
Before the
Federal Communications Commission
Washington, DC 20554

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

**COMMENTS OF CINGULAR WIRELESS LLC
IN RESPONSE TO
*FURTHER NOTICE OF PROPOSED RULEMAKING***

J. R. Carbonell
Carol L. Tacker
David G. Richards
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Its Attorneys

December 5, 2003

TABLE OF CONTENTS

SUMMARY	ii
I. THE COMMISSION SHOULD ENSURE THAT ITS SECONDARY MARKET POLICIES ARE FULLY AVAILABLE TO THOSE LICENSED AS DESIGNATED ENTITIES AND ENTREPRENEURS.....	2
II. THE COMMISSION SHOULD ALLOW MARKETS TO DEVELOP OPPORTUNISTIC DEVICES TO THEIR OPTIMUM POTENTIAL, RATHER THAN IMPAIRING MARKET FORCES BY MANDATING ACCOMMODATION OF PARTICULAR TECHNOLOGIES	8
III. THE NEW <i>DE FACTO</i> CONTROL STANDARD SHOULD BE APPLIED UNIVERSALLY.....	12
IV. THERE IS NO NEED FOR THE COMMISSION TO DEVELOP INFORMATION-SHARING MECHANISMS	14

SUMMARY

Cingular agrees with the Commission's approach of minimal regulation of secondary markets in order to increase efficient spectrum usage, but believes that additional steps should be taken to further minimize regulatory barriers that may inhibit the creation of vibrant secondary markets. Specifically, the Commission should: (1) ensure that all licensees, including Designated Entities ("DEs"), are able to fully participate in secondary markets; (2) ensure that opportunistic uses of "exclusive" spectrum can occur only through secondary market transactions, instead of mandated underlays; (3) eliminate inconsistent control tests and apply the new *de facto* control test in all wireless services; and (4) refrain from taking an expansive role as a market maker or information clearinghouse.

Designated Entities. The Commission should allow DE licensees to lease spectrum rights to any entity, regardless of the entity's status as a DE or a non-DE, on the same basis as other licensees. The Commission's DE policies have fulfilled the statutory mandate of providing new opportunities for participation in telecommunications services. Many DEs face challenges in obtaining the needed capital to participate fully in this industry, and access to secondary markets will provide an important potential source of capital.

The *Report and Order* ("R&O") took important steps toward giving DEs opportunities to participate in secondary markets. The Commission allowed DEs to fully participate in short-term *de facto* transfer leasing, but it placed restrictions on their ability to enter into long-term *de facto* transfer leases. Cingular supports eliminating these restrictions and placing DEs on the same footing as other licensees.

More generally, Cingular supports giving DEs the same rights to lease their spectrum as are afforded to all other wireless licensees, including the ability to lease to non-DEs. This can be accomplished by eliminating the restrictions on long-term *de facto* transfer leases.

With regard to spectrum manager leasing, the Commission's rules properly do not impose comparable restrictions, and allow DEs to lease to non-DEs as long as the licensee remains qualified as a DE. The Commission should eliminate any doubt regarding this policy. It should make clear that the only eligibility criteria that lessees must meet are *general* eligibility requirements, and that only the licensee needs to meet the DE eligibility requirements. The Commission should also address the leasing restrictions that the *R&O* appears to place on DEs who hold spectrum subject to installment payments; the guidelines for such leases (which are not incorporated into the rules) would appear to require the lessees to be qualified as DEs, contrary to the Commission's intent to allow DEs to enter into spectrum manager leases with non-DEs. There is no need for such restrictions. Finally, the Commission should make clear that the only instance when the traditional *de facto* control standard will trump the Commission's new standard is with respect to the DE's continued eligibility for DE status, and that it will not be applied to require licensee "control" over the lessee's facilities and operations.

Opportunistic Devices. Well-defined exclusive licenses with flexible secondary market leasing ability will provide the optimum environment for the development and deployment of opportunistic technologies such as "smart" radios. The Commission should not preclude the ability of licensees to lease their spectrum to the developers and operators of opportunistic devices so long as (1) such usage meets the service and technical rules of the band, and (2) non-leasing licensees operating on adjacent channels or in adjacent geographic areas co-channel do

not experience harmful interference. Deployment of multiple radio technologies in a given band and area is a complex task that can only be accomplished by, or in close cooperation with, licensees with well-defined spectrum rights. For the FCC to permit such usage on an underlay basis, it would have to adopt a complex regimen of rules that would cloud the prospect of smart-radio technology development for years. Spectrum leasing, on the other hand, gives licensees the ability to work closely and cooperatively with innovative technology developers.

The licensee of an exclusive allocation should have the sole right to determine whether and how it will share spectrum, giving it the incentive to work with innovators to increase and capture the value of that spectrum. On the other hand, if the Commission decrees unlicensed underlays are permissible without a licensee's agreement, such action would destroy those incentives and, thus, preclude spectrum sharing through market forces.

The establishment of an "interference temperature" does not change this situation; it may give licensees an incentive to refuse to lease spectrum to others, lest the interference temperature be elevated and even more extensive sharing permitted due to the "worst case" nature of the interference temperature concept. With exclusive rights and secondary market transactions, on the other hand, a licensee would be able to mitigate any harm.

In this connection Cingular asks the Commission to clearly define spectrum usage rights in exclusive allocations, such that a single licensee has the sole right to use, or permit others to use, the frequency at all times, within specific, defined geographic and spectral boundaries, subject to minimal limits on use of the frequency. Market forces will work best when the spectrum rights that may be bought or sold are well defined.

Apply the New De Facto Control Standard Universally. The Commission should apply its updated *de facto* control standard uniformly across all wireless services. The new standard has eliminated some uncertainty in the leasing context, but confusion remains with respect to licensee control in other contexts, due to the existence of numerous vague standards. At a minimum, the new standard should apply to all management agreements and similar arrangements, which currently have to be crafted with language which serves no purpose other than to comply with an outmoded control standard, such as requiring licensee physical access to transmitters or having authority over employment decisions.

No Need for FCC Information-Sharing Mechanisms. The Commission should not involve itself in extensive information-gathering regarding spectrum leases, consistent with its general policy of relying on the marketplace. The current limited information submission requirements are sufficient. If additional information is needed, private sector entities will likely undertake the task. In any event, the Commission should exercise restraint. For example, if the private sector is unable to compile needed information, the Commission should consider appointing a private-sector clearinghouse, instead of itself compiling the data.

Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

**COMMENTS OF CINGULAR WIRELESS LLC
IN RESPONSE TO
*FURTHER NOTICE OF PROPOSED RULEMAKING***

Cingular Wireless LLC (“Cingular”) hereby submits its comments in response to the *FNPRM* contained in the Commission’s October 6, 2003 *Report and Order and Further Notice of Proposed Rulemaking*.¹ The *R&O* adopted a minimalist regulatory approach to jumpstarting secondary markets for spectrum acquisitions. Cingular agrees with this approach, but believes that additional steps should be taken to further minimize regulatory barriers that may inhibit the creation of vibrant secondary markets. Specifically, the Commission should (i) ensure that all licensees — including Designated Entities (“DEs”) — are able to fully participate in secondary markets, (ii) clarify that underlays and opportunistic uses of “exclusive” spectrum can occur only through secondary market transaction, (iii) eliminate inconsistent tests for determining control by applying the new *de facto* control test universally, and (iv) refrain from taking an expansive role as a market maker or information clearinghouse.

¹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113 (Oct. 6, 2003) (portions referred to herein as “*R&O*” or “*FNPRM*,” as applicable), *R&O summarized*, 68 Fed. Reg. 66252 (Nov. 25, 2003), *FNPRM summarized*, 68 Fed. Reg. 66232 (Nov. 25, 2003).

I. THE COMMISSION SHOULD ENSURE THAT ITS SECONDARY MARKET POLICIES ARE FULLY AVAILABLE TO THOSE LICENSED AS DESIGNATED ENTITIES AND ENTREPRENEURS

The *FNPRM* seeks comment on whether a DE should be permitted “to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same small business designated entity status as that of the licensee.”² The answer is a resounding yes. The Commission should eliminate any question regarding the ability of a DE to participate fully in secondary markets.

In response to a Congressional mandate to fashion auction rules that encourage the participation of designated entities (small businesses, businesses owned by women and minorities, and rural telephone companies) in telecommunications,³ the Commission has over the years adopted a variety of provisions, including bidding credits, limited-eligibility auctions, and installment payments for various classes of designated entities and/or “entrepreneurs” (collectively, DEs). In fact, the Commission elsewhere notes that these special provisions have facilitated the participation of DEs in telecommunications services in a variety of ways, including as stand-alone system operators and in alliances with national system operators.⁴

In adopting its DE rules, the Commission recognized that these entities faced challenges in obtaining the capital needed to participate fully in the telecommunications industry. Secondary market mechanisms can be an important source of capital for DEs. For example, a DE could raise funds for its own spectrum-based telecommunications business by temporarily leasing to another company the use of all or part of its spectrum in certain geographic markets (or portions of markets). Indeed, the *R&O* cited comments saying that secondary markets would

² *FNPRM* at ¶ 323.

³ 47 U.S.C. § 309(j)(3)-(4).

⁴ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas*, WT Docket 02-381, *Notice of Proposed Rulemaking*, FCC 03-222, ¶ 3 (Oct. 6, 2003).

“enhanc[e] the ability of designated entities to access additional capital.”⁵ As a result, the Commission said, “We find that providing the widest array of interested parties, including designated entities and others that face regulatory and market barriers in accessing spectrum resources, increased opportunities to enter into a variety of spectrum leasing arrangements . . . will significantly advance our goal of promoting facilities-based competition in broadband and other communications services as well as our objective to ensure more efficient, intensive, and innovative uses of spectrum.”⁶

The new secondary market rules will maximize the efficient use of spectrum by giving both licensees and non-licensees much greater flexibility in how they participate in telecommunications services, and those opportunities should be made fully available to DEs. Short-term *de facto* transfer leasing is an option that the Commission made fully available to DEs in the *R&O*. DEs were restricted, however, with respect to their ability to enter into long-term *de facto* transfer leasing arrangements.⁷ The *FNPRM* asks whether the restrictions on long-term *de facto* transfer leases should be lifted,⁸ and Cingular supports such action, which would put DEs on the same footing as other licensees.

The *FNPRM* also asks more generally whether its rules should be amended to “permit a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same small business designated entity status as that of the licensee.” Cingular strongly supports giving DEs the same rights to

⁵ *R&O* at ¶ 36 & n.71 (citing comments by AT&T Wireless and the Small Business Administration).

⁶ *Id.* at ¶ 39.

⁷ Unjust enrichment rules and transfer restrictions apply to long-term *de facto* transfer leases by DEs to non-DEs, but not to short-term *de facto* transfer leases. See 47 C.F.R. §§ 1.9030(d)(4), 1.9035(d)(2).

⁸ *FNPRM* at ¶ 323.

lease their spectrum to others, including non-DEs, as are afforded to all other wireless licensees. This objective would be accomplished by eliminating restrictions on long-term *de facto* transfer leasing by DEs, as discussed above.

The rules do not impose any similar restrictions on DEs' ability to engage in spectrum manager leasing arrangements with non-DEs. The Commission made this clear when it announced that "this leasing option" permits DEs "to undertake spectrum leasing arrangements" as long as the DE rules are satisfied.⁹ Thus, the rules adopted in the *R&O* allow DEs to lease spectrum as spectrum managers to entities who are not DEs, requiring lessees to meet only general eligibility requirements unrelated to DE status, rather than requiring lessees to meet DE eligibility requirements.¹⁰ The *R&O* confirms this position by requiring only that such leases "not result in the lessee becoming a 'controlling interest' or affiliate that would cause the licensee to lose its designated entity or entrepreneur status."¹¹ Thus, as long as a DE's spectrum manager lease is structured to ensure it remains a DE, it is free to lease its spectrum to a non-DE.

While the rules do not restrict DEs' ability to lease spectrum to non-DEs as spectrum managers, and the Commission did not intend any such restriction, there is some language in the *R&O* that could be read as ambiguous regarding this policy. The Commission should take this opportunity to eliminate any doubt regarding its intent to allow DEs to lease their spectrum to non-DEs without restriction, provided the licensee remains qualified as a DE.¹²

⁹ *R&O* at ¶ 113.

¹⁰ 47 C.F.R. §1.9020(d)(2).

¹¹ *R&O* at ¶ 113.

¹² This clarification is within the scope of the *FNPRM*, given that the Commission sought comment generally on DEs' leasing spectrum usage rights to non-DEs. *See FNPRM* at ¶ 323. Alternatively, the Commission could eliminate ambiguity created by language in the *R&O* in a reconsideration order. Cingular plans to file a petition for reconsideration that will seek such clarification.

Specifically, the Commission should clarify that its statement that lessees must “satisfy the eligibility and qualification requirements that are applicable to licensees under their license authorization”¹³ refers to the general eligibility requirements in rule section 1.9020, and *not* the designated entity eligibility rules. It is clear from the context that the Commission was referring to these general eligibility requirements, which are discussed in the paragraphs following the quoted language, while the DE rules are addressed separately.¹⁴

The Commission should also clarify that its statement that DEs may engage in spectrum manager leasing only to the extent “doing so is consistent with our existing designated entity and entrepreneur policies and rules”¹⁵ was intended to ensure that DEs continue to remain qualified as DEs, and not to extend the DE eligibility rules to lessees. This is apparent from the Commission’s explanation that a DE “may lease to any spectrum lessee and avoid the application of our unjust enrichment rules and/or transfer restrictions so long as the lease does not result in the lessee becoming a ‘controlling interest’ or affiliate that would cause the licensee to lose its designated entity or entrepreneur status.”¹⁶ In other words, a DE may lease to a non-DE without restriction as long as it continues to satisfy the DE rules. If spectrum manager leases to non-DEs were restricted, there would have been no need for this statement.

While the Commission unquestionably intended to permit DEs to lease spectrum to non-DEs without restriction (other than that the licensee remain qualified as a DE), and its rules carry out this policy, the *R&O*’s section dealing with installment payments appears inconsistent with this policy. In particular, the *R&O*’s provisions governing leases of spectrum held by DEs

¹³ *Id.* at ¶ 109.

¹⁴ The general eligibility requirements (*e.g.*, compliance with foreign ownership restrictions, character qualifications) are discussed in paragraphs 110-111, following the quoted language. The DE rules and policies are discussed under a separate subhead, in paragraph 113.

¹⁵ *R&O* at ¶ 113.

¹⁶ *Id.*

pursuant to installment payments appear to restrict the licensees' ability to enter into spectrum manager leases with non-DEs: the order establishes "guidelines" requiring, among other things, new financing documents for leases of spectrum subject to installment payments and requiring the *lessee* to be "qualified to enter into such arrangements under the Commission's rules and regulations."¹⁷ This would appear to permit DE licensees who are eligible for installment payments to transfer only to other DEs eligible for installment payments, which would be contrary to the Commission's intent to allow DEs to enter into spectrum manager leases with non-DEs. It is noteworthy that no such limitation was codified in the rules. The Commission should eliminate this apparent contradiction and clarify that, consistent with its rules and its policies set forth elsewhere in the *R&O*, DEs may enter into spectrum manager leasing arrangements with non-DEs and that the lessee need not be qualified for installment payments. Indeed, there does not appear to be any need for the lessee to appear on financing documents at all, especially with respect to spectrum manager leases. With such leases, the DE licensee remains fully accountable to the Commission even for *de facto* control of the license. And even when a long-term *de facto* transfer lease occurs, there is no justification for requiring the lessee to appear on the financing documents, given that the DE licensee continues to have exclusive lawful rights (*i.e.*, *de jure* control) over the spectrum and license covered by the financing documents.

Finally, the Commission should make clear that by maintaining that the "*de facto* control standard in our rules" for DEs — *i.e.*, the *Intermountain* standard — will trump the "revised *de facto* control standard" adopted in the *R&O* in the event of any conflict, it was addressing only

¹⁷ *Id.* at ¶ 188.

the DE's continued eligibility for DE status,¹⁸ assuming that the Commission does not eliminate applicability of the *Intermountain* standard entirely.¹⁹ This is apparent from the fact that the Commission made the statement in the context of requiring that the DE not lose its status due to the lessee becoming a "controlling interest" or "affiliate."

There is no indication that the Commission intended that DEs entering into spectrum leases must continue to exercise control over the radio facilities and operations of their lessees under the *Intermountain* standard. That would be contrary to the entire premise of the secondary markets proceeding. Moreover, if there is no need for a non-DE licensee to exercise control over a lessee's hiring and firing practices or to maintain unfettered access to facilities, then there is no conceivable reason for imposing such requirements on DEs. The only issue for which the *Intermountain* standard would appear to have any relevance is whether persons meeting the DE eligibility criteria continue to have control over the entity holding the DE license — and even here the Commission should follow its new control standard instead of *Intermountain*.

In short, the Commission intended to allow DEs the benefits of leasing their spectrum to others through secondary market transactions.²⁰ The FCC did not intend to preclude DEs from taking full advantage of the flexibility accorded wireless licensees by the new secondary market policies. Indeed, treating DEs unlike other licensees would undercut the very goals of spectrum efficiency that the Commission seeks to promote through leasing. The Commission should make clear that there is no distinction between DEs and other licensees where spectrum leasing is concerned, whether the lease in question is a "spectrum manager" lease or a "*de facto* transfer"

¹⁸ *Id.*

¹⁹ See *R&O* at ¶¶ 316-319; see also Section III, *infra*.

²⁰ See *R&O* at ¶¶ 2, 12, 36, 39, 45. Moreover, the *FNPRM* implies that spectrum manager leasing between DEs and non-DEs is permissible when it suggests that only the *de facto* transfer leasing option poses a barrier to leasing between DEs and non-DEs. *FNPRM* at ¶ 323.

lease. DEs should be encouraged to participate in the business of leasing spectrum to others on the same basis as other licensees. Spectrum leases, whether DEs are involved or not, should not be subject to rules, regulations, and limitations that apply to full-fledged transfers or assignments involving *de jure* control. The Commission should give DEs full access to spectrum leasing arrangements with non-DEs, including long-term *de facto* transfer leases.

II. THE COMMISSION SHOULD ALLOW MARKETS TO DEVELOP OPPORTUNISTIC DEVICES TO THEIR OPTIMUM POTENTIAL, RATHER THAN IMPAIRING MARKET FORCES BY MANDATING ACCOMMODATION OF PARTICULAR TECHNOLOGIES

The *FNPRM* seeks comment on whether secondary market initiatives will foster the development and deployment of dynamic and innovative software-defined radio technologies (also known as “smart” or “opportunistic” radios) and whether any further steps are necessary, such as more exhaustively defining the spectrum rights of exclusive-use licensees.²¹ Well-defined exclusive licenses with flexible secondary market leasing ability will provide the optimum environment for the development and deployment of such technologies.

Specifically, the Commission should not preclude the ability of licensees to lease their spectrum to the developers and operators of opportunistic devices so long as (1) such usage meets the service and technical rules of the band and (2) non-leasing licensees operating on adjacent channels or in adjacent geographic areas co-channel do not experience harmful interference. Wireless carriers have had extensive experience over the years in deploying multiple technologies within the exclusive spectrum- and geographically-defined domains defined by their licenses. In fact, the multi-band, multi-mode wireless phones now in everyday use are, in effect, the first generation of software-defined radios.

²¹ See *FNPRM* at ¶¶ 233-236.

Experience has shown that the simultaneous deployment of analog and multiple digital cellular technologies in a given area, while minimizing the effects on other licensees, is an extremely complex task requiring close management of spectrum resources. Tasks such as this can only be accomplished by, or in close cooperation with, licensees with well-defined exclusive spectrum rights, rather than by unlicensed “underlay” operators who have no contractual responsibility to the licensees.

Moreover, for the FCC to establish rules to permit smart-radio usage on an underlay basis, it would have to adopt a complex regimen of rules regarding the design and capabilities of such radios. Such rules would inevitably lead to litigation, clouding the prospect for smart-radio technology for years. The establishment of rules could also unintentionally (and unnecessarily) favor certain technologies over others and/or retard development of innovative technologies, including licensees’ technologies, that could both increase spectrum efficiency and prevent interference in response to market forces. It could also result in the inadvertent creation of loopholes that would lead to a cascading level of interference to authorized, licensed services, requiring further proceedings to unravel. Spectrum leasing gives licensees the ability to work closely with innovative technology developers to ensure that the usage of spectrum by opportunistic devices does not adversely affect the licensee’s operations. The lessee would be required to operate under the service and technical rules in place for that particular band, consistent with the lessor-licensee’s responsibility to ensure rule compliance, and the parties would be free to negotiate the interference criteria needed to govern their respective operations.

This model can only exist if exclusive allocations give the licensee the sole right to determine whether or how it will share spectrum. The certainty that others cannot freely take advantage of a licensee’s spectrum usage patterns, as in an unlicensed underlay, gives the licensee the ability to bargain with would-be spectrum users for the right to lease spectrum for an

underlaid network. When a licensee has the ability to approve underlays, market forces provide the licensee with the needed incentives to work with innovators to develop engineering techniques that permit efficient sharing of spectrum, because by sharing its spectrum *voluntarily* through a lease, the licensee can increase and capture the value of that spectrum.

Unlicensed underlays within supposedly exclusively-licensed spectrum bands, on the other hand, destroy such incentives and preclude the development of spectrum-sharing arrangements through market forces. Instead of a licensee weighing a technology's added economic value against its potential adverse effects, particular technologies are decreed to be permissible as unlicensed underlays by fiat, and the burden falls on the primary licensee to detect and seek to remedy any interference — while its customers suffer degradation of service and blame the degradation on the licensee. Moreover, prospective sharers have no incentive to reach agreement on a spectrum lease with the licensee when they can use the spectrum freely without a lease. In short, unlicensed underlays undermine the working of market forces that the spectrum leasing policy seeks to enable.

The use of an “interference temperature” for delineating permissible unlicensed underlays does not change this situation.²² In fact, the establishment of an interference temperature may give licensees an incentive to *refuse* to lease spectrum to others, out of concern that the emissions from lessees' operations may result in an elevated noise plus interference level and hence permit even more extensive unlicensed sharing via the underlay. Moreover, the

²² Unfortunately, the Commission appears to assume that opportunistic devices can be used in an underlay or easement without causing interference to the licensed service. This assumption is purely theoretical. There has been only limited testing of such radios, and to the best of our knowledge there has never been a large-scale real-world test of their use in an underlay on spectrum intensively used for the provision of wireless service. Accordingly, there is no evidence that they can coexist with licensed service without causing harmful interference. Moreover, the ability of licensed and underlaid services to coexist without interference under an interference temperature cap is highly dependent on the geometry between the interfering transmitter and the victim receiver, as Cingular has previously shown. *See Cingular Comments, Spectrum Policy Task Force NPRM*, ET Docket 02-135, at 29 (filed Jan. 27, 2003).

availability and reliability of the licensee's services will be diminished due to increases in the noise floor resulting from sharing, and the licensee would have to divert some of its limited resources from providing service to the task of mitigating interference from underlay users. This is a significant risk under a yet-untested interference temperature set by regulatory fiat.²³ Through a secondary market transaction, on the other hand, a licensee would be able to mitigate any harm.

The interference temperature concept ensures that the licensee will increasingly face "worst case" interference conditions, because sharers would be allowed to increase noise and interference levels up to an FCC-specified limit corresponding to the peak noise level, whereas under an exclusive-licensing system with voluntary spectrum sharing, the licensee would be entitled to prevent noise and interference from a lessee exceeding a level compatible with the licensee's operational needs. Thus, departing from the market-oriented model and using the interference temperature to permit unlicensed spectrum sharing would take away the licensee's ability to avoid or manage such conditions through interference management, use of alternative approaches or other engineering approaches. It precludes the licensee from implementing new technologies that may improve efficiencies and allow reception of licensed service at levels where effective communication may not currently be possible. Under a secondary market scenario, this concern can be mitigated by the licensee, rather than have uncontrolled sharing thrust on the licensee by fiat.

²³ As Cingular has pointed out, even the establishment of an interference temperature for a particular frequency band requires extensive noise floor studies in the relevant band as well as substantial experimentation in test beds to ensure that there will not be service degradation when implementation occurs. *See id.* at 31-34.

In order to facilitate secondary markets through spectrum sharing, Cingular again calls on the Commission to clearly and exhaustively define spectrum users' rights and responsibilities.²⁴

[A]n exclusive frequency allocation should be defined as (i) granting a single licensee the *sole* right to use (or permit others to use) the frequency at all times, within specific, defined geographic and spectral boundaries, (ii) subject to minimal limits on the use of the frequency. Such a definition is required to ensure that the marketplace functions properly.²⁵

Market forces will work best in a secondary market when the spectrum rights of licensees that may be bought or sold are well defined. This enables both buyers and sellers to assess the value of spectrum usage rights and reach an optimal price. Uncertain or ill-defined rights, on the other hand, make it difficult for both buyers and sellers to value properties. The existence of underlays, even if not currently used, will devalue a licensee's rights, just as the entitlement of others to squat or poach on land will diminish the value of real property. The Commission can best encourage licensees to engage in secondary market spectrum transactions with innovators seeking to implement opportunistic radio technologies by defining and protecting the licensees' rights and permitting the marketplace to work efficiently.

III. THE NEW *DE FACTO* CONTROL STANDARD SHOULD BE APPLIED UNIVERSALLY

The *FNPRM* inquires whether the Commission should apply its new *de facto* control standard in contexts other than spectrum leasing, referring in particular to its DE eligibility rules and management agreements.²⁶ Rather than add yet another "standard" for determining control, the Commission should apply the new *de facto* control standard uniformly across all wireless services. Congress purposely did not define the term "control" when it adopted Section 310(d),²⁷

²⁴ See *id.* at 6.

²⁵ *Id.*

²⁶ *FNPRM* at ¶¶ 315-19.

²⁷ See H.R. Rep. No. 73-1850 at 4-5 (1934).

thus delegating definitional responsibility to the Commission. The Commission is entitled to broad discretion in adopting a control definition.²⁸

As noted in Cingular's prior comments,²⁹ uncertainty is a major impediment to the implementation of flexible policies designed to improve the efficiency of spectrum usage.³⁰ By adopting a new *de facto* control standard for leasing, the Commission has eliminated some uncertainty in the leasing context. This new standard, however, creates additional confusion for parties attempting to weigh the merits of different types of transactions. Specifically, in non-leasing contexts (as well as leasing situations not covered by the *R&O*), parties must evaluate control pursuant to disparate tests including:

- *Stereo Broadcasters* test — used in the broadcast context. Three factors weighed: who controls programming; who controls personnel; and who controls finances?
- *Intermountain Microwave* test — used in the common carrier radio context. Six factors weighed: does the licensee have unfettered use of all facilities and equipment; who controls daily operations; who determines and carries out policy decisions; who is in charge of employment; who is in charge of financing; who receives money and profits from operation of the facilities?
- *Motorola* test — used with regard to private radio licenses. This test provides that no transfer of *de facto* control occurs where the licensee owns the most significant equipment and a third party performs management functions pursuant to the supervision and instructions of the licensee, who can terminate the governing agreement.

These tests have not always been applied uniformly or clearly. For example, courts have been critical of the Commission's uneven application of *Intermountain* to cases involving similar facts.³¹

²⁸ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *NPRM* at ¶ 71.

²⁹ Cingular Comments, WT Docket 00-230, at 4, 9, 10 (Feb. 9, 2001).

³⁰ *Accord CMRS Flex Order*, 11 F.C.C.R. 8965, ¶ 8; *R&O* at ¶¶ 1, 22, 44; *Policy Statement* at ¶¶ 13, 15, 27.

³¹ Compare *Telephone and Data Systems, Inc.*, 19 F.3d 42 (D.C. Cir. 1994) with *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994).

The Commission should eliminate these disparate tests in favor of uniform application of the new *de facto* control test adopted in the *R&O*. At a minimum, the new test should apply to all management agreements and other similar agreements. The older standards cause licensees to craft such agreements with language that serves no purpose other than to comply with the standard. For example, provisions drafted to comply with *Intermountain* (e.g., provisions guaranteeing the licensee physical access to transmitters and antennas, or providing the licensee with the right to demand or veto particular employment decisions) do not meaningfully enhance licensee responsibility to the FCC or serve any other valid regulatory purpose. Elimination of the older standards in favor of the new approach would give licensees clear guidance with respect to the aspects of licensee control of importance to the Commission.

IV. THERE IS NO NEED FOR THE COMMISSION TO DEVELOP INFORMATION-SHARING MECHANISMS

The Commission should not deviate from its conclusion, as well as the recommendation of the Spectrum Policy Task Force, that the government should not be involved with gathering extensive information regarding spectrum leases.³² This conclusion is consistent with the Commission's general policy of relying on the marketplace, rather than regulation, whenever possible to accomplish its objectives.³³

³² Compare *FNPRM* at ¶¶ 221-229 with *R&O* at ¶ 193; *Policy Statement* at ¶ 39.

³³ See, e.g., *R&O* at ¶ 2 (noting that spectrum leasing policies should “continue our evolution toward greater reliance on the marketplace”); *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, *Report and Order and Notice of Proposed Rulemaking*, 17 F.C.C.R. _____, ¶ 537 (July 2, 2003); *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 F.C.C.R. 6685, ¶ 3 (2002); *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898, ¶ 9 (1999); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 F.C.C.R. 10030, ¶ 4 (1999).

The Commission appropriately required licensees to submit limited information regarding spectrum leasing and will make this information available via ULS.³⁴ If additional information is needed for secondary markets to emerge and flourish, the Commission correctly observed that “economic incentives will encourage private sector entities to undertake the task.”³⁵ Absent a demonstrated market failure, Commission involvement in the information gathering process is not warranted.

Even if the private sector is unable to compile the information necessary to promote the formation of secondary markets (which is doubtful), the Commission still should exercise restraint. Rather than adopt extensive informational filing requirements at that time, the Commission should appoint a clearinghouse — as with 2 GHz microwave relocation³⁶ — to compile and distribute the information demanded by the industry. The Commission only should take those steps absolutely necessary to promote secondary markets.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: _____

J. R. Carbonell
Carol L. Tacker
David G. Richards
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

Its Attorneys

December 5, 2003

³⁴ See *R&O* at ¶¶ 192-93.

³⁵ *R&O* at ¶ 193.

³⁶ See 47 C.F.R. § 24.241.