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Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

News media information 202 / 418-0500
TTY 202 / 418-2555
Fax-On-Demand 202 / 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

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FOR IMMEDIATE RELEASE
May 15, 2003

NEWS MEDIA CONTACT:
Meribeth McCarrick at (202) 418-0654

FCC ADOPTS SPECTRUM LEASING RULES AND STREAMLINED PROCESSING FOR LICENSE TRANSFER AND ASSIGNMENT APPLICATIONS, AND PROPOSES FURTHER STEPS TO INCREASE ACCESS TO SPECTRUM THROUGH SECONDARY MARKETS

Washington, DC – The Federal Communications Commission today adopted a *Report and Order* and a *Further Notice of Proposed Rulemaking* that (1) authorizes spectrum leasing in a broad array of wireless radio services, (2) adopts streamlined processing for certain categories of license transfer and assignment applications, and (3) seeks comment on additional steps to improve the functioning of secondary markets. The Commission noted that demand for spectrum has increased dramatically as a result of explosive growth in wireless communications technologies and user demand for wireless services. The steps taken in today's order will allow and encourage licensees to freely lease their unused or unneeded spectrum capacity, which will increase the amount of spectrum available to prospective users and new wireless technologies. Similarly, the steps taken to streamline the license assignment and transfer process will also enhance access to spectrum by a variety of entities.

The spectrum leasing policies adopted in the *Report and Order* are a landmark step in the Commission's evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices. These policies will lead to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country. Facilitating the development of these secondary markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by small businesses, and enable development of additional and innovative services in rural areas. Today's order also implements key recommendations of the Spectrum Policy Task Force, which advocated the development of secondary markets mechanisms, including spectrum leasing, in its report.

Summary of Report and Order. In the *Report and Order*, the Commission authorizes most wireless radio licensees with "exclusive" rights to their assigned spectrum to enter into spectrum leasing arrangements. These policies and rules affect both mobile and fixed services, including Cellular, Personal Communications Services (PCS), Specialized Mobile Radio (SMR), Local Multipoint Distribution Service (LMDS), fixed microwave, 24 GHz, and 39 GHz, among others.

Updated de facto control standard for spectrum leases. The *Report and Order* adopts an updated standard for defining transfers of *de facto* control under Section 310(d) of the

Communications Act. The *Report and Order* replaces the facilities-based standard set forth in the 1963 *Intermountain Microwave* decision because the Commission determined that, as applied to spectrum leasing, the *Intermountain Microwave* standard was not required by the statute, imposes unnecessary barriers to efficient and effective access to spectrum resources, and has become increasingly out of step with the flexible, market-based spectrum policies that Congress and the Commission have developed in recent years. Under the refined *de facto* standard adopted today, licensees may lease spectrum usage rights to spectrum lessees, without the need for prior Commission approval, so long as the licensee continues to exercise effective working control over the use of the spectrum it leases.

General spectrum leasing policies. Under the leasing rules adopted in the *Report and Order*, licensees in the covered services may lease some or all of their spectrum-usage rights to third parties, for any amount of spectrum and in any geographic area encompassed by the license, and for any period of time within the term of the license.

Alternative spectrum leasing mechanisms. The *Report and Order* creates two different mechanisms for spectrum leasing depending on the scope of the rights and responsibilities to be assumed by the lessee.

- The first leasing option – “spectrum manager” leasing – enables parties to enter into spectrum leasing arrangements without obtaining prior Commission approval so long as the licensee retains both *de jure* control (*i.e.*, legal control) of the license and *de facto* control (*i.e.*, working control) over the leased spectrum pursuant to the updated *de facto* control standard for leasing.
- The second option – *de facto* transfer leasing – permits parties to enter into long-term or short-term leasing arrangements whereby the licensee retains *de jure* control of the license while *de facto* control is transferred to the lessee for the term of the lease. *De facto* transfer leases under this option will require prior Commission approval under a streamlined approval process. Under the *de facto* transfer leasing option, the *Report and Order* establishes different rules and procedures for long-term and short-term leases (“short-term” leases are defined as leases of 360 days or less in duration).

Features of the “spectrum manager” leasing option –

- The licensee must file a notification at least 21 days in advance of operation and provide certain relevant information with regard to each lease.
- All technical and operational rules applicable to the licensee are applicable to the spectrum lessee.
- Lessees will be required to meet foreign ownership criteria and the Commission’s character qualifications.
- The licensee must maintain an oversight role to ensure lessee compliance with the Communications Act and applicable Commission rules, and is responsible to the Commission for such compliance.
- The licensee is ultimately responsible to the Commission for all spectrum-related applications and notifications.
- In enforcing spectrum-related rules, the Commission will look primarily to the licensee on compliance issues, but lessees are potentially accountable as well.

- Lessees are primarily responsible for compliance with non-spectrum-related requirements relating directly to their provision of whichever service they pursue (e.g., Title II requirements in the case of lessees providing common carriage).
- Following notification of the lease, the Commission retains the right to investigate and nullify a leasing arrangement to the extent it raises significant public interest concerns.

Features of long-term *de facto* transfer leasing –

- Prior FCC approval of the lease is required, but achieved through streamlined procedures.
- Lease applications are placed promptly on public notice, and approved within 21 days of the public notice unless “offlined” for more detailed review.
- All service rules and policies applicable to licensee, including all eligibility rules, are applicable to lessee.
- Spectrum lessees are directly and primarily responsible for ensuring compliance with all applicable Commission policies and rules, and for submitting filings relating to leased spectrum.
- For enforcement purposes, the Commission will look primarily to the spectrum lessee for compliance, and lessees will be subject to enforcement action as appropriate.
- Licensees’ responsibility for lessee compliance is limited to instances of actual or constructive knowledge of the lessee’s failure to comply or violation of the terms of the lease.

Features of short-term (360 days or less) *de facto* transfer leasing –

- Prior FCC approval is required, but short-term lease applications are subject to expedited approval (10 days) under the Commission’s Special Temporary Authority (STA) procedures.
- The respective rights and responsibilities of licensees and lessees generally are the same as under the long-term option (e.g., lessees exercise *de facto* control and are primarily responsible for compliance).
- All technical and operational rules apply to short-term spectrum lessees. However, given short-term nature of these arrangements, some rules applicable to the licensee – including certain use restrictions, designated entity/entrepreneur policies, and policies related to spectrum aggregation – will not be applied to the lessee.

Streamlined processing for transfer of control and assignment of license applications. The *Report and Order* applies the Commission’s forbearance authority under Section 10 of the Act to extend the streamlined processing rules adopted for long-term *de facto* transfer leasing to applications for assignment and transfer of control of telecommunications carrier licenses. Under this plan, such applications will be placed promptly on public notice once complete, and will be acted on within 21 days of that public notice date unless the application is “offlined” for more detailed review. Such streamlined processing will become effective upon completion of an implementation period during which the Commission will refine its databases and forms to facilitate such streamlined treatment.

Summary of Further Notice of Proposed Rulemaking. The *Further Notice* undertakes an expansive examination of critical issues affecting the Commission’s long-term vision for enhancing opportunities for spectrum access, efficiency, and innovation. It also considers options for expanding upon the steps taken in the *Report and Order*.

Specifically, the *Further Notice* seeks comment on the following issues:

- What additional steps the Commission should take to ensure that licensees with available spectrum and parties in need of access to spectrum have the necessary information to engage in secondary market transactions; what type of spectrum information interested parties may need; the potential for “market-maker” intermediaries to develop; and the nature of the Commission’s role in regulating such intermediaries or otherwise facilitating access to spectrum information.
- What secondary market mechanisms are necessary to facilitate access to spectrum by new technologies; whether there will be need for a clearinghouse mechanism to provide real-time spectrum access information for “opportunistic” devices; and what the Commission’s role should be in the establishment or regulation of such a clearinghouse.

The *Further Notice* also considers a number of potential actions to supplement and expand on actions taken in the *Report and Order*, including:

- Forbearing from requiring prior Commission approval for certain categories of spectrum leases that involve a *de facto* transfer of control to the lessee.
- Forbearing from requiring prior Commission approval of certain categories of transfers of control and assignments of licenses that do not raise public interest issues requiring prior Commission review.
- Extending spectrum leasing policies and procedures to services not within the scope of the Report and Order.
- Implementing the new *de facto* control standard established by the Report and Order in other regulatory contexts that require a determination of *de facto* control.
- Assessing the impact of the secondary markets policies on the Commission’s designated entity rules.

Action by the Commission, May 15, 2003, by Report and Order and Further Notice of Proposed Rulemaking (FCC 03-113). Chairman Powell, Commissioners Abernathy, Martin and Adelstein, with Commissioner Copps dissenting. Chairman Powell and Commissioner Martin issue joint statement, separate statements issued by Commissioner Abernathy, Adelstein, and dissenting statement issued by Commissioner Copps.

FCC Contact: Paul Murray at (202) 418-7240; TTY at (202) 418-7233; e-mail: pmurray@fcc.gov.

WT Docket No. 00-230