

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 )

**OPPOSITION TO PETITION FOR RECONSIDERATION**

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February 9, 2004

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Pursuant to Section 1.429(f) of the Commission's Rules, the Fixed Wireless Communications Coalition (FWCC) opposes in part the "Petition for Reconsideration and Clarification" filed by Cingular Wireless LLC on December 29, 2003, in the above-captioned proceeding ("Cingular Petition").<sup>1</sup>

**SUMMARY**

The Commission should construe its spectrum leasing rules as placing the obligation for microwave relocation costs on the licensee, even if the language of the lease says otherwise.

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<sup>1</sup> The FWCC is a coalition of companies, associations, and individuals interested in terrestrial fixed microwave communications. Our membership includes manufacturers of microwave equipment, licensees of terrestrial fixed microwave systems and their associations, and communications service providers and their associations. The membership also includes railroads, public utilities, petroleum and pipeline entities, public safety agencies, and/or their respective associations, telecommunications carriers, and telecommunications attorneys and engineers. Our members build, install, and use both licensed and unlicensed point-to-point, point-to-multipoint, and other fixed wireless systems, in frequency bands from 900 MHz to 95 GHz. Based in Washington, DC, the FWCC speaks for the Fixed Service community before the Commission, other governmental agencies, and the courts.

The Wireless Communications Association International, a member of the FWCC, does not support the positions set out in this pleading.

## BACKGROUND

Cingular's Petition requests "default rules" for interpreting certain aspects of leases for broadband PCS frequencies. This spectrum was reallocated to PCS from the Fixed Service, despite its heavy use by Fixed Service microwave licensees. The Commission determined that Fixed Service operations could be accommodated in other bands; and because broadband PCS licensees were the sole beneficiaries of relocating the incumbents to those other bands, the Commission made the PCS licensees responsible for the costs of relocation.<sup>2</sup> Cingular now seeks clarification of the rules governing spectrum leases that fail to specify whether the licensee or the lessee is responsible for the relocation costs.<sup>3</sup> Cingular expresses no preference as to how the rule should read.

## DISCUSSION

The FWCC vigorously disputes the premise basic to Cingular's Petition: that parties to a spectrum lease are free to assign accountability for Fixed Service relocation. To be sure, the parties may set up financial obligations *as between themselves*. A lease could require the lessee to reimburse the licensee for some or all of its microwave relocation costs, or alternatively could specify that the lessee need not cover that expense. But the licensee cannot contract away its obligation *as to the Fixed Service incumbents*.<sup>4</sup>

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<sup>2</sup> See generally 47 C.F.R. Secs. 24.239-24.253.

<sup>3</sup> Cingular Petition at 9-10.

<sup>4</sup> The FWCC's position here applies not only to the broadband PCS spectrum cited by Cingular, but to any spectrum that is both eligible for lease and subject to microwave relocation.

At the outset, we note that Cingular's question cannot arise under a spectrum manager lease. There, the licensee is "directly and primarily responsible" for the lessee's compliance with the Commission rules<sup>5</sup> (as well as its own compliance, of course). Regardless of the lease language, a microwave incumbent can always look to the licensee for relocation costs.

The result should be the same in the case of a *de facto* lease. The Commission cannot reasonably have intended to let the parties decide between themselves which one should be accountable to the Fixed Service incumbents. Again, the parties are free to allocate the financial burden between themselves, but not the ultimate obligation to the Commission and the incumbents.

When the Commission determined that a *de facto* lease places responsibility for complying with most rules on the lessee,<sup>6</sup> it based the decision on three arguments: (1) only the lessee actually using the spectrum, not the licensee, has the operational knowledge required for compliance;<sup>7</sup> (2) licensees would not lease spectrum if lessees' non-compliance could threaten the license;<sup>8</sup> and (3) holding licensees directly responsible for their lessees' compliance could impede the development of secondary markets.<sup>9</sup>

But none of these considerations bears on the licensee's obligation to relocate incumbent microwave users. That obligation is wholly financial. It entails no knowledge that is exclusive

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<sup>5</sup> 47 C.F.R. Sec. 1.9020(b)(1).

<sup>6</sup> 47 C.F.R. Sec. 1.9030(c)(1) (long term); 47 C.F.R. Sec. 1.9035(c) (short term).

<sup>7</sup> *Secondary Markets*, 18 FCC Rcd 20604 at para. 131 (2003).

<sup>8</sup> *Id.* at para. 130.

<sup>9</sup> *Id.*

to the lessee. Keeping the obligation on the licensee cannot have any effect on the market for spectrum. A prudent licensee will not only have factored in the cost of relocation when it bid on the spectrum, but will factor in the cost again when it negotiates lease rates.

Most Commission rules entail obligations to the Commission itself, or protect co-users as a class, or benefit the public as a whole.<sup>10</sup> But the relocation rules are fundamentally different from all of these. They serve to make whole a fixed group of operators whose identities were ascertainable when the lessor took its license. Indeed, licensees placed their bids with full knowledge they would be subject to the relocation requirement. And they were aware that paying for the relocation was a precondition to using the spectrum. All of these considerations point to the equity of keeping the relocation burden on the spectrum licensee.

There are also affirmative policy grounds for holding the licensee responsible for relocation costs. The microwave incumbent typically received its own license, built its facility, and began operating in reliance on its license before the Commission announced its intention to reallocate the spectrum to a different use. The Commission recognized the inherent unfairness of requiring an incumbent to bear the cost of a relocation carried out solely for the benefit of another.<sup>11</sup> Accordingly, the Commission established a mechanism to ensure the costs are equitably reimbursed by the incoming licensees that stand to profit from use of the spectrum.<sup>12</sup>

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<sup>10</sup> Examples include filing and certification requirements (Commission), technical and interference rules (co-users), and common carrier obligations (the public).

<sup>11</sup> *See generally Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 6886 (1992).

<sup>12</sup> *See id.*; *see also Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (1996).

That mechanism will be threatened if the Commission now construes its rules as allowing the licensee to hand off the relocation obligation. If the lessee does not live up that obligation -- or denies that the lease imposes it -- the hapless incumbent will find itself caught in contractual disputes between licensee and lessee, having to litigate over a lease agreement to which it is not as party and as to whose drafting it had no say. This is not a risk the incumbent should be asked to bear.

In short, none of the considerations that otherwise favor shifting compliance obligations to the lessee apply to microwave relocation. To the contrary, both policy and simple fairness to incumbents dictate a construction of the rules that leaves the obligation with the licensee.

### **CONCLUSION**

Fixed Service incumbents have been subject to enough disruption for the benefit of incoming spectrum users. They are entitled to a degree of certainty as to the source of reimbursement for relocation. Cingular having put the question is issue, the Commission should clarify that microwave relocation remains the responsibility of the licensee regardless of language in the lease.

Respectfully submitted,

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