either issue a blanket determination that transactions in the secondary market are in the public interest or, in the alternative, forbear from applying Section 310(d) to secondary market transactions. The Commission has made clear its view throughout the NPRM and its Policy Statement that, inasmuch as secondary markets encourage the more efficient use of spectrum, they are in the public interest. This should provide an adequate basis for the issuance of a blanket determination on the matter.

In the alternative, the Commission would also be authorized to simply forbear, under Section 10 of the Act, from enforcing Section 310(d) in the context of secondary market transactions. Section 10 provides for such forbearance if A(1) the enforcement of [Section 310(d)] is not necessary to ensure that the charges, practices and classifications or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of [Section 310(d)] is not necessary for the protection of consumers; and (3) forbearance from applying Section 310(d) is consistent with the public interest.@ As noted above, the Commission has already acknowledged that the development of a secondary market is in the public interest, satisfying the third prong. Satisfaction of the first prong will be ensured by the fierce competitiveness of this market, and of the second by the fact that, notwithstanding a leasing arrangement, the Commission=s various applicable rules must still be complied with.

H. The Commission Should Encourage and Facilitate the Development of Private Sector Information Resources

El Paso Global agrees with the Commission's tentative conclusion that secondary markets in spectrum management rights will operate more efficiently if adequate information on available or potentially available spectrum is readily accessible.⁹ El Paso agrees further with the Commission's conclusion that those with the strongest economic incentive to do so (namely, private sector actors like band managers, brokers and other would-be intermediaries) are best suited to the task.¹⁰ El Paso Global believes that the Commission can encourage such activities on the part of such private sector actors by affording them as much flexibility as possible in entering into secondary market transactions and by minimizing the administrative costs and delays as much as possible, consistent with statutory requirements.

⁹ NPRM at para. 99.

¹⁰ NPRM at para.100.

IV. CONCLUSION

El Paso Global supports the Commission's goal of encouraging the increasing efficiency of spectrum use through the promotion of the development of a secondary wireless market and applauds its efforts in this regard to date. As stated herein, El Paso Global believes that the swift advancement of this worthy goal will require considerable regulatory restraint on the Commission's part, consistent with statutory requirements, and the allowance of as much flexibility as possible to licensees and other parties in entering into secondary market transactions.

Respectfully submitted,

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