

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

WT Docket No. 00-230

To: The Commission

REPLY COMMENTS OF TELIGENT, INC.

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SUMMARY

Teligent, Inc. (“Teligent”) hereby submits its Reply Comments in the above-captioned proceeding. Thirty-seven parties filed initial comments in this proceeding expressing essentially unanimous support for early Commission action to promote spectrum leasing in order to increase efficiency, innovation, and utilization of spectrum. The Comments also reflect a consensus that the FCC should facilitate spectrum leasing by enabling its licensees flexibility in crafting private leases in response to market demands.

Numerous Commenters support Teligent’s view that while ultimate responsibility for compliance with FCC Rules and policies may rest with the lessor, first responsibility should rest with the lessee. Teligent further agrees with those Commenters who maintain that licensees and lessees should be afforded the flexibility to divide and enforce the vast majority of responsibilities via contract as they see fit. Teligent concurs with CTIA and others that Section 2 of the Communications Act confers on the Commission jurisdiction over spectrum lessees either as telecommunications service providers subject to the Communications Act or as third party beneficiaries to the spectrum leases.

Teligent does not believe that a special class of “band manager” license should be established for licensees leasing spectrum. Creating a special “class” of licensee and imposing a requirement to obtain a special license in order to engage in spectrum leasing would serve to discourage such activity by licensees engaged generally in the direct provision of wireless services, would create unnecessary regulatory burden for both licensees and the Commission causing further delay in the deployment of spectrum leasing opportunities.

Teligent agrees with those Commenters who argue that lessees should be subject to the same technical rules (e.g., interference-related rules regulating transmitter power, stability, emission masks, antenna height, RF safety standards, etc.) as those applicable to licensees in order to avoid degradation of the operations of co-channel and adjacent channel licensees. Teligent further believes that the licensee should remain the party responsible for all radio frequency coordination and interference issues.

Teligent concurs with Long Lines, Ltd. and Sprint, who recommend that the Commission avoid trying to address all issues collaterally related to spectrum leasing (e.g., spectrum caps, designated entity issues, regulatory fees) or issues such as universal service, local number portability, CALEA and E911, among others which are not even necessary to address in this context in this single proceeding. Addressing these collateral issues in the context of this rulemaking will serve only to complicate and delay the release of an initial order facilitating spectrum leasing.

Teligent disagrees with those Commenters who believe that the Commission should attempt to maintain a database of spectrum lessees. This will be an unnecessary and burdensome requirement for the Commission as well as for lessors and lessees, thereby, potentially discouraging and inhibiting leasing.

Accordingly, Teligent urges that the FCC expeditiously proceed with the adoption of the NPRM.

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To: The Commission

REPLY COMMENTS OF TELIGENT, INC.

Teligent, Inc. (“Teligent”), by its counsel, hereby submits its Reply Comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.¹ Thirty-seven parties filed initial comments in this proceeding. A review of these filings indicates essentially unanimous support for early Commission action to promote spectrum leasing in order to increase efficiency, innovation, and utilization of spectrum.

The Comments, moreover, reflect a consensus that the FCC should facilitate spectrum leasing by enabling its licensees flexibility in crafting private leases in response to market demands. To this end, the Commenters generally caution against the adoption of unduly intrusive or burdensome regulations regarding spectrum leasing and urge the FCC to rely upon its already-promulgated service rules to govern the provision of services by spectrum lessees.

¹ See 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, FCC 00-402 (Nov. 27, 2000) (“NPRM”).

Accordingly, as set forth in its Comments and herein, Teligent urges the FCC to expeditiously issue its decision in this proceeding and allow licensees new flexibility in entering into spectrum leases. In the interim, Teligent further urges that the Commission immediately rule that in the two pending proceedings in which particular spectrum lease or similar agreements have been presented for review, the lease agreements comply with existing FCC Rules and policies regarding licensee control.²

I. THE RECORD UNANIMOUSLY SUPPORTS SPECTRUM LEASING

As noted in Teligent's comments, Teligent, a licensee and user of spectrum, is both a potential lessor and a lessee of spectrum. Given the general scarcity of available spectrum, Teligent and all other Commenters in this proceeding enthusiastically support the Commission's efforts to undertake the rule and policy changes necessary to spur the development of secondary markets in spectrum.³ As further noted by Teligent in its Comments and echoed by other Commenters, these changes will both complement the primary spectrum market (auctions) and facilitate the availability of spectrum on both a short term (spot market) and long term basis, thereby greatly enhancing the efficiency of the spectrum allocation and assignment processes.

A. Responsibility for Compliance with Commission Rules

In the NPRM at para 29, the Commission proposes that licensees remain ultimately responsible for lessees' compliance with the Communications Act and

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 (Aug. 24, 2000); Wireless Telecommunications Bureau Seeks Comment on Request for Waiver and Proposed Airtime Capacity Agreement, Public Notice, DA-01-360 (Feb. 12, 2001).

³ See, e.g., comments of Direct Wireless Corporation, Enron, Nextel, Rural Telecommunications Group ("RTG"), Satellite Industry Association, Securicor, Vanu and Winstar.

Commission rules. Teligent expressed its view that while the licensee would hold ultimate responsibility, the FCC could, and in many instances should, look to the spectrum lessee as the responsible party for the lessee's violations of FCC Rules or policies. The Commenters expressed a variety of opinions on this issue, certain of them arguing that the licensee/lessor should remain responsible⁴ while others asserting that the lessee should shoulder the responsibility.⁵ Numerous Commenters, however, support Teligent's belief that while ultimate responsibility for compliance may rest with the lessor, first responsibility should rest with the lessee.⁶ Teligent further agrees with those Commenters who maintain that licensees and lessees should be afforded the flexibility to divide and enforce the vast majority of responsibilities via contract as they see fit.⁷ There are, however, certain bedrock requirements that must be incorporated in a spectrum lease consistent with the control provisions of Section 310(d) of the Act. As suggested by the Commission in the NPRM and supported by Teligent and other Commenters,⁸ the minimum regulatory obligations of a spectrum lessee should parallel the primary obligations of a Commission licensee, namely: (i) that the lessee will abide by the provisions of the Communications Act and the FCC's rules and regulations; (ii) that it

⁴ See, e.g., comments of AT&T Wireless indicating that licensees should have ultimate authority for lessee compliance with Commission rules because applying the rules directly to lessees would cause an enormous administrative burden and potential administrative duplication, especially in the context of short-term leases. See also comments of Nextel and Pacific Wireless Technologies.

⁵ See, e.g., comments of RTG stating that ultimate responsibility for compliance should be on the lessee because it is the beneficiary and operator of the spectrum. See also comments of Enron and UTStarcom.

⁶ See, e.g., comments of CTIA, Cinergy, Enron and Entergy.

⁷ See, e.g., comments of AMTA at 4, AT&T Wireless at 10, Blooston at 5, El Paso Global at 4, NTCA at 4 and Winstar at 2.

⁸ See, e.g., comments of Blooston, CTIA, Cook Inlet Region, Pacific Wireless and Vanu.

will maintain a current and complete set of all applicable FCC regulations; (iii) that the lessee submits to full FCC jurisdiction over its operations; and (iv) that the lease may be terminated in the event of a violation by the lessee of the FCC's rules or policies or the operation of facilities at variance with the parameters of the station license.

Teligent concurs with CTIA and others that Section 2 of the Communications Act confers on the Commission jurisdiction over spectrum lessees either as telecommunications service providers subject to the Communications Act or as third party beneficiaries to the spectrum leases.⁹ Thus, the Commission, in cases of a spectrum lessee's non-compliance with its rules or regulations, may proceed directly against the lessee.

B. Licensee Control Issues

In its comments, Teligent indicated that the Commission has correctly recognized that Intermountain Microwave and its progeny stand as an obstacle to those licensees that wish to engage in spectrum leasing.¹⁰ In particular, Teligent pointed out that Intermountain Microwave was not intended as an exhaustive analysis of the requirements of Section 310 in all circumstances or for all services, but instead represents a more than 38-year-old FCC interpretation based upon a single factual circumstance and the marketplace at that time. In recognition of this fact, the Commission has in many instances disavowed its applicability.

⁹ See comments of CTIA at 10 and Winstar at 8.

¹⁰ Teligent comments at 5, noting that the record on the FCC's May 31, 2000 En Banc hearing demonstrated that many licensees have found secondary market transactions prohibitively difficult, cumbersome and costly as a result of the strict Intermountain Microwave standards.

In the NPRM, the Commission proposed a three-part control standard applicable in the context of spectrum leasing. Specifically, the Commission proposes that control will be deemed to remain with the licensee if the licensee (1) retains full responsibility for compliance with the Act and FCC rules with regard to the use of spectrum by lessees, (2) certifies that each spectrum lessee meets all applicable eligibility requirements and complies with all technical and service rules, and (3) retains full authority to take all actions necessary to remedy non-compliance by the lessee.¹¹

In its comments, Teligent noted its general support for this three-part test as striking the correct balance between satisfying the requirements of Section 310 and providing spectrum licensees the needed flexibility to engage in spectrum leasing and other secondary market transactions. As points of clarification, however, Teligent explained that given a spectrum licensee's ultimate responsibility for all operations conducted pursuant to its license, and the risk of losing one's license, licensees are likely to provide for exactly the kinds of recourse and remedies in their spectrum leases that the FCC contemplates in its control standard, perhaps obviating the need for a regulatory obligation.

Teligent suggested that the second prong of the control standard be modified slightly to require only that licensees certify that each lessee has certified that the lessee meets all applicable eligibility requirements and that its lease requires the lessee to comply with all applicable technical and service rules.¹² This slight modification will

¹¹ NPRM ¶ 70 et seq.

¹² In the event that the Commission eliminates eligibility restrictions for lessees, this certification requirement would be rendered moot. See comments of AT&T Wireless at 5, Cingular at 8, Cook Inlet Region at 7, Nextel at 14, Pacific Wireless at 4 and Winstar at 13.

ensure that the licensee takes reasonable measures to ascertain the eligibility of the lessee and its ability to comply with all applicable FCC rules without imposing a burden of constant participation or oversight by the licensee in the lessee's operations.¹³

These minor modifications to the Commission's control standard are supported by many Commenters who proposed the adoption of rules similar to those governing the parameters established for the 700 MHz Guard Band.¹⁴ Many commenters expressed concern that placing ultimate responsibility on the licensee for the lessee's actions would require extensive and unwarranted due diligence by licensees, discourage leasing, and would be unduly onerous and detrimental to the policy objectives of the notice.¹⁵

C. Band Manager Licensing

In the NPRM, the Commission sought comment on the potential role of band manager licensing as a vehicle for facilitating the leasing of rights to use spectrum.¹⁶ Teligent agrees with AMTA that there is no need to establish a special category of license to issue to spectrum lessors.¹⁷ The 700 MHz Guard Band was a discrete allocation of spectrum by the FCC expressly for the purpose of spectrum leasing in recognition that such transactions could not easily occur under the then-existing regulatory environment. Creating a special "class" of licensee and imposing a requirement to obtain a special

¹³ Teligent thus agrees with those Commenters who argue that lessors should not be subject to onerous due diligence requirements with respect to their lessees. See comments of, AT&T Wireless at 10, Blooston at 7, El Paso Global at 5, Pacific Wireless at 5 and RTG at 15.

¹⁴ See, e.g., comments of Blooston, Land Mobile Communications Council, Maritel, Nextel, Vanu, and Verizon Wireless.

¹⁵ See comments of AT&T Wireless at 10, Blooston at 7, CTIA at 15, Pacific Wireless at 6 and RTG at 13.

¹⁶ NPRM ¶ 22.

¹⁷ See comments of AMTA at 3, AT&T Wireless at 11, El Paso Global at 5 and Pacific Wireless Technologies at 3.

license in order to engage in spectrum leasing would serve to discourage such activity by licensees engaged generally in the direct provision of wireless services, would create unnecessary regulatory burden for both licensees and the Commission causing further delay in the deployment of spectrum leasing opportunities.

D. Compliance with Technical Rules

The NPRM further sought comment regarding interference, frequency coordination and other technical rules, and which parties should be responsible for any infractions of such rules.¹⁸ Teligent agrees with those Commenters who argue that lessees should be subject to the same technical rules (e.g., interference-related rules regulating transmitter power, stability, emission masks, antenna height, RF safety standards, etc.) as those applicable to licensees in order to avoid degradation of the operations of co-channel and adjacent channel licensees.¹⁹ Contrary to the comments of certain other parties,²⁰ Teligent further believes that, as is currently the case, the licensee should remain the party responsible for all radio frequency coordination and interference issues. In particular, co-channel users should communicate with the licensee in the first instance to resolve such issues as it is the licensee who will be in the best position to know which lessees are operating on which frequencies in a particular geographic area. The licensee could then immediately direct any necessary communication to the lessee who by virtue of its contractual and FCC obligations will act quickly to correct the problem. This process will mitigate the need for a centrally managed database of all

¹⁸ NPRM ¶¶ 37-40.

¹⁹ See, e.g., comments of Pacific Wireless at 4, Vanu at 11 and Winstar at 13.

²⁰ See, e.g., comments of Enron at 19 and RTG at 25.

spectrum lessees and would facilitate more rapid resolution of interference issues. Through this type of process, licensees that lease spectrum would function much like a frequency coordinator on their licensed frequencies within their service area. This is important not only for neighboring licensees but for the lessees themselves who could provide for contractual protections against a non-performing licensee. Finally, maintaining the licensee as the initial point of contact for interference coordination matters for its licensed spectrum will ensure that the licensee has immediate information regarding the lessee's compliance with its technical/operational obligations in order to invoke the contractual provision applicable thereto.

E. Construction and Other Buildout Requirements

Commenters generally supported the Commission's proposal to permit a licensee to rely on the activities of its lessees when establishing that the licensee has met the applicable construction, substantial service, or similar requirement.²¹ Teligent agrees with Nextel, Cingular, Vanu, and El Paso Global that attributing lessee build-out to the licensee would encourage leases.²² Teligent does not concur with those Commenters who would condition such attribution on the length of the lease.²³ This would result in undue regulatory micro-management of private contractual arrangements. Clearly, a spectrum lessee operating in an economically rational manner will provide for a sufficient lease term (or renewal) or other contractual protections to support its investment in needed infrastructure. In other words, short-term spectrum leasing arrangements simply

²¹ NPRM ¶¶ 50-51.

²² See, e.g., comments of Cingular at 4, El Paso Global at 10, Nextel at 16 and Vanu at 12.

²³ See comments of Cook Inlet Region at 10 and Direct Wireless at 3.

will not become a convenient bypass of applicable construction requirements. In any event, the establishment of regulatory requirements regarding length of lease, geographic area, size of spectrum block and others will unnecessarily complicate the Commission's existing construction and build-out rules and require the filing of a significant number of additional and unnecessary build-out certifications. By giving licensees credit for the build-out undertaken by lessees, the Commission need look only to the licensee for such demonstrations. Teligent also supports Nextel's request that the Commission clarify that deconstruction rules should not penalize a licensee who decides to lease its spectrum.

II. SPECTRUM LEASING SHOULD BE IMPLEMENTED EXPEDITIOUSLY

As emphasized in Teligent's Comments, and as supported by all Commenters in this proceeding, spectrum leasing holds significant promise for increasing the efficiency and supply of spectrum available in the market. With the current high demand for spectrum and the expected prolonged spectrum allocation process necessary for the widespread deployment of next generation fixed and mobile technologies, it is clear that time is of the essence with respect to the implementation of spectrum leasing.

Accordingly, Teligent joins with the large number of Commenters who believe that the key to promoting spectrum leasing and creating secondary market transactions is for the Commission to eliminate as many barriers as soon as possible.

Teligent concurs with Long Lines, Ltd. and Sprint,²⁴ who recommend that the Commission avoid trying to address all issues collaterally related to spectrum leasing (e.g., spectrum caps, designated entity issues, regulatory fees) or issues such as universal

²⁴ See comments of Long Lines, Ltd at 5 and Sprint at 4.

service, local number portability, CALEA and E911 in this proceeding. In fact, the Commission need not address any of these issues in the context of spectrum leasing inasmuch as they already have been or are in the process of being established on a service-by-service basis and will apply to lessees based on the specific services they provide.²⁵ Addressing these collateral issues in the context of this rulemaking will serve only to complicate and delay the release of an initial order facilitating spectrum leasing. Therefore, Teligent agrees that it is not necessary to address these issues in this proceeding.

III. THE RECORD FULLY SUPPORTS MINIMUM REGULATION AND MAXIMUM FLEXIBILITY IN CONTRACTUAL RELATIONSHIPS BETWEEN LESSORS AND LESSEES

Numerous Commenters including Teligent expressed concern over the negative impact that too much regulation could have on the implementation of spectrum leasing.²⁶ For example, CTIA emphasized in its comments that the Commission should ensure that licensees are afforded flexibility to structure leases in a manner that best suits their business needs.²⁷ Similarly, El Paso Global supports maximum flexibility in leasing arrangements (including subleasing and downstream leasing) and enabling contract provisions to govern to the extent consistent with public interest.²⁸ Finally, AT&T Wireless indicated that too much regulation would bar many leases by delaying the ability to react to immediate business needs and unforeseen events.

²⁵ For example, spectrum users do not incur CALEA, E911, or number portability obligations by nature of becoming spectrum lessees. Rather these issues arise and the obligations associated with them only if the spectrum lessee chooses to provide certain types of service over its spectrum.

²⁶ See, e.g., comments of Alaska Native Wireless at 8, Nextel at 7 and 37 Concerned Economists at 5.

²⁷ Comments of CTIA at 4.

In the NPRM, the Commission requested comment on whether it should maintain a database regarding secondary markets and whether licensees that enter into spectrum leases should be required to provide notice (and copies) of their leases.²⁹ Teligent disagrees with those Commenters who believe that the Commission should attempt to maintain a database of spectrum lessees.³⁰ This will be an unnecessary and burdensome requirement for the Commission as well as for lessors and lessees, thereby, potentially discouraging and inhibiting leasing.³¹

Any issues related to the frequencies or licenses can and should be addressed to the licensee, whose information is already a matter of public record, and who through its own contractual provisions with its lessees will determine how to handle such issues. Prudent licensees will ensure that their spectrum leases are appropriately memorialized in written form and maintained, as are all significant corporate documents. The FCC simply need not mandate this by rule.³²

²⁸ Comments of El Paso Global at 4.

²⁹ NPRM ¶¶ 98-100.

³⁰ See, e.g., comments of Cook Inlet Region at 7, Kansas City Power and Light at 5, RTG at 9 and Shared Spectrum Company at 3.

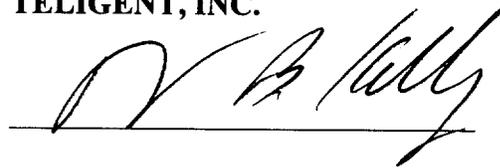
³¹ See comments of El Paso Global at 13 and Vanu at 14.

³² See comments of Vanu at 14.

For the foregoing reasons, Teligent urges that the Commission expeditiously adopt the proposals set forth in the NPRM in a manner consistent with the modifications suggested herein in order to enable those entities that presently desire to lease available spectrum as either a lessor or lessee to bring the benefits of that spectrum to the public as soon as possible.

Respectfully submitted,

TELIGENT, INC.

A handwritten signature in black ink, appearing to read "R B Kelly", is written over a horizontal line.

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March 12, 2001

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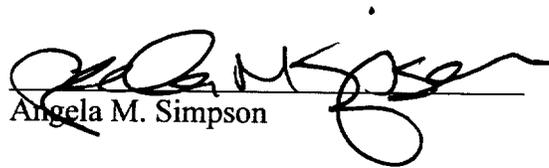
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