

MAR 12 2001

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Promoting the Efficient Use of)
Spectrum Through Elimination of)
Barriers to the Development of)
Secondary Markets)
)
)

WT Docket No. 00-230 /

REPLY COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc., an Entrepreneurs' Block PCS provider, hereby offers on behalf of itself and its Cricket subsidiaries (collectively "Leap"), these reply comments to the Commission's *Notice of Proposed Rulemaking* in the above-referenced docket.¹ Some of the nation's largest wireless carriers are using this proceeding to conduct a flanking attack on two of their favorite targets -- the Commission's CMRS spectrum cap and Entrepreneurs' Block eligibility restrictions. Leap believes that it is vitally important for the Commission to retain and protect each of these important Commission policies.

Commenters such as AT&T, Cingular, and "Alaska Native Wireless,"² urge the Commission to set aside the CMRS spectrum cap and the PCS C- and F-Block eligibility

¹ Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000) ("Notice").

² "Alaska Native Wireless" is 79.4 percent owned by AT&T on a fully-diluted basis. See FCC Form 601 Filed by Alaska Native Wireless, L.L.C., Exhibit A, page 2 (filed Feb. 21, 2001). The same document shows that on a fully-diluted basis, a grand total of 6.8 percent of "Alaska Native Wireless" is owned by Alaska Native Regional Corporations. *Id.* at 3-4, 8-9.

restrictions for an entire subset of spectrum transfers. Although they couch their comments in terms of spectrum leasing, they offer no distinction that would justify abdicating these policies for one subset of spectrum transfers, but not for others. Indeed, these commenters urge the Commission to enable spectrum leasing as the vehicle for an end-run around its long standing policies. The Commission should not do so, but instead should retain and apply the CMRS spectrum cap and Entrepreneurs' Block eligibility restrictions equally to all forms of spectrum holdings.

I. THE SPECTRUM CAP AND THE ENTREPRENEURS' BLOCK RESTRICTIONS EFFECTUATE IMPORTANT POLICIES

At the outset, it is important for the Commission to recall the policies that underlie both the spectrum cap and the Entrepreneurs' Block -- the promotion of efficient secondary markets is not the only policy interest that must be considered here. Indeed, the spectrum cap and the Entrepreneurs' Block restrictions both effectuate important public policies.

The CMRS spectrum cap was imposed (and remains in place) out of concern that if licensees were to aggregate sufficient amounts of CMRS spectrum, it would be possible for them, unilaterally or in combination, "to exclude efficient competitors, to reduce the quantity or quality of services provided, or to increase prices to the detriment of consumers."³ A year ago, the Commission determined that market conditions still required the spectrum cap, stating that, "the provision of CMRS remains concentrated among relatively few providers, even in urban markets."⁴ And again, less than six months ago, the Commission upheld the spectrum cap

³ See 1998 Biennial Regulatory Review: Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Report and Order*, 1999 FCC LEXIS 4623, ¶ 9 (rel. Sept. 22, 1999) ("*1999 Spectrum Cap Order*").

⁴ See *1999 Spectrum Cap Order* ¶ 27 .

against challenge from many of the same parties.⁵ Plainly, the vital policies driving the CMRS spectrum cap remain in place.

Likewise, the PCS Entrepreneurs' Blocks were established to serve important policy objectives: to realize for the American public the competitive and innovative benefits of entrepreneurial participation in broadband PCS. Indeed, the Entrepreneurs Block implements the explicit Congressional mandate that the FCC allocate licenses so as to promote "economic opportunity and competition," and to "ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wider variety of applicants, including small businesses."⁶ From the outset, the Entrepreneurs' Blocks were intended to prevent all of the nation's precious spectrum assets from being acquired and warehoused by an oligopoly of dominant mega-carriers.⁷

There is no reason that that these policies now should be abandoned.

II. THE CMRS SPECTRUM CAP AND ENTREPRENEURS' BLOCK ELIGIBILITY RULES SHOULD APPLY TO SPECTRUM LEASEHOLDS

AT&T, "Alaska Native Wireless," and other parties urge the Commission not to apply the CMRS spectrum cap and Entrepreneurs' Block restrictions to the recipients of

⁵ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, WT Dkt No. 97-82, ¶ 57 (rel. Aug. 29, 2000) ("*Sixth Report and Order*").

⁶ 47 USC § 309(j)(3)(B).

⁷ See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, Dkt No. 93-253, ¶¶ 13 - 16 (rel. Nov. 23, 1994) (creating block to "ensure that licenses are widely disbursed," and finding that "meaningful opportunities for participation" among small businesses requires "the insulation of the entrepreneur's block").

leasehold interests in CMRS licenses. Yet they fail to explain why spectrum *lessees* should be treated in this regard any differently from spectrum *licensees*.

The concept of spectrum leases held by the various commenters is somewhat ill-defined. Some parties, such as Enron,⁸ seem to envision spectrum leasing as something akin to delivered capacity in the energy market: a finished product (airtime minutes) that is offered at wholesale rates for delivery to retailers and the ultimate user.⁹ Other commenters (and the Commission's *Notice*) seem to envision spectrum leasing as something more – a transfer from the licensed entity to another entity of the right to use certain of its licensed radio frequencies, for some period of time.¹⁰

As a bare transfer of spectrum usage rights, such leasing arrangements would likely require Commission approval. Such a leasehold interest in spectrum differs from a license only in its temporal limitation: A PCS license runs for ten years, while a leasehold might (but need not) be of lesser duration.¹¹ But in either case the lessee or licensee holds the spectrum and does with it as it wishes. And no commenter has pointed to any evidence that a two-year or five-year interest (instead of a ten-year interest) in PCS spectrum somehow alleviates the competitive

⁸ See, e.g., Enron Comments at 2-5.

⁹ Insofar as AT&T cites NextWave's conception of the "carrier's carrier," AT&T Comments at 8, it appears to adopt this paradigm. NextWave never proposed to lease spectrum assets as such, but rather its business would have been that of a facilities-based wholesale carrier, selling airtime minutes to resellers such as MCI, which committed to "purchasing at least ten billion minutes of airtime" from NextWave. "MCI Hitches its Wireless Wagon to San Diego Start-Up NextWave," *Los Angeles Times*, Part D, p. 1 (Aug. 27, 1996).

¹⁰ See *Notice* ¶¶ 18-21.

¹¹ To the extent that a leasehold conveys bandwidth or geographic area that is less than that which was originally licensed by the FCC, the same is true of a disaggregated or partitioned license. See *Notice* ¶ 21. Significantly, partitioned and disaggregated licenses are subject to both the spectrum cap and Entrepreneurs' Block rules

concerns that underlie the spectrum cap, or satisfies the policies in favor of entrepreneurial innovation that underlie the C- and F-Block eligibility restrictions.

To the extent that some commenters argue against the spectrum cap and the Entrepreneurs Block restrictions, their arguments simply assail those policies, not their particular application to spectrum leases. For example, AT&T says that requiring Entrepreneurs' Block licenses to be leased only to other entrepreneurs would "limit the pool of potential lessees."¹² But of course, that is the whole point of the Entrepreneurs' Block – to set aside spectrum for the sole use of entrepreneurs. To be sure, AT&T would prefer to open up Entrepreneurs' Block spectrum to all users. But the Commission has repeatedly refused the self-serving entreaties of mega-carriers to do so,¹³ and should do so again here.

Likewise, Alaska Native Wireless and Cook Inlet argue that in order fund their buildouts, entrepreneurs may need to lease to some third party a portion of their spectrum.¹⁴ But nothing prevents these licensees from leasing or selling a portion of their spectrum to other *entrepreneurs*. Perhaps more importantly, the "buildout funding" logic cannot possibly be limited to the transfer of leasehold interests, rather than of full or disaggregated licenses. This argument -- that spectrum must be transferred to large carriers in return for cash to fund a buildout -- would also tend to prove that entrepreneurs should be allowed to *sell* unused portions of their spectrum to large carriers in order to fund a buildout, regardless of transfer restrictions. By sale or by lease, the end result would be to allow manipulation and evasion of Entrepreneurs' Block eligibility rules.

¹² AT&T Comments at 8. *See also* Cingular Comments at 8 ("the pool of potential lessees for this spectrum would be greatly reduced").

¹³ *See, e.g.*, Sixth Report and Order ¶ 19 (preserving entrepreneurs' "set-aside").

¹⁴ Alaska Native Wireless Comments at 6; Cook Inlet Comments at 8.

In the same way, some commenters baldly argue against the spectrum cap. CTIA criticizes the spectrum cap as a “vestige[] of traditional monopoly-style regulation,” and “welcomes” the 2000 biennial review.¹⁵ And AT&T cites a litany of its attempts to dissuade the Commission from maintaining the cap.¹⁶ However, no commenter adduces any evidence that the anticompetitive results of spectrum concentration are somehow lessened if this concentration lasts for a period of time less than a full license term. These comments, in other words, present nothing more than an assault on the spectrum cap itself – not its applicability to a specific type of spectrum transfer. As such, these arguments belong in another proceeding.

As a policy matter, a leasehold interest in spectrum should be treated no differently from any other.¹⁷ Practically speaking, differential treatment would give rise to perverse incentives – and, most likely, a wave of corporate restructurings. Why would a carrier such as Cingular *own* any licenses when it could evade the spectrum cap through a sale and leaseback agreement? And differential treatment through easing the restrictions on Entrepreneurs’ Block spectrum would, as a practical matter, open up the entire Entrepreneurs’ Block bandwidth to the dominant carriers. This could squash innovative service models such as Leap’s Cricket service, which has proven tremendously successful and has placed high-quality wireless service within the reach of a previously underserved mass market.

Those who would like to obtain Entrepreneurs’ Block spectrum, or spectrum in excess of the spectrum cap, see a liberalization of the transfer rules in spectrum leases as a means to achieve their end. And those who have licenses that they would like to transfer to large

¹⁵ CTIA comments at 6.

¹⁶ AT&T comments at 6 n.18.

¹⁷ *See, e.g.*, Vanu Comments at 2 (imposing those rules on licensees, but not lessees, will also distort the market).

carriers similarly would prefer a liberalization of the transfer rules. But the Commission established the spectrum cap and the Entrepreneurs' Block for the precise purpose of preventing this – to prohibit the consolidation that these parties would prefer. There is no evidence that these policies should now be abandoned, nor is there any interest that leasehold interests in spectrum differ from traditional license interests in any respect that would justify differential treatment.¹⁸

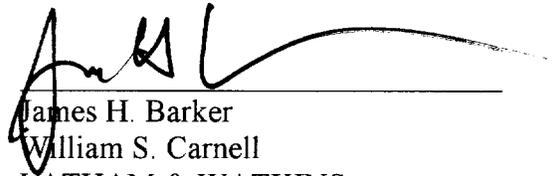
III. CONCLUSION

Some of the largest carriers in the world and their affiliates would use the concept of spectrum leasing to attempt an end-run around the spectrum cap and the Entrepreneurs' Block eligibility rules. But the Commission should resist this attempt to create a loophole in its longstanding policies. Spectrum lessees should remain subject to the CMRS spectrum cap, and to the Entrepreneurs' Block eligibility rules.

Respectfully Submitted,

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March 12, 2001

¹⁸ *Cf. Melody Music Inc. v. FCC* 345 F.2d 730 (D.C. Cir. 1965).

CERTIFICATE OF SERVICE

I, William S. Carnell, do hereby certify that on this 12th day of March, 2001, I caused copies of the foregoing Reply Comments of Leap Wireless International to be sent via hand-delivery to the following:

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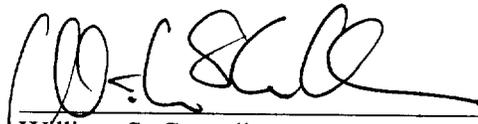
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