National Spectrum Managers Association
Key Note Address by FCC Commissioner Kathleen Q. Abernathy
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As prepared for delivery.

Thank you for the opportunity to join your group again for its annual conference. It is a great honor for me to be invited back to speak to you about spectrum issues. When I talked to you last year, we spent quite a bit of time discussing spectrum management policies. Today, I would like to take this opportunity to build on that discussion to focus on how government regulation intersects with market realities.

Past experience has demonstrated to me that if regulators place their trust in the market, and only regulate in areas where necessary and appropriate, we obtain the best result for American consumers and industry. The Secondary Markets Order, which the FCC adopted just last week and explicitly creates a regulatory regime for spectrum leasing by third parties, is an excellent example of such an approach and one which I will discuss today in greater detail.

As a policy maker, one of the principles I have tried to adhere to throughout my term is reliance on market competitive forces, as opposed to increased regulation when I am granted the discretion in making decisions. I firmly believe that as a regulator I have the obligation to trust competitive markets and forbear from imposing unnecessary regulation because fully functioning competitive markets make better decisions than the government can or ever will. Of course, I recognize that there are some exceptions because a number of important public policy objectives are not market driven, such as the USF program or regulations for public safety. But as a general matter past examples demonstrate, that decision making based on market forces ultimately results in the most innovative and reasonably priced services being provided to consumers by the communications industry.

One such example is the United States wireless industry. When the rules for the wireless industry were being developed by the FCC, the Commission considered imposing Section II common carrier type regulation. That is, it could have imposed price regulation, service quality controls, mandated certain technologies or demanded tariffing. But the FCC instead let go of the reins and relied on market forces to govern pricing and service terms for PCS and other mobile telephony services.

This is not to say, however, that there was no regulatory intervention. The FCC continued to place additional spectrum into the marketplace - thus allowing multiple players to pave their own wireless last mile and to compete with existing providers. Included in this policy was a spectrum cap that guaranteed, at least initially, that there would be at least four distinct wireless providers in each market. The Commission also developed and enforced strict interference rules that prevented competitors from interfering with each other.

So while the approach to cellular was largely deregulatory, the Commission also engaged in limited interventions to ensure, for example, that there was a diversity of

providers of the "last wireless mile" and to prevent competitors from externalizing costs onto one another or consumers.

In sum, the cellular experience illustrates how Commission policy ought to work: we establish policies that encourage entry into the marketplace; firms compete with one another based on price and service quality; and consumers make choices that maximize their welfare. In the end, some firms succeed while others fail, and it is the role of regulators to referee between carriers and consumers and among providers - not to pick winners and losers.

Based on the success of the U.S. mobile telephony industry, I believed that adhering to the core principle of trusting the marketplace would be relatively easy as a Commissioner. In reality, it is often quite difficult. Regulators are often hesitant to trust markets to operate rationally, even if they believe it is the right thing to do and even if past Commission decisions, such as with regard to the cellular industry, support such an approach. This is despite the fact that time and time again marketplace forces have delivered innovation, competition and their accompanying benefits to consumers. Today I would like to share with you some of the more recent FCC proceedings whereby the Commission is moving towards a more market-based approach to regulation with regard to spectrum-based services.

As I mentioned earlier, just last week, the FCC adopted its Secondary Markets Order. In this order, the FCC took a dramatic step forward in creating a more market-based approach to the usage of spectrum in the Wireless Radio Services. In the past, the FCC has sometimes taken too long to review wireless transactions and hindered marketplace developments with prophylactic rules like the spectrum cap. Our new order creates a regulatory regime under which wireless radio service licensees can more easily lease spectrum that is the subject of their regulatory authorization in total or in part.

Our first step in last weeks Order was to revisit the Intermountain Microwave test used for interpreting de facto control under Section 310(d) of the Communications Act. Specifically, we found it appropriate to update our current standard which heralds from 1963 to focus on whether the licensee exercises effective working control over the use of the spectrum it leases, as opposed to direct control of the facilities themselves. This long overdue updated standard is reflective of recent developments in the Commission's spectrum trends, is consistent with technological advances, is consistent with our statutory authority and reflects our willingness to place increasing trust in the marketplace.

Specifically, the order provides that wireless radio service licensees are able to lease spectrum to third parties using one of two approaches – either the spectrum manager leasing approach or the de facto transfer leasing approach. Under the spectrum manager leasing approach, parties may enter into spectrum leasing arrangements, without the need for prior FCC approval, provided that the licensee retains de facto control over leased spectrum. Under the de facto leasing approach, licensees and lessees may enter into spectrum arrangements in which de facto control of the leased spectrum is transferred to the spectrum lessees for the duration of the lease pursuant to streamlined approval procedures.

I believe that this orders strikes the right balance between market-based regulation and the FCC's critical oversight of licensees. This dual approach provides certainty to

the marketplace about the types of routine transfers that do not warrant and will not receive significant Commission attention and delineates those transactions that will receive increased scrutiny. In both cases, the FCC's rules provide sufficient protections to ensure that both lessors and lessees comply with FCC requirements. For example, the FCC can rely on its enforcement power or its ability to scrutinize the eligibility requirements of lessees under the de facto transfer of control approach.

Taken as a whole, I believe that the impact of the secondary markets docket will be tremendous. This order will open the door to allow licensees to lease excess spectrum to third parties that best suits their and the individual lessee's needs. Ultimately, this should result in increased spectrum efficiency and usage, which should translate into improved service and new services to consumers.

In addition, we adopted a further notice of proposed rulemaking which examines issues affecting the future development of secondary markets based on the regulatory framework we established in the order. In the further notice we will be examining whether for other services, such as broadcast and public safety, it would be appropriate to authorize spectrum leasing. Over the long term, I believe the Commission should continue to explore the creation of secondary spectrum markets for other services.

The FCC has also recently focused on moving towards increasing the amount of unlicensed spectrum that is available for new entrants to provide telecommunications services. Today American consumers increasingly rely on unlicensed devices in their day to day work and home environments. For example, your cordless telephone, garage door opener and computer all operate on an unlicensed basis under the FCC's rules. In addition, many more innovative devices operating in the unlicensed bands are becoming commercially available. I had the honor to see many of the latest unlicensed devices just last week at the joint FCC, NTIA and Department of State Unlicensed Wireless Technology Exhibit. Some of the unlicensed technologies showcased included broadband wireless access systems and wireless voice systems for use in hospitals and similar environments.

In the unlicensed environment, the FCC does intervene to establish certain rules of the road to avoid harmful interference and allow multiple devices to operate in the same frequency band. The success of the unlicensed approach to spectrum regulation has been due in large part to the Commission's willingness and ability to clearly define the rules that govern the common use of this resource, while resisting the urge to impose heavy-handed regulation. This approach has encouraged capital investment, and in turn, new services have been introduced to the American people. Unlicensed bands, unlike the licensed bands, do not create property like rights, but rather focus on communal use. Accordingly, like drivers on the highway, all users must comprehend and obey the rules of the road and the FCC, as the regulator, must ensure its rules are clear.

The FCC is continuing to examine its current spectrum allocations to see if additional spectrum can be made available for unlicensed use. Just last week, the FCC issued a NPRM to authorize the use of an additional 255 MHz of spectrum for unlicensed devices for use by RLANs or wi-fi devices in the 5 GHz band, in anticipation of the outcome of WRC 2003. This item provides yet another avenue for the FCC to provide a mechanism for the deployment of broadband services.

I also believe that there is significant benefit to internationally harmonizing unlicensed bands where practicable and where it is in the public interest. Unlicensed

bands may be able to benefit from the scale and scope that international harmonization can provide. I believe it is incumbent on the FCC to support the global harmonization of unlicensed (as well as licensed) spectrum where appropriate. In this NRPM the FCC is doing just that by proposing to provide access to spectrum for RLANs in frequency bands that are consistent with the use in other parts of the world. The ability of U.S. manufacturers to capture scale and scope economics by developing equipment in these frequency bands on a global basis should result in lower costs to consumers and the availability of increasingly innovative equipment.

As you may also know, the FCC recently affirmed its decision to allow ultra-wide band devices on an unlicensed basis to be deployed in a large portion of the lower frequency bands. Ultra-wide band technology holds great promise for many applications including public safety. For instance, one company exhibiting at last week's unlicensed exhibition has developed a device that allows police officers to see through the walls of buildings to locate hostages. This is just one of many possibilities!

The FCC recently has also been seeking to provide greater flexibility to wireless licensees through its service rules. For example, in April the FCC adopted an order providing flexibility to public safety licensees in using the 4.9 GHz band for mobile and fixed broadband applications. Such flexibility will allow each public safety licensee to deploy systems in a manner that best serves the service and technological needs of their community. In addition, the FCC also provided a regulatory framework which promotes interoperability. This will allow traditional public safety entities to pursue strategic partnerships with both traditional public safety entities, such as the Federal Government, and non-traditional public safety entities, such as utilities and commercial entities, in support of their missions regarding homeland security and protection of life and property.

Another key action which the FCC recently took was issuing a NPRM governing the service rules for MMDS and ITFS licenses. As you may remember, last year I talked to you about the importance of granting mobile flexibility to these providers to ensure that they could respond to consumer demands with the most appropriate service offerings. This past March, we issued an NPRM seeking comment on the creation of a regime that allows licensees even greater flexibility in creating service choices and permits more efficient use of the 2.5 GHz band. Ultimately, by affording such flexibility, we should see more efficient utilization of the spectrum resource.

In sum, I believe that in general, the FCC, as a regulator, needs to continue down this path of letting go and having faith in the marketplace as it drafts its rules and policies. Such faith requires the Commission to refrain from regulating where the market can do a better job and where appropriate afford sufficient flexibility to its licensees to allow innovation. As the examples I've discussed demonstrate, by placing our faith in the marketplace, consumers benefit from increased innovation and lower prices.

At this time, I would like to thank you for the opportunity to speak to you today and open the floor for questions that you may have.