

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

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

Comments of the Rural Telecommunications Group

The Rural Telecommunications Group (“RTG”),¹ by its attorneys, respectfully submits these initial comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) proposal to permit radio spectrum licensees to lease or rent their spectrum usage rights to unaffiliated entities.²

¹ RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service ("LMDS") licenses and have started to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. Other RTG members seek to acquire spectrum or to be able to utilize the spectrum of others. They have found it difficult to acquire spectrum through auctions or to structure management or lease arrangements due to FCC rules, policies and case precedent. RTG's members are all affiliated with rural telephone companies.

² *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking in WT Docket No. 00-230, FCC 00-402 (released November 27, 2000), 65 Fed. Reg. 81475 (December 26, 2000). (“*Secondary Markets Proposal*”). The Commission directed that comments be filed not later than February 9, 2001, 45 days after publication of the *Secondary Markets Proposal* in the Federal Register.

RTG has been a consistent promoter of spectrum leasing procedures. It is pleased to support the ambitious proposals of the Commission and its staff. It is not an overstatement to say that these proposals represent the most far-reaching and important spectrum management initiatives ever undertaken by the Commission. Spectrum leasing has the potential, if properly structured, to significantly increase the use of already-assigned spectrum bands. More productive use of assigned bands may relieve the immediate pressure on the Commission to allocate additional bands. Just as importantly, leasing will allow companies who do not hold spectrum licenses to offer a panoply of wireless services in the country's unserved and underserved areas. Spectrum leasing therefore has the potential of bringing the benefits of the wireless and digital broadband revolution to even the remotest parts of the United States.

As discussed in more detail below, RTG calls upon the Commission to take further steps to assure the enduring success of its important initiative. RTG believes that the Commission can and should place the ultimate responsibility for compliance with its rules and regulations not on the lessor of spectrum, but on the beneficiary and operator of the spectrum—the lessee. Not only does the Communications Act provide the Commission with jurisdiction over these spectrum lessees, but imposing these obligations on lessees focuses enforcement on the party that is directly responsible without implicating innocent licensees.

The Commission must impose both the rights and obligations of spectrum holding on the actual users if it is to create the proper incentive structure for licensees to voluntarily lease spectrum rights to independent entities. As such, RTG applauds the Commission for fashioning a successor test to the current *de facto* control standard of

Intermountain Microwave, which currently creates an almost absolute bar to leasing arrangements like those contemplated by the Commission. The Commission should, however, adopt an alternative test for evaluating actual control of licenses that better promotes both the economic incentives of leasing and reflects the practical realities of secondary market transactions that occur elsewhere in the U.S. marketplace.

The proper apportioning of compliance responsibilities is crucial to the success of the Commission's ambitious effort. RTG respectfully proposes a licensee due diligence standard that will provide the Commission with a workable formula that meets its enforcement obligations, complies with the law and properly delineates responsibilities between spectrum lessors and lessees.

I. INTRODUCTION AND BACKGROUND

The Commission's leasing proposal is consistent with an evolution to a property rights regime in other parts of the information industry. Business operators who hold expanded property rights and obligations in their factors of production can be expected to use these assets more efficiently and make efforts to protect them. For example, Internet companies and individuals have first-come, first-served access to domain names, may stop others from using these names or derivations of these names, and are provided with enforcement mechanisms to utilize and protect acquired domain names.³ The Commission recently recognized that it may be preferable to create a primary and secondary market in the numbering resources that are at the core of all telecommunications services. The Commission explained that a market-based numbering allocation system may improve efficiency in carrier utilization of this resource. "By

explicitly recognizing the value of numbers, we seek to provide incentives for carriers to take and retain only as many numbers as they need, in the short term, to provide service to their customers.”⁴ With a secondary market in numbers, “carriers that hold inventories of numbers in excess of their needs would be foregoing the revenue they could gain from selling or leasing.” In an analysis that applies equally to spectrum, the Commission goes on to explain that a secondary market will create an opportunity cost for unused numbering resources “that will encourage carriers to develop innovative ways to move these stranded resources to other carriers” that may desire these resources.⁵

The Commission is of course further along in creating market mechanisms for radio spectrum than numbering since it has maintained a primary market for spectrum licenses by way of competitive bidding since 1994 and allowed secondary market transactions such as assignments, transfers, partitioning and disaggregation to occur as well. Yet the efficient use of spectrum resources requires that markets play an efficient role in both the acquisition and disposition of spectrum assets. Without a freely operating secondary market, spectrum usage rights purchased in open bidding will continue to be stranded with carriers who do not have an approved means of easily putting excess spectrum to productive use.

The expansion of secondary spectrum market mechanisms, however, should not, and need not lead to the complete privatization of spectrum.⁶ The Commission can and should retain core regulatory obligations for licensees and users of spectrum even as it

³ See, e.g., the Uniform Domain Name Dispute Resolution Policy adopted by ICANN on October 24, 1999

⁴ *In the Matter of Numbering Resource Optimization*, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200 and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, FCC 00-429, ¶161 (rel. December 29, 2000)

⁵ *Id.* at ¶¶ 162, 164.

moves to an expanded property rights regime. For instance, the Commission must retain the authority to control the use of spectrum to avoid interference, to amend radio licenses when necessary and to allocate—and reallocate-- spectrum bands to ensure that spectrum usage keeps pace with changes in technology and public needs. A secondary market for spectrum does not mean, then, that the Commission must abdicate its core spectrum management functions or that paying spectrum users --in either primary or secondary markets-- can ignore their public interest obligations.

Of course, the Commission’s instant *Secondary Markets Proposal* is not its first effort to promote the use of secondary market spectrum mechanisms. The Commission has long maintained rules for assigning spectrum licenses or transferring control of businesses that hold spectrum licenses and has worked to streamline this process as much as possible. More recently, the Commission adopted what can be characterized as partial assignment mechanisms that allow licensees to partition a portion of their geographic license areas or disaggregate a portion of their bandwidth within a geographic license area.⁷ The Commission also notes that it currently permits a variety of mechanisms between licensees and non-licensees—such as management agreements, joint marketing ventures and resale arrangements that do not require Commission intervention at all.⁸

RTG understands that instances of partitioning and/or disaggregation actions have been quite few. Less than 1/10 of one percent of all auctioned licenses has had even one instance of partitioning or disaggregation. The Commission itself correctly concludes

⁶ Some commenters have referred to this as “propertyzing” the spectrum. See, e.g., Lawrence J. Wright “*Propertyzing the Electromagnetic Spectrum: Why It’s Important and How to Begin,*” Media Law and Public Policy, New York Law School, Volume IX, No. 1, Fall 2000.

⁷ See, e.g., *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*. Report and Order, 11 FCC Rcd 21831 (1996).

⁸ *Secondary Markets Proposal* at ¶ 15

that existing secondary markets mechanisms have not brought wireless services to rural and other less populated areas. Since assignments, transfers, partitioning and disaggregation all affect permanent transfers of all or part of a licensee's spectrum usage rights, licensees hesitate to enter arrangements that would put excess capacity to use.⁹ RTG has identified several other reasons why license holders are unwilling to part with their spectrum rights even for areas or bands in which they have no plans to operate. License holders are hesitant to create holes in their spectrum assets in contemplation of future population growth. Likewise, licensees may hesitate to dilute their spectrum assets in contemplation of future sales of their systems. Certain licensees may also cater to financial markets where they need to demonstrate a huge footprint even though the licensee has no intention to provide service to most of the area within the footprint. Larger license holders may ignore attempts to put only a portion of their spectrum rights in others' hands due to the relatively large transactional costs of completing even a partial assignment of spectrum rights. Licensees are also hesitant to sell portions of their licenses because of difficulty in valuing spectrum in the absence of a functioning secondary market that establishes market rates for spectrum. This is especially true in the case of broadband wireless spectrum, and the current leasing proposal may be of particular benefit to this family of services.¹⁰ Permanent assignments of spectrum—whether involving all or part of a licensee's spectrum usage rights—are not the solution for putting fallow spectrum to use.

Unfortunately, this disconnect between rural consumer's wireless demands and spectrum holders' willingness to serve them is magnified by Commission policies. Rural

⁹ See *Secondary Markets Proposal* at ¶¶ 2,7,8.

telephone companies and entrepreneurs are willing to serve these often-ignored areas of the country, but do not hold spectrum usage rights to do so. The entity that has purchased the spectrum license encompassing rural communities has no desire or obligation to serve the least-populated portions of its license area. This “Catch 22” situation is exacerbated by recent regulatory trends. Rural telephone companies cannot enter into spectrum-based businesses through the primary (auction) market due to the Commission’s consistent trend toward creating larger and larger license areas.¹¹ Rural telephone companies do not seek to serve the heavily populated metropolitan regions of these wide area licenses. Nor can they afford to purchase a spectrum license that is driven up in price by these population cores. The ultimate purchasers of these large area licenses are purchasing them expressly for these population cores and have no plans to service the less populated periphery of their regions. Nor do Commission rules even require that they ever do so.

Therefore, rural telephone companies and other entrepreneurs must bid head-to-head with well-financed public and private companies for the same spectrum asset despite the fact that each wishes to use a different portion of the same spectrum asset. As a result, the public living in the rural and other less populated geographic parts of a license area may never receive the radio service originally contemplated by the Commission. This disconnect neither serves the goal of spectrum efficiency nor the public interest in creating nationwide radio communications services; a fair and efficient distribution of radio services to all communities; and service in rural areas.¹²

¹⁰ See, e.g. RTG Comments in WT Docket No. 99-327; *In re Amendments to Parts 1, 2, 87, 101 of the Commission’s Rules to License Fixed Services at 24 GHz.* .

¹¹ Despite calls by RTG and others, the Commission has refused to adopt competitive bidding incentives for rural telephone companies to promote their entry into spectrum-based businesses despite express statutory directives to do so. See 47 U.S.C. §§309(j)(3)(B) and 309 (j)(4)(C).

¹² 47 U.S.C. §§ 151, 307(b) and 309(j)(3)(A).

Permitting license holders to lease or rent their spectrum usage rights offers a viable, market-based incentive to put fallow spectrum to use and to permit new companies to offer wireless options to unserved consumers. At the same time, the Commission should still consider stricter operational requirements that ensure that licensees serve their licensed areas, or, at some point, forfeit the right to do so. RTG notes, for example, that under the Commission's PCS service rules, one third (1/3) of a licensee's covered population may never be served at all even if the licensee receives repeated renewals.¹³ Other service requirements are even more accommodating and could permit licensees to warehouse spectrum and maintain vast unserved areas indefinitely. At some point in the life of a radio license, the Commission may need to mandate service to sub-parts of a license area or adopt a fill-in policy that allows carriers who wish to provide service to "white" areas an opportunity to acquire the spectrum.¹⁴ If a licensee has no regulatory obligation to serve a portion of its population or service area, even the incentive to lease its unused spectrum assets may well be ignored by incumbent spectrum license holders.¹⁵

RTG is concerned that the Commissions' tentative decision to impose all compliance obligations on a licensee-lessor would create an additional disincentive to leasing small portions of their unused spectrum rights. Today, the Commission

¹³ 47 C.F.R. §24.203(a)

¹⁴ *See, e.g.* the cellular fill-in rules at 47 C.F.R. ?? 22.946 – 22.951.

¹⁵ Some economists may counter that if it is economically viable to provide a service in rural America, then the licensee will do so. This argument fails to account for the different missions and economic expectations of different companies. For example, venture capitalists generally expect a 30% rate of return within three years coupled with a planned exit strategy (such as an IPO or sale) to liquidate their investment. Rural telephone companies, by contrast, exist to provide services to their members and may do so at near cost, and with a substantially longer investment horizon. Thus, while a VC-based licensee may be unwilling to provide a service to a rural area, a rural telephone company may be ready, willing and able, but for the access to spectrum.

contemplates leasing as a voluntary act of a licensee that the licensee will find to be in its own economic interest. At the same time, leasing will serve a public interest in putting unused spectrum to work for the benefit of the public. Therefore, the Commission needs to establish the proper balance of rights and responsibilities to promote these voluntary acts that serve a public interest.

RTG urges the Commission to determine that licensees (lessors) should not be primarily responsible for the independent acts of spectrum lessors. The Commission can and should impose its regulations directly upon these spectrum users. In the same vein, spectrum lessees should have the freedom to operate independently of licensees so long as they comply with Commission rules and the terms of their leases. Instead of what the Commission contemplates as a “joint liability” regime, the Commission can promote compliance with its rules in a simpler fashion. As discussed below, the Commission can require that all leases contain express terms that ensure that lessees are aware of their obligations as spectrum users and that they consent to Commission jurisdiction.

The Commission can enforce its rules directly against spectrum users by maintaining a database of all users operating under a particular license in a particular area. This information would be supplied by a licensee as a condition of its due diligence obligations. This “focused compliance regime” both protects innocent licensees and imposes obligations on the entity with day-to-day knowledge of and responsibility for spectrum operations. RTG urges the Commission to adopt this “focused” approach as it encourages licensees to lease unused spectrum and places responsibilities on the lessors who garner the economic benefit from leasing.

II. THE COMMISSION MUST CLEARLY DELINEATE THE RIGHTS AND OBLIGATIONS OF SPECTRUM LESSORS AND LESSEES

It is crucial to the success of this initiative that the public understand precisely what the Commission intends by “spectrum usage rights” and the “leasing” of these rights. In its *Secondary Markets Policy Statement*, the Commission properly concluded that for a secondary markets regime to operate, “licensees and users must have certain rights and responsibilities that define and ensure their economic interests.”¹⁶ And while the Commission noted that the public cannot hold property rights per se in spectrum, the right to use the spectrum—and transfer that right-- is a valuable economic asset that warrants careful delineation.¹⁷

RTG urges the Commission to further clarify what constitutes the “spectrum usage rights” of a licensee and what portion of these rights may be alienated through the lease or rental of these rights. RTG notes here that while the Commission has elsewhere recognized the importance of careful delineation of this term,¹⁸ it provides little discussion of this issue in the *Secondary Markets Proposal*. If the Commission intends to limit these rights to the explicit terms and conditions contained on a license, it must ensure that its licenses clearly spell out both rights and obligations. RTG is concerned that “spectrum usage rights” reflects a bundle of rights/obligations that are nowhere set forth for the private parties to easily consider. The existence of “spectrum usage rights” beyond the terms of a license in rules, Policy Statements, statutes and informal practice can hinder market negotiations by denying the parties the ability to easily assess what is

¹⁶ *In the Matter of Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, FCC 00-401, ¶20 (rel. December 1, 2000)

¹⁷ *Id.* at 21-22.

¹⁸ *Id.* at 22.

contained in the “spectrum usage right.” The Commission can assist in these transactions by both clarifying the scope of these rights and setting them out on all licenses.

Just as importantly, the Commission must define what it means by a “lease” of these spectrum usage rights. The Commission first defines “ spectrum leasing” as a licensee’s leasing of a [sic] its spectrum usage rights, as granted under the Commission license, to third parties.¹⁹ Elsewhere, the Commission describes leasing as

a kind of temporary partitioning, disaggregation or partial assignment of a licensee’s spectrum usage rights, without the complete and permanent transfer of control or assignment of the discrete leased portion of that spectrum license, and the full panoply of licensee responsibilities, to that particular lessee of spectrum usage rights for the remainder of the license term.

Secondary Markets Proposal at ¶ 21

The Commission should adopt a definition of “leasing” that is consistent with commercial practice. For example, the Uniform Commercial Code defines a “lease” as “a transfer of the right to possession and use of goods for a term in return for consideration.... and unless the context clearly indicates otherwise, the term includes a sublease.”²⁰ The UCC goes on to define a “sublease” as “a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.”²¹ Black’s Dictionary defines a “lease” as “a contract by which a rightful possessory of real property conveys the right to use and occupy that property in exchange for consideration.”²² The Commission should incorporate these generally accepted definitions of leasing along with any particularized phrasing necessary to reflect the

¹⁹ *Secondary Market Proposal* at footnote 18.

²⁰ Uniform Commercial Code Article 2A, §2A-103(1)(j).

²¹ *Id.* at §2A-103(1)(w).

²² Black’s Law Dictionary (7th ed. 2000)

context of spectrum leasing. Use of commonly accepted definitions will assist the public as well as courts in considering the scope of a spectrum lease.

However the Commission fashions the exact wording, it must recognize that a lease constitutes a partial alienation of both a lessor's rights and obligations to a lessee. A lease is a simple conveyance of a lessor's interest in property for a fixed term and at common law, all obligations for the condition of the property are shifted to the lessee.²³ The interests of the landlord and the tenant in leased property are freely transferable. Otherwise, any restriction of the freedom of alienation of these separate interests would involve a restraint on alienation.²⁴ Spectrum lessees, like lessees of more traditional tangible goods, must be able to step into the shoes of the lessor in accordance with the terms of the lease. The lessee must be able to enjoy the lessor's economic rights and take on the responsibilities that go with temporary possession and operation of the asset.

III. A VIABLE LEASING PROGRAM REQUIRES THAT RIGHTS AND RESPONSIBILITIES FALL ON THE ULTIMATE BENEFICIARY OF SPECTRUM OPERATIONS

In order for leasing to become a viable tool, the Commission must fashion a compliance and enforcement regime that focuses upon the day-to-day user of spectrum. Under the leasing scenarios contemplated by the Commission, it will be the lessee, not the lessor, who has actual, operational control of the spectrum usage rights. The Commission should fashion its compliance and enforcement procedures to match this business reality.

²³ *Lavoie v. Pobent*, 494 A.2d 676 (Me 1985).

²⁴ Restatement (Second) of Property? 15.1 (1977).

A. Licensees Cannot Guarantee Lessee Compliance

The Commission describes as a “core feature” of its proposal that licensee’s retain the ultimate responsibility for a lessee’s compliance with applicable laws and Commission rules. The Commission goes on to propose that a licensee be subject to revocation of its license for a lessee’s violations of rules or laws of which the licensee is unaware.²⁵

RTG submits that this draconian approach to compliance will snuff out all incentives that a licensee may have to lease its unused spectrum usage rights. Under the Commission’s proposal, a licensee will either need to hire staff to supervise its independent lessees or tolerate the risk of surprise forfeitures and revocations unrelated to the licensee’s “willful” acts. The Commission’s proposed approach to compliance is itself a new barrier that does not facilitate leasing or increase the opportunity costs to not using spectrum fully. Instead, the Commission proposes to create a Hobson’s choice for licensees that it need not do to assure compliance with its rules.

As is typical in the business world, lessors should not be responsible for the bad acts of their lessees unless they participate in those acts or have actual knowledge of them. Lessors are not the guarantors of their lessees’ behavior and it should be no different in the context of spectrum usage rights. Since leasing spectrum usage rights is a wholly voluntary action for licensees under the Commission’s current proposal, placing this burden on licensees will fundamentally undermine their willingness to lease or rent their excess spectrum.

The Commission itself recognizes that leasing will most likely be considered by licensees who identify a portion of their usage rights that are not in their current business

plans. These licensees are unlikely to hold licenses for the purpose of leasing, or to garner a majority of their income through leases. In fact, RTG does not expect that leasing will be more than a small incremental benefit—in terms of revenues—for any particular licensee. It is the public and spectrum lessees who will garner the most benefit from this proposal. Licensees will surely forgo this incremental leasing income to avoid responsibility and liability for acts of independent companies. At best, the Commission’s guarantor obligation will require the largest licensees to establish lessee-monitoring operations within their organizations at considerable cost. Under this scenario, the only employees that a wide area licensee may have in a given state are the employees dedicated to lessee oversight. The Commission should not add this unnecessary cost and responsibility to these transactions.

The Commission must distinguish between the obligations of 700 MHz guard band spectrum managers, who are required to lease spectrum as a condition of their very licensing, and other licensees who must be encouraged to do so in order to place unused spectrum into operation. In the 700 MHz guard band, the Commission felt that it was necessary to place “guarantor” obligations on guard band managers in order to protect the adjacent public safety bands from interference. Moreover, unlike the various licensees that may face leasing choices, guard band licensees entered into auctions knowing that a condition of their licenses was that they lease no less than 51% percent of their spectrum capacity to unrelated entities. The Commission need not, as a matter of law or policy,

²⁵ *Id.* at ¶¶27, 32.

extend the obligations imposed on guard band managers to the licensee who wishes to lease excess spectrum.²⁶

The Commission asks whether there are instances where the Commission should hold a spectrum lessee responsible for non-compliance with its rules in lieu of the licensee. The answer is a resounding “ALWAYS.” As discussed below, the Commission can adopt an oversight and enforcement mechanism that targets the lessees with actual control of the spectrum usage rights.

B. A Licensee’s Due Diligence Obligation Should be Extremely Limited

The Commission asks whether it should impose specific due diligence obligations on licensees to certify or verify a lessee’s compliance.²⁷ A licensee should only be responsible for ensuring that a lessee is initially qualified to hold the license in accordance with the Commission’s rules. The Commission should establish a procedure by which a licensee must conduct a due diligence review of eligibility. The licensee should not be required to go beyond these required steps unless it has reason to believe that a potential lessee is acting fraudulently.

In addition, the Commission should adopt a due diligence process that informs lessees of their obligations and provides the Commission with data on spectrum users. The Commission should require that all leases be in writing and that the lessor (or the lessee in the case of subleases) retain a copy in its records.²⁸ All leases should include express and explicit contract terms adopted or approved by the Commission that notify

²⁶ RTG also opposes the adoption of the “band manager” concept across the board. *Secondary Markets Proposal* at ¶22. The Commission’s own justification for creating a band manager for the particular concerns of the 700 MHz guard band is enough justification for not generally adopting this concept as standard practice. *Id.*

²⁷ *Secondary Markets Proposal* at ¶ 30.

the lessee of its obligations. The lessee would also agree in writing to Commission jurisdiction over its operations and agree to cooperate with the Commission in an investigation.

The licensee or sublessor would then submit core information concerning leases or subleases (name, address, band, location, duration, etc.) to the Commission so that the Commission would always know who held spectrum usage rights in a given place, for a given band at a given time. With this process in place, the Commission could identify the spectrum user at any time and enforce its rules against the actual wrongdoer, without punishing unsuspecting licensees.

C. Enforcing Rules Violations Against Both Licensees and Lessees Creates Needless Confusion and is Fundamentally Unfair

The Commission proposes to impose sanctions against an innocent licensee for the actions of its lessees. Not only does this approach create a tremendous disincentive to leasing spectrum, but it creates needless confusion and is fundamentally unfair.

Licensees simply cannot be held to account for the acts of lessees if the Commission seeks to promote a vibrant secondary market.

RTG notes at the outset that this approach to enforcement is not in keeping with the express terms of the Communications Act. The Act establishes an enforcement regime based upon “willful” and “knowing” violations of law or Commission rules.²⁹ Section 312(f)(1) defines “willful” as “the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act, or any

²⁸ These leases would not be routinely available for public inspection, but available to Commission staff under confidentiality procedures.

²⁹ See, e.g. 47 U.S.C. §§501, 502, and 312.

rule or regulation of the Commission...³⁰ The Commission has itself noted that “willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question, as opposed to being accidental.”³¹ The Commission has also explained that to establish a “willful” violation, it is not necessary to show that the person knew he was acting wrongfully.³² Under the Commission’s proposal, licensees would instead be strictly liable for the acts of lessees irrespective of their participation in (beyond the initial leasing) or knowledge of those violations. The Communications Act does not permit the Commission to transform the “willful” standard for imposing penalties to one of strict liability.

The Commission’s proposed approach to enforcement is particularly onerous because elsewhere in its *Secondary Markets Proposal* it proposes to delete the very incidents of *de facto* control that would cause a licensee to have actual knowledge of rules violations. In its proposed modification of the *Intermountain Microwave* factors for determining which entity actually controls a license, the Commission tentatively concludes that a lessor-licensee *can* relinquish unfettered use of the facilities and equipment; control of daily operations; employment supervision; payment of financial obligations; and receipt of monies and profits from the operations of the facilities.³³ The Commission correctly concludes that a viable leasing regime could not operate if lessors are obligated to continue this level of supervision over lessees. Yet the Commission cannot expect lessors to be responsible or know of violations of lessees *without* this level of supervision. Thus, the Commission’s perfectly appropriate loosening of the

³⁰ 47 U.S.C. §312(f)(1).

³¹ *In re Private Land Mobile Station WSM534, Chesapeake Bay Contractors*, 9 FCC Rcd 1647 (1994).

³² *In re Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991).

³³ *Secondary Markets Proposal* at ¶¶ 75-76.

Intermountain Microwave factors is a chimera, to be replaced by a strict liability standard under which licensees must continue to supervise day-to-day operations of their spectrum usage rights, or risk catastrophic consequences.

This approach is also out of step with commercial practice. Lessees in other business areas are typically responsible for their violations of law or regulations. For example, when a person leases a car from a car dealership, the dealer lessee is not responsible for accidents or tickets the driver lessor may cause. Rather, the driver lessor is responsible for any illegal activity or conduct that occurs while he is in possession of the leased property.

Not only is the Commission's proposed enforcement regime suspect as a matter of law and practice, but the Commission would waste its limited enforcement resources by incorporating innocent licensees into compliance, forfeiture and/or revocation proceedings. Where once the Commission would bring action against a licensee, it proposes here to create joint and several liability with the licensee and/or lessor. This creates additional parties that lead to more complicated proceedings and procedural detours.

Instead, the Commission should merely exercise its ample authority to enforce its rules directly against lessees as users of radio spectrum. Congress determined that the provisions of the Communications Act apply to "all persons" engaged in communications by radio or the transmission of energy by radio.³⁴ Section 307(e)(2) of the Act requires that radio operators authorized to use spectrum without an individual license nonetheless comply with the Communications Act and FCC rules.³⁵ The Commission has exercised

³⁴ 47 U.S.C. §152.

³⁵ 47 U.S.C. §307(e)(2).

its authority to impact the behavior of non-carriers and non-licensees under Section 205 of the Act and recognized that these entities could be joined in enforcement proceedings under Section 411(a) of the Act.³⁶ As RTG noted above, Sections 501 and 502 of the Act grant the Commission authority to impose forfeitures against “any person” and Section 503(b)(5) establishes parameters for enforcement against non-licensees operating in bands that otherwise require a license.³⁷

The Commission already has a working example of a compliance approach that does not rely upon enforcement against radio licensees. For many years, tower lighting, painting, height restrictions and other rules were enforced against each licensee on a tower. In 1995, the Commission concluded that tower owners—who need not be radio licensees—should be primarily responsible for compliance and it initiated tower structure registration procedures.³⁸ The Commission noted then that such a fundamental change was necessary to reduce administrative burdens on the public and aid the Commission in ensuring the safety of air navigation.³⁹ RTG is not aware that this revised focus on the entity with day-to-day operational control of towers has increased non-compliance or caused the Commission administrative concerns.

RTG submits, then, that the Commission may, as a matter of law, target its oversight on the actual users of spectrum. The Commission’s only real concern should be its ability to identify these spectrum users to ensure compliance with its rules. This

³⁶ See, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rule Making in WT Docket No. 99-217, ¶¶136-143, FCC 00-366 (rel. October 25, 2000).

³⁷ 47 U.S.C. §§501, 502, 503(b)(5).

³⁸ *In the Matter of Streamlining the Commission’s Antenna Structure Clearance Procedures: Revision of Part 17 of the Commission’s Rules*, 10 FCC Rcd 4272 (1995)

³⁹ *Id.* at 4272.

can be done through a record-keeping/document filing scheme that is part of a lessor's due diligence obligation.

D. The Commission Must be Available to Resolve Disputes Between Licensees and Lessees

RTG agrees with the Commission that disputes over leases should typically be resolved by the courts or other dispute resolution means.⁴⁰ However, courts are likely to defer to the Commission's expertise when contractual disputes revolve around interference, rule compliance and operational requirements that are within the expertise of the Commission. The Commission should not require parties to take the unnecessary step of exhausting judicial means before seeking resolution of matters under the Commission's expertise. Parties to a lease should be able to use the Commission's formal or informal complaint procedures, or a version thereof, to resolve their disputes that focus on matters within the Commission's purview. To deter parties from bringing frivolous matters before it, the Commission can establish a filing fee that reflects the cost of conducting dispute resolution. In the alternative, the Commission could establish an expedited process for responding to courts seeking clarification or resolution of issues of which the Commission has expert knowledge.

IV. THE COMMISSION CORRECTLY CONCLUDES THAT INTERMOUNTAIN MICROWAVE CANNOT CO-EXIST WITH A SECONDARY MARKETS REGIME

The Commission properly recognizes that the leasing of spectrum usage rights as set out in the *Secondary Markets Proposal* cannot function in conformance with its

⁴⁰ *Secondary Markets Proposal* at ¶34.

current standard for determining whether parties have violated Section 310(d) of the Communications Act of 1934. Specifically, RTG applauds the Commission for demonstrating a willingness to abandon its current *de facto* control standard for assessing unlawful transfers of control under Section 310(d). The Commission should, however, further modify its suggested change to the *de facto* control factors to promote leasing and simplify enforcement.

Spectrum leasing necessarily implicates several of the factors used by the Commission to evaluate whether an unauthorized *de facto* transfer has occurred. In particular, under the controlling precedent of *Intermountain Microwave*, the typical lease would find the lessee improperly responsible for use of facilities and equipment; daily operations; employment supervision; payment of financial obligations; and receipt of monies and profits.⁴¹ The Commission correctly finds that the *Intermountain Microwave* factors are in conflict with the typical leasing arrangements expected in a leasing regime. Moreover, the Commission correctly finds that it has the authority to modify this test to comport with new business realities, spectrum management requirements and the public interest.⁴²

⁴¹ Under *Intermountain Microwave*, the FCC weighs the following factors to determine whether a licensee has transferred *de facto* control (control in fact) of a radio license without first receiving authorization by the Commission:

- (1) Does the licensee have unfettered use of all facilities and equipment?
- (2) Who controls daily operations?
- (3) Who determines and carries out policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment supervision, and dismissal of personnel?
- (5) Who is in charge of payment of financial obligations, including expenses arising out of operation?
- (6) Who receives monies and profits from the operations of facilities?

Intermountain Microwave factors reprinted at *Secondary Markets Proposal*, ¶72.

⁴² *Secondary Markets Proposal* at ¶¶73-76. RTG agrees with the Commission's tentative conclusion, however, that the *Intermountain Microwave* factors have continuing viability in a related context. In the absence of a written spectrum lease agreement, the Commission should continue to use the *Intermountain Microwave* criteria to determine whether the parties have engaged in an unauthorized *de facto* transfer and to determine attribution in licenses for other purposes. *Id.* at ¶77.

A. The Commission's Proposed Standard for Analyzing Transfers of Control in Spectrum Leasing is Too Rigid

RTG respectfully suggests that the Commission has not gone far enough in revising its existing *de facto* control test to create the flexibility necessary to lease spectrum. The Commission suggests various times in its *Secondary Markets Proposal* that the licensee could be relieved of compliance obligations in favor of an enforcement regime targeted at the lessee as user of the spectrum. Here, however, the Commission takes back any hope for creating conditions that promote voluntary leasing by spectrum licensees in its proposed test of control.

Under the Commission's proposal, the licensee is relieved of showing compliance with the *Intermountain Microwave* factors that demonstrate actual day-to-day operational knowledge and control of the license. Yet the Commission proposes to replace this standard with a standard that holds a licensee to legal knowledge of day-to-day aspects of lessees' operations without maintaining the incidents of actual control as reflected in *Intermountain Microwave* factors 1, 2, 4, 5, 6.⁴³ RTG suggests that the Commission has not proposed any effective change in its existing *de facto* control standard if a licensee: (1) is strictly liable for a lessee's operating compliance with all rules and law; (2) must certify to a lessee's eligibility to operate spectrum and comply with all technical and service rules; and (3) must enforce penalties for lessee non-compliance with rules.⁴⁴ Instead, the Commission has merely given with one hand and taken back with the other, leaving licensees to choose between daily supervision of lessees or unexpected

⁴³ See footnote 61.

⁴⁴ *Secondary Markets Proposal* at ¶79.

forfeitures, or worse, revocation of a license. The Commission's proposed test will hinder or foreclose most spectrum leasing opportunities before they can be recognized.

B. The Commission Should Instead Adopt a Functional Control Standard

RTG recommends that the Commission instead adopt a functional transfer of control standard that would impose strict initial obligations on licensees and ongoing obligations on lessees (and sub lessees). This test requires preliminary due diligence on the part of licensees and then imposes compliance obligations on the lessee as the beneficial user of the spectrum. Under RTG's proposed standard, the Commission would find that a *de facto* transfer of control has not occurred if:

- ?? A licensee follows the Commission's checklist for determining the initial eligibility of a lessee to qualify for the use of spectrum;
- ?? A licensee informs each lessee of a lessee's service, technical and operational obligations within the body of a lease;
- ?? A licensee requires that the lessee acknowledge and submit to Commission jurisdiction through a certification by the lessee in the lease that it will comply with Commission rules, policy, and laws and that it recognizes the authority of the Commission or licensee to cancel a lease for failure to comply;
- ?? A licensee requires that all lease terms be committed to writing;
- ?? A licensee retains a record of all leases, FCC filings and coordination/interference agreements reached by its lessees;
- ?? A licensee makes these records available to the Commission upon request;
- ?? For each lease, a licensee submits identifying information to the Commission that allows the Commission to identify and contact each lessee;
- ?? A licensee commits to assist the Commission in identifying non-complying lessees and to take all reasonable steps to halt non-compliance brought to its attention.

RTG submits that its proposal comports with Section 310(d) of the Communications Act in that the licensee does not abdicate its responsibilities to promote and assist in the compliance with the various obligations of holding a license. At the same time, RTG's approach ensures that the Commission is able to focus its compliance and enforcement resources against the parties who manage daily operations of the leased spectrum. Not only does this approach save the Commission's limited resources, but it creates the proper incentive structure both for a licensee to voluntarily lease its spectrum and for the benefiting lessee to take responsibility for its actions.

Under this proposal, the Commission need not approve each lease that is consummated in accordance with these procedures. Instead, RTG believes that leases would go into force upon the agreement of the leasing parties. However, RTG does not oppose the Commission's alternative approach that would have the FCC blanket authorize all leases that meet these formation and execution requirements.⁴⁵ A blanket authorization procedure would provide all parties with the necessary certainty that compliance with established procedure would result in a leasing arrangement approved by the Commission. Nor would RTG oppose the Commission's suggested short-form notification procedure as it reflects RTG's suggestion that the FCC receive identifying information about each lease and lessee.⁴⁶ Finally, while RTG does not believe that Section 310(d) requires that the Commission approve each lease, the Commission could readily find that Section 10 forbearance is appropriate in order to dispense with this requirement in the context of leasing.

⁴⁵ *Secondary Markets Proposal* at ¶81.

⁴⁶ *Id.*

V. LICENSEES CANNOT BE EXPECTED TO RESOLVE FREQUENCY INTERFERENCE AND COORDINATION MATTERS OR TO COMPLY WITH OPERATING RULES ON BEHALF OF LESSEES

There can be no question that licensees and other users of radio spectrum must operate in a manner that does not interfere with other users and consumers of communications services. This is a core responsibility that the spectrum user cannot delegate. It is the spectrum user, however, not the licensee who should shoulder this duty.

Under the Commission's proposal, the licensee retains ultimate responsibility for interference, frequency coordination and other technical compliance by its lessees.⁴⁷ Requiring licensee involvement at this level of detail will create a major disincentive to leasing; cause confusion and delay in the daily resolution of these matters; and add significant costs to this process.

With the Commission's ability to target enforcement actions against the ultimate violator, the FCC should not want or require licensee involvement in these matters. Instead, the licensee should only be required to ensure that the lessee has knowledge of these obligations and commits to comply with them. This is not to say that licensees and lessees will not choose to work cooperatively on these matters. Licensees should be permitted by contract-- perhaps with an additional fee-- to provide lessees with technical assistance.⁴⁸

⁴⁷ *Secondary Markets Proposal* at ¶36.

⁴⁸ The Commission can expect that licensees will include in their leases an obligation that the lessee not cause interference with the licensee's system and cooperate in coordinating operations on adjacent and co-channel intra-system operations.

Lessees should be required to resolve all interference matters with other spectrum users. The lessee can resolve these matters to the extent of its lease parameters and consistent with its lease obligations. If the lessor chooses to work with the lessee on these matters, it should be able to do so. A lessee's resolution of and consent to interference solutions cannot harm the licensee's interest because the lessee can only take such actions that impact the time, the place and the band parameters under which the lessee holds the spectrum usage rights. A licensee need not consent to these solutions unless it wishes to agree to these resolutions for parameters outside of the lease terms. Of course, under this scenario, the Commission's technical and operational standards remain the loadstar for the lessee's interference protection and coordination efforts.

Likewise, RTG agrees with the Commission that the lessee should be responsible for compliance with all other technical rules.⁴⁹ However, it disagrees that licensees must file applications and other requests for approvals with the Commission on behalf of lessees. This would lead to unwarranted delays and impose costs on both licensees and lessees. Instead, lessees, with notification to the licensee, should be responsible for routine filings with the Commission. Filings that do not fundamentally alter a license beyond a lessee's term should not require consent of the licensee, unless the licensee so requires in the terms of the lease. This notice requirement will provide a licensee an opportunity to challenge technical changes that it believes significantly impact its operations. Any such filings by a lessee would require an identifier in the form of a discrete number or code that identifies the lessee with the lease previously recorded with the Commission by the licensee.

VI. SERVICE RULES SHOULD BE APPLIED INDEPENDENTLY TO LESSEES

RTG urges the Commission, to the extent possible, to apply its service rules independently to lessees who hold long-term leases. RTG, consistent with its view that secondary market mechanisms should not override those service and eligibility rules that the Commission chooses to retain, agrees with the Commission that leasing should not be used as a means of circumventing eligibility or service rules.

Lessees should be allowed to independently qualify under the Commission's "qualification, eligibility and use" restrictions without regard to the licensee under long-term leases. That is, the Commission should not link these entities in any way in calculating compliance. RTG suggests that the Commission generally define "long-term," for the purposes of creating an independent standard for the lessee, as three (3) years or more. For terms less than three years, the Commission should look to the qualifications of the underlying licensee/lessor for determining compliance.

RTG does not agree, however, that the licensee should be required to independently certify as to a lessee's eligibility to use a spectrum band.⁵⁰ If the licensee follows the due diligence regime suggested by RTG, the Commission should not require the licensee to further investigate the *bona fides* of a prospective lessee. Instead, the lease itself should require a certification from the lessee that it understands these requirements and meets them.

Where the Commission requires that a particular band of spectrum be put to a particular use, as in certain private land mobile services, a lessee must comply with these

⁴⁹ *Secondary Markets Proposal* at ¶40.

⁵⁰ *Secondary Markets Proposal* at ¶¶44-45.

restrictions irrespective of the length of its lease.⁵¹ To allow otherwise, absent a waiver or special temporary authority, would allow licensees to transform spectrum to non-compliant uses through the artifice of a lease. This would undermine the Commission's core public interest determinations.

The Commission should apply a long-term/short-term leasing dichotomy to its attribution and aggregation rules. For short-term leases, the determination of attribution and aggregation should remain with the underlying licensee. For long-term leases, this calculation should apply to the lessee. This approach creates a strong incentive for licensees to enter into long-term leases. Moreover, this treatment of attribution recognizes that the typical spectrum usage rights lease will effectively remove from the licensee the operational rights and benefits of control, leaving it only with lease revenues.

RTG believes that the measurement of construction requirements and/or substantial service requirements is a unique instance where the licensee should be able to rely upon, and be responsible for, the actions of its lessees.⁵² It is preferable that the leased geographic areas and bands within a license be counted toward a licensee's obligations in order to ensure that the public receives the benefit of the assigned spectrum. Otherwise, a licensee could use the leasing option to further dilute what RTG believes are already liberal construction and service obligations. In the alternative, the Commission could simply look at the population/geographic areas not subject to leases when evaluating a licensee's compliance and review independently the population/geographic area of a lessee. This alternative should only apply to long-term

⁵¹ *Id.* at ¶46.

⁵² *Secondary Markets Proposal* at ¶¶50-51

leases and should not be permitted in the waning days of a license term as a means for a licensee to avoid the consequences of its failure to construct and operate.

Leasing rights should not undermine the Commission's previous decisions on band usage. Consistent with this approach, RTG agrees with the Commission that in bands where the Commission requires a particular regulatory status, lessees must agree to operate in compliance with those regulatory terms absent a waiver or special temporary authority. To do otherwise would create an incentive for licensees to lease spectrum to escape the obligations of a particular regulatory status by using a lease to nullify the Commission's prior rule making decision as to that band.⁵³ The Commission should maintain the same approach as applied to resellers of common carrier radio services. While non-facilities-based resellers are arguably less capable of independently complying with the obligations that accompany Title II CMRS operations than would be a facilities-based lessee, the Commission generally holds such resellers to the same standards as the licensee. It should do no less with lessees.

The Commission seeks comment as to how it should ensure compliance with the conditions and other rules that accompany a particular regulatory status, particularly CMRS.⁵⁴ As RTG explained previously, lessees should be required to certify as to their knowledge of and commitment to comply with Commission rules in their lease agreements.

The Commission correctly notes that in many of its bands it permits a licensee to select its regulatory status. Consistent with this flexibility, a lessee should be permitted

⁵³ The Commission does not specifically seek comment on the implications of permitting a licensee to lease spectrum to an affiliated or co-owned entity. Allowing a lessee to negate the regulatory status of the underlying licensee would promote these types of arrangements.

⁵⁴ *Secondary Markets Proposal* at ¶59.

to choose its own regulatory status independent of the licensee. RTG notes that in certain bands the Commission allows a licensee to informally partition its network and operate the network on both a private and common carrier basis.⁵⁵ RTG urges the Commission to extend the same regulatory flexibility to two or more independent entities operating on the same band. Lessees would be required to notify the Commission of their regulatory status under the same procedures that licensees in these bands use today.

VII. LESSEES SHOULD FILE DIRECTLY WITH THE COMMISSION

In various sections of its *Secondary Markets Proposal*, the Commission tentatively concludes that the licensee, not the lessee, should make filings with the Commission. For example, the Commission suggests that the licensee make filings necessary to add new facilities or frequencies, increase operating power, or change emissions or antenna characteristics.⁵⁶ For reasons discussed by RTG elsewhere in its comments, the Commission should permit lessees to make filings and other requests to the Commission independent of licensees. By definition, a lessee can make such requests only to the extent of its spectrum usage lease parameters. These types of filings will not impact or bind the licensee beyond the parameters of the lease unless the licensee itself commits to such an extension. The Commission need only require that a lessee be on file with it before that entity begins to make routine applications. The lessee would

⁵⁵ For example, in the LMDS bands, the Commission grants licensees authority to operate under varying regulatory requirements under one license. “We also decline to require an applicant to choose between either common carrier or non-common carrier status in providing services under the broad license to be issued. We find it is inconsistent with the broad service definition and the flexible operations we adopt for LMDS to require the licensee to forgo one category of service for the other category. Licensees may well provide services that include elements of both common carrier and non-common carrier services. Instead, we will permit LMDS to be licensed to allow both common carrier and non-common carrier services in a single license.” *Local Multi-Point Distribution Service Second Report and Order and Order on Reconsideration*, 12 FCC Rcd 12545, ¶225 (1997).

⁵⁶ *Secondary Markets Proposal* at ¶¶60-61.

use the requisite nomenclature to identify it when communicating with the Commission. Licensees should be notified of lessee filings, but not be responsible for preparing such filings or consenting to them. To do so will delay the ability of the lessee to efficiently use the spectrum. In cases where a licensee would like to exercise more control over the spectrum, the parties could agree in their lease terms that the licensee would be responsible for all government filings, presumably for an additional charge.

VIII. LESSEES MUST HAVE AN EXPECTATION OF RENEWAL AND CONTINGENT INTERESTS TO PROTECT SIGNIFICANT INVESTMENTS

RTG expects that long-term leases will be the predominant approach to spectrum leasing. Lessees are likely to lease bare spectrum usage rights that track a licensee's license term. With these long-term leases lessees will be responsible for making significant infrastructure investments. The Commission must recognize that lessees will have difficulty funding these investments without some continuing expectation of access to the spectrum usage right comparable to those of the licensee.

RTG urges the Commission to allow lease terms that extend beyond the term of the licensee's authorization. Of course, any lease period beyond the license term would necessarily be contingent upon renewal of the underlying license. RTG understands that the Commission has, in other radio services, permitted leases that extend to 15 years.⁵⁷ In the alternative, RTG supports the Commission's proposal to permit the leasing parties to

⁵⁷ *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 2000 FCC LEXIS 3789 (July 21, 2000).

enter into contingent arrangements that give the lessee an expectation of a further term based upon renewal of the underlying license.⁵⁸

RTG strongly suggests that the Commission go further in protecting the ongoing interest of lessees in leased spectrum usage rights. Lessees should have some means of obtaining the status of a licensee in instances where the underlying licensee is legally disabled or allows a license to lapse. The Commission should permit the parties to a lease to create an option/right of first refusal contingency in licenses subject to FCC approval. This provision would protect a lessee if the underlying licensee discontinued its business, entered into bankruptcy, returned its license or otherwise becomes legally unqualified to hold the license. Without this qualified right, lessees will have difficulty justifying significant investments in an asset that might be taken from them through no fault of their own.

This type of lease provision reflects the practice in the leasing of tangible and real property when the lessee is expected to make substantial investments in the asset. When the lessor sells or disposes of its rights in traditional property, the property is still subject to the existing leasehold. With spectrum usage rights, however, a licensee could effectively eliminate the economic investment of a lessee by simply relinquishing the license. RTG recognizes that neither the lessor nor lessee can own outright the spectrum usage right. However, the Commission could alleviate the uncertainty that will limit a lessee's ability to invest in spectrum-based networks if it is willing to recognize the purchase option rights contained in leases. The Commission already recognizes the need to explore liberalization of its prohibitions on security interests and reversionary interests

⁵⁸ *Secondary Markets Proposal* at ¶62.

in licenses in order to promote access to capital by small businesses.⁵⁹ RTG suggests that the Commission can take a small step here in the context of leases to protect investments made by lessees.

IX. THE COMMISSION SHOULD ADOPT LEASING RIGHTS FOR AS MANY OF ITS LICENSED SERVICES AS POSSIBLE

RTG urges the Commission to apply its leasing rules, if adopted, to most if not all of its radio services. Those spectrum-based services that are excluded from the general right to lease should be the rare exception and the Commission should carefully justify these exceptions.

The Commission first proposes to apply leasing to “Wireless Radio Services” in which the licensee holds “exclusive” authority to use the license in its service area.⁶⁰ Rather than tie leasing authority to a specifically defined radio service or group of radio services, the Commission should instead extend leasing rights to all spectrum-based services and specifically delineate the exceptions. That way, as new radio services are authorized by the Commission, it will not need to expressly authorize leasing by modifying Section 1.907 of its rules to add the service. Instead, it need only amend its rules to reflect the rare times that leasing is not authorized.

The Commission should not categorically exclude radio services from leasing rights unless it finds the most compelling reasons. In its *Secondary Markets Proposal*, for example, the Commission categorically excludes Public Safety Radio, Amateur, Personal Radio, Maritime and Aviation Radio for “considerations unique to these

⁵⁹ *Spectrum Policy Statement* at ¶23.

⁶⁰ *Secondary Market Proposal* at ¶24.

particular services.”⁶¹ While the Commission’s reasoning is not clear, RTG surmises that the Commission is concerned with the specific eligibility and use requirements that exist in these bands. Rather than this categorical exclusion, however, the Commission need only continue to enforce its existing eligibility and use requirements on a lessee.

In this regard, RTG is particularly concerned that the Commission seems to have excluded Multichannel Multipoint Distribution Service (MMDS) and Instructional Television Fixed Service (ITFS) from the category of “Wireless Radio Services” that would be eligible for leasing under its *Secondary Markets Proposal*.⁶² The Commission recently authorized MMDS and ITFS licensees to provide two-way, broadband voice, video and data services similar to licensees in the 24, 28-31, and 39 GHz bands.⁶³ These services will be comparable and directly competitive. Moreover, in the 3G Allocation NPRM, the Commission contemplates the use of a secondary market in these bands to allow MMDS operations to evolve to Third-Generation mobile (3G) and other uses.⁶⁴ In that proceeding, the Commission is considering adding mobile use to the allocation for the MMDS/ITFS spectrum and allowing MMDS/ITFS licensees and mobile carriers to negotiate use of these bands for 3G. Leasing rights in the MMDS/ITFS bands need not be dependent upon a decision to permit mobile operations by MMDS/ITFS operators since other fixed wireless bands are incorporated in the instant leasing proposal. The Commission should strive to avoid artificial regulatory distinctions between licensees

⁶¹ *Secondary Markets Proposal* at footnote 19.

⁶² MMDS and ITFS are regulated in accordance with Part 21 of the Commission’s rules, which is not included among the rule parts in footnote 19 of the *Secondary Markets Proposal*.

⁶³ *Amendments of Parts 21 & 74 to Enable Multichannel Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two Way Transmissions*, Report and Order, 13 FCC Rcd 19112 (1998).

⁶⁴ *In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including*

offering like services. The Commission has repeatedly attempted to “establish consistency and promote regulatory parity with respect to policies governing wireless services.”⁶⁵ Here, MMDS spectrum leasing could promote new providers of broadband or 3G services. The Commission should reconsider this omission from its proposal.

The Commission need not even categorically limit its proposal to “exclusive use” licenses. The Commission expresses concern that in a shared use environment interference avoidance and frequency coordination with co-channel users is far more complex. Moreover, it notes that leasing may not even be necessary in a shared use environment since a potential lessee could just as well obtain a license.⁶⁶ First, RTG believes that the potential for leasing should not be foreclosed outright on the assumption that potential lessees will be unable or unwilling to comply with the operational requirements in these bands. These lessees will simply need to commit to meet those requirements as a condition of their licenses. Perhaps this is an instance where lessees will have less flexibility to run their networks independently of a lessor’s oversight and the Commission might direct that lessees comply with the same conditions already adopted by the lessor. Second, RTG believes that even in a shared use environment, entities may choose the leasing option over seeking an FCC license. For example, a potential lessee with a short term need for spectrum may view leasing as preferable to licensing.

The Commission should strive to make its leasing rules as generic as possible and not balkanize an initiative intended to promote more efficient use of all radio spectrum.

Third Generation Wireless Systems, Notice of Proposed Rule Making and Order in E.T. Docket 00-258, FCC 00-455, ¶64 (rel. January 5, 2001)

⁶⁵ *Amendment of Parts 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, Report and Order, 2000 FCC Lexis 3992 (August 1, 2000).

X. CONCLUSION

The Commission has embarked on an initiative that has the potential to significantly increase the use of already-assigned spectrum resources. The leasing of spectrum usage rights may also place spectrum into the hands of rural telephone companies and entrepreneurs who are willing to serve the less populated portions of license areas. In order to provide licensees with incentives to lease their spectrum rights, the Commission must relieve them of the strict liability obligations it proposes here. Licensees cannot be expected to be responsible for the far-flung actions of independent lessees. The Commission has the authority to exercise control over spectrum lessees and should require that leasing parties provide information on lessees as a condition of their due diligence.

⁶⁶ *Secondary Markets Proposal* at ¶65.

RTG commends the Commission for proposing to abandon its existing *de facto* control standard for reviewing leases. This standard is fundamentally inconsistent with a leasing environment. RTG implores the Commission not to replace this standard with control factors that are equally anathema to a vibrant secondary markets regime. The Commission should instead adopt a functional control alternative like that proposed by RTG.

Respectfully submitted,

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