

FCC ISSUES SWEEPING SECONDARY MARKET ORDER

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*The Order revises the
FCC's rules to
implement a more
flexible leasing regime.*

On October 6, 2003, the Federal Communications Commission ("FCC") released a Report and Order ("Order") adopting new regulations to promote wireless services and new leasing opportunities through the creation of a so-called "secondary market" for radio spectrum. The Order revises the FCC's rules to implement a more flexible leasing regime, which permits FCC licensees of exclusive frequencies in most wireless services to lease any amount of their spectrum, in any geographic area encompassed by their licenses, for any amount of time within the term of their licenses. The Order also redefines the FCC's long-standing policies regarding wireless licensees' *de facto* control over their licenses in certain circumstances, and adopts streamlined approval procedures for spectrum leases, as well as for full license assignments and transfers of control. Additionally, the FCC seeks further comment on, among other things, additional steps the Commission should take to facilitate increased access to spectrum for new technologies.

Although the new rules, once they become effective, will allow for additional flexibility in many cases, they impose new regulatory and procedural requirements of their own. Wireless licensees and prospective lessees should review the Order carefully before entering into spectrum leases. Additionally, the new, relaxed standard for *de facto* control will not apply in any context other than spectrum leasing.

The Order promulgates two leasing options: the "spectrum manager" option and the "*de facto* transfer" option. Under the first approach, the licensee retains *de jure* and *de facto* control of its subject license, and the licensee and proposed lessee may enter into a spectrum lease without prior FCC approval. Although no prior FCC approval is required for spectrum manager leasing arrangements, the licensee must provide prior notification to the Commission of the proposed leasing agreement within 14 days of execution, and at least 21 days before operating under the lease (for leases of duration of up to one year, licensee must provide notification at least 10 days in advance of operation). The notification must also include certification that the proposed lessee meets the FCC's eligibility requirements.

The Order revises the FCC's *de facto* control standard with respect to spectrum leasing. That standard previously emphasized a licensee's control over facilities and business operations using the spectrum. The new standard focuses on ensuring that the licensee has control over proper use of the spectrum, *i.e.*, compliance with the applicable sections of the Communications Act ("Act") and FCC rules and policies. A licensee that wishes to lease its spectrum under the spectrum manager option will need to make sure that the lease agreement contains contractual provisions that permit the licensee to ensure the lessee's compliance

with its FCC requirements, including rights of inspection and termination. The licensee also remains responsible for communications with the FCC.

Under the second leasing option, a licensee may transfer *de facto* control over the leased spectrum to the lessee, and the lessee would be primarily responsible for compliance with the Act and the FCC's rules, although the licensee would retain some responsibility for operations on its licensed spectrum. The parties must file a lease application with the FCC, and prior FCC approval is required. The rules differ depending on whether the parties propose a long term (more than 360 days) or short term (360 days or less) leasing arrangement.

For long term arrangements, all the pertinent FCC rules and policies for the subject service will apply. The parties' lease application will be subject to streamlined approval processing: the application will be placed on public notice, petitions to deny will be due within 14 days, and the FCC will either grant or "offline" the application within 21 days of the public notice. The Order also adopts this streamlined procedure for most types of full license assignments and transfers of control.

The Order also adopts rules for subleasing, transfers and assignments, installment payments, and construction performance matters involving leasing arrangements.

Most short term leasing arrangements will be approved within 10 days pursuant to the Commission's special temporary authority ("STA") procedures. Additionally, certain service rules will not be applicable to short term lessees, including rules pertaining to use restrictions, designated entities and entrepreneurs, and spectrum aggregation.

The Order also adopts rules for subleasing, transfers and assignments by a lessee of its interest, treatment of licensees subject to installment payments under the FCC's competitive bidding procedures, and construction/performance matters involving spectrum leasing arrangements.

Additionally, the FCC seeks public comment on these issues:

- * How should the FCC facilitate information sharing between licensees with underutilized spectrum and those in need of spectrum access.
- * What additional secondary market mechanisms should be employed to facilitate spectrum access by new technologies.
- * Should the FCC forbear from requiring prior approval for certain types of *de facto* transfer leasing arrangements, license assignments and transfers of control.
- * Should spectrum leasing rights be extended to service types not covered in the Order, e.g., services with shared spectrum and public safety services.

The deadline for filing comments is December 5, 2003. Reply comments are due by January 5, 2004.

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E911 BILLS RAPIDLY MOVING THROUGH CONGRESS

The House and Senate have recently moved bills through their respective Committees that would provide funding for, and establish federal coordination of, deployment of enhanced 911 ("E911") services in the U.S. Although some significant differences remain between the two companion bills, it is expected that they will be reconciled before the end of this year.

The House Bill (HR-2898) would authorize \$100 million annually for five years for grants for E911 implementation purposes, including: planning, infrastructure improvements, equipment purchases, and personnel training. Fifty percent matching grants would be available to "eligible entities," i.e., state and local governments and tribal organizations that have developed E911 implementation plans approved by the federal government. The FCC will be required to review, twice a year, how the states are assessing and using E911 fees collected from telecommunications consumers. Each state must certify annually to the FCC that none of the revenues derived from E911 fees have been diverted to purposes other than E911 deployment. Any government located within a state that fails to make the required certification will be ineligible for E911 grants.

The House and Senate have moved bills through Committees that would provide funding for, and establish federal coordination of, E911 services in the U.S.

Among other provisions, the House Bill would also establish an E911 Implementation Coordination Office ("EICO") within the Commerce Department. The functions of EICO will include: (a) facilitating communication between E911 "coordinators" such as federal, state, and local communications systems, public safety organizations, emergency personnel, and equipment manufacturers and vendors; (b) assisting eligible entities in the preparation of E911 implementation programs; (c) reviewing and recommending approval or disapproval of grant applications; (d) collecting and disseminating E911 implementation information; and (e) overseeing the use of funds provided by E911 grants.

The Senate Bill (S-1250) is similar to the House Bill in many respects. The principal differences between the two bills are that the Senate Bill proposes: (a) to devote \$500 million annually, as opposed to \$100 million, for E911 implementation; and (b) that the E911 coordination and administration functions would not be provided by EICO, but rather by a Task Force of representatives of many agencies, including the FCC, and the Departments of Commerce, Homeland Security, Defense, Justice, Interior and Transportation.

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FCC GRANTS E911 IMPLEMENTATION RELIEF FOR SOME SMALL CARRIERS; SETS WAIVER GUIDELINES

The FCC recently released an Order granting approximately 90 small wireless carriers additional time to comply with certain E911 implementation requirements, and setting forth specific guidelines for all E911 waiver requests. The FCC released its Order in response to several petitions from "Tier III" commercial mobile radio ("CMRS") carriers (those with fewer than 500,000 subscribers) seeking temporary relief from the FCC's E911 deployment obligations stated in the FCC's Rules.

The Order promulgates guidelines that carriers must follow to meet the "substantial burden" of showing that waiver of their E911 requirements is warranted.

Based on their claims of technical and/or financial difficulties, many of the Tier III carriers petitioned for relief from the FCC's accuracy and reliability standards for Phase II of the E911 rollout, which require that wireless phones or networks be equipped to give public safety answering points ("PSAPs") the approximate location of a caller. The FCC did not rule on the merits of those requests, but rather stayed the application of its E911 requirements for a period of up to six months after release of the Order, to allow the petitioners additional time to supplement their waiver petitions in accordance with the guidelines set out in the Order.

The Order promulgates guidelines that carriers must follow to meet the "substantial burden" of showing that a waiver of their E911 requirements is warranted. Specifically, an E911 waiver request must contain clear evidence supporting the grounds on which the petition relies, "with a clear path to full compliance." For example, if a carrier claims that it is technically infeasible to meet the E911 requirements, its waiver request must provide testing data and other evidence to demonstrate its inability to meet those requirements, as well as specific plans to meet the E911 standards. Similarly, if a carrier contends that financial hardship requires a waiver, that carrier must provide the FCC with "sufficient and specific factual information to assess the *bona fides* of the hardship showing," along with documentation showing that it has used its best efforts to obtain financing.

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FCC STAYS BLAST FAX RULE ON "ESTABLISHED BUSINESS RELATIONSHIP"

The FCC recently issued an Order staying the limitations in Section 64.1200(f)(3) of its Rules on the duration of "established business relationships" as applied to the sending of unsolicited "blast faxes." That rule states that an established business relationship has a duration of either: (a) 18 months based on a customer's purchase or transaction with the "blast faxing" company; or (b) three months based on a customer's inquiry or application with that company.

The FCC has stayed certain rule restrictions as they pertain to blast faxes.

In July 2003, the FCC released a Report and Order ("R&O") wherein it: (a) reversed its prior conclusion that an established business relationship provides companies with the necessary express permission to send blast faxes to prospective customers under the Telephone Consumer Protection Act of 1991; (b) required that companies receive express written consent from intended recipients before sending blast faxes; and (c) modified its definition of established business relationship to include the eighteen month and three month duration periods in the context of telephone solicitations. The FCC later extended the effective date of its determination that an established business relationship is not sufficient permission to receive blast faxes to January 1, 2005.

Based on its consideration of a petition for reconsideration, the FCC has stayed the limitations stated in Section 64.200(f)(3) as they pertain to blast faxes. The Commission reasoned that because the adoption of the modified established business relationship definition in the R&O was limited to telephone solicitations, good cause existed to stay its applicability to blast faxes. Consequently, during the period of the stay, an established business relationship, as it applies to blast faxes,

will not expire after 18 months of the recipient's last purchase or transaction or three months after the last application or inquiry. The Order does not impact the FCC's conclusion that an established business relationship will no longer constitute sufficient permission to send a blast fax as of January 1, 2005.

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FCC CLARIFIES WIRELESS-TO-WIRELESS NUMBER PORTABILITY ISSUES

In response to a request for declaratory ruling, the FCC recently issued a Memorandum Opinion and Order ("MO&O") clarifying certain matters respecting wireless-to-wireless number portability. The FCC will address wireline-wireless number porting issues in a separate order. The FCC's rules provide that as of November 24, 2003, many commercial mobile radio ("CMRS") carriers such as broadband PCS, cellular, and 800/900 MHz SMR wide area or geographic area licensees that provide real time two-way switched voice service ("covered CMRS carriers") must provide a database method for number portability, including the ability to support roaming, in the 100 largest Metropolitan Statistical Areas ("MSAs"). The MO&O was released to provide guidance to CMRS carriers regarding their obligations that will begin on November 24, 2003.

The MO&O was released to provide guidance to CMRS carriers regarding their obligations that will begin on November 24, 2003.

The Commission clarifies the following issues:

- * Covered CMRS carriers must port a number anytime they receive a verified porting request, and may not impose any non-porting related restrictions on the porting process.
- * Any provision in a customer contract that purports to limit porting is ineffective.
- * Interconnection agreements or other agreements are not required for number porting.
- * Covered CMRS carriers must port numbers regardless of whether the requesting carrier has numbering resources or direct interconnection to the rate center associated with the number to be ported.
- * Covered CMRS carriers are encouraged to meet the industry standards of completing a number port within two and one half hours. Although this is not mandatory, the FCC may consider inordinate porting delays as an unreasonable practice in violation of Section 201(b) of the Communications Act.

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