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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF TELIGENT, INC.

Teligent, Inc. ("Teligent"), by its counsel, hereby submits its Comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] Teligent, through its various wholly-owned subsidiaries is a full-service, facilities-based integrated communications company offering high-quality local, long distance, high-speed data, and dedicated Internet service to small and medium-sized business customers. For more than three years, Teligent has been rapidly deploying point-to-point and point-to-multipoint fixed wireless microwave technology for the provision of its competitive local exchange and other services utilizing frequencies in the 24 GHz and other frequency bands. Teligent provides its services in numerous markets across the nation, pursuant to spectrum licenses granted to it by the Commission.[2]

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1 Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets (Notice of Proposed Rulemaking), FCC 00-402 (November 27, 2000).

2 Teligent holds 24 GHz band geographic licenses (formerly known as Digital Electronic Message Service) licenses in 74 major metropolitan areas throughout the United States and currently provides a full range of services in 43 of these markets. Initially, these licenses were granted for operations in the 18 GHz frequency band,

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As a significant license holder and spectrum user, Teligent is both a potential lessor and lessee of spectrum. Accordingly, Teligent applauds the Commission's efforts to create a regulatory environment that will lead to more efficient and effective use of the spectrum and welcomes the rule and policy changes proposed by the NPRM and its companion Policy Statement.[3] Teligent agrees that these changes are necessary to spur the development of secondary markets in spectrum, which, in turn, will complement the primary spectrum market (auctions) and facilitate the availability of spectrum on both a short term (spot market) and long term basis. As discussed herein, the FCC should expeditiously implement its proposals in a manner that affords potential spectrum lessors and lessees the maximum flexibility in crafting business relationships best suited to meet their needs. Those needs, when met, ultimately will lead to the greater use of licensed spectrum to serve the public interest.

THE COMMISSION'S RULES SHOULD PROMOTE SECONDARY MARKETS THROUGH SPECTRUM LEASING

The NPRM (at para. 14) proposes to clarify Commission rules and policies, and revise them where necessary, to establish that wireless licensees may lease all or portions of their assigned spectrum subject to compliance with the provisions of the Communications Act. Teligent concurs with the FCC's conclusion that the increased use of spectrum leasing will promote the more efficient use of the spectrum and immediately

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but were subsequently reassigned to the 24 GHz band. See Amendment of the Commssion's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band for Fixed Service, 12 FCC Rcd 3471 (1997).

[3] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets (Policy Statement), FCC 00-401 (December 1, 2000).

enhance the supply of spectrum available in the market without the regulatory delays associated with licensing and transfer of control proceedings.

This is particularly important to a service provider, like Teligent, that is deploying a nationwide service. Due to resource availability and time requirements associated with the construction of a nationwide network, some markets inevitably will be served before other markets. By removing barriers to spectrum leasing, the FCC will enable a service provider that holds regional or nationwide licenses to seek partners/lessees that are able to commit their resources to build out the necessary infrastructure in markets that otherwise may not receive its service for some time. Importantly, with spectrum leasing, the spectrum lessor may preserve the integrity of its spectrum footprint, a core asset for any wireless service provider.

Section 310(d) of the Communications Act has been interpreted many times by the Commission in many different factual contexts. For common carriers generally, the Commission in the oft-cited Intermountain Microwave decision of 1963 articulated what it believed at that time was an appropriate standard for licensee control over its facilities.[4] That decision held that "[t]he normal minimum incidents" of licensee control included: (1) the unfettered use of all facilities and equipment; (2) day to day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of monies and profits derived from operation.

Since Intermountain Microwave in 1963, the FCC admittedly has interpreted Section 310(d) differently for various services subject to different or even the same parts

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[4] Intermountain Microwave, 12 FCC 2d 559, 24 RR 983 (1963).

of its rules. As the NPRM notes, the FCC has allowed ITFS licensees to lease excess channel capacity and fixed satellite service ("FSS") licensees may lease part or all of their transponder capacity for any period of time to third parties. And, of course, the FCC just last year not only approved spectrum leasing but actually required it for the 700 MHz "Guard Band" licensees. The FCC, moreover, has applied for fifteen years a different standard of control to private radio and (now) Private Mobile Radio Service ("PMRS") licensees, one that requires a licensee to maintain an interest in the facilities on which their systems operate.[5] These standards were all crafted in response to legitimate market demand, yet all of them derive from the very same statutory provision, Section 310(d), that applies indiscriminately to each of the Commission's Title III licensed entities. The Commission has already determined that the control standard of Section 310(d) evolves with technical and marketplace changes. The challenge for the Commission here is to define the bedrock requirements necessary to comply with the control provisions of Section 310(d) without unduly restricting the ability of licensees to enter into arrangements that maximize and facilitate spectrum use.

In Teligent's view, a licensee may clearly retain ultimate control over its license in a manner which complies with Section 310 by providing for appropriate safeguards in its contractual relationships with spectrum lessees. Licensees, of course, must retain the ultimate responsibility to the FCC for the operation of licensed facilities in order to also remain in compliance with the Communications Act and the FCC's rules and policies. This ultimate responsibility provides the compelling economic incentive to ensure that appropriate safeguards exist since a failure to do so would jeopardize the licensee's core

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[5] Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked

revenue producing asset, its license. Safeguards of this nature should include, as suggested by the Commission, contractual assurances from a spectrum lessee that it will abide by the provisions of the Communications Act and the FCC's rules and regulations (and that it maintains a current and complete set of all applicable FCC regulations); that the lessee submits to full FCC jurisdiction over its operations and that the Lease may be terminated in the event of a violation by it of the FCC's rules or policies or the operation of facilities at variance with the parameters of the station license. While the spectrum lease cannot extend beyond the term of the license, the licensee and the lessee should be able to agree on options to extend the lease upon renewal of the license. Just as it is important to licensees that they have a "renewal expectancy" for the licenses upon which they have built their businesses, so too should lessees have parallel assurances.

Today, the Commission correctly recognizes that Intermountain Microwave and its progeny stand as an obstacle for the majority of the FCC's licensees that wish to engage in spectrum leasing. As the record on the FCC's May 31, 2000 En Banc hearing amply demonstrates, many licensees have found secondary market transactions prohibitively difficult, cumbersome and costly as a result of the strict Intermountain Microwave standards.

As the FCC wisely revisits the relevance of Intermountain Microwave in today's marketplace, it is instructive to note of that decision that it was not intended as an exhaustive analysis of the requirements of Section 310 in all circumstances or for all services. Rather, the brief decision simply touched on the basic facts regarding that specific case alone. And, even in that case, the FCC held that "it is permissible for [the]

Systems (Order), File Nos. 507505 et. al. (July 30, 1985).

licensee to lease facilities from a customer utilizing the services of such licensee," which in itself approximates a secondary market transaction.

In short, the Intermountain Microwave control standard is not statutorily required, but is rather a more than 38-year-old FCC interpretation based upon a single factual circumstance and the marketplace at that time. While it has been often cited as precedent, the Commission has in many other instances disavowed its applicability and has not followed it. In any event, it is clear that the examination of the relevant issues that the FCC commenced with an En Banc hearing in May 2000 followed by the record that will be compiled as a result of this NPRM will reflect a far more comprehensive examination of the requirements necessary to maintain compliance with Section 310 in a manner which maximizes the public interest. It is Teligent's view, therefore, that it is appropriate to meet the demands of today's marketplace for spectrum and the services that may be provided therefrom that the FCC adopt a more flexible standard for measuring licensee control in the context of spectrum leasing.

In this regard, the NRPM (at para. 79) proposes a new three-part control standard applicable in the context of spectrum leasing. This test would require the licensee: (1) to retain full compliance with the Communications Act and the FCC's Rules and policies with regard to the use of licensed spectrum by any lessee or sub lessee; (2) to certify that each spectrum lessee meets all applicable eligibility requirements and complies with all applicable technical and service rules; and (3) to retain full authority to take all actions necessary in the event of non-compliance, including the right to suspend or terminate the lessee's operations. As set forth below, with certain minor modifications or clarifications, Teligent believes that this three-part test will both satisfy the requirements

of Section 310 and provide spectrum licensees the needed flexibility to engage in spectrum leasing and other secondary market transactions.

Because a spectrum licensee, in all cases, must hold the ultimate responsibility for all operations conducted pursuant to its license, it is likely to provide for exactly the kinds of recourse and remedies in their spectrum leases that the FCC contemplates in its control standard, even if not required to do so by regulation. Indeed, if the license were revoked as a result of non-compliance with the Commission's rules, the licensee would suffer the greatest harm. Teligent believes, however, that the FCC need not necessarily pursue action in the first instance against the licensee for a violation of a Commission rule or policy by one of its spectrum lessees. Indeed, the FCC may and should be able to proceed directly against the lessee as a telecommunications service provider subject to the Communications Act or as a third party beneficiary to the spectrum lease (and the proviso that the lessee agrees to be subject to FCC jurisdiction). In many cases, Teligent anticipates that direct FCC action against the spectrum lessee would serve as a further effective means of addressing a potential violation of the FCC's rules by a lessee in addition to the contractual remedies available to the licensee.

In addition, Teligent suggests that the second prong of the control standard be modified slightly to require only that licensees certify that each lessee (or sublessee) has certified that the lessee or sublessee meets all applicable eligibility requirements and that its lease requires that the lessee will comply with all applicable technical and service rules. This slight modification will protect the licensee from those circumstances where a lessee has successfully hidden its lack of eligibility or other criteria despite the exercise of reasonable care by the licensee. This will ensure that the licensee takes reasonable

measures to ascertain the eligibility of the lessee and its ability to comply with all applicable FCC rules without imposing a burden of constant participation or oversight by the licensee in the lessee's operations. The FCC, of course, will retain the jurisdiction to address any issues concerning a lessee's noncompliance either with the lessee or the lessor.

THE COMMISSION'S RULES SHOULD PROVIDE FOR FLEXIBILITY IN CONTRACTUAL RELATIONSHIPS BETWEEN THE LICENSEE AND ITS LESSEES

The NPRM seeks comment on a number of issues regarding the licensee/lessee relationship, including the issues of whether the lessee should be subject to the same regulatory classification as the licensee and whether the Commission should require the inclusion of specific provisions in a spectrum lease. Teligent urges that the FCC provide the maximum flexibility possible to licensees to develop business relationships to meet market demand. Because the market for spectrum leasing has yet to take shape in the wireless communications services, restrictions or encumbrances on the licensee's ability to enter into private agreements with third parties may unintentionally inhibit the development of secondary spectrum markets. Accordingly, Teligent urges the Commission to refrain from requiring specific provisions in spectrum leases beyond those that may be necessary to meet the control standard adopted for spectrum leasing.

Spectrum lessees should not be required to operate under the same regulatory classification that the licensee has chosen if a different classification for that spectrum would otherwise be permitted by the FCC's rules. For example, a lessee in the 24 GHz band should be free to elect to operate on a private carrier basis even if the host licensee has elected to provide service only as a common carrier. A lessee should not, however,

obtain greater rights or be subject to less requirements than would otherwise apply to a license holder of the same spectrum.

For the foregoing reasons, Teligent urges that the FCC expeditiously adopt the proposals set forth in the NPRM in a manner consistent with the modifications suggested herein in order to enable those entities that presently desire to lease available spectrum as either a lessor or lessee to bring the benefits of that spectrum to the public as soon as possible.

Respectfully submitted,

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