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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Verizon Wireless logo features a large checkmark symbol above the word "verizon" in a bold, lowercase sans-serif font, followed by "wireless" in a smaller, lowercase sans-serif font.

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February 9, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Promoting Efficient Use of Spectrum Through Elimination of Barriers to the
Development of Secondary Markets – WT Docket No. 00-230

Dear Ms. Salas:

Verizon Wireless is submitting this letter in response to the FCC's request for comments on its proposal to permit Wireless Radio Services licensees to lease spectrum to other carriers.¹ Verizon Wireless previously addressed many of the issues raised in the NPRM in comments it filed on September 15, 2000 in a Wireless Telecommunications Bureau proceeding seeking comment on a proposed spectrum lease arrangement,² and attaches those comments here for inclusion in the record of this proceeding.

Verizon Wireless believes that clarifying the Commission's spectrum leasing policy is good public policy, but that it is not a substitute for allocating new wireless spectrum, and will not uncover abundant new sources of spectrum. In fact, there is no more urgent public interest task for the Commission in the wireless area than to move forward quickly on the allocation and licensing of substantial amounts of new spectrum

¹ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, WT 00-230 (rel. Nov. 27, 2000).

² See "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. August 24, 2000).

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to meet public demand for commercial mobile and other wireless services. We note that the Commission has commenced a proceeding to identify which bands of spectrum could be best used for next generation wireless services,³ and we urge the Commission to devote its limited spectrum allocation rule making resources to that task. It is in that light that we highlight the following points of our attached comments:

- *Permitting spectrum leasing does not relieve the Commission of its fundamental responsibilities to manage the spectrum.* Spectrum leasing is not the ultimate “fix” for spectrum shortages. Businesses desire as much control as possible over their assets, but by law, a lease cannot grant control over spectrum, which is one of a wireless carrier’s most valuable assets. Most wireless carriers would prefer licensing spectrum directly from the FCC because leasing spectrum simply is more risky than controlling a license. While the risks associated with leasing can be mitigated through contract, they cannot be entirely removed, and the importance of long-term control over its business assets that is implicit in an FCC license inevitably leads a carrier to prefer being a licensee.
- *The Commission should adopt clear spectrum leasing guidelines.* Verizon Wireless believes, however, that clear guidelines regarding spectrum leasing and transfers of control will help meet important public and spectrum policy objectives. Clarifying spectrum leasing policies will lift a layer of regulatory confusion from the process of forming wireless business partnerships. Delineating such policies will help licensees understand from the outset what is permissible and thus will likely reduce transaction costs and facilitate business relationships. For the Commission’s spectrum leasing policies to work effectively, however, leasing rules must be simple and be consistent across all wireless services.
- *The Commission no longer needs to apply the rigid control standards of Intermountain Microwave.* Indeed, the Commission has already determined that, provided that adequate safeguards exist to ensure that licensees retain ultimate *de facto* control of their licenses, spectrum leasing is consistent with the requirements of Section 310(d) of the Communications Act. In the recent *Guard Band Decision*, the Commission established a new category of commercial user in the Guard Bands -- a Guard Band Manager,⁴ without reference to the *Intermountain Microwave* six factors for evaluating control.⁵ The Guard Band Manager will be a Commission licensee

³ See 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 Third Generation Wireless Systems, *Notice of Proposed Rule Making and Order*, ET Docket No. 00-258 (rel. Jan. 5, 2001).

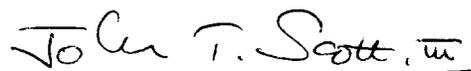
⁴ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, WT Docket No. 99-168 (*Guard Band Decision*) at ¶ 26 (rel. Mar. 9, 2000).

⁵ *Intermountain Microwave*, 24 Rad. Reg. (P&F) at 984.

engaged solely in the business of leasing spectrum to third parties on a for-profit basis.⁶ The Commission established a spectrum use agreement that ensures that the licensee/lessor will have full authority and the obligation to take whatever actions are necessary to ensure the operations of the spectrum lessee comply with the Act and the Commission's rules.⁷

Verizon Wireless believes that permitting licensees to lease spectrum may provide a more efficient secondary market for existing services, and as such urges the Commission to adopt clear spectrum leasing guidelines. However, spectrum leasing will not free up the large amounts of new spectrum carriers need to meet growing public demand for expanded voice, data and other wireless services. Verizon Wireless believes that it is extremely important that the Commission focus its efforts on identifying, allocating and licensing spectrum for new services.

Sincerely,



John T. Scott, III
Vice President and Deputy General
Counsel – Regulatory Law

Attachment

⁶ *Guard Band Decision* at ¶27.

⁷ *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

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SEP 15 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re)
)
GOLDEN WEST TELECOMMUNICATIONS)
COOPERATIVE, INC.,)
SULLY BUTTES TELEPHONE COOPERATIVE, INC.,) DA 00-1953
AND LONG LINES, LTD.)
)
Request For Clarification of *De Facto* Control)
Policy and Request for Authority to Operate)
Broadband PCS and LMDS Facilities Pursuant)
to Spectrum Lease Arrangement)

To: Wireless Telecommunications Bureau

COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits comments supporting the request of Golden West Telecommunications, Inc., Sully Buttes Telephone Cooperative, Inc., and Long Lines, Ltd. (jointly "Rural Carriers") filed in the above-captioned proceeding on June 30, 2000, seeking authority to enter into a specific spectrum lease and joint operating arrangement.¹

I. SUMMARY

Verizon Wireless submits these comments because it believes that clear guidelines regarding spectrum leasing and transfers of control will help meet important public and spectrum policy objectives. At the same time, however, by clarifying its spectrum leasing policies, the

¹ See "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. August 24, 2000).

Commission does not relieve itself of its fundamental responsibilities to manage the spectrum. Clarifying spectrum leasing policies will lift a layer of regulatory confusion from the process of forming wireless business partnerships, but it will not uncover abundant new sources of spectrum. Delineating such policies will help licensees understand from the outset what is permissible and thus will likely reduce transaction costs and facilitate business relationships. In short, clarifying the Commission's spectrum leasing policy is good public policy, but it is not a substitute for allocating new wireless spectrum.

Under the Rural Carriers' proposed arrangement, each Rural Carrier would be a member of a limited liability company ("LLC") that would operate an integrated PCS/LMDS system in each licensee's respective Basic Trading Area in South Dakota and Iowa. The LLC would not be a Commission licensee, but would lease spectrum from each of the Rural Carriers to operate the PCS/LMDS system. Each of the Rural Carriers would remain ultimately responsible for compliance with the Commission's rules.

Verizon Wireless supports the Rural Carriers' request for authority to enter into the proposed spectrum lease and joint operating arrangement. Verizon Wireless believes that the Rural Carriers' request offers the Commission an important opportunity to clarify its spectrum leasing policies and provide clear guidelines on what is permissible. As the Commission has already determined, spectrum leasing can be undertaken in a manner that is wholly consistent with the requirements of Section 310(d) of the Communications Act, provided that adequate safeguards exist to ensure that licensees retain ultimate *de facto* control of their licenses. The Rural Carriers' proposed spectrum lease arrangement satisfies these criteria. The proposed arrangement serves the public interest by permitting the Rural Carriers to pool their resources

and share in the costs of designing, financing, constructing, and operating a wireless network. The arrangement also includes sufficient safeguards for the Commission to conclude that the licensees are retaining *de facto* control of their licenses consistent with Section 310(d).

II. THE FCC SHOULD PERMIT LEASING BECAUSE IT WILL HELP PUT MORE SPECTRUM TO USE, BUT THIS ACTION DOES NOT OBVIATE THE URGENT NEED TO ALLOCATE AND LICENSE MORE CMRS SPECTRUM.

Spectrum leasing can serve both important business purposes and public policy goals. Spectrum leasing can facilitate more intensive use of this scarce resource, where in a particular market those that demand capacity can deal directly with those that can supply that capacity. Spectrum leasing can provide a carrier a means to “fill holes,” either in its footprint, or by providing additional capacity where it already has licenses. The Commission can promote leasing (and thus more productive and efficient use of spectrum resources) by adopting rules that clarify that leasing is permissible under Section 310(d) if certain conditions are met. However, for the Commission’s spectrum leasing policies to work effectively, leasing rules must be simple and be consistent across all wireless services. Disparate policies for separate (although competing) services distort and skew the market, and the Commission has pledged to eliminate and avoid such disparate policies.²

² Avoiding disparate regulation and the distorting effects it can have on competitive markets was one of the primary goals of Congress’s amendments in 1993 to Section 332 of the Communications Act. In implementing those amendments, the Commission declared, “The creation of a symmetrical regulatory framework for the regulation of similar commercial mobile radio services is an essential step toward achieving the overarching congressional goal of promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market.” *Implementation of Section 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8015 (1994).

Nor is spectrum leasing the ultimate “fix” for spectrum shortages. Businesses desire as much control as possible over their assets, but by law, a lease cannot grant control over spectrum, which is one of a wireless carrier’s most valuable assets. Most wireless carriers would prefer licensing spectrum directly from the FCC because leasing spectrum simply is more risky than controlling a license. As a licensee, a carrier can generally expect that its license will be renewed if it complies with the FCC’s rules. Licensees do face the risk that, in carrying out its spectrum management responsibilities, the Commission could change service rules or reallocate the licensee’s spectrum for another use. But those risks are inherent in a spectrum leasing relationship as well, and the lessee has the additional risk of dealing with the lessor, who might, for example, not want to enter a long term lease, or will escalate recurring lease payments or substantially increase rent at time of renewal. Decisions as to how and to what extent to invest in network infrastructure, for example, are much more difficult if access to the underlying spectrum is vested in another entity. The lessee also must account for the risk that the lessor could violate FCC rules, default on government payments, or declare bankruptcy, leaving the lessee with no business. While the risks associated with leasing can be mitigated through contract, they cannot be entirely removed, and the importance of long-term control over its business assets that is implicit in an FCC license inevitably leads a carrier to prefer being a licensee.

Even if these disincentives to leasing can be alleviated by, for example, clearer policies that expressly permit leasing, spectrum leasing can never be the full remedy for the current spectrum shortage. Rather, it is one of a number of public policy initiatives the Commission should undertake to facilitate business transactions. It is not a substitute for allocating and licensing significant additional spectrum. The record in many other proceedings has amply

documented the serious, unmet need for additional spectrum that is flowing from the public's rapidly growing demand for access to wireless voice, data and Internet-related services.³

Verizon Wireless and its legacy companies have placed in the record of other proceedings evidence that it itself needs significant additional spectrum, and it is only one of many wireless carriers facing growing demands for capacity.⁴ There can be no more urgent public interest task for the Commission in the wireless area than to move forward quickly on the allocation and licensing of substantial amounts of new spectrum to meet public demand.

III. THE PROPOSED SPECTRUM LEASE ARRANGEMENT IS CONSISTENT WITH SECTION 310(d).

Verizon Wireless concurs with the Rural Carriers that the proposed spectrum lease arrangement is consistent with Section 310(d) and the ultimate objectives of the *de facto* control standard set forth in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963). Section 310(d) of the Act requires that a Commission licensee must at all times have control of and responsibility for its facility.⁵ To determine who has control of a proposed facility, the

³ See, e.g., Cellular Telecommunications Industry Ass'n Petition for Rulemaking Concerning Implementation of WRC-2000, filed July 12, 2000, RM-9920.

⁴ See, e.g., Comments of Verizon Wireless on CTIA Petition for Rulemaking, RM-9920, filed Aug. 28, 2000; Bell Atlantic Mobile Petition for Limited Forbearance, filed February 17, 2000 (documenting need for more spectrum as basis for removing CMRS spectrum cap for PCS reauction).

⁵ 47 U.S.C. § 310(d).

Commission has traditionally examined the following six factors originally laid down in

Intermountain Microwave:

- < Does the licensee have unfettered use of all facilities and equipment?
- < Who controls daily operations?
- < Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- < Who is in charge of employment, supervision and dismissal of personnel?
- < Who is in charge of the payment of financing obligations, including expenses arising out of operating? and
- < Who receives monies and profits derived from the operation of the facilities?⁶

The *Intermountain Microwave* factors do not, however, form a rigid standard. Instead, they are simply “useful guidelines for evaluating real-party-in-interest and transfer of control questions. . . . We stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case.”⁷ They provide the Commission guidance in reviewing contracts and other arrangements for control issues and to provide licensees with meaningful direction in negotiating such arrangements.⁸ In fact, the Commission has expressly recognized that the ultimate test under Section 310(d) is whether the licensee retains “exclusive responsibility for the operation and control of the facilities.”⁹ The six factors are simply a useful tool for making that determination.

⁶ *Intermountain Microwave*, 24 Rad. Reg. (P&F) at 984.

⁷ *La Star Cellular Telephone Company*, 9 FCC Rcd 7108, 7109 (1994).

⁸ *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7123, 7127 (1994).

⁹ *Id.*

In short, neither Section 310(d) nor *Intermountain Microwave* prohibits spectrum leasing, provided that adequate safeguards exist so that licensees are in a position to exercise control to ensure that a system's operations remain in compliance with the Communications Act and the Commission's rules. That simple principle is what has guided Commission decisions permitting leasing of spectrum in *non*-CMRS services. The Commission first allowed Instructional Television Fixed Service licensees to lease portions of their spectrum 17 years ago.¹⁰ Likewise, it is standard for Multipoint Distribution Service licensees to lease their spectrum,¹¹ and the Commission allows leasing of spectrum in the Local Multipoint Distribution Service by those desiring to offer, for example, point-to-point services.¹² Clearly the Commission believes that permitting licensees to lease spectrum in non-CMRS services is consistent with Section 310(b).

As the Commission reviews the Rural Carriers' proposal it should also review its interpretation of its longstanding *de facto* control standard in light of its more recent decisions. The Commission's goal in this proceeding should not only be to ensure that spectrum leasing does not result in a change in control, but that its leasing policies ensure the best use of spectrum.

In the recent *Guard Band Decision*, the Commission established a new category of commercial user in the Guard Bands -- a Guard Band Manager.¹³ The Guard Band Manager will

¹⁰ See *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service*, 94 FCC 2d 1203, 1249-50 (1983).

¹¹ See *Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service*, 104 FCC 2d 283, 286 (1986).

¹² See *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-27.9 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, the Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 11 FCC Rcd 19005, 19040 (1996).

¹³ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the*

be a Commission licensee engaged solely in the business of leasing spectrum to third parties on a for-profit basis.¹⁴ Without reference to *Intermountain Microwave*, the Commission found the Guard Band Manager consistent with Section 310(d) because “Guard Band Managers will have full authority and the duty to take whatever actions are necessary to ensure third-party compliance with the Act and our rules.”¹⁵

This conclusion was based upon certain rules governing the Guard Band Managers which ensure that the Guard Band Managers retain ultimate *de facto* control of their licenses. Specifically, spectrum use agreements may not authorize the spectrum user to construct or operate a system except under the terms, conditions and operational parameters established in the underlying license. Such agreements (1) may not extend beyond the term of the underlying Commission authorization; (2) must detail the operating parameters of the spectrum user’s system; (3) must include provisions that apply all existing license obligations to the spectrum user; and (4) must require the spectrum user to comply with all applicable Commission rules and to accept Commission oversight and enforcement consistent with the underlying license.¹⁶ In addition, the Guard Band Manager must retain the right to conduct on-sight inspections of all transmission facilities and to take measures to resolve any interference or rule violations it identifies.¹⁷

Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, FCC 00-90, at ¶ 26 (rel. March 9, 2000).

¹⁴ *Id.* at ¶27.

¹⁵ *Id.* at ¶46.

¹⁶ *Id.* at ¶¶ 49-50.

¹⁷ *Id.* at ¶ 50.

In its *Guard Band Manager* decision, the Commission has determined that the actual licensee may, consistent with Section 310(d), transfer operation and use of spectrum through lease, as long as it is done pursuant to an express agreement that meets the above conditions. The Commission, through the Guard Band Manager, will be able to exercise its regulatory authority to enforce requirements necessary to ensure that the system and the spectrum user operate consistently with the requirements of the Act. The licensee must, at all times, exercise sufficient control over a system to ensure that the Commission, through its authority over the licensee, retains the ability to exercise its regulatory authority over the utilization of spectrum.

The Rural Carriers' proposed spectrum agreement meets this fundamental standard. Indeed, the proposed agreement incorporates provisions consistent with the requirements established in the *Guard Band Decision*.¹⁸ The spectrum use agreement ensures that the licensee/lessor will have full authority and the obligation to take whatever actions are necessary to ensure the operations of the spectrum lessee comply with the Act and the Commission's rules.¹⁹ That is sufficient control to meet the statutory requirement. And the Commission, through its direct authority over the licensee/lessor, retains the ability to exercise its regulatory authority over the operations of the spectrum user, thereby enabling it to ensure that it can discharge its public interest obligations under the Communications Act.

¹⁸ See Request at 6.

¹⁹ *Id.*

IV. CONCLUSION

The Rural Carriers' proposed spectrum use agreement is consistent with Section 310(d) of the Act and the Commission's longstanding objective to ensure that a licensee maintains *de facto* control over the spectrum licensed to it. The Commission should therefore grant the Rural Carriers authority to enter into the proposed spectrum lease and joint operating arrangement. More broadly, the Commission should use the opportunity provided by this specific request to adopt, through declaratory ruling or a rulemaking, clear standards for leasing. Those standards should grant wireless carriers express authority to acquire access to needed spectrum through leasing arrangements, adopt clearly defined requirements as to what conditions must be included in such spectrum leases, and ensure that these requirements apply even-handedly to all wireless services.

Respectfully submitted,

VERIZON WIRELESS

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Its Attorney

Date: September 15, 2000

Certificate of Service

I hereby certify that on this 9th day of February 2001, copies of the foregoing "Comments of Verizon Wireless" in WT Docket No. 00-230 were sent by hand delivery to the following parties:

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