

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF THE WIRELESS
COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.**

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ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. (“WCA”) applauds the Commission for the steps it has already taken in this proceeding to remove unnecessary barriers to the development of secondary markets for almost two dozen wireless services, thereby promoting more efficient spectrum utilization. WCA endorses the Commission’s finding that robust secondary markets based on the Commission’s new spectrum leasing paradigm will contribute significantly to the Commission’s broadband policies intended to bring advanced telecommunications services to all Americans and to promote increased facilities-based competition.

Extending the new flexible spectrum leasing policies to the Multipoint Distribution Service and the Instructional Television Fixed Service (“MDS/ITFS”) would be a natural fit, as spectrum leasing has been a staple of the MDS/ITFS rules for twenty years. Such an action not only would further promote the Commission’s broadband policy objectives but would dovetail well with the pending proposals in WT Docket No. 03-66 that would allow new technologies and a new geographic service area licensing regime to be deployed in the MDS/ITFS frequency bands. While the Commission correctly proposes in WT Docket No. 03-66 to eliminate the facilities-centric focus of its current MDS/ITFS licensing regime, the instant proceeding provides a parallel opportunity for the Commission to eliminate the facilities-centric focus of its current MDS/ITFS leasing policies. Moreover, extending the new flexible spectrum policies to MDS/ITFS would further the Commission’s policy goal to create regulatory parity between MDS and ITFS and similar services to which the new spectrum leasing policies already apply.

The Commission must make clear, however, that extension of the new spectrum leasing paradigm to the MDS/ITFS bands does not vitiate existing capacity lease agreements in those bands. Grandfathering of these existing lease agreements will preserve the integrity of the same type of private contractual rights that this proceeding is intended to foster.

WCA supports the concept that secondary market mechanisms, rather than unlicensed access, are the appropriate means for introducing so-called “opportunistic” technologies and “smart” devices into licensed spectrum. Indeed, as the record in WT Docket No. 03-66 indicates, the factual predicate for permitting unlicensed use of opportunistic technologies – that unlicensed opportunistic use can occur without causing interference to licensed operations – is both unproven and a threat to innovation by licensees. On the other hand, WCA strongly supports permitting licensees to engage in secondary market transactions whereby they can determine on a case-by-case basis whether to make capacity on their licensed spectrum available for such technologies and under terms of their own choosing.

As WCA applauds the Commission for seeking ways to encourage the development of a robust secondary market, WCA recommends that the Commission limit its role to maintaining an on-line listing of licensees, lessees, frequencies and service areas. Other “market maker” functions can best be performed by private sector entities.

Finally, the Commission can, as a matter of law – and should, as a matter of policy – apply maximum forbearance standards to provide streamlined approvals of *de facto* transfer

leases as well as outright license transfers and assignments. Although the Commission's statutory forbearance authority under Section 10 of the Communications Act is limited to "telecommunications carriers" or "telecommunications services," the Commission may adopt nearly identical streamlined processing procedures for non-telecommunications services. The language of the relevant transfer statute, 47 U.S.C. § 310(d) does not contain any requirement for prior individual Commission review of approved applications. The Commission, therefore, could adopt procedures allowing parties to consummate transfers without prior individual examination and approval at their own risk, subject to *post hoc* review by the public and possible reversal by the Commission.

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The Wireless Communications Association International, Inc. (“WCA”), by its attorneys and pursuant to Section 1.415 of the Commission’s rules, hereby submits its comments in response to the *Further Notice of Proposed Rulemaking* (“FNPRM”) portion of the Commission’s *Report and Order and Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹

I. INTRODUCTION

WCA is the trade association of the wireless broadband industry. Its members include licensees, system operators, equipment manufacturers and consultants involved in the provision of wireless broadband services over licensed frequencies allocated to the Multipoint Distribution Service (“MDS”), the Instructional Television Fixed Service (“ITFS”), the Local Multipoint Distribution Service (“LMDS”), the 39 GHz service and the Wireless Communications Services (“WCS”), as well as the license-exempt bands. Thus, WCA has a substantial interest in the

¹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 00-230, 68 Fed. Reg. 66232 (November 25, 2003) (“R&O & FNPRM”).*

Commission's efforts to promote the most efficient use of spectrum in frequency bands utilized by WCA members through elimination of barriers to the development of secondary markets.

The Commission is to be commended for the promising first steps it has taken in the *R&O & FNPRM* towards more efficient spectrum utilization through secondary markets. WCA, whose MDS and ITFS members have more than 20 years of experience in the leasing of system capacity, fervently believes that the elimination of barriers to the development of secondary markets, coupled with affirmation of the exclusive rights afforded licensees of exclusive use spectrum, will result in the most efficient possible use of the licensed allocations. Thus, as will be discussed in more detail below, the Commission should: (i) expand the rules and policies adopted in the *Report and Order* portion of the *R&O & FNPRM* to include MDS and ITFS (while grandfathering existing leases to avoid unnecessary disruption); (ii) promote the use of secondary market transactions to facilitate the deployment of new spectrum-sharing technologies; (iii) provide on-line access to information within its purview, but otherwise rely on the marketplace to the maximum extent possible to facilitate secondary market transactions; and (iv) further streamline the processing of *de facto* transfer leases and outright license transfers and assignments.

II. THE COMMISSION SHOULD EXTEND ITS NEW SPECTRUM LEASING POLICIES TO MDS AND ITFS LICENSEES, BUT MUST GRANDFATHER EXISTING LEASES TO AVOID MARKETPLACE DISRUPTION.

The Commission's new secondary market policies are applicable to almost two dozen specified fixed and mobile wireless services regulated by the Wireless Telecommunications Bureau,² including most of the services utilized by WCA members. However, because the Commission issued the *Notice of Proposed Rulemaking* ("NPRM") in this proceeding at a time

² *Id.* at ¶ 84 n. 181.

when MDS and ITFS were under the aegis of the Mass Media Bureau,³ those services were not included in the *NPRM* and thus could not be included in the *Report and Order*.⁴ Recognizing that the benefits of the new leasing regulatory regime could yield more efficient use of additional bands, the *FNPRM* requests comment on whether the Commission should extend its spectrum leasing policies to several other wireless services, including MDS and ITFS.⁵ For the reasons set forth below, WCA urges the Commission to apply its new secondary market policies to MDS and ITFS, while grandfathering all existing MDS and ITFS capacity leases.⁶

As an initial point, WCA commends the Commission for taking affirmative action in the *Report and Order* to remove unnecessary barriers to the development of secondary markets in spectrum usage rights for many wireless radio services. WCA heartily endorses the

³ *Promoting Efficient Use of Spectrum Through Elimination of Barriers in the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 24203 (2000) (“NPRM”).

⁴ *R&O & FNPRM* at ¶ 288.

⁵ *See id.* at ¶¶ 307-308.

⁶ It should be emphasized that WCA is not proposing that the Commission in this proceeding make any changes to the special rules set forth in Section 74.931(c) that govern the leasing of excess capacity by ITFS licensees. More specifically, and consistent with the position taken by WCA, the National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”) in WT Docket No. 03-66, the Commission should continue to impose on new ITFS excess capacity lease agreements entered under the new spectrum leasing paradigm the minimum ITFS usage requirements set forth in Sections 74.931(c)(1) and (2) and 74.931(d)(1). *See* Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 128-132 (filed September 8, 2003). Retention of those minimum use requirements also dictates that the Commission retain the related provisions of Sections 74.931(c)(3) and 74.931(d)(2) authorizing channel mapping, channel loading, and channel shifting of minimum use transmissions. The need for those provisions is a matter of record and need not be repeated here. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules and Regulations Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, the Instructional Television Fixed Service & Cable Television Relay Service*, Order on Reconsideration, 6 FCC Rcd 6764, 6774 (1991); *Amendment of Part 74 of the Commission’s Rules and Regulations Governing Use of the Frequencies in the Instructional Television Fixed Service*, Report and Order, 9 FCC Rcd 3360, 3365-66 (1994); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, 19166 (1998). There is nothing in the spectrum manager or *de facto* transfer models that alters the established benefits of permitting ITFS licensees to meet their minimum use transmissions on any channel within an integrated, multichannel system. Indeed, given that the next generation of highly-cellularized systems often will not use each channel at each base station to avoid intra-system cochannel interference, retention of these policies is the only means by which ITFS licensees will be able to provide ubiquitous service within their service areas.

Commission's finding that robust secondary markets will contribute significantly to the Commission's broadband policies intended to bring advanced telecommunications services to all Americans and to promote increased facilities-based competition. WCA agrees with the Commission that:

Facilitating the ability of [broadband service] providers to gain ready access to licensed but unused or underutilized spectrum will provide an important, efficient, and more timely means of delivering these services. Improved secondary markets also will serve our goal of enhancing competition among facilities-based providers. By adopting the leasing policies and procedures herein, we remove unnecessary regulatory constraints, lower transaction costs, and reduce spectrum acquisition costs, so as to enable more parties to enter into voluntary leasing arrangements, thus enabling more facilities-based competition by new providers. These policies provide potential lessees a ready means of obtaining access to that spectrum (in amount, location, and duration) best suited for their business needs. They also remove regulatory uncertainty . . . Thus, these policies should facilitate the ability of licensees and potential spectrum lessees to negotiate voluntary, market-driven leasing arrangements that enable other providers or new entrants to provide facilities-based services to the public or other end-users.⁷

For the same reasons the Commission described, WCA urges the Commission to extend its new flexible spectrum leasing policies to the MDS and ITFS services and allow both spectrum manager and *de facto* transfer leasing activity.

Increased spectrum leasing flexibility is a natural fit for the MDS and ITFS services. As WCA noted earlier this year in the FCC's Spectrum Policy Task Force proceeding, "[t]he secondary markets concept (under which licensees could lease the spectrum usage rights to third parties) has been a staple of the Commission's MDS/ITFS rules for twenty years."⁸ Having been

⁷ *R&O & FNPRM* at ¶ 44 (footnotes omitted).

⁸ Comments of Wireless Communications Association International, Inc., ET Docket No. 02-135, at 5-6 (filed January 27, 2003). Although the *R&O & FNPRM* acknowledges that ITFS licensees have been engaged in the leasing of capacity since 1983, it does not reflect the widespread leasing of MDS capacity. See *R&O & FNPRM* at ¶¶ 307-308. Indeed, until 1987 every MDS licensee was regulated as a common carrier, barred from controlling the content transmitted over its system, and generally leased all of its capacity to a single operator who utilized that capacity to provide service to the public. See *Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service*, 2 FCC Rcd 4251, 4252 (1987). However, in 1987 the Commission awarded every MDS licensee the flexibility to provide service on a non-common carrier basis should it so elect, and clarified that a

developed long before the concept of “*de facto* transfer leasing,” the rules and policies currently applicable to MDS and ITFS capacity leasing reflect a perceived need to avoid any *de facto* transfer of control from the licensee to the lessee. The Commission’s evaluation of MDS and ITFS leases to determine whether *de facto* control has transferred has been based on the *Intermountain Microwave* standard focusing on managerial and financial control over licensed facilities.⁹ Although over the years this “control over facilities” approach has evolved marginally to reflect the particular facts and circumstances surrounding MDS and ITFS leasing, WCA wholeheartedly agrees with the Commission that “[b]y its very nature, the *Intermountain Microwave* standard imposes significant constraints on the development of . . . secondary markets because it restricts the ability of licensees to make spectrum available for a defined period to third-party users that would prefer to construct and use their own facilities instead of being forced to rely on the licensees’ facilities and technology.”¹⁰ Elimination of those constraints can only provide greater use of the MDS and ITFS bands.

The flexibility inherent in the new spectrum manager and *de facto* transfer leasing models will dovetail well with the proposals pending in the *Notice of Proposed Rulemaking* in WT Docket No. 03-66 (“*MDS/ITFS Rule Rewrite NPRM*”) to foster the development of the MDS and ITFS bands for a wide variety of video, voice and data services offered on a mobile and/or fixed

non-common carrier MDS licensee was free to lease its capacity to others pursuant to individually-negotiated contracts. *See id.* at 4253. That paradigm – non-common carrier MDS licensees leasing all of their capacity pursuant to individually-negotiated contracts – is prevalent today.

⁹ *Intermountain Microwave*, 12 FCC 2d 559 (1963).

¹⁰ *R&O & FNPRM* at ¶ 60. The Commission’s authority to depart from the *Intermountain Microwave* standard to reflect the particular circumstances of given services is well established. *Id.* at ¶ 54; *NPRM*, 15 FCC Rcd at 24230-31. [cites to pars. 75-76 of *NPRM* and Par. 54 of *R&O*]

basis.¹¹ As is recognized in the *MDS/ITFS Rule Rewrite NPRM*, the new technologies that will be widely deployed in the MDS and ITFS bands to provide such services require substantial network cellularization.¹² While the *MDS/ITFS Rule Rewrite NPRM* proposes to eliminate the facilities-centric focus of its MDS/ITFS licensing regime, the *FNPRM* in this proceeding provides a parallel opportunity for the Commission to eliminate the facilities-centric focus of its MDS/ITFS leasing policies.

Given the complexities in network design, construction and operation that are inherent in the coming highly-cellularized networks, it is inevitable that crafting agreements which maintain licensee control over facilities under the *Intermountain Microwave* approach will prove burdensome to licensees and lessees, and ultimately will diminish the prospects for the most efficient use of the MDS and ITFS bands. Thus, there is a vital need to move away from facilities-centric leasing policies based on *Intermountain Microwave*. The Commission has correctly concluded that:

the *Intermountain Microwave* standard is increasingly out of step with the flexible spectrum use policies we are adopting in the Wireless Radio Services and that we consider essential to furthering our obligations to promote the public interest in today's environment. *Intermountain Microwave* was decided at a time when it was difficult to imagine a distinction between the business and infrastructure, on the one hand, and the actual use of the spectrum license, on the other. We also note that the standard was designed in a regulatory environment that significantly predates the flexible use licensing models (including large geographic area licenses) and technological advances (e.g., software-defined radios) that are making spectrum use increasingly divisible, fungible, and capable of being accessed in various dimensions (geography, bandwidth, and time) by different users on different systems. Its consequent focus on licensee control of facilities is no longer suited to the sea change in the regulatory and technological environment affecting most of our exclusive use Wireless Radio Services. Given

¹¹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, 18 FCC Rcd 6722 (2003) ("*MDS/ITFS Rule Rewrite Proceeding*").

¹² *Id.* at 6737.

these dramatic changes and our goals regarding spectrum access, we do not believe it makes sense to continue to require that a licensee have immediate direct control over every facility that operates using its licensed spectrum and nearly every aspect of the business plan, financing, and operations in connection with the use of the spectrum. Continued reliance on the *Intermountain Microwave* standard, particularly given that it is not required by statute, would unnecessarily impede our efforts to promote more ready access to spectrum with minimal transaction costs and to ensure that spectrum is put to its most highly valued use.¹³

Each of these findings is as applicable to MDS and ITFS as it is to any of the other services to which the new leasing rules apply.

Indeed, one of the Commission's primary regulatory objectives has been to create regulatory policies that treat similar services similarly.¹⁴ To this end, the Commission made clear in the *MDS/ITFS Rule Rewrite NPRM* that one of its goals is to create regulatory parity between MDS and ITFS and similar services (like WCS, LMDS and 39 GHz).¹⁵ Each of the latter services can now take advantage of the new secondary market opportunities created by the *R&O & FNPRM*, and there is no public interest rationale for denying MDS and ITFS licensees access to those same benefits.

The Commission must make clear, however, that extension of the new spectrum leasing paradigm to the MDS/ITFS bands does not vitiate capacity lease agreements that were entered into prior to the extension of the rules to MDS/ITFS. Grandfathering of these existing lease arrangements will allow the parties to retain the benefits of their bargains, thereby preserving the integrity of the same type of private contractual rights that this proceeding is intended to foster. Indeed, the importance of preserving existing lease rights was recently reinforced by WCA, NIA

¹³ *R&O & FNPRM* at ¶ 62 (footnote omitted).

¹⁴ *MDS/ITFS Rule Rewrite Proceeding*, 18 FCC Rcd at 6742.

¹⁵ *See id.*

and CTN in their joint reply comments in WT Docket No. 03-66.¹⁶ Those arguments need not be repeated at length here, but instead are incorporated by reference. Suffice it to say that WCA fully agrees with the Spectrum Policy Task Force’s finding that “a level of certainty regarding one’s ability to use spectrum, at least for some foreseeable period, is an essential prerequisite to investment, particularly in services requiring significant infrastructure installation and lead time.”¹⁷

III. THE COMMISSION’S NEW SPECTRUM LEASING PARADIGM, RATHER THAN UNSUPERVISED UNLICENSED USE, PROVIDES THE APPROPRIATE VEHICLE FOR THE COMMISSION TO ENCOURAGE SPECTRUM SHARING, WITHOUT ADVERSE RISKS TO LICENSE HOLDERS

In the *R&O & FNPRM*, the Commission solicited comment on whether to allow access to currently licensed spectrum by so-called “opportunistic” technologies and “smart” devices through secondary market mechanism.¹⁸ WCA fully supports the concept that secondary market mechanisms, rather than unlicensed access, represent the most effective and efficient vehicle for introducing these new sharing technologies into licensed spectrum.

In the initial and reply comments in WT Docket No. 03-66 jointly filed by WCA, NIA and CTN, the Commission was cautioned against allowing unlicensed uses by such opportunistic technologies in bands subject to exclusive licenses on a non-interfering basis.¹⁹ WCA will not reiterate in full the arguments presented in that docket but highlights the fact that the predicate for unlicensed use – that such use can occur without causing interference to licensed operations – is unproven. Absent strong evidence that the particular sharing technologies being deployed will

¹⁶ Reply Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 62-71 (filed October 23, 2003).

¹⁷ *Spectrum Policy Task Force Report*, ET Docket No. 02-135, at 23 (Nov. 2002).

¹⁸ *R&O & FNPRM* at ¶ 230-236.

¹⁹ Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 64-68 (filed September 8, 2003); Reply Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 78-84 (filed October 23, 2003).

protect licensees' current and future operations, adopting rules that would allow unlicensed uses of licensed bands would only undermine efforts to provide existing licensees the service flexibility that the Commission repeatedly stated it wants to provide. WCA firmly believes that once the Commission permits unlicensed devices to emerge and proliferate in a licensed band, the ability of licensed users to introduce their own innovations to take full advantage of the licensed spectrum inevitably will be stifled.

On the other hand, also consistent with its comments in WT Docket No. 03-66,²⁰ WCA strongly supports permitting licensees to engage in secondary market transactions that will allow sharing technologies pursuant to the Commission's new spectrum leasing paradigm. Each licensee could then determine on an individual, case-by-case basis – in its own discretion and under terms of its own choosing – whether to make capacity on its spectrum available. Each licensee could balance the economic benefit of a particular secondary market arrangement against the costs associated with that particular arrangement, including the potential for interference to its particular service from the particular opportunistic technology permitted under the arrangement and possible limitations on the licensee's future flexibility. Because the contractual relationship will be crafted to reflect specific marketplace needs, it can provide for limitations on opportunistic use (perhaps restricting the number of users to protect licensed operations and avoid a “tragedy of the commons” among opportunistic users), impose specific interference protection standards, establish specific interference mitigation procedures, and contain specific cost allocations (including allocations of interference mitigation costs) that cannot possibly be imposed by any “one size fits all” Commission rule.

²⁰ Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 33-35 (filed September 8, 2003).

In short, a contract-based secondary markets regime is best suited for the introduction of spectrum sharing technologies. Such an approach avoids the fundamental flaw inherent in proposals for unlicensed access to licensed spectrum – licensees’ current and/or future uses may suffer unanticipated interference unless the rules for unlicensed access are sufficiently technically restrictive to protect the most vulnerable licensed use imaginable. In contrast to such a restrictive unlicensed environment, a secondary-markets approach will allow a greater variety of spectrum sharing technologies to evolve, as licensees who deploy technologies that are less vulnerable to interference authorize sharing that could never be permitted universally on an unlicensed basis.

IV. THE COMMISSION SHOULD LIMIT ITS EFFORTS TO FACILITATE SECONDARY MARKET SPECTRUM LEASES AND EXCHANGES TO MAINTAINING UP-TO-DATE, ON-LINE INFORMATION

In the *R&O & FNPRM*, the Commission solicits comment on three ways that it could facilitate secondary market transactions: (i) whether it should maintain an on-line listing of licensees, lessees, frequencies and service areas; (ii) whether it should encourage the development of information services that list spectrum resources that licensees are actively offering for sale or lease; and (iii) whether to support the establishment of private spectrum exchanges and brokers who would match parties interested in acquiring spectrum usage rights with existing licensees.²¹

WCA applauds the Commission for seeking to encourage the development of a robust secondary market encompassing spectrum leasing and exchanges. WCA agrees with the Commission’s own tentative assessment that the simplest of the approaches outlined above – maintaining an on-line database – is the most appropriate role for the Commission to take, as

²¹ *R&O & FNPRM* at ¶ 221-229.

long as the on-line information is made available to the public in readily downloadable form. WCA concurs with the Commission that the private sector can better perform the two other functions identified, promoting the exchange of information and the development of “market-makers.”²²

V. THE COMMISSION LAWFULLY CAN AND SHOULD APPLY MAXIMUM FORBEARANCE STANDARDS TO STREAMLINE PROCESSING OF *DE FACTO* SPECTRUM LEASES AND OUTRIGHT TRANSFERS/ASSIGNMENTS

In the *R&O & FNPRM*, the Commission adopted rules intended to facilitate certain categories of spectrum leasing and to reduce the associated regulatory processing requirements. The Commission solicited comment on whether these regulatory processing requirements could be further streamlined to allow *de facto* transfer leases to become effective without prior public notice and without prior Commission review and consent and, if so, whether the further streamlined regulatory processing procedures could be extended to similar categories of outright license transfers and assignments.²³

WCA strongly supports the Commission’s goal of minimizing the regulatory processing requirements and delays for those categories of *de facto* transfer leases and outright transfers and assignments whose prompt effectuation would serve the public interest and do not require individual scrutiny and prior Commission approval to ensure that the Commission’s public policy responsibilities and objectives are met. WCA endorses the Commission’s proposed list of eligibility conditions and elements for *de facto* transfer leases and outright assignments and transfers that would qualify to become effective without FCC prior approval:

- The transferee or assignee must satisfy applicable eligibility and use restrictions associated with the licensed spectrum;

²² See *id.* at ¶ 226.

²³ *Id.* at ¶ 237-240, 246.

- The transferee or assignee must comply with the foreign ownership requirements applicable to Commission licensees; and
- The transfer or assignment must not raise any competitive concerns.²⁴

The Commission notes, however, that its authority under Section 10 of the Communications Act of 1934, as amended (“the Act”), 47 U.S.C. § 160, to forbear from applying any provision of the Communications Act is limited to “telecommunications carriers” or “telecommunications services.”²⁵ Thus, the Commission recognizes that its Section 10 forbearance authority does not literally extend to wireless information services such as Internet access or to other non-telecommunications services such as private land mobile radio or private fixed microwave services. The Commission asks whether any further streamlined processing procedures such as forbearing from enforcing prior approval requirements could be applied to services and bands, for example, the MDS/ITFS bands, where licensees may provide either telecommunications services or non-telecommunications services.²⁶ WCA submits that the Commission lawfully can and should forbear from requiring individual review and prior approval of almost all types of *de facto* transfer leases and outright transfers and assignments in the bands subject to the new paradigm.

First, WCA urges the Commission to apply its maximum Section 10 statutory authority to streamline transfers and assignments of any licenses used by telecommunications carriers or for telecommunications services by forbearing from enforcing any prior public notice or prior FCC

²⁴ *R&O & FNPRM* at ¶¶ 246-265, 281.

²⁵ *Id.* at ¶¶ 241-243. Section 3(44) of the Communications Act defines the term telecommunications carrier as “any provider of telecommunications services.” 47 U.S.C. § 153(44). Section 3(46) of the Act defines the term “telecommunications service” to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

²⁶ *R&O & FNPRM* at ¶ 242 n. 434.

approval requirements. The Commission could identify which licenses are eligible for Section 10 forbearance simply by requiring the licensee to certify in the notification that the licensee will file that it is, or will be, providing a telecommunications service. The Commission could deem all notifications approved immediately upon their filing but subsequently place them on public notice. In response to the public notices, interested parties could file a petition for reconsideration of an approval within thirty days or the Commission could rescind an approval on its own motion within 40 days.

Second, WCA recommends that the Commission adopt practically identical streamlined transfer and assignment procedures for licenses used for non-telecommunications services, even though such services are not covered by the express forbearance authority of Section 10 of the Act. Contrary to the Commission's assertion, Section 310(d) of the Act, 47 U.S.C. § 310(d), does not, in fact, require *prior, individual* Commission review and approval of all transfer and assignment applications involving non-common carrier and non-broadcast licenses.²⁷ The language of Section 310(d) does not include "prior" or any similar term, nor does it contain any specific requirement for individual review of applications. The statute says only that no licenses shall be transferred or assigned "except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby." The language of Section 310(d) is similar to the language of Section 214(a) of the Act ("No carrier shall undertake the construction of a new line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of

²⁷ See *R&O & FNPRM* at ¶ 276.

such additional line or extended line”).²⁸ Based on the latter statutory language -- and decades prior to the enactment of Section 10 of the Act in 1996 -- the Commission adopted a policy to forbear from individual review of domestic Section 214 applications and issued a blanket Section 214 certificate that allows nondominant common carriers to enter the domestic interstate marketplace without prior approval or even *post hoc* notification.²⁹

The Commission should exercise similar pre-Section 10 forbearance authority here and declare in advance by rule that *de facto* transfer leases and outright transfers and assignments of licenses not used in the provision of telecommunications services, which meet specified eligibility and certification requirements to serve the public interest, convenience and necessity, may take place without individual review and prior approval, subject only to the notification and *post hoc* review procedures described previously.

If, however, the Commission believes that the forbearance authority it began exercising in the mid-1980s somehow is constrained with respect to non-telecommunications services by the enactment of Section 10 of the Communications Act, the Commission still could adopt nearly identical streamlined transfer and assignments processing procedures for non-telecommunications services and licensees, whereby “applications” for *de facto* transfer leases or outright transfers and assignments are automatically deemed granted upon filing, if the necessary certifications are incorporated in the applications and the eligibility requirements satisfied. Under such an automatic procedure, applicants for any type of transfer involving non-telecommunications services could consummate their proposed transactions, at their own risk, on

²⁸ 47 U.S.C. § 214(a).

²⁹ See *Policy and Rules Concerning Rates For Competitive Common Carrier Services and Facilities Therefor*, Further Notice of Proposed Rulemaking 84 F.C.C.2d 445, 490 (1981); Second Report and Order, 91 F.C.C.2d 59, 72-73; (1982); Third Report and Order, 93 F.C.C.2d 54 (1983), Fourth Report and Order, 95 F.C.C.2d 554, 575-582 (1983). See also 47 C.F.R. § 63.07 (1985), now codified as 47 C.F.R. § 63.01(a)(2002).

the day their applications are filed. The Commission subsequently could review the applications to confirm their eligibility for automatic grant or otherwise could reconsider a grant on its own motion. Additionally, upon issuance of a public notice of the grants, interested third parties could file a petition for reconsideration of any application that they believed ineligible for automatic grant. Thus, applicants seeking to transfer licenses for non-telecommunications services could obtain practically identical streamlining benefits as applicants eligible for proposed Section 10 forbearance, while the Commission at the same time would preserve its right and responsibility *post hoc* to ensure that the automatic grants, in fact, would serve the public interest, convenience and necessity.

