**STATEMENT OF COMMISSIONER**
**MICHAEL J. COPPS**
**Dissenting**

*RE: 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).*

Developing a secondary market in spectrum holds great promise. It could lead to more efficient spectrum allocation, more intense use of rural spectrum that currently lies fallow, and, with new technologies like software designed radio, it could assist in bringing innovative spectrum uses to the public.

From a policy perspective, I could support many of the ideas in today's Order. I am encouraged that the Order concerns only a subset of our licensees. Generally we limit our actions to commercial telecommunications providers that paid for their spectrum licenses at auction. Allowing leasing by companies that have already compensated the public for the use of spectrum is both significantly different and far more defensible than allowing companies that were given their spectrum rights for free to lease it and reap windfall profits. Second, we would require all de facto leases to be reviewed by the Commission before being approved. Third, we would only allow spectrum-manager-type leasing where the lessor is held liable for the actions of the lessee. We make it clear that lessors are responsible if their lessees violate Commission rules. Because of these important protections, I could support many of the policy ideas contained in this Order.

But I keep running into the same problem and I cannot make it go away. I do not see how the law allows us to effectuate these policies. I must therefore respectfully dissent. Congress enacted Section 310(d) of the Communications Act and we must abide by it. That section makes it clear that no "station license *or any rights thereunder* shall be transferred, assigned or disposed of in any manner . . .except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." But today we allow licensees to transfer a significant right – the right to control the spectrum on a day-to-day basis – without applying to the Commission and without the requirement of any Commission public interest finding. How can this be legal under Section 310(d)?

The majority believes that that when Congress said licensees can not transfer "any rights" under a license that they did somehow not mean this phrase to include the right to control all use of the spectrum on a day-to-day basis. This is not my reading of the statue. If "any rights" does not include the right to exclusive use of the spectrum on a day-to-day basis, what can it mean? The majority apparently believes that it means only those rights that are needed to "exercise effective working control" of the spectrum. But if this were true, why did Congress use such sweeping language? It could have limited Section 310(d) only to preclude transfers of a more limited set of powers. Instead it chose to include "any rights" under the license. The Order's interpretation conflicts with the plain language of the statute and effectively reads the "any rights thereunder"

language completely out of the statute, preferring to treat the provision as if Congress had only limited transfers of "all rights" under a license.

The majority notes that taking the "any rights thereunder" language seriously would endanger previous Commission decisions allowing spectrum managers, ITFS leasing, and other types of leasing. If this is true, then given the plain language of the statute, we have even more incentive to look for Congressional clarification. Finally, the majority argues that a plain language reading of the statute proves too much, asserting that if the statute precludes leasing of complete day-to-day control of a license that it would also preclude a CMRS provider from allowing a customer to place a phone call over its system. But this approach misses, I believe, an important distinction between these two extremes. A customer of a CMRS provider placing a call has no rights to control the spectrum when placing a call – the CMRS provider maintains all rights to the spectrum, including the right to monitor the call, to cut it off, or to assign it to one channel or another. Just as a restaurateur does not transfer any rights to control his restaurant to a patron who comes in for lunch, a CMRS provider does not transfer any rights to control its spectrum to a caller on its system. But if the restaurateur leases his building to another company, or if a licensee leases day-to-day control of his license to another company, a transfer of rights to control has occurred.

Because Section 310(d) does not allow transfers without FCC approval, I remain of the opinion that the Commission, if we wish to go down this road, will have to go the Congress and seek legislative changes before proceeding with the sweeping changes it would make today. Any other approach puts us in conflict with the law. Seeking legislative change can be frustrating and time consuming; I know that as well as anybody here. But the Commission simply cannot overstep its authority and exchange its policy preferences for those imposed by statute. Yet that is exactly what today's Order does.

Finally, I want to thank my colleagues for agreeing to eliminate several sections of the NPRM. I appreciate their willingness to accommodate Commissioner Adelstein's and my concerns. Beginning the process of allowing television and radio broadcasters to sell to non-broadcasters access to spectrum rights that Congress and the FCC gave them for free would have been a terrible mistake. It would have meant that broadcasters could sell control of part or all of their spectrum rights to others, potentially without Commission review. Broadcasters were given these spectrum rights for free because they are engaged in work that is critically important to our country – the provision of free over-the-air TV and radio. To allow them to sell these spectrum rights for other uses would have been deeply troubling. And by doing so we may have undermined the digital transition by giving broadcasters an incentive to hang on to control as much spectrum as they can for as long as they can with the hope of leasing it for profit.

Similarly, proposing to do away with traditional FCC review of transfers of control of all licenses, <u>including broadcast licenses</u>, would have been a mistake. It would have meant that the FCC would no longer need actually to conduct a review of mergers and acquisitions involving FCC licenses. It would merely require companies to file applications and then hold that transfers would be deemed granted unless the

Commission acted within 21 days. So while we are considering eliminating our media consolidation rules on one hand, claiming that case-by-case review will pick up the slack, we would have been proposing to vastly cut back on even case-by-case review.

I also support the decision to eliminate a proposal to drop our policies designed to promote opportunities for small businesses to participate in spectrum-based services. We would have erred in abandoning the designated entity and entrepreneur policies without proposing replacing them with anything more than our general secondary markets policy. A hope that secondary markets will guarantee small and rural businesses access to spectrum is still untested. Congress has specifically instructed us to protect access by small and rural companies, and we must not take this instruction lightly.

I appreciate eliminating the section that would have proposed allowing licensees to mortgage their licenses as a way to raise money. After NextWave, we are right to be particularly cautious before allowing our licenses to become entangled in such arrangements. And given that the law instructs us that we many not grant licensees ownership rights in spectrum that is owned by the public, I believe we would have been on shaky ground.

Finally, as I understood it as late as this morning, the NPRM still proposes to apply our new and more liberal *de facto* transfer of control standard to questions of foreign ownership. This, too, troubles me and could well set us on a collision course with the Section 310 mandate that the Commission review foreign ownership of U.S. licenses.

Thank you.