

## FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 20, 21, 22, 24, 25, 27, 74, 78, 80, 87, 90, 95, 97, and 101

[WT Docket No. 00–230; FCC 03–113]

### Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document we seek comment on several actions the Commission could take to further enhance spectrum access and efficient use of spectrum through the development of more robust secondary markets in spectrum usage rights in the wireless radio and satellite services. We also seek comment on how to encourage the development of information and clearinghouse mechanisms that will facilitate secondary market transactions between licensees and new users in need of access to spectrum. Finally, we seek comment on further streamlining of application processing for spectrum leasing, transfer of control, license assignments, expanding leasing to additional services, and modifying or eliminating other regulatory barriers impeding secondary market transactions.

**DATES:** Comments by the public on the proposals set forth in the Further Notice of Proposed Rulemaking (*Further NPRM*) are due December 5, 2003. Reply comments are due January 5, 2004.

**FOR FURTHER INFORMATION CONTACT:** Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at [Paul.Murray@fcc.gov](mailto:Paul.Murray@fcc.gov); for additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at [Judith.B-Herman@fcc.gov](mailto:Judith.B-Herman@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Further NPRM* portion of the Commission's Report and Order and Further Notice of Proposed Rulemaking, FCC 03–113, in WT Docket No. 00–230, adopted on May 15, 2003, and released on October 6, 2003. Contemporaneous with this document, the Commission issues a Report and Order (published elsewhere in this publication). The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's

copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at [Brian.Millin@fcc.gov](mailto:Brian.Millin@fcc.gov).

### Synopsis of the Further NPRM

#### I. Introduction

##### A. Wireless Radio Services

1. We adopt a Further Notice of Proposed Rulemaking (*Further NPRM*) that proposes several actions the Commission could take to further enhance spectrum access and efficient spectrum use on a wider scale following adoption of the *Report and Order* in this proceeding. We seek comment on how to encourage the development of information and clearinghouse mechanisms that will facilitate secondary market transactions between licensees and new users in need of access to spectrum. We also seek comment on further streamlining of application processing for spectrum leasing, transfers of control, and license assignments, expanding leasing to additional services not covered by the *Report and Order*, and modifying or eliminating other regulatory barriers impeding secondary market transactions.

##### B. Satellite Services

2. In the *Further NPRM*, we further explore and seek comment on improving access to unused or underutilized satellite spectrum through secondary markets.

#### II. Background

3. In November 2000, the Commission concurrently adopted the *Policy Statement* and the *Notice of Proposed Rulemaking (NPRM)*, 65 FR 81475 (December 26, 2000) in this proceeding regarding secondary markets in spectrum usage rights. The *Policy Statement* enunciated general goals and principles for the further development of those secondary markets, while the *NPRM* proposed concrete steps the Commission might take to implement such policies with respect to Wireless Radio Services and Satellite Services. Thirty-seven parties commented on the proposals set forth in the *NPRM*, and twenty-one filed reply comments.

4. In 2002, the Commission's staff-level Spectrum Policy Task Force undertook a comprehensive review of spectrum policy. In examining 90 years of spectrum policy, the Task Force sought to assist the Commission in

developing policies that are more responsive to the consumer-driven evolution of new wireless technologies, devices, and services. The findings and recommendations submitted to the Commission in November 2002 in the *Spectrum Policy Task Force Report* addressed many issues relevant to the promotion of secondary markets in spectrum usage rights.

5. Concurrent with the adoption of the *Further NPRM*, and as part of the same document, we adopted a Report and Order portion (*Report and Order*), in which we take several actions to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights in the Wireless Radio Services. Specifically, in the *Report and Order*, we take several steps to facilitate and streamline the ability of spectrum users to gain access to licensed spectrum by entering into spectrum leasing arrangements that are suited to the parties' respective needs. As a threshold matter, we revise the Commission's interpretation of the *de facto* control standard relating to section 310(d) of the Communications Act, 47 U.S.C. 310(d), in the context of spectrum leasing, replacing the standard that has been in place since 1963 under the *Intermountain Microwave* decision, 12 FCC 2d 559 (1963), with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances. The *Intermountain Microwave* standard, which focuses its *de facto* control analysis on whether licensees exercise close working control over all of the facilities using licensed spectrum, is not required by the Communications Act. Moreover, this standard impedes innovative and efficient leasing arrangements with third party spectrum users that do not require Commission approval under the statute. The updated standard we adopt today for leasing refines the *de facto* control analysis, consistent with statutory requirements, by focusing instead on whether licensees continue to exercise effective working control over any spectrum they lease to others.

6. In the *Report and Order*, we implement two different options for spectrum leasing. One option enables licensees and "spectrum lessees" to enter into leasing arrangements, without the need for Commission approval, so long as the licensee retains *de facto* control of the leased spectrum under the newly refined standard. The other option permits parties to enter into arrangements in which the licensee transfers *de facto* control to the lessee