

**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 ) WT Docket No. 00-230  
Secondary Markets )

**REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.**

Pursuant to the Commission’s Notice of Proposed Rulemaking, AT&T Wireless Services, Inc. (“AT&T”) hereby submits its reply comments in the above-captioned proceeding.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The majority of commenters strongly support AT&T’s view that to promote the fullest development of a secondary market for spectrum leasing, the Commission should take a regulatory “hands-off” approach. It is critical to the success of spectrum leasing arrangements that the Commission refrain from imposing unnecessary administrative hurdles to entering into leases, such as requiring licensees to serve as, or retain, a “band manager” or otherwise obtain pre-approval from the Commission, or requiring licensees and lessees to define their relationship with reference to a predetermined uniform contract. Further, the Commission can best serve the public interest in ensuring the efficient use of spectrum and promoting the availability of innovative services to consumers by clarifying that spectrum leasing arrangements are permissible as soon as possible, and rejecting unsupported requests for a “pilot” program to test the viability of such arrangements.

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<sup>1/</sup> In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking, WT Docket No. 00-230 (rel. Nov. 27, 2000) (“Notice”).

As many commenters observe, the rationales for imposing a spectrum cap on licensees no longer apply to the highly competitive CMRS market. If the Commission retains the spectrum limits, however, leased spectrum should not be attributable to the lessee. The licensee will retain full control over use of the spectrum, including the ability to terminate the lease, and spectrum leasing arrangements generally would not constitute a transfer of control under section 310(d) of the Act. The Commission has ample support to reject the use of the Intermountain Microwave criteria in the spectrum leasing context, and institute an alternate set of criteria for determining when a transfer of control has occurred.

**I. THE COMMISSION SHOULD NOT IMPOSE UNNECESSARY AND BURDENSOME ADMINISTRATIVE HURDLES TO SPECTRUM LEASING**

A majority of commenters agree with the Commission that “the best way to realize the maximum benefits from the spectrum is to permit and promote the operation of market forces in determining how spectrum is used.”<sup>2/</sup> Like AT&T, most commenters advocate refraining from imposing complex regulatory requirements that would hinder the Commission’s goal of creating such a market.<sup>3/</sup> The Commission should reject proposals of some parties to adopt such requirements, including instituting a band manager licensing scheme, requiring a uniform leasing contract, or imposing various procedural delays such as pre-approval requirements or a pilot program.

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<sup>2/</sup> In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Policy Statement (rel. Dec. 1, 2000) ¶ 8.

<sup>3/</sup> See, e.g., Comments of the National Telephone Cooperative Association at 2-3; Comments of Nextel Communications, Inc. at 12; Comments of the Organization for the Promotion and Advancement of Small Telecom Cos. at 2-4.

**A. A “Band Manager” Or Other Pre-Approval Requirement Would Hinder The Development of the Secondary Market for Spectrum Leasing.**

Many commenters agree that instituting a “band manager” licensing model or requiring Commission pre-approval of the ability to lease spectrum or any specific spectrum lease arrangement would be inappropriate and contrary to the public interest because it would introduce an additional layer of regulatory requirements that would delay and complicate spectrum leasing.<sup>4/</sup> The few commenters arguing that there is a need for a band manager model assert that such a structure would clarify “the obligation of licensees to ensure compliance with applicable rules”<sup>5/</sup> or would “reduce the risks of harmful effects of spectrum transactions” (by, for example, “assign[ing] frequencies in such a way as to minimize interference among lessees”).<sup>6/</sup> However, a band manager is unnecessary to achieve these outcomes. As discussed in AT&T’s initial comments, licensees can ensure adequate compliance with Commission rules through contractual provisions.<sup>7/</sup> Attempts to minimize interference among spectrum users similarly can be accomplished through contract or by the parties directly, without need for an intermediate third person. Rather than facilitate spectrum leasing arrangements, imposing band manager and other regulatory impediments would deter parties from entering into spectrum leases and thus harm the public interest.

**B. A Uniform Lease Agreement Would Decrease Needed Flexibility.**

AT&T’s demonstration that licensees and lessees should be allowed to design individualized lease contracts that can take into account the unique circumstances of a particular

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<sup>4/</sup> See, e.g., Pacific Wireless Comments at 3; Comments of Enron Corp. at 15.

<sup>5/</sup> Comments of the Land Mobile Communications Council at 7; see Comments of El Paso Global Networks Company at 4.

<sup>6/</sup> Comments of Vanu, Inc. at 7.

<sup>7/</sup> See Comments of AT&T Wireless Services, Inc. at 9-10.

lease, the length of the leasing arrangement, and any other relevant factors is echoed in many other comments.<sup>8/</sup> The suggestion by Enron and others, however, that the Commission should “encourage the use of a standardized contract”<sup>9/</sup> or the use of certain standardized contract provisions could undermine the benefits of such flexible arrangements, and thereby jeopardize the future of spectrum lease agreements.

Cingular’s proposal, for example, that the Commission develop a “safe harbor” list of specific actions a licensee must take to ensure compliance with Commission rules<sup>10/</sup> would violate the basic principles of flexibility that drive parties to enter into lease agreements. In practice, the “safe harbor” terms would become a required part of the contract. Once parties were deprived of the ability to tailor individualized lease agreements, and were required by contract to assume certain predefined responsibilities, they would be much less likely to enter into spectrum leases.

While it may be reasonable for the Commission to solicit from the industry suggested language for certain contractual provisions, that language should not be required for licensee-lessee relationships. If the Commission’s goal of increasing spectrum efficiency is to be met, licensees and lessees must be able to enter into contracts that best suit the needs of the parties and their customers.

**C. A “Pilot Test” of Spectrum Leasing Is Unnecessary And Would Delay Development of a Robust Secondary Market.**

AT&T demonstrated in its initial comments that spectrum leasing arrangements would help alleviate carriers’ urgent need for additional spectrum to provide traditional telephony

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<sup>8/</sup> See id.; see also NTCA Comments at 4 (“License holders should also be free to negotiate the responsibilities, obligations and restrictions associated with spectrum leasing”)

<sup>9/</sup> Enron Comments at 20.

<sup>10/</sup> Cingular Comments at 5-6.

service and newer 3G services to the public, and that the Commission should implement policies encouraging use of lease arrangements to ensure that consumers have access to the most innovative technologies and services available.<sup>11/</sup> Indeed, since there is nothing prohibiting spectrum leasing today, designing flexible standards to promote leasing does not require significant amendment to the Commission's rules.

Enron's proposal that implementation of spectrum lease arrangements be delayed so that the Commission can conduct "testing on a limited scale and for a set experimental period" to determine "whether, and if so to what extent, a secondary market for spectrum usage rights is feasible"<sup>12/</sup> is completely unfounded and would contradict the Commission's goals of alleviating the immediate need for additional spectrum. While Enron asserts that a pilot program would "enable the Commission to better shape the regulations" governing secondary markets,<sup>13/</sup> the same results could be achieved by allowing the market to develop freely, which would also carry the additional benefit of maximizing efficient use of spectrum and availability of services at a time when spectrum is scarce.

There is also no justification either to cap the permissibility of spectrum leasing at 50 percent of licensed spectrum or to limit leasing to certain bands.<sup>14/</sup> In particular, Enron's proposal that leasing be limited to certain bands so that competitive bidding for those bands would reflect their increased value contradicts the public policy behind the Commission's original lease proposal.<sup>15/</sup>

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<sup>11/</sup> AT&T Comments at 2-4.

<sup>12/</sup> Enron Comments at 22.

<sup>13/</sup> Id. at 22-23.

<sup>14/</sup> Id. at 23.

<sup>15/</sup> Id. For similar reasons, RCA's proposal that the Commission adopt a fill-in policy for certain PCS spectrum licenses is unfounded. Comments of the Rural Cellular Association at 8-9.

## II. LEASED SPECTRUM SHOULD NOT BE ATTRIBUTABLE TO THE LESSEE

Most commenters support AT&T's position that to the extent the Commission continues to believe a spectrum aggregation limit is wise, then it is appropriate to attribute that spectrum to the licensee, not the lessee. As CTIA demonstrates, "by incorrectly attributing leased spectrum to licensees 'double counting' distorts market realities" and skews the intent of the rules.<sup>16/</sup> Alaska Native Wireless similarly argues that attributing spectrum to lessees would "inhibit the value of the licensed spectrum."<sup>17/</sup> Cingular Wireless agrees, stating that "[t]he cap simply is unnecessary in the competitive CMRS marketplace" and that applying the cap to licensees and lessees "would effectively 'double count' spectrum and would likely dampen the development of secondary markets."<sup>18/</sup> Further, Cingular adds that "[a]pplication of the spectrum cap to lessees ... would be inconsistent with the Commission's determination that licensees retain ultimate control over the spectrum."<sup>19/</sup>

Cook Inlet asserts, without explanation, that "[i]n order to satisfy the Commission's existing policy objectives that supported the imposition of the spectrum cap (i.e., safeguard competition in the CMRS market), any spectrum that is leased on the secondary market should be attributable both to the licensee and the lessee for purposes of the existing spectrum cap

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Instituting fill-in policies is inappropriate when, as in this case, licensees have paid substantial compensation for their licenses at auction. While AT&T agrees that the Commission should institute policies to promote efficient use of spectrum, this result can be achieved by adopting flexible leasing policies in this proceeding, or licensees can partition or disaggregate their spectrum.

<sup>16/</sup> CTIA Comments at 7-8.

<sup>17/</sup> Comments of Alaska Native Wireless, LLC at 14.

<sup>18/</sup> Cingular Comments at 5.

<sup>19/</sup> Id.

rule.”<sup>20/</sup> As CTIA observes, however, “such aggregation limits are vestiges of traditional monopoly-style regulation that are unnecessary given today’s competitive market for mobile wireless services and the availability of sufficient, alternative enforcement options to restrain anticompetitive conduct.”<sup>21/</sup> Indeed, the Commission itself has questioned whether any aggregation limits are necessary,<sup>22/</sup> and Chairman Powell has observed that “many changes in the marketplace have occurred that require the immediate reexamination of this artificial barrier . . . to the acquisition of spectrum.”<sup>23/</sup> The Commission should not formulate new regulations based on outdated and inapplicable policy objectives.

### **III. THE COMMISSION IS NOT REQUIRED TO APPLY THE INTERMOUNTAIN MICROWAVE TEST TO DETERMINE WHEN A TRANSFER OF CONTROL HAS OCCURRED**

The comments overwhelmingly confirm that the Commission has ample authority to devise a new test to assess when a transfer of control has occurred in the spectrum leasing context, and is not bound by the Intermountain Microwave criteria in making that determination.<sup>24/</sup> Indeed, as several commenters observe, the Commission is obligated to

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<sup>20/</sup> Comments of Cook Inlet Regions, Inc. at 10.

<sup>21/</sup> CTIA Comments at 6 (internal citations omitted).

<sup>22/</sup> AT&T Comments at 6 (citing 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, Notice of Proposed Rulemaking, WT Docket No. 01-14 (rel. Jan. 23, 2001), ¶ 12).

<sup>23/</sup> See id. (citing Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Further Notice of Proposed Rulemaking, FCC 00-197, WT Docket No. 97-82 (rel. June 7, 2000), Separate Statement of Commissioner Michael K. Powell, Concurring at 1).

<sup>24/</sup> See, e.g., AMTA Comments at 4; CTIA Comments at 11-12; Cook Inlet Comments at 12-13; El Paso Global Networks Comments at 12; Nextel Comments at 3; Pacific Wireless Comments at 6-7; Rural Telecommunications Group Comments at 20-22.

reconsider a policy decision that is no longer relevant in a particular context.<sup>25/</sup> As AT&T demonstrated, a departure from the Intermountain Microwave test is warranted here because the test would preclude a valuable use of the licenses that advances an important Commission goal, and the Commission's proposed substitute test satisfies the Commission's responsibilities under Section 310(d).<sup>26/</sup> Further, as CTIA and others observe, the Commission alternatively has authority to forbear from enforcing Section 310(d) in the spectrum leasing context, and doing so would advance the public interest by encouraging efficient use of spectrum and by allowing licensees to gain the additional spectrum they need to provide innovative services to their customers.<sup>27/</sup>

### CONCLUSION

For the foregoing reasons and as discussed in AT&T's initial comments, the Commission should implement rules to facilitate spectrum leasing that minimize regulatory burdens that could discourage the fullest development of a secondary market.

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<sup>25/</sup> See, e.g., CTIA Comments at 12 (citing Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) and Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979)).

<sup>26/</sup> See AT&T Comments at 13.

<sup>27/</sup> See CTIA Comments at 16; El Paso Global Networks Comments at 12; Comments of Winstar Communications, Inc. at 11-12.

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## CERTIFICATE OF SERVICE

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