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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Promoting Efficient Use of Spectrum)
Through Elimination of Barriers to the)
Development of Secondary Markets)

WT Docket No. 00-230

To: The Commission

COMMENTS

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February 9, 2001

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SUMMARY

Cingular generally supports the Commission's efforts to facilitate the creation of secondary markets by removing unnecessary regulatory barriers to spectrum leasing in the Wireless Radio Services. These markets will not prosper, however, unless the rules governing spectrum leasing are clear and licensees and potential lessees are confident that leasing arrangements can withstand judicial scrutiny. This may require an exercise of the Commission's forbearance authority.

Cingular submits the following comments on issues specifically raised in the *NPRM*:

- *Lessee Non-Compliance*: Licensees should bear ultimate responsibility for lessee actions. The Commission must establish, however, a "safe harbor" specifying the factors that should be included in a compliance program. The Commission also should clarify that lessee non-compliance will not be considered as a relevant factor at renewal unless the non-compliance relates to a matter identified in the Commission's compliance program and the licensee fails to take prompt corrective action. The Commission has ample legal authority to move against licensees or lessees for non-compliance with the Act or FCC rules.
- *Construction Obligations*: Cingular supports the Commission's proposal to allow licensees to rely on the activities of lessees for purposes of demonstrating compliance with applicable construction or substantial service obligations.
- *Regulatory Status*: The regulatory status of a lessee should be tied to the actual service it provides, rather than the status of the licensee.
- *Spectrum Cap*: There is no need for a CMRS spectrum cap given the competitive state of the marketplace. At a minimum, the cap should not be applied to both licensees and lessees. Such an approach would effectively "double count" spectrum and would potentially dampen the development of secondary markets.

Further inquiry may be necessary, however, to address significant issues not raised in the *NPRM*. Cingular is particularly concerned with how the spectrum leasing proposal will be applied in the following areas: Enhanced 911; CALEA; Local Number Portability; Numbering Administration; CPNI; Truth-in-Billing; Universal Service Contributions; and Regulatory Fees. The Commission should issue a Further Notice of Proposed Rulemaking setting forth how each of these requirements might be implemented under a secondary market regulatory regime.

Finally, Cingular urges the Commission to exercise its forbearance authority to eliminate uncertainties relating to "control" issues governed by Section 310(d) of the Act. Cingular supports adoption of the control test proposed in the *NPRM*, but urges that it be applied uniformly across all services.

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Elimination of Barriers to the Development of)
Secondary Markets)

To: The Commission

COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”) hereby submits comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.¹ Cingular generally supports the Commission’s efforts to facilitate the creation of secondary markets for spectrum in the Wireless Radio Services² by removing unnecessary regulatory barriers. Secondary markets will not prosper, however, unless licensees and potential lessees are confident that leasing arrangements can withstand judicial scrutiny. This may require an exercise of the Commission’s forbearance authority in order to adopt the control test proposed in the *NPRM*. The Commission also should clarify that its technical and service rules will be applied in a manner that encourages, rather than discourages,

¹ *Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, FCC 00-402 (rel. Nov. 27, 2000) (“*NPRM*”).

² Wireless Radio Services are defined in Section 1.907 of the Commission’s rules. 47 C.F.R. § 1.907. Although they include all radio services authorized in Parts 13, 20, 22, 24, 26, 27, 74, 80, 87, 90, 95, 97, and 101 of Chapter 1 of Title 47 of the Code of Federal Regulations, the Commission has indicated that its secondary market proposal will not apply to radio and television broadcasting services under Part 74. *NPRM* at n.19.

carriers to obtain access to spectrum via secondary markets. Further inquiry may be necessary to address issues not contained in the *NPRM*.

INTRODUCTION

Section 303(g) of the Communications Act requires the Commission to “generally encourage the larger and more effective use of radio in the public interest.” 47 U.S.C. § 303(g). Consistent with this mandate, the Commission has attempted to make spectrum usage more efficient by moving away from assigning spectrum for specific uses to permitting flexible spectrum usage.³ For example, in the CMRS context, the Commission has amended its rules to allow licensees to provide either fixed or mobile service over CMRS frequencies.⁴ Similarly, rather than stipulate the types of services that can be provided over new spectrum allocations, the Commission is allowing licensees to determine how best to use the spectrum.⁵ Cingular fully agrees that such flexibility will help drive the highest and best use of spectrum.

The Commission’s spectrum leasing proposal is consistent with this approach. It would remove a potential regulatory barrier — prior Commission approval — faced by those attempting to serve underserved areas or to implement “new, higher valued uses” for spectrum.⁶ Spectrum leasing can be successful under the following conditions:

³ See *NPRM* at ¶8.

⁴ *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *First Report and Order*, 11 F.C.C.R. 8965, ¶8 (1996) (“*CMRS Flex Order*”).

⁵ See *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 F.C.C.R. 10785, 10797-02 (1997); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, 15 F.C.C.R. 476 (2000).

⁶ *Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Policy Statement*, FCC 00-401, ¶18 (rel. Dec. 1, 2000).

- (1) Licensees must be able to obtain a real economic benefit from leasing and willing to lease;
- (2) Lessees' regulatory obligations must be clear and no more onerous than those imposed on licensees; and
- (3) There must be certainty that spectrum leasing agreements will pass regulatory and judicial review.

A secondary market for spectrum will flourish only if the market produces an economic benefit for licensees. For example, a new licensee may opt to lease a substantial portion of its spectrum while it is building out its system and obtaining subscribers. This lease arrangement could be used to subsidize build-out costs and be timed to terminate when the licensee anticipates that it will need the spectrum for capacity reasons. Absent an economic incentive, there is no reason for a licensee to lease its spectrum to another service provider, given attendant licensing risks and responsibilities.

Cingular strongly agrees with the Commission that secondary markets should not be a substitute for the allocation of additional spectrum to meet demand.⁷ The current consumer demand for wireless services has created, however, a shortage of spectrum.⁸ Thus, secondary markets will prove viable.

Although the current spectrum shortage may help drive the development of a secondary market, the size of that market will depend upon the regulations imposed. If the secondary market regulatory regime imposes more regulations on lessees than on licensees, the market will be constrained. Rather than lease spectrum in these secondary markets, parties will be incented to acquire traditional rights to spectrum pursuant to the transfer and assignment process. The burdens

⁷ *Policy Statement* at ¶2.

⁸ *See NPRM* at ¶6.

imposed on lessees will more than offset the benefits associated with avoiding the time-consuming transfer and assignment process.

Similarly, parties are unlikely to use leases extensively if there is uncertainty that lease arrangements will withstand regulatory and judicial scrutiny. As the Commission has previously recognized, carriers will be unwilling to take advantage of regulatory flexibility absent clarity.⁹ Lessees will not build facilities-based systems or businesses if their ability to operate these systems could be eliminated on judicial review. Accordingly, the Commission should take steps to eliminate as much uncertainty as possible regarding the ability of its secondary markets policies to withstand judicial review. Cingular also urges the Commission to adopt clear rules and provide ample guidance regarding the responsibilities of licensees and lessees.

I. COMMENTS ON SPECIFIC PROPOSALS RAISED IN THE *NPRM*

Cingular submits the following comments on matters specifically raised in the *NPRM*.

A. Lessee Build-Out Should be Attributable to the Licensee

Cingular supports the Commission's proposal to allow licensees to rely on the activities of lessees for purposes of demonstrating compliance with applicable construction or substantial service obligations. *NPRM* at ¶50. By allowing licensees to rely on the activities of lessees, the Commission will create additional incentives for the development of secondary markets. A licensee will be more willing to lease spectrum if such leasing facilitates satisfaction of FCC construction and service obligations.

The construction and service activities of a lessee should be attributable whether the lessee has a short-term or long-term lease. The only relevant inquiry should relate to the extent of the lessee's construction and service area. Short-term leases are unlikely to become a subterfuge for

⁹ *CMRS Flex Order*, 11 F.C.C.R. 8965, ¶8.

satisfying FCC construction and service obligations because lessees will incur substantial costs with any build-out. There is no economic incentive for a lessee to enter into a short-term lease for the sole purpose of satisfying a licensee's construction and service obligations.

B. The Spectrum Cap Should be Eliminated or Applied Only to Licensees

Cingular continues to steadfastly oppose retention of the CMRS spectrum cap. The cap simply is unnecessary in the competitive CMRS marketplace. In this environment, the Commission should not apply its CMRS spectrum cap to both licensees and lessees. *NPRM* at ¶¶ 48-49. Such an approach would effectively “double count” spectrum and would likely dampen the development of secondary markets. Application of the spectrum cap to lessees also would be inconsistent with the Commission's determination that licensees retain ultimate control over the spectrum. Excluding spectrum used by lessees from the cap would foster more of an open entry environment in numerous markets and introduce additional competitors.

At a minimum, the spectrum cap should apply only to lessees to the extent they are providing voice services. In its two most recent spectrum cap decisions, the Commission has made clear that the spectrum cap rule was based *only* on the distinct market for voice services.¹⁰ Thus, leased spectrum that is used solely for non-voice services should be excluded from the spectrum cap.

C. The Commission Must Establish a “Safe Harbor” Compliance Program

Although Cingular agrees that licensees should retain ultimate responsibility for compliance with the FCC's rules, the Commission should establish a “safe harbor” specifying the factors that

¹⁰ *Report and Order*, 15 F.C.C.R. at 9241; *Reconsideration Order*, FCC 00-376, ¶ 15 (Nov. 8, 2000), *appeal docketed sub nom. Cingular Wireless LLC v. FCC*, No. 01-1006 (D.C. Cir. Jan. 5, 2001). *But see 2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 01-14, *Notice of Proposed Rulemaking*, FCC 01-28 (Jan. 23, 2001) (even here, however, the Commission indicates that the cap was based primarily on voice services).

should be included in a compliance program. From the perspective of both licensees/lessors and lessees, the development of such a safe harbor is essential to the success of secondary markets. The safe harbor should delineate the specific items that a licensee must oversee to ensure lessee compliance, including how often these items should be monitored and the paperwork necessary to demonstrate compliance. Because both the licensee and lessee will be relying on the license, all aspects of the safe harbor must be clearly defined. The safe harbor criteria can then be incorporated into spectrum leases and will provide needed certainty regarding how the Commission will assess compliance. Licensees should not be held accountable, however, for non-compliance with matters not identified in the safe harbor — these items should be deemed non-essential from a forfeiture and renewal perspective.

Lessees will not be incented to ignore rules not specifically covered by the safe harbor program because the Commission has authority to issue forfeitures against lessees for non-compliance with FCC rules. *See* 47 U.S.C. § 503(b)(5). Cingular also notes that the Commission has the authority to enjoin lessees from violating the Act and FCC rules pursuant to Sections 312 and 401 of the Communications Act.¹¹

D. Lessee Non-Compliance Should Not Impact Renewal if Licensee Takes Prompt Corrective Action

Although Cingular agrees with the Commission that licensees retain ultimate responsibility for ensuring compliance with FCC rules and regulations, the Commission should not consider lessee non-compliance as a relevant factor at renewal unless the licensee failed to take prompt action to correct the non-compliance after sufficient notice. Absent this clarification, renewal implications

¹¹ 47 U.S.C. § 312(b) (“where any person . . . has violated or failed to observe any of the provisions of this Act . . . or any rule or regulation of the Commission . . . , the Commission may order such person to cease and desist from such action”); 47 U.S.C. § 401. *See Westel Samoa, Inc.*, WT Docket No. 97-199, *Memorandum Opinion and Order*, 13 F.C.C.R. 6342 (1998).

may have a chilling effect on the development of secondary markets. Licensees will be reluctant to lease spectrum if bad acts by lessees could cause harm at renewal. Thus, the Commission should expressly state that lessee non-compliance will be “purged” from the licensee’s record if the licensee takes prompt corrective action. An equally difficult problem may occur where there are a number of lessees under a single license and some lessees act in accordance with FCC rules, but others do not.¹² It is unclear how the Commission will evaluate this situation at renewal.

E. Regulatory Classification of Licensee Should Not Apply to Lessees

The Commission seeks comment on whether a licensee’s regulatory status — *i.e.*, common carrier versus private carrier — should be applied to lessees. Cingular believes that the lessee should have maximum flexibility and there should be no pass through of regulatory status. A licensee’s regulatory status should be irrelevant for purposes of determining the regulatory status of a lessee. The Commission should adopt an approach similar to the one set forth in Section 332(c)(1) of the Act:

A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier.

47 U.S.C. § 332(c)(1)(A). Thus, the regulatory status of a lessee should be tied to the actual service it provides, rather than the status of the licensee. Cingular notes that the Commission has defined CMRS very broadly so that there should be no real opportunity to evade common carrier obligations.¹³

¹² Because of the potential repercussions of lessee non-compliance, the Commission should prohibit subleasing without the express consent of the licensee. It would be unfair to hold a licensee responsible for non-compliance by a sublessee if the licensee did not have knowledge of the sublease arrangement.

¹³ See 47 C.F.R. §§ 20.3; 20.9.

F. Lessees Should Not be Subject to Qualification, Eligibility or Use Restrictions

The Commission should not require lessees to satisfy the qualification, eligibility, and use restrictions that apply to licensees. Application of these rules to lessees will prevent spectrum from being used in the most efficient manner. Moreover, if these rules were applicable to lessees, many small businesses and “entrepreneurs” may be unable to take advantage of many of the benefits associated with secondary markets. For example, if these rules were not applied, PCS C and F Block entrepreneur licensees could lease spectrum in order to defray build-out costs, which in turn could expedite build-out. If the rules were applied, however, the pool of potential lessees for this spectrum would be greatly reduced. This would unfairly prejudice the aforementioned C and F Block PCS licensees by inhibiting their ability to subsidize build-out requirements in the same manner as their competitors.

G. The *NPRM* Fails to Address Many Important Issues

Cingular doubts whether adoption of clear rules is possible given the number of questions raised at this stage of the proceeding. The *NPRM* contains approximately nineteen pages worth of questions and no proposed rules. Although Cingular supports the Commission’s general proposal that “the licensee retain ultimate responsibility for ensuring that the spectrum lessee complies with the Act and the Commission’s applicable technical and service rules” (*NPRM* at ¶27), many regulatory matters not specifically covered in the *NPRM* are not adequately resolved by this policy. For example, the following subject matters are not fully addressed by the *NPRM*:

- Enhanced 911
- CALEA
- Local Number Portability
- Numbering Administration
- CPNI
- Truth-in-Billing
- Universal Service Contributions
- Regulatory Fees

The Commission should issue a Further Notice of Proposed Rulemaking setting forth how each of these requirements might be implemented under a secondary market regulatory regime. The Further Notice should seek comment on how the Communications Act, particularly as amended by the Telecommunications Act of 1996, and the FCC's rules apply to licensees where service is actually being provided by a lessee. For example, certain provisions of the Act pertain to applicants and licensees while other sections use the term telecommunications carriers.¹⁴ Where do lessees fit? Can lessees qualify as eligible telecommunications carriers for universal service purposes? Will licensees be required to submit regulatory fees on behalf of lessees? Will PSAPs be required to submit E911 requests to licensees or lessees? If 911 service is provided by a lessee, will the licensee still be afforded liability protection under the Public Safety Act of 1999? Does the Public Safety Act provide liability protection to lessees? Who is responsible for responding to wiretap requests — licensee or lessee? Will licensees be held responsible for billing formats used by lessees?

Until the Commission adopts tentative conclusions on the aforementioned matters, there may be enough regulatory uncertainty to inhibit the growth of secondary markets.

¹⁴ Compare 47 U.S.C. §§ 301 (prohibiting the operation of radio equipment without a license), 304 (waiver by licensee), 308 (requiring a written application for licenses), with 47 U.S.C. § 254 (imposing obligations on telecommunications carriers). Moreover, it appears that Section 310(b) of the Act would not prohibit lessees from being wholly-owned by a foreign entity. Compare 47 U.S.C. § 310(b) with *Aerial Communications, Inc.*, WT Docket No. 00-3, *Memorandum Opinion and Order*, 15 F.C.C.R. 10089, ¶¶ 45-47 (2000); *Vodafone AirTouch, PLC*, 2000 FCC LEXIS 1683, ¶¶ 34-37 (March 30, 2000).

II. THE COMMISSION SHOULD EXERCISE ITS FORBEARANCE AUTHORITY TO ELIMINATE ANY CONCERNS THAT SPECTRUM LEASING MAY RUN AFOUL OF SECTION 310(d)

As stated above, the Commission has recognized that uncertainty is a major impediment to the implementation of flexible policies designed to improve the efficiency of spectrum usage. The Commission has correctly identified that uncertainty over application of Section 310(d) of the Communications Act to spectrum leasing is one of the primary impediments to the creation of secondary markets.¹⁵ Cingular agrees.

Section 310(d) of the Act provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

47 U.S.C. § 310(d). Section 310(d) has been held to prohibit both *de facto* and *de jure* transfers of control without prior Commission authorization. *See Lorain Journal Co. v. FCC*, 351 F.2d 824, 828-29 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

Congress, however, did not define the term “control” in the Communications Act and thus the Commission has broad discretion to interpret it.¹⁶ In fact, the Commission has used a number of different tests to determine whether there has been a *de facto* transfer of control under Section 310(d), as shown below:

¹⁵ See *Policy Statement* at ¶¶ 13, 15, 27.

¹⁶ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *NPRM* at ¶ 71.

- *Stereo Broadcasters Test* — used in the broadcast context. Three factors weighed: who controls programming; who controls personnel; and who controls finances?
- *Intermountain Microwave Test* — used in the common carrier radio context. Six factors weighed: does the licensee have unfettered use of all facilities and equipment; who controls daily operations; who determines and carries out policy decisions; who is in charge of employment; who is in charge of financing; who receives money and profits from operation of the facilities?
- *Motorola Test* — used with regard to private radio licenses. This test provides that no transfer of *de facto* control occurs where the licensee owns the most significant equipment and a third party performs management functions pursuant to the supervision and instructions of the licensee, who can terminate the governing agreement.

These tests have not always been applied uniformly or clearly. For example, courts have been critical of the Commission's uneven application of *Intermountain* to cases involving similar facts.¹⁷

The Commission has acknowledged that carriers have been previously unwilling to enter into spectrum leasing arrangements out of fear that such arrangements may run afoul of these tests. Accordingly, the Commission proposes to adopt a new control test just for spectrum leasing. It proposes that a spectrum lease arrangement will not constitute a *de facto* transfer of control if the licensee: (1) retains full responsibility for compliance with the Act and FCC rules with regard to the use of spectrum by lessees; (2) certifies that each spectrum lessee meets all applicable eligibility requirements and complies with all technical and service rules; and (3) retains full authority to take all actions necessary to remedy non-compliance by a lessee. *NPRM* at ¶79. This test, however, may be too similar to the one proposed by PCC Management Corporation in the *Ellis Thompson* case, which the Commission ultimately rejected as violative of Section 310(d).¹⁸ Thus, the creation of a new control test alone may not be the best way to create regulatory certainty.

¹⁷ Compare *Telephone and Data Systems, Inc.*, 19 F.3d 42 (D.C. Cir. 1994) with *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994).

¹⁸ See *Ellis Thompson Corporation*, 9 F.C.C.R. 7138, n.4 (1994).

Statutory forbearance may also be necessary to create a “safe harbor” control test.

Even with forbearance, the Commission may be open to an arbitrary and capricious charge that it has adopted disparate tests for application within the same service and to different services without a reasoned basis. It may be seen as arbitrary for the FCC to apply one test to determine whether a local marketing agreement constitutes a *de facto* assumption of control in the broadcast context; a different test to determine *de facto* control under a management agreement in the cellular service; a third test for determining *de facto* control in private radio services; and another test for determining *de facto* control pursuant to a spectrum lease. Equally important, it would seem to make little sense to apply completely different control tests within the same service depending upon whether spectrum leasing is involved. One answer may be to adopt one test for all services. Cingular recommends application of the *Motorola* which seems quite similar to the test proposed by the Commission in this docket.

Section 310(d) forbearance is justified under the statutory criteria for the following reasons.

A. Enforcement of Section 310(d) is Not Necessary to Ensure Just, Reasonable, and Nondiscriminatory Charges, Practices, Classifications, or Regulations

Prior FCC approval of spectrum leasing arrangements is not necessary to ensure that licensee’s charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. First, under the Commission’s proposal, licensees will be ultimately responsible for ensuring compliance with the Communications Act and FCC rules. Thus, if a lessor adopts charges or practices that are unjust or unreasonable, the licensee can be held accountable. Second, spectrum leasing is likely to result in the introduction of more wireless competition in the already competitive market for Wireless Radio Services.¹⁹ The Commission has previously stated

¹⁹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile*

that it relies “on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination.”²⁰

B. Enforcement of Section 310(d) is not Necessary to Protect Consumers

Forbearance is also warranted because enforcement of Section 310(d) is not necessary to protect consumers. Under the Commission’s secondary markets proposal, licensees will be held accountable for the actions of lessees. Thus, the Commission will be able to proceed directly against a licensee for any actions taken by lessees that are adverse to consumers. Moreover, if a licensee fails to remedy lessee actions targeted by consumer groups, these consumer groups can object to the renewal of the license. Finally, as stated above, the creation of secondary markets is likely to result in increased competition which results in consumer benefits.

C. Forbearance is Consistent with the Public Interest

Forbearance from enforcement of Section 310(d) to spectrum leasing agreements is consistent with the public interest. Spectrum leasing may facilitate the creation of secondary markets which will help alleviate spectrum shortages and may promote the more efficient use of spectrum. Moreover, because spectrum leasing can be used by licensees to finance build-out and system upgrades, consumers will see increased competition and new innovative service offerings. Secondary markets will simply speed the deployment of basic services to underserved areas as well as the development of new, innovative services.

Accordingly, forbearance from Section 310(d) satisfies the three criteria set forth in Section 10 of the Act.

Services, Fifth Report, FCC 00-289 (Aug. 18, 2000).

²⁰ *Wireless Consumers Alliance, Inc.*, FCC 00-292, 2000 FCC LEXIS 4287, ¶ 21 (August 14, 2000), *recon. denied* FCC No. 01-35 (WTB Jan. 31, 2001).

CONCLUSION

For the foregoing reasons, Cingular generally supports the Commission's proposal to create secondary markets for spectrum. There are many regulatory issues not identified by the *NPRM* that still must be resolved. At a minimum, the Commission should forbear from applying Section 310(d) of the Act to spectrum leasing so that it can adopt a uniform control test for the many services covered by the *NPRM*.

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