Before the
Federal Communications Commission
Washington, DC 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

To: The Commission

CINGULAR WIRELESS LLC
PETITION FOR RECONSIDERATION
AND CLARIFICATION

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Cingular Wireless LLC ("Cingular") hereby petitions for reconsideration and clarification of the *Report and Order* contained in the Commission's October 6, 2003 *Report and Order and Further Notice of Proposed Rulemaking.*[1]

I. THE FCC SHOULD CLARIFY THAT ITS SECONDARY MARKET POLICIES ARE FULLY AVAILABLE TO DESIGNATED ENTITIES

The Commission should make clear that there is no distinction between designated entities (small businesses, businesses owned by women and minorities, and rural telephone companies) ("DEs") and other licensees where spectrum leasing is concerned, including spectrum manager leasing. In the *R&O*, the Commission found that

> providing the widest array of interested parties, including designated entities . . . , increased opportunities to enter into a variety of spectrum leasing arrangements . . . will significantly advance our goal of promoting facilities-based competition in broadband and other communications services as well as our objective to ensure more efficient, intensive, and innovative uses of spectrum.[2]

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[1] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113 (Oct. 6, 2003) (referred to herein as "*R&O*" or "*FNPRM*," as applicable), *R&O summarized*, 68 Fed. Reg. 66252 (Nov. 25, 2003), *FNPRM summarized*, 68 Fed. Reg. 66232 (Nov. 25, 2003).

[2] *Id.* at ¶ 39.

Thus, the Commission clearly enunciated a policy to enable designated entities (small businesses, businesses owned by women and minorities, and rural telephone companies) ("DEs") to derive the benefits of spectrum leasing, including leasing under the new spectrum manager leasing rules.[3] Treating DEs differently from other licensees would undercut the very goals of spectrum efficiency that the Commission seeks to promote through leasing.

Spectrum leases, whether DEs are involved or not, should not be subject to rules, regulations, and limitations that apply to full-fledged transfers or assignments involving *de jure* control. The Commission should give DEs full access to spectrum manager leasing arrangements with non-DEs. Given the potential repercussions of forfeiting DE status, there must be no uncertainty.

In adopting its DE rules, the Commission recognized that these entities faced challenges in obtaining the capital needed to participate fully in the telecommunications industry. Secondary market mechanisms can be an important source of capital for DEs. For example, a DE could raise funds for its own spectrum-based telecommunications business by temporarily leasing to another company the use of all or part of its spectrum in certain geographic markets (or portions of markets). Indeed, the *R&O* cited comments saying that secondary markets would "enhanc[e] the ability of designated entities to access additional capital."[4]

The new secondary market rules will maximize the efficient use of spectrum by giving both licensees and non-licensees much greater flexibility in how they participate in telecommu-

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[3] *See also R&O* at ¶¶ 2, 12, 36, 45. Indeed, spectrum manger leases between DE licensees and non-DE lessees are specifically contemplated. *R&O* at ¶ 113. Moreover, the *FNPRM* implies that spectrum manager leasing between DEs and non-DEs is permissible when it suggests that only the *de facto* transfer leasing option poses a barrier to leasing between DEs and non-DEs. *FNPRM* at ¶ 323.

[4] *R&O* at ¶ 36 & n.71 (citing comments by AT&T Wireless and the Small Business Administration).

nications services. These opportunities should be made equally available to DEs and non-DEs alike. In order for these benefits to be achieved by DEs, however, they must be confident that the new leasing rules give them full access to spectrum manager leasing arrangements with non-DEs. Given the potential repercussions of forfeiting DE status, there should be no uncertainty as to the application of the Commission's rules to such arrangements. The Commission made clear that DEs may freely engage in short-term *de facto* transfer leasing, and the *FNPRM* explores whether this should be the case with respect to long-term *de facto* transfer leases as well.

With respect to spectrum manager leasing by DEs to non-DEs, the rules adopted in the *R&O* specifically authorize such arrangements.[5] Lessees under the spectrum manager leasing option must meet general eligibility requirements unrelated to DE status,[6] and DE licensees must remain qualified under the DE rules.[7] The new rule requires only that such leases "not result in the spectrum lessee becoming a 'controlling interest' or affiliate of the licensee such that the licensee would lose its eligibility as a small business or entrepreneur."[8] Thus, it would appear that as long as a DE's spectrum manager lease is structured to ensure it remains a DE, it is free to lease its spectrum to a non-DE.

While the *rule* does not restrict DEs' ability to lease spectrum to non-DEs as spectrum managers, there is some language in the *R&O* that could be read to introduce some ambiguity.[9] The Commission must eliminate any doubt and clarify that, provided the licensee remains qualified as a DE, it may lease its spectrum to non-DEs without having to maintain *Intermountain*-like

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5 47 C.F.R. § 1.9020(d)(4).

6 47 C.F.R. § 1.9020(d)(2).

7 *R&O* at ¶ 113.

8 47 C.F.R. § 1.9020(d)(4).

9 *See generally* Cingular Comments at 4-8 (filed Dec. 5, 2003).

indicia of control over the lessee's operations.[10] In particular, the Commission should make clear that when the *R&O* says the "*de facto* control standard in our rules" for DEs — *i.e.*, the *Intermountain* standard — will trump the "revised *de facto* control standard" in the event of any conflict, it was addressing only the DE's continued eligibility for DE status[11] — not DE control over the lessee's operations.

There is no indication that the Commission intended that DEs entering into spectrum leases must continue to exercise control over the radio facilities and operations of their lessees under the *Intermountain* standard. That would be contrary to the entire premise of the secondary markets proceeding. Moreover, if there is no need for a non-DE licensee to exercise control over a lessee's hiring and firing practices or to maintain unfettered access to facilities, then there is no conceivable reason for imposing such requirements on DEs. The only issue for which the *Intermountain* standard would appear to have any relevance is whether persons meeting the DE eligibility criteria continue to have control over the entity holding the DE license.[12]

Moreover, the Commission should clarify that its statement that lessees must "satisfy the eligibility and qualification requirements that are applicable to licensees under their license authorization"[13] refers to the general eligibility requirements in rule section 1.9020, and *not* the designated entity eligibility rules. It is clear from the context that the Commission was referring

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[10] Cingular has sought similar clarification in its comments responding to the *FNPRM*'s solicitation of comment on DEs' leasing spectrum usage rights to non-DEs. *See FNPRM* at ¶ 323; Cingular Comments at 2-8 (filed Dec. 5, 2003).

[11] *Id.* at ¶ 188. This assumes that the Commission does not eliminate applicability of the *Intermountain* standard entirely as suggested by the Commission and requested by commenters responding to the *FNPRM*. *See FNPRM* at ¶¶ 316-19; Comments of AT&T Wireless Services, Inc., WT Docket 00-230, at 7-8 (filed Dec. 5, 2003); Comments of Salmon PCS, LLC at 4-8 (filed Dec. 5, 2003).

[12] Moreover, in acting on the *FNPRM*, the Commission should follow its new control standard instead of *Intermountain* even with respect to satisfying the DE eligibility criteria. *See* Cingular Comments at 12-14 (filed Dec. 5, 2003).

[13] *Id.* at ¶ 109.

to these general eligibility requirements, which are discussed in the paragraphs following the quoted language, while the DE rules are addressed separately.[14]

The Commission should also clarify that its statement that DEs may engage in spectrum manager leasing only to the extent "doing so is consistent with our existing designated entity and entrepreneur policies and rules"[15] was intended to ensure that DEs continue to remain qualified as DEs, and not to extend the DE eligibility rules to lessees. This is apparent from the Commission's explanation that a DE "may lease to any spectrum lessee and avoid the application of our unjust enrichment rules and/or transfer restrictions so long as the lease does not result in the lessee becoming a 'controlling interest' or affiliate that would cause the licensee to lose its designated entity or entrepreneur status."[16] In other words, a DE may lease to a non-DE without restriction as long as it continues to satisfy the DE rules. If spectrum manager leases to non-DEs were restricted, there would have been no need for this statement.

While the rules unquestionably intended to permit DEs to lease spectrum to non-DEs, the *R&O*'s section dealing with installment payments appears inconsistent with this policy. The provisions addressing leases of spectrum held by DEs pursuant to installment payments appear to restrict such licensees' ability to enter into spectrum manager leases with non-DEs: the order establishes "guidelines" requiring, among other things, new financing documents for leases of spectrum subject to installment payments and requiring the *lessee* to be "qualified to enter into such arrangements under the Commission's rules and regulations."[17] This guidance appears to permit DE licensees who are eligible for installment payments to lease only to other DEs eligible

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14 The general eligibility requirements (*e.g.*, compliance with foreign ownership restrictions, character qualifications) are discussed in paragraphs 110-111, following the quoted language. The DE rules and policies are discussed under a separate subhead, in paragraph 113.

15 *R&O* at ¶ 113.

16 *Id.*

17 *Id.* at ¶ 188.

for installment payments, which is contrary to the Commission's intent to allow DEs to enter into spectrum manager leases with non-DEs. No such limitation was codified in the rules. The Commission should eliminate this apparent contradiction and clarify that DEs may enter into spectrum manager leasing arrangements with non-DEs and that the lessee need not be qualified for installment payments. Indeed, there does not appear to be any need for a lessee under spectrum manager leasing to appear on any financing documents, given that the DE licensee remains fully accountable to the Commission.

II. THE FCC SHOULD CLARIFY OR RECONSIDER ADDITIONAL ISSUES RAISED IN OR BY THE REPORT AND ORDER

A. Lessor Responsibility for Rule Compliance

Paragraph 66 of the *R&O* states that licensees leasing spectrum pursuant to the spectrum manager model will be held primarily responsible for lessees' rule violations. The Commission indicated, however, that a lessor could "take steps through contractual provisions and actual oversight" to ensure lessee compliance.[18] On reconsideration, the Commission should clarify that spectrum managers will not be held responsible for lessee conduct or failure to act if the lease contained contractual provisions requiring compliance and the lessor exercised reasonable oversight. For example, if a lease requires the lessee to comply with all FCC rules, and the lessee constructs a facility that would have a significant environmental effect, the spectrum manager lessor should not be held accountable if it had exercised appropriate diligence in ensuring lessee compliance. Although a spectrum manager may supervise overall lessee operations, it will be impossible to review every individual decision. Accordingly, spectrum managers should not be liable where they exercise due diligence in ensuring lessee compliance with FCC rules and policies.

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[18] *R&O* at ¶ 66.

Similarly, the Commission should reconsider its decision that licensees that enter into *de facto* transfer leases "may" be held accountable for "ongoing violations or other egregious behavior" by the lessee if the licensee *knew or should have known* of the lessee's actions.[19] This standard is extremely vague, providing virtually no guidance for licensees considering a *de facto* transfer lease. The Commission does not define "ongoing violations," for example: Does this mean only violations occurring continuously for months or years, or a violation that occurs for several days, with each day being a separate offense? Is the licensee going to be held responsible for relatively minor transgressions by the lessee that continue over some period? In addition, the Commission provides no standards for what constitutes "egregious behavior." The example provided (wherein the licensee permits the lessee to continue operating despite an FCC order that the lessee cease operations) is not helpful in classifying which behavior by a lessee will be attributed to the lessor. Likewise, the Commission apparently will exercise its discretion in deciding when to pursue the licensee, saying that in some specific cases, when it finds these indistinct criteria have been satisfied, it "may be appropriate" to hold the licensee responsible,[20] suggesting that in other cases it would *not* be appropriate to do so.

On balance, holding the lessor responsible for the lessee's violations is inconsistent with the concept of *de facto* transfer leasing, where the licensee transfers *de facto* control to the lessee with FCC consent. Having transferred *de facto* control, the lessor would not be in a position to supervise and control the lessee's day-to-day operations. Holding the lessor responsible for the lessee's "ongoing" or "egregious" transgressions, however, requires the lessor to maintain more than *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 lessor/licensee has retained a

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19 *R&O* at ¶ 136.

20 *Id.*

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. On reconsideration, the Commission should reconsider its decision to subject the licensee to liability for a *de facto* transfer lessee's transgressions. If the Commission retains this policy, it must clarify the standards that will be applied in holding licensees responsible for lessees' actions.

B. Right to Notice and Opportunity to Be Heard Prior to FCC Termination of Lease

The *R&O* gives the Commission broad authority to terminate spectrum manager leases after they have been implemented by the parties.[21] The Commission indicated that it could terminate a spectrum manager lease based on comments received in response to the public notice of the lease or on its own motion.[22] Nothing in the *R&O* indicates that the parties to the lease agreement would have the right to notice and an opportunity to be heard prior to termination.

While a lease is not a license, it 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, in that the Commission would either order the licensee to cease and desist from certain leasing activity or modify the terms and conditions of the license, or both. Both of these sections require the Commission, at a minimum, to provide the licensee with notice and an opportunity to be heard prior to taking action.[23]

On reconsideration, the Commission should clarify the procedures it will follow for terminating a spectrum lease, and amend its rules to codify such procedures. It should also clarify

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21 *R&O* at ¶125.

22 *Id.*

23 If the action is taken pursuant to Section 312 or 316, it would be subject to review only via an appeal to the D.C. Circuit, pursuant to 47 U.S.C. § 402(b)(5), (7).

that it will issue a written order whenever a lease is terminated, providing an explanation for its action, and that any such order will provide a reasonable time frame for terminating the lease, in light of the circumstances of the case. A written order containing the reasoning on which the action was based is needed for effective judicial review of such action.[24]

C. Lease Disputes

The Commission should clarify that a lessee with a valid lease cannot be required to terminate service simply because the license has been acquired by a new entity, unless the lease so provides. If the lease does not permit termination in the event of a sale, the new licensee should take the license subject to the lease. The Commission has indicated that lease information will be available on ULS. Thus, any prospective purchasers can identify the leases associated with the license and value the spectrum accordingly.

D. Microwave Relocation Rights and Obligations

In the absence of express language in a lease involving broadband PCS, it is unclear who would be responsible for complying with the cost-sharing obligations for microwave relocation. Moreover, it is unclear whether each new lessee creates another cost-sharing obligation, given that the lessee will be more than a mere reseller, but not an independent licensee; will the Commission deem the lessee a "PCS entity" subject to the cost-sharing obligation, or will that responsibility be limited to the licensee?[25] Moreover, if the lessor/licensee has already paid to clear the

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[24] The Administrative Procedure Act grants any party aggrieved by agency action the ability to seek judicial review. *See* 5 U.S.C. § 702. As noted above, if a lease termination is ordered pursuant to Section 312 or 316, it would be subject to appeal pursuant to Section 402(b); if there is a different statutory basis for the termination, making Section 402(b) inapplicable, the affected parties would be entitled to seek judicial review pursuant to 47 U.S.C. § 402(a).

[25] Under 47 C.F.R. § 24.247, the reimbursement obligation with regard to relocations in the "licensed PCS band(s)" applies to a "PCS entity," leaving open the question whether it applies to non-licensees providing service in the licensed PCS band pursuant to a lease. When the rule was written, the only "PCS entities" in the licensed PCS band were licensees.

spectrum, it is unclear whether the lessee would also need to contribute, given that its rights are derivative of the licensee who has already contributed.

On reconsideration, the Commission should establish default rules regarding how microwave relocation costs will be handled in the absence of lease provisions addressing the issue.

CONCLUSION

For the foregoing reasons, the instant petition for reconsideration and clarification should be granted as requested herein.

Respectfully submitted,

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