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 Secondary Markets	)))	WT Docket No. 00-230

COMMENTS OF NEXTEL COMMUNICATIONS, INC.
IN RESPONSE TO PETITIONS FOR RECONSIDERATION

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these comments in response to the petitions for reconsideration or clarification filed by Cingular Wireless, the National Telecommunications Cooperative Association ("NTCA") and the Blooston Rural Carriers ("Blooston") to the Federal Communications Commission's ("Commission's") *Report and Order* "remov[ing] unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights."[1]

Fundamentally, the Commission has taken positive steps to introduce a new range of flexible spectrum leasing arrangements into the market, and all licensees and would-be spectrum users are benefited as a result. While the general framework provides parties with far more options than in the past, new questions have arisen in connection with the rules and procedures the Commission has set forth for spectrum leasing. Nextel supports those petitions for reconsideration of the *Report and Order* that request clarification of when and how a licensee can be held liable under a long-term *de facto* lease agreement for lessee misbehavior. As it now stands, some aspects of the Commission's decision are unnecessarily vague as to the ultimate

[1] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Deployment of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking,* WT Docket No. 00-230, FCC 03-113 (rel. October 6, 2003) ("*Report and Order*").

responsibility of a licensee under a *de facto* lease arrangement. As noted by several petitioners, of particular concern is the extent of a licensee's responsibility to "police" lessee behavior. Nextel supports the petitions that request the Commission to clarify its determination to hold the licensee accountable for lessee failure to meet the license build-out requirements. Under the current rule, it appears that licensees may well be subject to license cancellation without the ability to cure the lessee's build-out failure – a risky proposition for any spectrum license holder. Finally, Nextel agrees with those petitions that request the Commission to clarify that the Commission's right to terminate a lease agreement is subject to the appropriate due process procedures afforded to licensees.

I. Reasonable Licensee "Safe Harbor" Provisions Should be Permitted in *De Facto* Lease Agreements.

As several of the petitioners recognize, the *Report and Order* is ambiguous with respect to a licensee's liability in the case of lessee wrongdoing under a *de facto* control lease arrangement.[2] Specifically, the *Report and Order* states that a licensee "may" be held accountable for "ongoing violations or other egregious behavior" on the part of the lessee if the licensee *knew or should have known* of the lessee's actions.[3] This type of "constructive knowledge" standard is unpredictable and offers little to no guidance or comfort as to the ultimate regulatory rights and responsibilities of parties considering a *de facto* transfer lease arrangement.

---

[2] *See* Cingular Petition at 7-8; NTCA Petition at 2; Blooston Petition at 3.

[3] *Report and Order* at ¶ 136.

Among other things, as Cingular points out, the *Report and Order* fails to define specifically what an "ongoing violation" would be for spectrum leasing purposes.[4] It is not obvious whether such a violation would have to be more than a single occurrence, or be ongoing continuously for months, years, or just days. Further, the *Report and Order* is equally lacking in detail in addressing what might in fact constitute "egregious behavior." Under the new leasing policy, large spectrum holders that might otherwise be inclined to lease spectrum to third parties simply have no way of knowing what to do to ensure that its lessees are in compliance with applicable laws and rules.[5]

On the whole, the Commission's determination to hold licensees responsible for lessee violations that the licensee ***should have known about***, is inconsistent with the policy underlying *de facto* transfer leasing – where the licensee transfers *de facto* control to the lessee with Commission consent. Indeed, pursuant to a *de facto* transfer of control, the licensee would simply not be in a position to supervise and control the lessee's *day-to-day* operations.[6] And,

---

[4] Cingular Petition at 7-8.

[5] NTCA Petition at 2. As NTCA correctly notes, licensees do not know whether or if they should conduct surprise inspections, if they must review the lessee's written records and filings, and whether if they do not do so, they are subjecting themselves to liability. *Id.* at 2-3; *see also* Blooston Petition at 3 ("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.").

[6] Cingular Petition at 7. Holding the licensee responsible for the lessee's "ongoing" or "egregious" transgressions seems to require that the licensee maintain more than simply *de jure* control. If the lessor wanted to do that, the lessor would have entered into a spectrum manager lease, not a *de facto* transfer lease. Thus, unless the licensee has retained a significant degree of *de facto* control (which, again, would defeat the purpose for doing this type of lease), it would not have the ability to prevent or stop "ongoing" or "egregious" behavior by the lessee. *Id.* at 7-8. *See also* Blooston Petition at 3-4 ("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 facto* control. As such, it will act as a disincentive for licensees to enter into long-

there is simply no way for the licensee to know about every *potential* lessee violation of the Commission's rules. The Commission must provide greater clarity regarding how both large and small infractions will be treated, and how parties may reasonably deal with these issues contractually, secure in the knowledge that they have been able to protect their legitimate interests in the transaction.

The current spectrum leasing rules as they pertain to licensee liability "stunt a carrier's willingness to part with spectrum."[7] On reconsideration, therefore, the Commission should clarify the standards that will be applied in holding licensees responsible for lessees' actions. In particular, a safe harbor should be adopted. A safe harbor would permit a licensee to avoid or limit its liability by putting conditions or covenants in the lease requiring the lessee to comply with applicable Commission rules and policies and clarifying that the lessee will be subject to Commission enforcement action if it fails to do so.[8] Such covenants could also specify that should the lessee fail to comply with the applicable Commission rules, the lease may be revoked, cancelled, or terminated by the licensee.[9]

---

term *de facto* transfer lease arrangements with small businesses and rural telephone companies.").

[7] NTCA Petition for at 3.

[8] *Id.* at 3. *See also* Blooston Petition at 4 (suggesting that the Commission should remove the disincentive to engage in *de facto* lease agreements by "clarifying that a licensee is able to fully discharge its oversight responsibilities, and protect itself from liability arising from Commission 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.*")

[9] Blooston Petition at 4. 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. *Id.*

II. Licensees Should be Permitted to "Cure" Lessee Failure to Comply with the License Build-Out Requirements in Extraordinary Circumstances.

Facilitating the development of secondary markets in spectrum usage rights is the fundamental goal underlying the *Report and Order*.[10] Indeed, the policies adopted in the *Report and Order* are important first steps to facilitating significantly broader access to valuable spectrum resources.[11] Through increased flexibility for spectrum licensees, the Commission has spurred the "evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country."[12]

Specifically, under the framework adopted in the *Report and Order*, licensees that enter either into a spectrum manager lease or a long term *de facto* lease arrangement may "rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization."[13] To the extent, however, that the spectrum lessee ultimately fails to meet the licensee's build-out obligation – no matter what the reason and regardless of whether the licensee reasonably relied on the affirmations of the lessee that critical build-out benchmarks would be met – the ultimate enforcement of the applicable performance or

---

[10] *Report and Order* at ¶ 1.

[11] *Id.* at ¶ 2.

[12] *Id.*

[13] *Id.* at ¶¶ 114, 146. Unlike the policies applicable to manager agreements and long-term *de facto* transfer leasing arrangements, licensees will not be permitted to rely on the activities of their short-term spectrum lessees when seeking to establish that they have met any applicable construction requirements. *Id.* at ¶ 177.

build-out requirements will be against the licensee in the form of automatic license cancellation.[14]

While this requirement reflects the general view that it is appropriate for the spectrum lessee to operate pursuant to the Commission's rules and policies applicable to spectrum licensees,[15] it is plain that strict enforcement of the build-out requirements in *extraordinary* circumstances may be contrary to the public interest. Indeed, it is foreseeable that a licensee could reasonably rely on the statements of a lessee that the license build-out requirements will be met, only to learn after the fact that no such build-out had been undertaken or completed. Such a situation could easily occur in those instances where a larger nationwide wireless carrier seeks to extend service to rural communities with the help of multiple small business and rural telephone company lessees. In those instances, the large nationwide carrier will simply not be able to "police" on a daily basis the rural lessee's build-out activities. Under such scenario, however, the lessee's failure to meet the licensee's build-out requirements, where the licensee was unaware of the incomplete construction, would result in license cancellation, stranded investment, and the potential loss of service to the licensed communities. This is harsh punishment in a case where a licensee was both prudent and reasonable in relying on the lessee

---

[14] *Id.* at ¶ 115. *See also id.* at ¶ 146 (noting that the build-out policies adopted for long-term *de facto* lease arrangements are "identical to the approach taken with respect to the spectrum manager leasing option.").

[15] *Id.* at ¶ 12 (under spectrum manager arrangements, the "Commission will also hold spectrum lessees independently accountable for complying with the Act and the Commission's policies and rules, potentially subjecting them to enforcement action, such as admonishments, monetary forfeitures . . . ."); *see also id.* at ¶ 13 (under long-term *de facto* lease arrangements the Commission will look to lessee for compliance "[i]n enforcing the Act and its policies and rules.").

to perform the necessary build-out.[16] Moreover, application of a strict license cancellation policy in this circumstance might also chill or discourage spectrum leasing in rural areas, contrary to the very initiatives the Commission has recently undertaken to encourage access to spectrum in rural markets.[17]

Licensees, of course, should not be permitted to circumvent their build-out or performance requirements simply by leasing their spectrum to third-parties and claiming ignorance. However, as one petitioner notes, the underlying purpose of license construction requirements is not served by policies that call for the ***automatic revocation of a spectrum lessor's license*** in every circumstance.[18] Indeed, reasonable processes should be afforded licensees to cure the lessee's build-out failure in extraordinary circumstances, *i.e.*, where the licensee reasonably relied on the lessee to build-out the license and was "surprised" to discover that no such build-out had occurred. Accordingly, the Commission should clarify that licensees in this circumstance will be given a reasonable extension to complete the system build-out by itself or through another lease arrangement, so long as the licensee is able to demonstrate good faith reliance on a lessee's build-out assurances.[19]

---

[16] Blooston Petition at 8.

[17] *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Notice of Proposed Rulemaking*, FCC 03-202, WT Docket Nos. 02-381 and 01-14 (rel. Oct. 6, 2003).

[18] Blooston Petition at 9 (emphasis added).

[19] *Id. See also* NTCA Petition at 4 ("The Commission may also adopt a policy of leniency if a licensee can show that it will fail to meet a construction deadline as a result of its good faith reliance on a spectrum lessee.").

III. The Commission Must Provide the Appropriate Due Process Prior to Canceling a Lease.

In addition to providing licensees with the appropriate due process prior to terminating a license for lessee failure to meet the Commission's license construction requirements, the Commission should also afford licensees and lessees with the appropriate due process prior to termination of a lease arrangement. Specifically, the *Report and Order* provides the Commission with broad authority to terminate spectrum manager leases after they have been implemented by the parties: "The Commission retains the ability to investigate and terminate any spectrum leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns."[20]

Critically, however, nothing in the *Report and Order* indicates that parties to a lease agreement will be provided with notice and an opportunity to be heard prior to such termination. As Cingular points out, a lease – although not a license in and of itself – is "nevertheless relevant to the licensee's rights under *its* license, and FCC actions with respect to a lease should be subject to the procedural protections of Sections 312 and 316 of the Communications Act."[21]

---

[20] *Report and Order* at ¶ 125. *See also* Section 1.9040(a)(i) ("The spectrum lessee must comply at all times with applicable rules set forth in this chapter and other applicable law, and the spectrum leasing arrangement *may be revoked, cancelled, or terminated by the licensee or Commission if the spectrum lessee fails to comply with the applicable requirements*.") (emphasis added.

[21] Cingular Petition at 8; 47 U.S.C. § 312(c) ("Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued."); 47 U.S.C. § 316(a)(1) ("Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. *No such order of*

Both of these provisions require the Commission, at a minimum, to provide the licensee with notice and an opportunity to be heard prior to license revocation or modification. Thus, the Commission must clarify the procedures it intends to follow for terminating a spectrum lease, and amend its rules to codify such procedures.

---

modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification. . . .") (emphasis added).

IV. CONCLUSION

The Commission has taken positive steps to provide all parties interested in forming new and creative arrangements for spectrum access important new options. As described in several petitions for reconsideration, while much of the *Report and Order* and the new rules provide a commendable framework for flexibility for all parties, additional clarity on certain critical provisions of these policies will better promote the spectrum access objectives the rules are intended to achieve. These clarifications will enable parties to enter into arrangements secure in the knowledge that they understand the circumstances and consequences of their leasing arrangements.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

/s/ Laura H. Phillips

Laura H. Phillips
Laura S. Gallagher
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
(202) 842-8800

Its Attorneys

Lawrence R. Krevor
Vice President – Government Affairs
James B. Goldstein
Senior Attorney – Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, Virginia 20191

February 9, 2004

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 9th day of February, 2004, a copy of the foregoing "**COMMENTS OF NEXTEL COMMUNICATIONS, INC. IN RESPONSE TO PETITIONS FOR RECONSIDERATION**" was sent via U.S. Mail to the following:

John A. Prendergast
D. Cary Mitchel
Blooston, Mordkofsky, Dickens, Duffy & Prendergast
2120 L Street, NW
Suite 300
Washington, DC 20037

L. Marie Guillory
Jill Canfield
National Telecommunications Cooperative Association
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203

John T. Scott, III
Vice President and General Counsel-Regulatory Law
Charla M. Rath
Director – Spectrum Policy
Verizon Wireless
1300 I Street, N.W., Suite 400-W
Washington, D.C. 20005

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

Eric W. DeSilva
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, D.C. 20006
Counsel for First Avenue Networks, Inc.

/s/ Cynthia S. Shaw
Cynthia S. Shaw