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FCC OKs Secondary Markets for Spectrum

The much-touted "spectrum shortage" is a myth. In fact, most of the spectrum is vacant most of the time. Turn on a spectrum analyzer in the heart of a supposedly spectrum-congested city. The local broadcast frequencies and cell and PCS phone bands will show steady, concentrated activity -- but elsewhere, nothing but isolated, short-lived spikes. There is a shortage, to be sure, but not of spectrum as such. The problem is a dearth of *unlicensed* spectrum. But vast amounts of licensed spectrum are used only lightly, while many would-be providers cannot obtain spectrum at all.

A second-grader could solve this one: Let the people who have spectrum and don't need it lend it to the people who need it but don't have any. An economist (or a fourth-grader) would acknowledge that money must change hands in the opposite direction. The result? Spectrum leases.

The obstacle to implementing this simple solution lies in a 1934 statute. In its present wording, the law prohibits an FCC licensee from transferring away "any rights" under its license without prior FCC approval. And getting that approval has been a slow and expensive process. The statute made sense back in 1934, when the FCC wanted to keep track of the powerful AM broadcast stations that accounted for most of the extant licensees. But when the FCC applied the statute to non-broadcast facilities, in the infamous 1963 *Intermountain Microwave*, it required the licensee to be firmly in charge of every aspect of running the licensed station. For 40 years, that decision has kept spectrum in the hands of people who don't need it.

Now the FCC has overthrown *Intermountain Microwave* and announced it will let licensees lease spectrum to others. The new rules apply to most licensees holding exclusive rights to their spectrum. These include, for example, cellular, PCS, SMR, LMDS, fixed microwave, 24 GHz, and 39 GHz -- but not broadcast spectrum.

The new procedures set out three options. They vary in time scale, FCC approvals required, and the party responsible for maintaining compliance with the license.

"Spectrum manager leasing" has no time limit, and does not need prior FCC approval, although the parties must notify the FCC of their plans 21 days in advance. The licensee is responsible for ensuring that the lessee maintains compliance with spectrum-related rules.

"Short-term leasing" cannot exceed 360 days. Prior FCC approval is required, but will be granted (or denied) on an expedited basis, ordinarily within ten days. The FCC will look to the lessee for compliance with FCC rules, except those that are inherently long-term in character, such as certain use restrictions, designated-entity and entrepreneur policies,

and spectrum aggregation issues.

"Long-term leasing" has no lower time limit, but is required for leases that exceed 360 days. Prior FCC approval is required. Applications will be placed on public notice and automatically deemed granted after 21 days, unless pulled aside for more detailed review. The lessee must answer to the FCC for compliance with all rules and license conditions, with the licensee's responsibility limited to actual or constructive knowledge of violations.

Where the parties prefer not to lease, and instead seek an outright transfer of the license, the FCC will deem its approval granted 21 days after public notice, barring special problems.

Finally, a Further Notice of Proposed Rulemaking asks about mechanisms that might help a secondary market in spectrum operate more efficiently. It also seeks input on how the FCC can extend the reach of its new secondary market policies, forbear from regulating some transactions altogether, and speed up approvals for others.

But that 1934 statute -- the one requiring prior FCC approval for transfer of rights -- is still in force. Not a problem, say four of the five Commissioners, who believe the new rules comply with the statute. The fifth Commissioner disagrees, and accordingly dissented, with a request to Congress to step in and make the new policies lawful.