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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting the Efficient Use of Spectrum Through Eliminating Barriers to the Development of Secondary Markets	)))	WT Docket No. 00-230

To: The Commission

REPLY COMMENTS OF ENRON CORP

Enron Corp ("Enron"), pursuant to section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments concerning the *Notice of Proposed Rule Making* ("*NPRM*")[1] in the above-captioned proceeding. Enron is pleased that the overwhelming weight of the comments filed in this proceeding encourages the Commission to develop a regulatory scheme that will enable spectrum usage rights to pass fluidly among market participants. As Enron noted in its Initial Comments, by establishing a regulatory environment in which a robust secondary market for spectrum can develop, the Commission will serve the public interest by encouraging the advancement of technology and services, facilitating greater diversity in the wireless communications marketplace, and promoting the most efficient use of spectrum.

Enron believes that the successful development of a secondary market for spectrum will require innovation in spectrum allocation and authorization and a

[1] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Notice of Proposed Rule Making*, FCC 00-403 (rel. Nov. 27, 2000).

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substantive reform of current regulatory policies. Enron's Initial Comments urged the Commission to enact several specific reforms that will, at a minimum, allow a secondary market to emerge. The comments filed by other parties echoed themes similar to those stressed by Enron. Some of the major issues that the Commission must resolve in this proceeding in order to accomplish its stated objectives are set forth below.

It is encouraging that many commenters urged the Commission to allow licensees to allocate responsibility for regulatory compliance between and among themselves and the actual users of the licensed spectrum. In addition, numerous commenters demonstrated a strong opposition to the application of service-specific rules and other regulatory encumbrances on secondary users of licensed spectrum. Finally, it is significant that several parties, including Enron, urged the Commission to encourage industry efforts to develop uniform contract provisions for use in the secondary market for spectrum, a measure that Enron believes will expedite the development of a free market for secondary rights in spectrum.

The Commission's primary objective should be to create a regulatory scheme for secondary spectrum markets that encourages the maximum number of parties to participate. Adoption of the policies detailed in Enron's Initial Comments and outlined below will go a long way toward achieving this objective.

I. THE COMMISSION SHOULD RELY ON MARKET FORCES TO PROPERLY ALLOCATE RESPONSIBILITY FOR REGULATORY COMPLIANCE.

Enron is pleased to note the broad consensus in the comments urging the Commission to allow market forces to operate effectively in an attempt to satisfy the

communications industry's growing spectrum needs.[2] Virtually every commenter acknowledged that a freely operating secondary market would permit any interested entity or service provider to enter, furthering the Commission's goal for diverse participation and encouraging innovative spectrum use. As AT&T Wireless noted in its comments, "It is only by allowing the market to function freely, including allowing for the greatest possible number of potential participants, that the Commission can achieve its goal of developing a robust secondary market for spectrum usage."[3]

The Commission must not retain or create disincentives or barriers to entry for any potential market participants. Under the Commission's proposed model for a secondary market, for example, licensees would be held ultimately responsible for ensuring that lessees or sub-lessees comply with the Commission's regulations.[4] Enron believes that imposing this type of regulatory compliance burden on licensees may deter their participation in the secondary market. Several other commenters agreed that this aspect of the Commission's model would create strong disincentives against leasing spectrum usage rights.[5] On the one hand, holding a licensee ultimately responsible (and

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[2] Like other commenters, Enron recognizes the wireless industry's growing need for spectrum. *See* Comments of Verizon Wireless at 4 (urging the Commission to use any mechanism available to provide relief). The development of a fluid secondary market for spectrum should be an efficient and expeditious way to satisfy this need.

[3] *See* Comments of AT&T Wireless Services, Inc. ("AT&T Wireless") at 8.

[4] The Commission states that a licensee could be held directly responsible for both its own and a lessee's non-compliance, and that a licensee may face license revocation for a lessee operating outside the parameters of the license. In addition, the Commission tentatively concludes that spectrum lessees are independently responsible for adhering to the Commission's rules and regulations and should be subject to sanctions for noncompliance, including forfeitures. *NPRM* at paras. 29-32.

[5] *See, e.g.*, Comments of El Paso Global Networks Company ("El Paso Global") at 5-6 (licensees and sub-lessors should not be strictly liable for non-compliance by transmitting lessees); Comments of National Telephone Cooperative Association ("NTCA") at 4-6 (non-compliant entity should be held responsible by the Commission); Comments of the Cellular Telecommunications & Internet Association ("CTIA") at 8-11 (compliance obligation should rest with the entity actually transmitting on the spectrum); Comments of Cook Inlet Region, Inc. ("Cook Inlet") at 4 (imposition of all compliance responsibilities

thus strictly liable) for non-compliance by any of its downstream lessees would represent a substantial risk to its own position, and possibly lead the licensee to avoid the risk and instead allow its unused spectrum to remain fallow.[6] An end user lessee, on the other hand, may be unable to attract the capital necessary to make use of leased spectrum if its own use could be terminated due to non-compliance by the original licensee. Moreover, any requirement that licensees oversee or have access to lessees' day-to-day operations would reduce both parties' interest in entering into a leasing relationship; this would be especially true if a licensee and a lessee were providing potentially competing services.

Enron believes that, with respect to leased spectrum, the Commission should allow licensees to contractually convey their regulatory compliance responsibilities along with the spectrum usage rights. In a secondary spectrum market, the obligation for regulatory compliance must flow along with the right to use the spectrum.[7] There is no

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upon licensee may "stymie" growth and development of secondary market); Comments of Blooston, Mordkofsky, Dickens, Duffy and Prendergast ("Blooston Rural Carriers") at 6 (licensee should only be secondarily responsible for non-compliance of lessee); Comments of UTStarcom, Inc. at 3 (full compliance responsibility on licensee creates disincentive and overly burdensome policing responsibility).

[6] Enron also agrees that requiring licensees to verify potential lessees' eligibility or otherwise conduct due diligence reviews would create equally significant disincentives to leasing spectrum usage rights. *See* Comments of CTIA at 9; Comments of Pacific Wireless Technologies, Inc. at 6; Comments of Cook Inlet at 5.

[7] *Accord* Comments of AT&T Wireless at 10; Comments of Teligent, Inc. ("Teligent") at 7; Comments of Winstar Communications, Inc. ("Winstar") at 8. Enron agrees with many commenters that the Commission possesses the authority to craft a new control standard applicable to secondary spectrum markets. *See, e.g.*, Comments of CTIA at 13-14 (noting that the Commission has authority to define "control" in a manner that accommodates spectrum leasing); Comments of El Paso Global at 11-12 (noting different control criteria employed by the Commission in different contexts); Comments of Nextel Communications, Inc. ("Nextel") at 4 (noting that the U.S. Court of Appeals for the District of Columbia Circuit has recognized the Commission's freedom to overrule or limit its prior policy decisions, including application of *Intermountain Microwave* to CMRS license transfers). To the extent that the Commission believes that the conveyance of compliance obligations in this context would raise transfer of control issues, Enron concurs with the suggestion made by numerous commenters that the Commission can and should exercise its authority under Section 10 of the Communications Act to forbear from applying Section 310(d) to spectrum leasing transactions. *See, e.g.*, Comments of Cingular Wireless LLC at 13; Comments of El Paso Global at 11-12; Comments of CTIA at 15-16; Comments of Winstar at 12.

reason why a licensee or intermediary should not be permitted to transfer compliance responsibilities *in toto* to the transmitting user(s) of the spectrum.

As El Paso Global noted in its comments, a well-functioning secondary market for spectrum will emerge if the Commission allows intermediary holders of spectrum usage rights to operate free from compliance responsibilities.[8] These intermediary entities will play an essential role in creating a market for spectrum usage rights that will enable transmitting end-users to put spectrum to its most efficient use.[9] Further, such intermediaries will only hold spectrum usage rights for varying amounts of time, will not engage in transmission, and therefore, should not be subject to compliance responsibilities.[10] In fact, many commenters believe that the obligation to meet FCC requirements rests with transmitting users.[11] Finally, as numerous commenters acknowledged, the Commission possesses the necessary authority to enforce its rules and the Communications Act against a non-complying lessee (*i.e.*, transmitting end-user).[12]

Recognizing that the Commission has a valid interest in maintaining access to basic information concerning the entities that transmit over the electromagnetic spectrum, Enron proposes that the Commission require transmitting spectrum rights users to notify

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[8] *See* Comments of El Paso Global at 7-8.

[9] *See id.*

[10] *See id.*

[11] *See, e.g.*, Comments of CTIA at 9; Comments of El Paso Global at 5; Comments of NTCA at 5. An analogy to this compliance model can be drawn from the electricity industry, where a transmission provider is responsible for technical compliance, but the party purchasing transmission service is not responsible for technical compliance of the system.

[12] *See* Comments of Teligent at 7; Comments of Winstar at 8; Comments of NTCA at 5. Pursuant to Section 2 of the Communications Act, the Commission has jurisdiction over entities engaged in transmitting communications by wire or radio equipment. The Commission, therefore, could hold transmitting lessees directly responsible for their own non-compliance.

both the Commission and the licensee prior to commencing transmission over leased spectrum.[13] This notification could include basic contact information, summary details regarding the service that the transmitting end-user intends to provide, and a certification in which the end-user submits to the Commission's jurisdiction and recognizes its responsibility to comply with all applicable requirements under the Commission's rules and the Communications Act. Enron believes that this compliance model would provide the necessary assurance to potential market participants that each party to a spectrum usage agreement will bear a reasonable proportion of risk.

II. THE COMMISSION SHOULD REFRAIN FROM APPLYING SERVICE-SPECIFIC RULES AND REQUIREMENTS TO SECONDARY USERS OF THE SPECTRUM.

Enron's Initial Comments emphasized that, in an open and effective secondary market, licensees and intermediary lessees should be incented to capture value from the spectrum by determining the actual capacity that they individually will need over a given period of time and then leasing the balance for varying periods of time to third parties. The potential for extracting additional value from otherwise fallow spectrum ensures that spectrum usage rights will end up in the hands of transmitting users with the greatest interest in using the spectrum most efficiently. On the other hand, if the market for such usage rights is limited by service-specific eligibility rules, construction requirements, or other impediments to potential usage, a free flowing secondary market for spectrum will not operate properly.

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[13] Any minimal reporting requirements should fall upon the transmitting lessee or end-user. Thus, Enron disagrees with commenters who suggest that the Commission require *licensees* to report information regarding lessees. *See, e.g.*, Comments of Winstar at 8; Comments of NTCA at 5; Comments of Cook Inlet at 4-5.

An overwhelming number of commenters were clearly opposed to applying the service-specific eligibility restrictions and other rules to potential secondary users of licensed spectrum.[14] Enron submits that such restrictions will serve only to shrink the size of the potential secondary market without any real public interest benefit. Enron agrees that the incentives that would be present in a well-functioning secondary market eliminate the likelihood that parties will either warehouse or hoard spectrum, thus obviating the need to apply detailed construction requirements or spectrum caps to participants in a secondary market.[15]

Moreover, several commenters suggested that a licensee should not be obligated to satisfy construction requirements in areas that its lessee has built out.[16] Enron agrees, but more importantly, a well-functioning secondary market should create incentives that would eliminate entirely the need for construction requirements. Similarly, a robust secondary market will advance the statutory goal of diversified participation in the provision of spectrum-based services by fostering an environment in which a variety of niche service providers may emerge.

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[14] *See, e.g.*, Comments of 37 Concerned Economists at 6; Comments of Nextel at 15; Comments of Winstar at 13; Comments of Cingular Wireless LLC at 8; Comments of Cook Inlet at 8; Comments of Alaska Native Wireless, LLC at 11; Comments of United States Small Business Administration at 3; Comments of Blooston Rural Carriers at 5; Comments of Vanu, Inc. at 11-12.

[15] *See* Comments of Winstar at 16; Comments of Cingular Wireless LLC at 5; Comments of 37 Concerned Economists at 6.

[16] *See* Comments of Nextel at 16; Comments of El Paso Global at 10; Comments of Vanu, Inc. at 13; Comments of Direct Wireless Corporation at 3.

III. CONCLUSION

In order for a robust secondary market for spectrum to have a chance to develop, the Commission must allow market forces to function to the maximum extent possible. As discussed above, compliance responsibilities should be borne by the entities actually transmitting pursuant to spectrum usage rights obtained in the secondary market, and the Commission should refrain from imposing regulatory conditions that will inhibit the development and growth of a secondary market for spectrum.

Respectfully submitted,

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March 9, 2001

CERTIFICATE OF SERVICE

I, LaVon E. Stevens, do hereby certify that on this 9th day of March, 2001, copies of the foregoing Reply Comments of Enron Corp were served, via hand delivery, to the following parties:

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