

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION
OF THE BLOOSTON LAW FIRM**

Submitted by:

John A. Prendergast
D. Cary Mitchell

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, NW, Suite 300
Washington, DC 20037
(202) 659-0830

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SUMMARY

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, on behalf of its clients listed in Attachment A hereto (the “Blooston Rural Carriers”) and pursuant to Section 1.429 of the Commission’s Rules, hereby requests partial reconsideration and/or clarification of the *Report and Order* in WT Docket No. 00-230.

The Blooston Rural Carriers applaud the Commission’s action in creating a regulatory framework for spectrum leasing. This can be a valuable tool for small and/or rural carriers that might otherwise have difficulty gaining access to spectrum in areas where they are best suited to provide service. However, there are certain aspects of the spectrum leasing rules that may create unnecessary obstacles to spectrum leasing, thereby discouraging the use of this potentially valuable mechanism. In particular, the Commission should establish a “safe harbor” whereby a licensee/lessor can fully discharge its oversight responsibilities (and protect itself from liability arising from FCC enforcement activities involving the lessee’s operations) by, e.g., including certain express covenants in its lease agreement; it should clarify and strengthen lessee protections in the context of license revocation / cancellation or bankruptcy proceedings; it should adopt a flexible enforcement policy in cases where a licensee/lessor’s ability to meet its construction and performance requirements is jeopardized by a lessee’s breach; and it should specify precisely how far a licensee will need to go in using “all legal means necessary” to enforce an FCC order.

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The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, on behalf of its clients listed in Attachment A hereto (the “Blooston Rural Carriers”) and pursuant to Section 1.429 of the Commission’s Rules, hereby requests partial reconsideration of the *Report and Order* in the above-captioned proceeding regarding the development of secondary markets in spectrum usage rights.¹ In general, the Blooston Rural Carriers applaud the Commission’s action in creating a regulatory framework for spectrum leasing. This can be a valuable tool for small and/or rural carriers that might otherwise have difficulty gaining access to spectrum in areas where they are best suited to provide service. However, there are certain aspects of the spectrum leasing rules that may create unnecessary obstacles to spectrum leasing, thereby discouraging the use of this potentially valuable mechanism. The Blooston Rural Carriers hope to identify these potential roadblocks so that the Commission can consider whether further streamlining is possible.

¹ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 00-230, FCC 03-113 (*rel.* October 6, 2003); (“*Secondary Markets Order*”).

Statement of Interest

The entities listed in Attachment A represent a variety of rural telephone company interests and small businesses that are engaged in the provision of wireless services to the public. Each has a significant interest in the outcome of this proceeding because each has an interest in seeing that the FCC adopts policies and rules that ensure meaningful rural telephone company and small business participation in the secondary spectrum market, and that encourage the rapid deployment of advanced telecommunications services in rural America.²

I. The Commission Should Clarify a Licensee's Liability for Regulatory Violations of a Spectrum Lessee in the Context of a *De Facto* Transfer Lease

In the *Secondary Markets Order*, the FCC has provided licensees and spectrum lessees with a model for long-term “*de facto* transfer” leasing arrangements, in which licensees can delegate *de facto* control of the leased spectrum and associated legal responsibilities to their spectrum lessees.³ When *de facto* control is thus transferred, the Commission requires the parties to obtain prior Commission approval upon review of the lessee's qualifications, as though the lessee was acquiring the affected license(s). Such arrangements have the potential to make spectrum in rural areas that might otherwise be underutilized available to rural telephone companies and other businesses that have a greater ability and incentive to provide service in remote areas. However, the potential utility of long-term *de facto* transfer leasing is hindered, and a significant disincentive to

² As the Commission is aware, the Blooston Rural Carriers filed comments and reply comments and have been active participants in WT Docket No. 00-230. See Comments of the Blooston Law Firm, *filed* February 9, 2001; Errata, *filed* February 13, 2001; Reply Comments of the Blooston Law Firm, *filed* March 12, 2001. The Blooston Law Firm also filed comments to the Commission's *Further Notice* in WT Docket No. 00-230. See Comments of the Blooston Law Firm, *filed* December 5, 2003.

³ *Secondary Markets Order* at ¶¶ 126-159.

such arrangements is created, by forcing licensees to retain a vague “secondary” responsibility for lessee operations conducted on leased spectrum. Accordingly, the Commission should clarify its *Secondary Markets Order* to the extent that the FCC may hold a licensee liable for regulatory violations of a lessee that is operating pursuant to a long-term *de facto* transfer lease. In this regard, the Commission should indicate that a licensee/lessor will have fully discharged its oversight responsibilities (and protected itself from liability arising from FCC enforcement activities involving the lessee’s operations) if it includes certain express covenants in its lease agreement.

At first blush, the long-term *de facto* transfer leasing option described in the *Secondary Markets Order* appears to provide rural carriers with a commercially viable way to approach licensees that have rights to excess or underutilized rural spectrum and to negotiate a long-term arrangement that will allow this spectrum to be put to use. In spelling out the respective rights and responsibilities of licensees and spectrum lessees in the context of a long-term *de facto* transfer lease, the Commission indicates that the licensee in this instance “retains some responsibility to the Commission for operations on spectrum encompassed within its license.”⁴ A problem arises when the Commission indicates that such licensees may be held liable for FCC Rule violations *by the lessee* “about which the licensee has knowledge *or should have knowledge*.”⁵ These obligations are vague and could be interpreted as requiring the licensee/lessor to perform periodic or “surprise” inspections of the lessee’s facilities, which may be difficult and costly to implement. Imposing such secondary or indirect liability for another party’s conduct is unnecessary and inconsistent with the concept of a Commission-approved transfer of *de*

⁴ *Secondary Markets Order* at ¶ 136.

⁵ *Id.* (Emphasis added).

facto control. As such, it will act as a disincentive for licensees to enter into long-term *de facto* transfer lease arrangements with small businesses and rural telephone companies.

The Blooston Rural Carriers urge the Commission to remove this significant disincentive by clarifying that a licensee/lessor is able to fully discharge its oversight responsibilities, and protect itself from liability arising from FCC enforcement activities involving the spectrum user's operations (*i.e.*, exercise an appropriate degree of care), by including appropriate covenants and certifications in the spectrum lease agreement, which will be subject to FCC approval under the *de facto* transfer lease procedures described in the *Secondary Markets Order*. Such covenants should make it clear that the spectrum user's operations will be subject to any relevant FCC rules and enforcement action, and that if the lessee fails to so comply, the lease may be revoked, cancelled, or terminated by either the licensee or the Commission. Obviously, if a lessee violation comes to the attention of the licensee, that licensee should be expected to enforce the terms of the lease, and advise the Commission of such violation. However, the imposition of a vague "should have known" liability will likely chill any potential interest in spectrum leasing.

II. The Lack of Clear Lessee Protections in the Context of License Revocation/ Cancellation or Bankruptcy will Discourage Leasing Arrangements

Under the regulatory framework set forth in the *Secondary Markets Order*, a spectrum lessee will be forced to shut down its operations, with no rights to take over the license or otherwise transition to other spectrum gradually, if the license is revoked or cancelled for any reason,⁶ or if a licensee/lessor should go out of business due to

⁶ *Secondary Markets Order* at ¶ 187.

bankruptcy.⁷ This lack of clear protection for lessees that entered into a spectrum leasing arrangement in good faith creates another significant disincentive to invest in long-term spectrum leasing arrangements, and is contrary to the public interest. As such, the Blooston Rural Carriers urge the FCC to clarify its spectrum leasing policies and rules to remove this disincentive.

In a typical spectrum leasing scenario envisioned by the Blooston Rural Carriers, a rural telco or other small business pursuing a rural business strategy would enter into an arm's length spectrum leasing arrangement with a large geographic area licensee (or other licensee with excess spectrum holdings), and then invest a significant amount of time and resources to develop that spectrum into a viable business, in reliance on the spectrum rights it has negotiated to obtain. However, as the Commission is all too aware, even large licensees are not immune from bankruptcies,⁸ or lapses in regulatory compliance that could jeopardize their licensed status.⁹ In situations such as these, the rules adopted in the *Secondary Markets Order* will require the lessee "to terminate its operations since the spectrum lessee gains its access to the licensed spectrum through the licensee's authorization."¹⁰ To its credit, the Commission has indicated that it would "take into account the public interest in affording a reasonable transition period to users

⁷ *Secondary Markets Order* at ¶ 189.

⁸ Within the past few years, WorldCom, Global Crossing, NextWave, Teligent, WinStar and other high-profile telecom carriers have sought protection from creditors through bankruptcies.

⁹ See, e.g., MobileMedia Corporation, 12 FCC Rcd 14896 (1997). MobileMedia, the fourth largest paging company in the United States, was designated for a license revocation proceeding after an internal investigation revealed that the Company had filed at least 289 false notifications on FCC Form 489 and also filed at least 94 "40-Mile Rule" applications.

¹⁰ *Secondary Markets Order* at ¶ 187.

of the service in order to minimize disruption to business and other activities.”¹¹

However, it is respectfully submitted that this “transition period” language is vague, and does not adequately protect an innocent third party lessee that may have invested huge sums of money and contracted with thousands of public subscribers, based on the long-term lease rights it was able to obtain. Moreover, the Commission has indicated that a lessee in this context will have “no greater right to obtain a comparable license” than any other interested parties. This, too, is unfair because a small business may not have the resources to compete in a FCC-sponsored re-auction or other bankruptcy-related transfer of the underlying spectrum rights.

The Blooston Rural Carriers believe it would be unfair for to penalize an innocent lessee by requiring it to terminate its operations if the underlying license is revoked or cancelled for any reason, or if the licensee/lessor becomes embroiled in bankruptcy proceeding. Instead, in situations where a rural licensee has entered into a *bona fide* long-term lease arrangement with a non-affiliated licensee, the Commission should recognize that the public interest is better served by preserving the ongoing spectrum use rights of the lessee and the continuity of service to rural subscribers. The FCC can do this by either requiring that the spectrum subject to the lease be partitioned and/or disaggregated to the lessee, or by requiring that the new licensee assume the lease on the same substantive terms as the original licensee. The new licensee would, of course, be rewarded for this arrangement by collecting lease payments from the lessee; and the new licensee could seek to negotiate an early termination of the lease, if it believes that it has an immediate, more profitable use for the spectrum. In the case of a bankrupt licensee, the lessee should be granted an option by the FCC to acquire the partitioned and/or

¹¹ *Id.* Note 364.

disaggregated license by paying the bankruptcy estate the lesser of (1) the net present value of all lease payments that would be due if the lease were extended for the remainder of the license term, or (2) a pro-rata share of the licensee's net high bid, based on the population of the partitioned area. In the absence of such assurances, rural carriers will be reluctant to utilize the spectrum lease mechanism.

III. The FCC Should Be Flexible in its Enforcement of License Construction and Performance Requirements Where a Licensee/Lessor's Ability to Meet These Requirements Is Jeopardized by a Lessee Breach

Under the spectrum leasing framework adopted by the Commission in its *Secondary Markets Order*, licensees that enter into certain types of spectrum leases are entitled to rely upon the activities of its lessee(s) when establishing that it has met the applicable construction, substantial service, or other build-out requirements that are a condition of the license authorization.¹² To the extent that a licensee seeks to rely on the activities of a spectrum lessee to meet the licensee's obligation, and for some reason the lessee fails to engage in those activities, the Commission has indicated that it will enforce the applicable performance or buildout requirements against the licensee.¹³ These requirements are consistent with the fact that the spectrum lessee operates under the authority granted to the licensee. However, strict enforcement of buildout requirements in all instances is not in the public interest because it will have a policy impact of discouraging licensees from entering into spectrum lease arrangements with small businesses and rural carriers. It would also discourage spectrum leasing in a majority of the nation's BTA and RSA markets, where a greater level of rural build-out is necessary to meet minimum construction and performance requirements. Because this result would

¹² *Secondary Markets Order* at ¶ 114.

¹³ *Secondary Markets Order* at ¶ 115.

be contrary to many of the policy objectives that underlie the Commission's secondary markets initiative, the Blooston Rural Carriers urge the FCC to adopt more flexible policies and rules for situations when a licensee/lessor's ability to meet its construction requirements is jeopardized by a lessee's breach of its lease obligations.

In a realistic scenario for any rural carrier, the business may seek to obtain a BTA or RSA license so it can provide advanced wireless services to its existing customers, who live exclusively in outlying areas. If such a carrier wants to undertake immediate buildout of these rural and underserved areas, consistent with the policy goals of the Communications Act, one logical business plan might call for the rural carrier to lease its spectrum in the larger population centers to another carrier (or carriers) as a way to generate immediate revenues while at the same time allowing it to meet the construction and performance requirements for its entire license. However, if the lessee is unable to fulfill its buildout obligations under the lease due to circumstances beyond its control, and even if the licensee was reasonable in relying on the lessee to timely complete its construction, a strict application of the policies and rules adopted in the *Secondary Markets Order* would result in license cancellation, stranded investment, and the potential loss of service to rural communities.

Another realistic situation might involve a larger carrier that is presented with an opportunity to extend service to rural communities with the help of multiple small business and rural telephone company lessees. If such a carrier's license might be at risk if even one lessee was unable to fulfill its buildout obligation, and the licensee did not have assurance from the FCC that it would be given a reasonable opportunity to remedy

the shortfall, the carrier would have a significant disincentive to work with the rural carriers.

The Blooston Rural Carriers agree with the Commission that measures taken to promote spectrum leasing should not lead to circumvention of the underlying purposes of the particular service rules. However, the underlying purpose of license construction requirements is not served by policies that call for the automatic revocation of a spectrum lessor's license, if the licensee/lessor fails to meet its lease obligations. Accordingly, the Blooston Rural Carriers urge the Commission to clarify that licensee/lessors in this instance will be given a reasonable extension to complete the system buildout by itself or through another lease arrangement, so long as they can show good faith reliance on a bona fide, arms' length lease with an unrelated third party lessee.

IV. The Requirement that Licensee/Lessor Must Use “All Legal Means Necessary” is Unclear and Creates a Disincentive to Spectrum Leasing Arrangements where the Licensee Retains *De Facto* Control of its Spectrum

It specifying its new *de facto* control standard for spectrum leasing arrangements, it is not at all clear what is meant by the requirement in Rule Section 1.9010(b)(1)(iii) that a licensee/lessor must use “all legal means necessary to ensure compliance.”¹⁴ As discussed below, the Blooston Rural Carriers believe this open-ended requirement is too vague as written and will create another potential disincentive to spectrum manager leasing arrangements. Moreover, this requirement could prove difficult for the FCC to enforce against the licensee. The Commission should therefore clarify the policies and rules adopted in its *Secondary Markets Order* to specify precisely how far a licensee will need to go to enforce an FCC order.

¹⁴ See 47 C.F.R. § 1.9010(b)(1)(iii).

Where a licensee is acting as a spectrum manager, the new rules adopted in the *Secondary Markets Order* require the licensee to ensure that the spectrum lessees comply with all applicable policies and rules.¹⁵ The Commission determined that licensees, by exercising these responsibilities, would be able to ensure that the spectrum users' activities with regard to the leased spectrum complied with the applicable interference and other services rules permitted under the license authorization, consistent with the Commission's public interest objectives attached to that licensing scheme.¹⁶ The applicable standard of care, in this instance, requires that the licensee maintain "reasonable operational oversight over the leased spectrum."¹⁷ The Blooston Rural Carriers agree that this degree of oversight is appropriate under the circumstances, given the FCC's obligation to enforce its policies and rules as well as the requirements of the Communications Act of 1934, as amended (the "Act").

However, if a situation should arise where a lessee refuses to resolve interference, remedy a rule violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the *Secondary Markets Order* indicates that the licensee/lessor "must use all legal means necessary to enforce the order."¹⁸ This obligation creates yet another area of uncertainty with respect to spectrum leasing. Must a licensee spend tens of thousands of dollars filing lawsuits to enjoin a lessee that is violating the Commission's Rules and/or the terms of its lease? Must a licensee continue its efforts into the appeals process? What if a rule violation or the actual cause of an interference situation is not clear? Does a licensee have to subject itself to countersuits

¹⁵ *Secondary Markets Order* at ¶ 64.

¹⁶ *Id.*

¹⁷ *Secondary Markets Order* at ¶ 65.

¹⁸ *Secondary Markets Order* at ¶ 67.

Attachment A

A list of the rural telephone companies, cooperatives and rural telco subsidiary companies that comprise the “Blooston Rural Carriers” is provided below.

- Alliance Communications Cooperative, Inc. (formed through the merger of Splitrock Telecom Cooperative, Inc. and Baltic Telecom Cooperative on January 1, 2003)
- Golden West Telecommunications Cooperative, Inc. (and its subsidiary GW Wireless, Inc.)
- Interstate Telecommunications Cooperative, Inc. (and its subsidiaries Stateline Telecommunications, Inc. and Interstate Satellite Services, Inc.)
- James Valley Cooperative Telephone Company (and its subsidiary Northern Valley Wireless, Inc.)
- Kennebec Telephone Company, Inc.
- McCook Cooperative Telephone Company (and its subsidiaries Hanson County Telephone Company and Hanson Communications, Inc.)
- Midstate Communications, Inc. (and its subsidiary Midstate Wireless, Inc.)
- Mobile Phone of Texas, Inc.
- Penasco Valley Telephone Cooperative, Inc. d/b/a/ Penasco Valley ‘Telecommunications (and its subsidiaries PVT Networks, Inc. and PVT Wireless Limited Partnership
- Santel Communications Cooperative
- SRT Communications, Inc. (and its subsidiary North Dakota Network Co.)
- Valley Telecommunications Cooperative Association, Inc. (and its subsidiary Valley Cable & Satellite Communications, Inc.)
- Venture Communications, Inc. (and its subsidiary Venture Wireless, Inc.)
- West River Cooperative Telephone Company