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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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 OF SECURICOR WIRELESS HOLDINGS, INC.

Securicor Wireless Holdings, Inc. ("Securicor Wireless"), by its counsel, hereby submits its Comments on the *Notice of Proposed Rulemaking* ("NPRM") in the above-captioned proceeding.[1]

I. BACKGROUND

A. Securicor Wireless

Securicor Wireless is the largest service provider in the 220-222 MHz band ("220 MHz Service"). Through its two subsidiaries, Intek License Acquisition Corp. ("ILAC") and Roamer One, Inc. ("Roamer One"), it is by far the largest single license holder in the 220 MHz Service and, with its national footprint, it serves customers in markets throughout the United States. Securicor Wireless has acquired 220 MHz spectrum by assignment, lottery and auction, and has also been active in partitioning and disaggregating its licensed holdings, when it determined that the spectrum could be more efficiently developed by a partner. Moreover, Securicor Wireless

[1] Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000) ("NPRM").

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continues to seek out new opportunities to expand its 220 MHz spectrum holdings and plans to make the 220 MHz Service as competitive as other commercial and private wireless services.

As the Commission is aware from Securicor Wireless's participation in the recent public forum on secondary markets in radio spectrum,[2] and other proceedings before the Commission,[3] Securicor Wireless has been actively exploring a new use for the 220 MHz spectrum – spectrum leasing. Therefore, Securicor Wireless is very interested in this proceeding and commends the Commission for its leadership in promoting more efficient use of spectrum by eliminating barriers to secondary markets.

B. 220 MHz SMR Market

The Commission initially set aside the two megahertz of spectrum in the 220-222 MHz band for the development of narrowband technology. Originally, the Commission authorized use in the 220 MHz Service by site-specific licenses; even the nationwide licenses were licensed on a site-specific basis. Like most wireless services, the Commission would later amend its rules for 220 MHz Service to allow for geographic licensing, acquired through competitive bidding, and to permit licensees to partition their licensed service area and disaggregate their licensed frequencies.

Securicor Wireless believes that while the 220 MHz market has been successful, it has not reached its full potential, primarily because licensees do not have the opportunity to maximize the use of their spectrum for the development of the market. By allowing greater

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[2] *See* Statement of Robert J. Shiver, President and Chief Executive Officer of Securicor Wireless Holdings, Inc. before the Federal Communications Commission Public Forum on Secondary Markets in Radio Spectrum held on May 31, 2000 (http://www.fcc.gov/realaudio/presentations/2000/053100/welcome.html).

regulatory flexibility, the Commission will give 220 MHz licensees the opportunity to fully utilize their best asset – their spectrum – towards the better development of the service. Specifically, spectrum leasing will allow licensees, like Securicor Wireless, to lease out portions of their spectrum holdings that would otherwise go underused or unused, especially in secondary or tertiary markets, without losing their core asset. Securicor Wireless believes that such spectrum leasing is in both the public interest and the interest of the 220 MHz licensees, because it will encourage greater use of the 220 MHz spectrum and help generate revenue that will encourage a more complete nationwide 220 MHz network and provide a clear alternative to other wireless services for small and medium-size businesses.

II. SECONDARY MARKETS IN RADIO SPECTRUM – SPECTRUM LEASING

A. Existing Spectrum Secondary Markets

As set forth in the NPRM, the concept of secondary markets in radio spectrum generally refers to markets in which an entity may acquire licenses (in whole or in part), or rights to use all or portions of the licensed spectrum from entities that have been authorized to use that spectrum by the Commission. A secondary market in radio spectrum has existed for years, primarily through assignment of licenses or transfer of control of licensees. Moreover, licensees have also entered into a variety of arrangements to allow other entities use of their frequencies without relinquishing control, including management agreements, joint marketing agreements, and resale agreements. In addition, in recent years, the Commission has continued to expanded the option of partial assignments, either by partitioning part of a licensed service area, disaggregating

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[3] *See, e.g.*, Comments filed by Securicor Wireless Holdings, Inc. dated September 15, 2000, in response to "Wireless Telecommunications Bureau Seeks Comment on Request for Clarification of *De Facto* Control Policy and Proposed Spectrum Lease Agreement," *Public Notice*, DA 00-1953 (rel. Aug. 24, 2000).

portions of the licensed frequencies, or some combination thereof. None of these approaches, however, provide licensees with the flexibility allowed in spectrum leasing.

B. Spectrum Leasing

As set forth in the NPRM, "spectrum leasing" refers to the leasing by Commission licensees of their spectrum usage rights to third parties.[4] Spectrum leasing allows licensees to lease, for a certain duration, a portion or all of their licensed spectrum to entities that need spectrum but neither have the resources or desire to acquire and maintain spectrum directly from the Commission or from licensees on an permanent basis. Moreover, spectrum leasing makes sense to licensees because it places spectrum that might otherwise go unused or underutilized into use, producing more revenue for licensees, while allowing licensees to maintain their core asset – their licensed spectrum.

As the Commission recognized in the NPRM, some services already are able to lease part of their unused or underutilized spectrum. For example, ITFS and MDS licensees have developed a symbiotic relationship where ITFS licensees lease part of their spectrum holdings to MDS operators in exchange for help in constructing and maintaining facilities. Likewise, leasing has been allowed in various manners in the satellite context. In addition, the Commission has recently established a new wireless service, the 700 MHz Guard Band spectrum, that was created entirely with the idea that the spectrum would be leased by a private, separately licensed "band managers."[5]

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[4] NPRM at n. 3.

[5] The band manager concept is also currently being considered in other new wireless services, including the 3650-3700 MHz and 4.9 GHz bands. *See generally* 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 Services, *Fifth Report*, 15 FCC Rcd 17660 (2000); 4.9 GHz Band Transferred from Federal

Despite these advances in certain services, the vast majority of licensees are either prohibited from leasing their licensed spectrum or are uncertain whether they can lease spectrum. Such uncertainty has been intensified recently by the apparent discrepancies between the Commission's traditional standard for control of facilities and the Commission's most recent statements regarding control, either in the 700 MHz Guard Band proceeding or by statements made by Commission officials at the Secondary Markets Public Forum.[6] In any event, such uncertainty has placed a chill on the development of secondary markets, to the point that many licensees are currently skeptical about entering into *any* secondary transactions. Therefore, Securicor Wireless strongly requests that the Commission act expeditiously in the instant proceeding so spectrum secondary markets can continue and expand into greater of spectrum leasing.

C. Benefits of Spectrum Leasing

As limited spectrum becomes more scarce, it is more important now to fully utilize all available spectrum. To have spectrum sit fallow because of limits on the control standard makes little economic sense and is not in the public interest as the most efficient use of the radio spectrum. Moreover, as new technology is created to utilize as much of the spectrum as possible – for example, software-defined radios – it is vital to allow licensees the flexibility to lease the extra capacity to other entities that are in need of spectrum.

Spectrum leasing is also in the public interest because it provides greater opportunities for small businesses. Many small businesses do not have the capability to acquire spectrum,

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Government Use, WT Docket No. 00-32, *First Report and Order and Second Notice of Proposed Rule Making*, FCC 00-363 (rel. Oct. 24, 2000).

maintain the spectrum, and dispose of it when they no longer need it. Spectrum leasing would give these companies access to spectrum on terms more suitable to their business plans.

Spectrum leasing is also important for utilization of spectrum in secondary and tertiary markets. As many nationwide licensees do, Securicor Wireless has focused its initial rollout of service to primarily high-population urban areas. Securicor Wireless has partnered with other entities to bring 220 MHz Service to rural areas, either through partitioning and disaggregation or other types of arrangements. These relationships, however, have been limited because of they are cumbersome, costly and hard to administer, and a licensee must surrender part of its core asset. Spectrum leasing would allow licensees to maximize their use of the spectrum without losing their core, revenue-producing asset, while at the same time encouraging service to underserved or unserved areas.

D. No Detriment to Allowing Greater Use of Spectrum Leasing

The NPRM asks if there are any parties, such as licensees, spectrum users, or the public in general, that may not benefit from a wider use of spectrum leasing. Securicor Wireless is not aware of any such parties. As outlined above, there are indeed a great deal of benefits for allowing greater use of spectrum leasing. Moreover, in the event that some detriment from spectrum leasing may possibly exist, it would likely be alleviated if spectrum leasing is presented as an option available to all eligible wireless licensees.

The Commission also asks if there are any practical limits to spectrum leasing, such as potential lessees being unwilling to build out facilities if they are only leasing for a short period. Securicor Wireless believes that spectrum leasing should be an option that licensees and

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[6] Federal Communications Commission Public Forum on Secondary Markets in Radio Spectrum held on May 31, 2000.

potential lessees can evaluate and determine if it is in their best economic interest to choose that option. Even temporary use of spectrum that would otherwise go unused or underutilized is a benefit to licensees and the businesses and consumers – and the public in general – that use the spectrum. Potential spectrum lessees will decide whether it is in their interest to build out facilities given the length of the lease and need for the spectrum. Moreover, short-term lessees may decide to eventually acquire the leased spectrum from the licensee (*i.e.*, a lease with option to buy) or sell the constructed facilities to the licensee, which in turn can lease the spectrum to another lessee or use it for its own purposes. With several available options, the Commission should allow licensees and lessees the flexibility to enter into whatever relationships allow for the most efficient and economic use of the spectrum, within the parameters of control set forth in this proceeding.

Along the same lines, the Commission should not regulate the amount of spectrum that a potential lessor must lease. In the recent 700 MHz Guard Band proceeding, the Commission required Guard Band licensees to lease a predominant amount (*i.e.*, at least 51%) of their spectrum.[7] Such a restriction, while perhaps relevant to the specific circumstances of the Guard Band spectrum, would not allow the most efficient use of the spectrum via spectrum leasing. For example, a licensee's business plan may envision that ten percent of its licensed spectrum will go unused for the first five years after acquiring the license, but that the licensee will need all of the spectrum thereafter. Spectrum leasing would allow that licensee to lease a portion of its frequencies to a third party that needs spectrum for a short-period (for example, while they are transitioning to a new service or technology). After the five-year period, the licensee could then

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[7] *See* In the Matter of 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, *Second Report and Order*, 15 FCC Rcd. 5299 (2000). *See also* 47 C.F.R. § 27.603(c).

recapture use of the spectrum without having to go through costly transactional and regulatory hurdles. Requiring potential lessors to lease a certain minimum level of spectrum may hamper such transactions. Moreover, the cost and time for the Commission to regulate and enforce such restrictions has little or no corresponding public benefit.

III. SCOPE OF SPECTRUM LEASING PROPOSAL IN NPRM

The Commission tentatively concludes to limit the specific proposals set forth in the NPRM, at least initially, to Wireless Radio Services in which licensees have exclusive rights to use the licensed spectrum. As set forth in the Commission's rules, "Wireless Radio Services" includes Part 90 licenses, whether commercial or private in nature,[8] and, although not specifically enumerated in the NPRM, includes licenses in the 220 MHz Service.[9] The licenses in the 220 MHz Service that have exclusive rights to the licensed spectrum can be regulated as either Commercial Mobile Radio Service ("CMRS") and Private Mobile Radio Service ("PMRS") licenses.

Securicor Wireless agrees with the Commission's tentative conclusion to limit the initial scope of spectrum leasing to "exclusive-use" Wireless Radio Services. While the Commission may later determine that expansion of secondary markets is appropriate or desirable for other services, including "shared use" spectrum, it is more advisable to initially begin with exclusive wireless licenses and study how the secondary markets actually develop. If the Commission attempts to answer all of the various issues that are brought up with these other services (including how shared use would work in the leasing context), it would substantially delay

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[8] *See* 47 C.F.R. § 1.907 ("Wireless Radio Services" is defined as 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 27 of the U.S. Code).

introduction of spectrum leasing. If, at a later date and after further consideration, the Commission later decides it appropriate to expand spectrum leasing to other services, then it could do so at that time.

Securicor Wireless also advocates that the spectrum leasing proposals set forth in the NPRM should apply equally to both CMRS and PMRS licenses. So long as the licensees have exclusive use over the licensed frequencies, the spectrum leasing proposals considered in the NPRM apply the same to both regulatory categories.

IV. COMMISSION'S SPECTRUM LEASING PROPOSAL

Securicor Wireless suggests the Commission set forth a general framework for spectrum leasing that, if followed, would essentially be a "safe harbor" for licensees and potential lessees. Under such a framework, if a particular spectrum leasing arrangement follows the general criteria outlined by the Commission, then the licensee and potential lessee should be allowed to develop an arrangement particular to their own business needs. Such an arrangement would, therefore, primarily be between the licensee and lessee and interaction with the Commission would be minimal. Securicor Wireless believes that such a framework for spectrum leasing would be the most effective way to create a robust secondary market.

A. Responsibility for Compliance with Commission's Rules.

Under the Commission's proposal set forth in the NPRM, the licensee must retain ultimate responsibility for ensuring that a spectrum lessee complies with the requirements of the Communications Act and the applicable technical and service rules. Securicor Wireless

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[9] *See* NPRM at n. 19 (includes Private Land Mobile Radio Services, but does not specifically enumerate the 220 MHz Service).

understands the Commission's proposal that the licensee has ultimate responsibility for the use of its licensed spectrum, but also supports the notion that the Commission should also have the option, where appropriate, to enforce particular sanctions against the lessee directly for non-compliance. Securicor Wireless believes that there may be circumstances were it is more appropriate or expedient for the Commission to act directly with the spectrum user, while maintaining ultimate responsibility with the licensee.

The relationship between the Commission, the licensee and the lessee should be set forth in the spectrum lease. The spectrum lease should specify certain conditions to which the lessee must agree. For example, as the NPRM suggests, the lessee must (1) comply with all applicable FCC rules, including those that may be imposed at a later time; (2) accept FCC oversight and enforcement consistent with licensee's license; and (3) cooperate fully with an investigation or inquiry conducted by either the FCC or the licensee. If these conditions are in the spectrum lease, the lease should be deemed to meet the relevant standard of control (as set determined in the instant proceeding). Such conditions will provide the licensee and lessee with a "safe harbor," and if the parties do not believe one or more of these conditions apply to their particular situation, then they may need to request prior approval from the Commission.

The Commission also asks in the NPRM if it should impose additional requirements on the licensees to ensure that each of its spectrum lessees complies with all the applicable interference, technical and service rules. For example, the Commission suggests that it could require the licensees to perform due diligence on the lessee and its activities to ensure compliance. Alternatively, the lessee could be required to certify that it complies with Commission rules and policies. Securicor Wireless believes such additional requirements are both unnecessary and could be difficult to implement or burdensome on the Commission's

resources. Securicor Wireless believes that licensees will have the proper incentive to engage in an initial due diligence examination of a potential lessee and continued monitoring of the lessee's activities to ensure it would maintain its core asset (*i.e.*, its licensed spectrum). Requiring a due diligence process would be difficult to enforce and may take an unusual amount of time and resources away from normal Commission activities. Certainly, a certification process would be easier to implement and more flexible from the licensee's perspective, however, it too has little practical advantage.

The Commission also suggests that it may be appropriate to require licensees and lessees to maintain written agreements and keep them current and available upon request for inspection by the Commission or its representatives, as was required in the 700 MHz Guard Band. Securicor Wireless agrees with the general notion that licensees and lessees should maintain written agreements and keep them current, however, it believes that this practice would be self-imposed. Such practice is common in the prudent course of business, and therefore, it is unnecessary as a regulation. Spectrum leasing agreements should be not different than any other agreements made between Commission licensees and third-parties related to the licensed spectrum, all of which are available to the Commission staff upon request. Securicor Wireless does note, however, that spectrum leases should be considered proprietary and advocates that the Commission should liberally grant confidentiality treatment to such agreements.

Securicor Wireless agrees with the Commission's proposal to have disputes resolved in the same manner that parties would resolve commercial disputes under contract, that is through either court or alternative dispute resolution ("ADR"). As with the proposed requirement for written and current agreements, however, Securicor Wireless believes such action should be left to the parties to negotiate. Recognizing that such provisions may help to avoid litigation that

could tie up spectrum, the Commission could *encourage* licensees to place ADR provisions (arbitration or mediation) in their leasing agreements.

B. Interference, Frequency Coordination and Other Technical Rules

The Commission asks in the NPRM what kind of relationship a licensee and potential lessees should have in complying with the Commission's rules against interference and other technical rules. Securicor Wireless believes that, in general, the Commission should allow the parties to negotiate who is initially responsible for any conflicts or problems with other licensees and/or lessees. The licensee, however, will always maintain a oversight role and will be ultimately responsible to resolve any conflicts. This general framework will provide licensees the greatest amount of flexibility to determine what works in their particular situations, while allowing parties affected by the licensed spectrum to work directly with those entities that are using the spectrum.

C. Service Rules

Securicor Wireless believes that the success of a robust secondary markets is contingent on a maximum amount of flexibility allowed to licensees and lessees. Based on this premise, the Commission should start any analysis regarding the applicability of specific service rules to lessees with the idea that, unless otherwise necessary, the rules should not strictly be applied to lessees. Securicor Wireless notes, however, that there may be a number of circumstances that, by not applying the service rules to the lessees, entities can use spectrum leasing to circumvent the Commission's rules. Therefore, Securicor Wireless advocates an approach with maximum

flexibility for licensees to lease their spectrum, but application of certain service rules to lessees to prevent circumvention of the Commission's rules.

D. Construction/Substantial Service Requirements

In the NPRM, the Commission proposes to permit a licensee to rely on the activities of its lessee(s) when establishing that the licensee has met the applicable construction, substantial service, or similar coverage requirements. Securicor Wireless agrees with this proposal because it believes that it will give licensees the flexibility to lease spectrum that is not being used while focusing their efforts on building out other parts of their network. Build out requirements are in place to encourage use of the spectrum by prompting licensees to construct a minimum level of facilities within a given timeframe. On the other hand, licensees have sufficient economic incentive, apart from the Commission's requirements, to build out their systems as market dictates. Therefore, if a licensee decides that it is in its best economic interest to lease part of its spectrum holdings, either temporarily or a long-term basis, then it is still putting its spectrum to more efficient and economic use. Thus, if a licensee is leasing part of its spectrum holdings to an entity that is effectively using the spectrum, there is little concern about non-competitive spectrum warehousing.

Securicor Wireless also agrees with the Commission's tentative conclusion that the licensee's reporting requirements are adequate to demonstrate that the spectrum is being used. Any additional requirements may be unnecessarily burdensome on both the licensee and the lessee and may possibly stifle the development of a robust spectrum secondary market. Moreover, Securicor Wireless reiterates that, while information should be made available to Commission staff to properly determine compliance with the Commission's rules and regulations,

some of the information may be proprietary and, therefore, Securicor Wireless requests that the Commission grant liberal application of confidentiality requests.

V. NEW CONTROL STANDARD FOR SPECTRUM LEASING

As the NPRM sets forth in detail, any arrangements for leasing spectrum (or introduction of frequencies into the secondary market in general), must continue to comply with all statutory requirements, including particularly Section 310(d) of the Communications Act.[10] Section 310(d) prohibits the unauthorized transfer of control or assignment of licenses (or parts of licenses, where permitted) to third parties. For many of wireless licenses, the Commission historically has interpreted Section 310(d) through its 1963 *Intermountain Microwave* decision, in which it set forth six factors for determining whether a *de facto* transfer of control has occurred.[11] The Commission has also used other tests in interpreting Section 310(d) in other contexts, including the private radio and broadcast.[12]

In the NPRM, the Commission recognized that the types of leasing arrangements that it proposes to allow in this proceeding may conflict with *Intermountain Microwave* standards of control. The Commission also recognized that *Intermountain Microwave* is not controlling, and is simply an interpretation – one that Securicor Wireless notes is over 35 years old. Therefore, the Commission tentatively proposes a new standard to ensure that licensees retain control for Section 310(d) purposes. Specifically, the Commission proposes a three-part test, in which

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10 47 U.S.C. § 310(d).

11 *Intermountain Microwave*, 12 FCC 2d 559, 24 RR 983 (1963).

12 *See, e.g.*, Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems, File Nos. 507505 et al., *Order* (Private Radio Bureau 1985) (control of private radio licenses rests on licensee's supervision and its propriety interest in equipment); Application of WGPR, Inc. and CBS, Inc. For Assignment of License at WGPR-TV, *Memorandum Opinion and Order*, 10 FCC Rcd 8140, 8141 (1995) (test for broadcast licenses examines who controls the programming, personnel, and financing).

would require the licensee to (1) retain full responsibility for compliance with the Communications Act and the FCC's rules and policies with regard to the use of licensed spectrum by any lessee or sublessee; (2) certify that each spectrum lessee (or sublessee) meets all applicable eligibility requirements and complies with all applicable technical and service rules; and (3) retain full authority to take all actions necessary in the event of noncompliance, including the right to suspend or terminate the lessee's operations if such operations do not comply with the Communications Act or the Commission's rules. As discussed below, Securicor Wireless believes that this new standard, with some modifications, will both satisfy the statutory requirements and provide licensees an increased amount of flexibility in forming relationships with spectrum lessees.

With regard to the first prong, Securicor Wireless believes that the Commission should modify its requirement that the licensee retain *full* responsibility for compliance with the Communications Act and Commission rules and policies with regard to the lessee's use of the licensed spectrum. Instead, Securicor Wireless advocates that the licensee should retain *ultimate* responsibility for compliance. As noted above, there may be cases in which the Commission may wish to proceed directly against the lessee as a telecommunications service provider under the Communications Act. Moreover, the spectrum lease may be crafted to allow the Commission to act directly against the lessee for violations of the Commission's rules or policies. Of course, this modification would not relieve the licensee of its ultimate responsibility for the licensed spectrum, but it allows certainty flexibility in circumstances where it is deemed most appropriate or efficient for the Commission to act directly against the lessee for a possible violation.

With regard to the second prong, the requirement may not be necessary, and if it is necessary, that it should be slightly modified. The Commission must first determine whether or not the lessee is in fact required to meet all the eligibility requirements and to comply with all applicable technical and service rules. As the Commission itself acknowledges in the NPRM, there may be circumstances where it is not appropriate to require the lessee to follow the same requirements and rules as the licensee. Moreover, if certification of compliance is deemed necessary, that the licensee should only need to certify that lessee has itself certified that it meets all of the requirements and rules and that its lease requires that the lessee will comply with all applicable technical and service rules.

Finally, with regard to the third and final prong, the standard as set forth by the Commission adequately meets the statutory requirement and provides flexibility to licensees that are interested in leasing their spectrum.

VI. CONCLUSION

For the foregoing reasons, Securicor Wireless urges the Commission to adopt the proposals set forth in the NPRM with the modifications suggested in these Comments. Securicor Wireless, furthermore, respectfully requests that the Commission act in this proceeding in an expedited manner so licensees and potential lessees can begin to enjoy the benefits of spectrum leasing in the immediate future.

Respectfully submitted,

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