

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

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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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY COMMENTS

CINGULAR WIRELESS LLC

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TABLE OF CONTENTS

SUMMARY	1
I. THE FCC SHOULD ADOPT RULES THAT CLEARLY DELINEATE THE RESPONSIBILITIES OF LICENSEES AND LESSEES	2
A. FCC Should Adopt a Safe Harbor	3
B. Licensees Should Only Be Secondarily Liable	3
C. The Commission Needs to Clarify How Its Rules Will Apply to Lessees	5
II. THE FCC SHOULD ELIMINATE ITS DISPARATE CONTROL TESTS IN FAVOR OF THE SINGLE TEST PROPOSED IN THIS DOCKET	7
III. SPECTRUM CAP SHOULD NOT APPLY TO BOTH LICENSEES AND LESSEES ..	8
IV. LESSEES SHOULD NOT BE SUBJECT TO FCC RULES GOVERNING ELIGIBILITY, QUALIFICATION, AND SPECTRUM USE	9
V. SERVICE-SPECIFIC CONSTRUCTION AND SERVICE OBLIGATIONS SHOULD BE ELIMINATED OR LICENSEES SHOULD BE ABLE TO RELY ON LESSEES TO MEET THESE OBLIGATIONS	9
CONCLUSION	10

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REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”) hereby replies to the comments submitted in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.¹

SUMMARY

Commenters unanimously supported the creation of secondary markets for spectrum in the Wireless Radio Services.² Virtually all commenters, however, identified issues that must be clarified if these secondary markets are going to prosper. As discussed below and in its initial comments, Cingular agrees. Of particular importance, the Commission should take the following steps:

- establish clear rules with respect to the responsibilities of licensees and lessees, including the establishment of a safe harbor, making licensees secondarily liable, and treating lessees as “sub-licensees;”
- eliminate the agency’s disparate control tests in favor of the test proposed in this docket and forbear as necessary. At a minimum, the *Intermountain* test should not be applied to spectrum leasing;
- refrain from double counting the CMRS spectrum cap against both lessees and licensees;

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 As noted in its initial comments, however, the creation of secondary markets does not serve as a substitute for the allocation of additional spectrum to meet demand. Cingular Comments at 3.

- streamline the service and eligibility rules to remove unnecessary burdens on leasing spectrum in secondary markets; and
- encourage licensees to lease spectrum by allowing them to rely on the construction activities of lessees.

I. THE FCC SHOULD ADOPT RULES THAT CLEARLY DELINEATE THE RESPONSIBILITIES OF LICENSEES AND LESSEES

A number of commenters, including Cingular, urged the Commission to establish clear rules with respect to the responsibilities for licensees and lessees.³ The development of secondary markets will be inhibited absent clear rules.⁴ Simply put, licensees will be unlikely to lease spectrum if they lack confidence that they will be insulated from lessee non-compliance.⁵ Cingular and others suggested that the Commission take the following steps to create this confidence: (i) create a “safe harbor” that delineates 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; (ii) proceed directly against lessees for non-compliance with FCC rules.

With respect to the latter, Cingular continues to believe that the FCC has the requisite statutory authority to proceed directly against non-licensee lessees.⁶ To eliminate any uncertainty, however, the Commission could establish a notification procedure whereby licensees notify the FCC

³ Alaska Native Wireless Comments at 9 (urging FCC to clarify the law governing licensee-lessee relationship); Blooston Rural Carriers Comments at 6-7 (suggesting creation of “safe harbor” for licensees); ENRON Corp. Comments at 16-17; Rural Telecommunications Group (“RTG”) Comments at 10-12; Verizon Wireless Comments at 2; 37 Concerned Economists’ Comments at 4-5 (urging FCC to eliminate all rules not related to interference in order to let the marketplace operate efficiently).

⁴ Alaska Native Wireless Comments at 9 (stating that “licensees that are otherwise inclined to lease spectrum to designated entities may not do so if the requirements of the law are not readily-discernable”).

⁵ See Alaska Native Comments at 9; UTStarcom, Inc. Comments at 3.

⁶ See Cingular Comments at 6.

about all spectrum leases. As discussed below, the FCC would then enter the lessee into its database as a “sub-licensee.”

A. FCC Should Adopt a Safe Harbor

In its comments, Cingular asserted that the creation of a safe harbor is essential to the success of secondary markets. Cingular was not alone in its suggestion. A number of commenters urged the Commission either to create a safe harbor or to clarify that licensees will not be held accountable for lessee actions without prior notice and an adequate opportunity to cure.⁷ Absent a safe harbor, or a “notice and opportunity to cure” provision, licensees will not be incented to enter into spectrum leases because it will be impossible to adequately police all aspects of lessee activities.⁸ The establishment of safe harbor criteria, however, will provide certainty regarding how the Commission will assess compliance with its rules.⁹ These criteria can then be incorporated into spectrum leases.

B. Licensees Should Only Be Secondarily Liable

Cingular agrees with those commenters that support holding lessees primarily responsible for compliance with FCC rules.¹⁰ As the Rural Telecommunications Group (“RTG”) noted, the

⁷ Cingular Comments at 5-7; Blooston Rural Carriers Comments at 6-7; El Paso Global Networks Company (“El Paso”) Comments at 6-7 (licensees must have reasonable notice and opportunity to cure violation before being held responsible by FCC for lessee actions); ENRON Comments at 19 (stating that licensees need some assurances from the FCC that violations by lessees will not threaten their continued use of spectrum); Cook Inlet Comments at 6, 13 n.21; National Telephone Cooperative Association (“NTCA”) Comments at 5-6.

⁸ CTIA Comments at 4 (noting that licensees may be unwilling to enter into leases because they could be held responsible for lessee non-compliance, even if lease required lessee to comply with FCC rules); El Paso Comments at 5-6; ENRON Comments at 19.

⁹ As Cingular noted in its comments, licensees should not be held accountable for lessee non-compliance with matters not identified in the safe harbor — these items should be deemed non-essential from a forfeiture and renewal perspective. Cingular Comments at 6-7.

¹⁰ Cingular Comments at 5-7; Blooston Rural Carriers at 6-7 (stating that “licensee’s liability for a spectrum users regulatory compliance [should be] only *secondary*”); CTIA at 8-11 (stating that compliance should be the responsibility of the entity actually providing service); NTCA Comments

Commission's proposal to hold licensees primarily responsible for lessee non-compliance with FCC rules is "draconian" and "will snuff out all incentives that a licensee may have to lease its unused spectrum usage rights."¹¹ Although Cingular does not necessarily agree that all incentives will be eliminated, it does agree with the RTG that:

Under the Commission's proposal, a licensee will either need to hire staff to supervise its independent lessees or tolerate the risk of surprise forfeitures and revocations unrelated to the licensee's "willful" acts. The Commission's proposed approach to compliance is itself a new barrier that does not facilitate leasing or increase the opportunity costs to not using spectrum fully. Instead, the Commission proposes to create a Hobson's choice for licensees that it need not do to assure compliance with its rules.

As is typical in the business world, lessors should not be responsible for the bad acts of their lessees unless they participate in those acts or have actual knowledge of them. Lessors are not the guarantors of their lessee's behavior and it should be no different in the context of spectrum usage rights. Since leasing spectrum usage rights is a wholly voluntary action for licensees under the Commission's current proposal, placing this burden on licensees will fundamentally undermine their willingness to lease or rent their excess spectrum.¹²

As Cingular noted in its comments, there is no reason to create this Hobson's choice. The Commission has authority to issue forfeitures directly against lessees for non-compliance with FCC rules. *See* 47 U.S.C. § 503(b)(5). Moreover, the Commission has the authority to enjoin lessees from violating the Act and FCC rules pursuant to Sections 312 and 401 of the Communications

at 5; RTG Comments at 12-20; UTStarcom Comments at 3; Winstar Communications Comments at 3, 6-9.

¹¹ RTG Comments at 13. *Accord* CTIA Comments at 9 (noting that "if the licensee/lessor must 'guarantee' the lessee's compliance . . . , it likely would be quite reluctant to lease spectrum at all"); El Paso Comments at 6.

¹² RTG Comments at 13 (emphasis in original).

Act.¹³ Accordingly, the Commission should not hold licensees primarily responsible for the actions of their lessees.

C. The Commission Needs to Clarify How Its Rules Will Apply to Lessees

Although the Commission appears to have the statutory authority both to proceed directly against lessees for violations of FCC rules or the Communications Act and to enjoin lessees from engaging in such activities, it is unclear whether this authority extends to lessee non-compliance with rules applicable only to licensees, telecommunications carriers, *etc.* Accordingly, Cingular continues to urge the Commission to issue a Further Notice of Proposed Rulemaking seeking 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. At a minimum, the Further Notice should specifically address applicability of the Commission's rules regarding enhanced 911, CALEA, local number portability, numbering administration, CPNI, truth-in-billing, Universal Service contributions, and regulatory fees to lessees.¹⁴

Cingular continues to believe that lessees should be subject to FCC rules designed to apply to facilities-based carriers, including those rules applicable to licensees. To make clear that lessees are subject to these rules, the Commission may want to treat lessees as "sub-licensees."¹⁵

¹³ 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).

¹⁴ This certainly is not an exhaustive list, but provides a starting point for establishing the clarity necessary for the development of secondary markets. As stated above, the development of secondary markets will be chilled if parties are not clear regarding the potential applicability of FCC rules in the leasing context.

¹⁵ The Commission also should explore other options, such as requiring lessees to obtain a "blanket" secondary market authorization prior to commencing operations. Although this blanket license could be used as a prerequisite to leasing spectrum, the license should clearly state that: (i) it does not confer any rights to operate on spectrum in a particular market; (ii) a spectrum lease is

Under this approach, licensees would be required to notify the FCC within thirty (30) days of entering into a spectrum lease.¹⁶ The notification would (i) identify the lessee, (ii) set forth the lease term, and (iii) contain a certification that the licensee retains ultimate control and will terminate the lease for lessee non-compliance with FCC rules. Upon receipt of the notification, the lessee would be classified by the FCC as a “sub-licensee” and would be subject to all FCC rules applicable to licensees.¹⁷ Because the licensee would retain ultimate control under the Commission’s proposal, a spectrum lease would not transfer substantial control to a lessee. Thus, prior approval need not be obtained from the Commission and summary notification procedures are appropriate.¹⁸

The Commission has broad authority under Sections 303(l)(1) and 303(r) of the Communications Act to classify licensees. 47 U.S.C. §§ 303(l)(1); 303(r). Although it is yet untested, the Commission may very well be permitted to create a class of “sub-licensees” that would be comprised of spectrum lessees. To avoid any confusion relating to the necessity to file written transfer/assignment applications requiring prior Commission approval (including an assessment of basic qualifications) under Sections 301, 308, and 309 of the Act, the Commission should exercise its forbearance authority under Section 10 of the Act.¹⁹ Absent forbearance, litigation over whether

required prior to commencing operations; (iii) it does not confer any rights enforceable by the lessee against a licensee/lessor; and (iv) spectrum leases are “private contractual arrangements” over which the Commission will not exercise jurisdiction.

¹⁶ See CTIA Comments at 11 (suggesting that the Commission could require the licensee to submit contact information for the lessee to the FCC); Cook Inlet Region, Inc. Comments at 4-7; NTCA Comments at 5-6; Winstar Comments at 8.

¹⁷ See RTG Comments at 30-31; UTStarcom Comments at 3.

¹⁸ See *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses*, 13 F.C.C.R. 6293, ¶2 (1998) (noting that where no substantial change of control will result from the transfer or assignment, grant of the application is deemed presumptively in the public interest and the application is placed on public notice as granted).

¹⁹ See 47 U.S.C. §§ 160, 301, 308, & 309.

prior FCC approval and public notice are required for the creation of sub-licensees will inhibit this program for years.

II. THE FCC SHOULD ELIMINATE ITS DISPARATE CONTROL TESTS IN FAVOR OF THE SINGLE TEST PROPOSED IN THIS DOCKET

No commenter supported application of the *Intermountain* control test to spectrum leasing. The vast majority of commenters urged the Commission either to eliminate the *Intermountain* control test altogether or, at a minimum, to apply a different control test in the leasing context.²⁰ As stated in its initial comments, Cingular believes that the best course is for the Commission to eliminate its disparate control tests in favor of the test proposed in this docket.²¹

Although Cingular supports the control test proposed by the Commission to eliminate any uncertainty whether spectrum leasing would constitute a transfer of control, this test would constitute at least the fourth different test used by the Commission.²² The use of disparate control tests may spawn litigation and raise questions concerning arbitrariness. A court may find no rational basis for

²⁰ AT&T Wireless Services, Inc. (“AWS”) Comments at 12-14 (supporting the Commission’s proposed test and stating that *Intermountain* should not be applied to spectrum leasing); AMTA Comments at 4 (stating that “the *Intermountain Microwave* criteria no longer provide the appropriate framework for a transfer of control analysis under Section 310(d) of the Act”); Blooston Rural Carriers Comments at 3-4; CTIA Comments at 11-17; Cook Inlet Comments at 12-13; Direct Wireless Corporation Comments at 2-3; El Paso Comments at 11-12; HYPRES, Inc. Comments at 7; Land Mobile Communications Council Comments at 3 (stating that *Intermountain* “simply has outlived its relevance in today’s marketplace”); Long Lines, Ltd. Comments at 1; Nextel Comments at 2-4 (urging the Commission to eliminate the *Intermountain* test altogether); Pacific Wireless Technologies, Inc. Comments at 6-7; RTG Comments at 20-24; Securicor Wireless Comments at 14-16; Small Business Administration Comments at 1-2; Sprint Corporation Comments at 1-2, 4 (stating that FCC control test should be eliminated in favor of market forces); Teligent Comments at 3-8; Verizon Comments at 2-3; Winstar Comments at 9-12.

²¹ Cingular Comments at 12.

²² As noted in its initial comments, the other control tests formally acknowledged by the FCC are: *Stereo Broadcasters*; *Intermountain*; *Motorola*. Cingular Comments at 11. The Commission appears to utilize a different analysis, however, in the context of local marketing agreements. *See, e.g.*, Letter From Roy J. Stewart, Chief, Mobile Media Bureau, to Roy Russo, Esq., 5 F.C.C.R. 7586 (1990).

applying different control tests simply based on the type of service involved. The risk of such a finding is compounded where the Commission applies different tests within the same service. Finally, the use of disparate tests is confusing because the Commission does not always apply the tests uniformly.²³

For the reasons stated in its comments, Cingular urges the Commission to eliminate its disparate control tests in favor of the test proposed in this proceeding. Moreover, because the proposed test deals more with ultimate legal control rather than *de facto* control, the Commission should exercise its forbearance authority under Section 10 of the Act to eliminate any uncertainty regarding application of Section 310(d) in the spectrum leasing context.²⁴

III. SPECTRUM CAP SHOULD NOT APPLY TO BOTH LICENSEES AND LESSEES

The majority of commenters addressing the spectrum cap issue opposed its application to both lessees and licensees.²⁵ In general, the Commission was urged either to eliminate the cap or apply it to either lessees or licensees, but not to both. Cingular continues to steadfastly oppose retention of the CMRS spectrum cap as simply unnecessary in the competitive CMRS marketplace. To the extent the cap is not eliminated, however, Cingular agrees with those commenters urging the Commission to apply the cap to either lessees or licensees. As Cingular and other commenters

²³ Compare *Telephone and Data Systems, Inc. v FCC*, 19 F.3d 42 (D.C. Cir. 1994) with *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994).

²⁴ Cingular Comments at 12-13; CTIA Comments at 16; El Paso Comments at 12; RTG Comments at 24; Winstar Comments at 11-12.

²⁵ Cingular Comments at 5 (spectrum cap should only apply to licensee); AWS Comments at 5-7 (cap should only apply to licensee); Alaska Native Wireless Comments at 14-15 (cap should only apply to licensee); CTIA Comments at 6-8 (cap should only apply to lessee); RTG Comments at 28.

noted, application of the CMRS spectrum cap to both licensees and lessees would effectively “double count” spectrum and would likely dampen the development of secondary markets.²⁶

IV. LESSEES SHOULD NOT BE SUBJECT TO FCC RULES GOVERNING ELIGIBILITY, QUALIFICATION, AND SPECTRUM USE

The vast majority of commenters (that addressed the issue) believe that the Commission should not require lessees to independently satisfy rules governing eligibility, basic qualifications, and spectrum use.²⁷ Similarly, most commenters that addressed the regulatory classification of lessees concurred with Cingular that the classification should be based on the services offered by the lessee rather than the regulatory status of the licensee.²⁸ Cingular continues to support this approach. Requiring lessees to satisfy these obligations “would discourage potential participants and thus undermine the goal of developing a ‘robust’ secondary market.”²⁹

V. SERVICE-SPECIFIC CONSTRUCTION AND SERVICE OBLIGATIONS SHOULD BE ELIMINATED OR LICENSEES SHOULD BE ABLE TO RELY ON LESSEES TO MEET THESE OBLIGATIONS

Every commenter that addressed the applicability of construction and substantial service obligations in the leasing context urged the Commission either to eliminate these obligations altogether or to allow licensees to demonstrate compliance with construction and substantial service

²⁶ Cingular Comments at 5; AWS Comments at 6; CTIA Comments at 7.

²⁷ Cingular Comments at 8; Alaska Wireless Comments at 9-13; 37 Concerned Economists Comments at 2-6 (urging FCC to eliminate all restrictions and requirements not directly related to interference); Cook Inlet Comments at 7 (stating that designated entities should be allowed to lease to non-DEs); El Paso Comments at 9; ENRON Comments at 15; Land Mobile Communications Council Comments at 8-9; Nextel Comments at 15; Winstar Comments at 13-14. *But see* CTIA Comments at 17-19 (urging application of use restriction to lessees).

²⁸ *See* Cingular Comments at 7; El Paso Comments at 11; RTG Comments at 29-30; Teligent Comments at 8-9.

²⁹ AWS Comments at 5. *See* El Paso Comments at 9 (stating that “use restrictions inherently limit the fungibility of spectrum”).

obligations through lessee activities.³⁰ Cingular urges the Commission to seriously consider elimination of the construction and service requirements.³¹ These requirements were adopted to prevent warehousing, but are no longer necessary.³² The cost of spectrum alone is sufficient to prevent warehousing. Construction and service requirements should only be considered in the event of a marketplace failure.

Absent elimination of the construction and substantial service requirements, licensees should be permitted to rely on the activities of lessees to satisfy these obligations.³³ As one commenter noted: “Without such credit, licensees will have a disincentive against leasing their spectrum, because in many cases such leases would make it more difficult for the licensee to find population clusters needed for its own coverage requirements.”³⁴

CONCLUSION

For the foregoing reasons, as well as those set forth in its Comments, Cingular generally supports the Commission’s proposal to create secondary markets for spectrum. The Commission must take the following steps, however, if secondary markets are going to prosper: (i) establish clear rules with respect to the responsibilities of licensees and lessees, including the establishment of a safe harbor, making licensees secondarily liable, and treating lessees as sub-licensees; (ii) refrain

³⁰ Cingular Comments at 4-5; 37 Concerned Economists Comments at 4-5; Blooston Rural Carriers Comments at 9; Cook Inlet Comments at 10; El Paso Comments at 10; ENRON Comments at 17-18; Land Mobile Communications Council Comments at 5-6; RTG Comments at 28-29; Securicor Wireless Comments at 13-14; Winstar Comments at 15-17.

³¹ 37 Concerned Economists Comments at 4-5; ENRON Comments at 17-18; Winstar Comments at 16-17.

³² See 47 U.S.C. § 309(j)(4)(B); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Docket No. 93-253, *Fifth Report and Order*, 9 F.C.C.R. at 5532, 5570 (1994).

³³ Cingular Comments at 4-5.

³⁴ Blooston Rural Carriers Comments at 9. See El Paso Comments at 10.

from applying the *Intermountain* control test to spectrum leasing; (iii) refrain from applying the CMRS spectrum cap to both lessees and licensees; (iv) streamline its service and eligibility rules to entice carriers to lease spectrum in secondary markets; and (v) encourage licensees to lease spectrum by allowing them to rely on the construction activities of lessees. Finally, Cingular urges the Commission to adopt a single, uniform control test for the many services covered by the *NPRM* and to forbear from applying Section 310(d) of the Act, as well as any statutory sections necessary for the creation of sub-licensees.

Respectfully submitted,

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