

“The Importance of the Market”

3G Americas Board Briefing FCC Commissioner Kathleen Q. Abernathy Washington, D.C. – June 3, 2003 As prepared for delivery.

First, I would like to thank you for the opportunity to spend some time with you to discuss an area that is very important to me. Specifically, today I would like to take some time to share with you my thoughts on the FCC’s role in creating a flexible and market-based regulatory environment that provides you the opportunity to be responsive to consumer needs through the development and deployment of innovative services and technologies.

I happen to agree strongly with the voice in the movie, “Field of Dreams” that said, “if you build it, they will come”. Except in this case, it is not baseball players and fields that are issue, but the ability of the FCC to adopt regulations that are market-based and provide sufficient flexibility to service providers to respond to market needs. If the FCC can craft this type of playing field, I believe that industry will have the ability and incentive to provide innovative technologies and services to consumers. You will build it and consumers will come.

To demonstrate my point I would like to take the opportunity today to focus on four areas in the wireless arena where I believe that the FCC has worked to craft a regulatory environment that permits this type of innovation to occur: 1) the adoption of regulations to facilitate the deployment of new technologies; 2) the creation of secondary markets for spectrum-based services; 3) the allocation of additional spectrum for unlicensed uses; and 4) the provision of additional flexibility in our rules for licensees.

First, it is imperative for regulators to stay ahead of the technology curve, and in a sense, be technology visionaries. In this regard, regulators must, like businesses, identify and understand emerging technologies. In addition, we must go a step farther and anticipate the potential effects of such emerging technologies on regulatory policies.

To this end, it is important that we also act as technology facilitators – that is – we must recognize and reduce regulatory barriers to entry for emerging technologies through the adoption of policies that tap the benefits of emerging technologies. This does not mean, however, that the regulator should pick winners and losers. Instead, we should enact rules that allow free market forces to decide whether a particular technology succeeds or fails. In this manner, the market will dictate the success of technologies, not regulators. For example, if the FCC had adopted the predominant technology of the time when it issued its rules for PCS, it would not have allowed for the development of CDMA, today one of the predominant technology choices.

A second area of importance for wireless providers is last month’s secondary spectrum market order which ushers in a monumental and much needed change in the way that spectrum is utilized in this country. This new approach was crafted to maximize efficient use of the spectrum and to free-up spectrum for new services.

The order institutes two major changes to our rules and policies. First, we revisited the Intermountain Microwave Test, which is a legal test we use to determine who has legal control of the license as defined by Section 310(d) of the Communications

Act. Just so you understand the importance of this – the Intermountain Microwave test for evaluating ownership control had been used by the FCC since 1963 – a period of 40 years. We decided to relook at this ownership test to see if it remains relevant in light of technological innovation, the need for increased spectrum efficiency, and the need to ensure that our regulations are more market-based. After reviewing the test, we found it appropriate to update our current standard to focus more on whether the licensee exercises effective working control over the use of the spectrum it leases, as opposed to the direct control of the facilities themselves.

This monumental change in our standard of what constitutes legal or de facto control under the Telecom Act provided the basis for us to create an effective secondary market spectrum regime. Specifically, under our new rules, licensees in the general wireless service will be able to lease spectrum to third parties either using a de facto transfer approach or a spectrum manager leasing approach. Even in the case of the de facto transfer approach, most parties will be able to qualify for streamlined approval of the transaction, while in the case of the spectrum manager leasing approach, all that is necessary is FCC notification. Of course, the lessor and the lessee are still subject to the terms of the underlying license.

To further our efforts to create an effective secondary spectrum market, we also adopted a further notice of proposed rulemaking which examines issues affecting the future development of secondary markets based on the regulatory framework already adopted in the order. In this follow up proceeding, we will examine whether for other services, such as broadcast, satellite and public safety, it would be appropriate to authorize spectrum leasing.

What will be the practical impact of this order be? First, I believe that this approach provides regulatory certainty to licensees about the amount and timing of Commission scrutiny of spectrum leases without diminishing the FCC's authority to take action against bad actors. Second, I believe that this order will lead to increased efficiency in the use of the spectrum. For example, a general wireless service licensee who may not need all of its spectrum in a certain geographic area may lease the spectrum to a third party who needs access to that spectrum. Once that lease is either notified or approved by the FCC, as required under our rules, that lessee will now be in a position to actually build facilities and provide service in that spectrum. In such a case, spectrum that may have been wasted is now being utilized. This approach also provides opportunities for lessees to gain access to spectrum to provide new and innovative services, again, as long as such use is consistent with the terms of the license. So, in our example, the lessee may be able to provide a different service than the lessor does, as long as that service is consistent with the underlying license. Over the long term, I believe that our creation of a secondary spectrum markets will dramatically increase the efficiency of the use of the spectrum and lead to the creation of new technologies and services.

A third important area receiving the FCC's attention is the increasing demand for spectrum for unlicensed uses. As you are most likely aware, each day we rely on many unlicensed devices to assist us at work and at play. For example, cordless telephones, garage door openers and computers all operate on an unlicensed basis. More recently, with the development of wi-fi, blue tooth, ultra-wideband and other technologies, there has been a dramatic increase in demand for the availability of and access to unlicensed

spectrum. Just last month at the Wireless Innovations Exhibit co-hosted by the FCC, NTIA and the Department of State, I had the privilege of viewing many of the most advanced of these technologies in action – including broadband wireless internet solutions for use in the home and office.

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 the resource, while resisting the urge to impose heavy-handed regulation. Our unlicensed bands, unlike our licensed bands, do not create property rights, but rather focus on communal use. Accordingly, like drivers on the highway, access to the unlicensed bands is available to all users, but these users must comprehend and obey the rules of the road and the FCC, as the regulator, must ensure its rules are clear. The benefit is that entrepreneurs can introduce new products to the market without the initial upfront costs associated with a spectrum auction.

The FCC is continuing to examine its current spectrum allocations to see if additional spectrum can be made available for unlicensed use. Just last month, the FCC adopted an item that proposes to allow access to an additional 255 MHz of unlicensed spectrum in the 5 GHz band. This was done in anticipation of the upcoming ITU global conference on spectrum allocation. Many parties both in the United States and globally have expressed interest in using this spectrum, once it becomes available, for wi-fi and other remote lan type devices to transmit high speed data. I believe that the increased capacity gained from access to this added spectrum, on a global basis, coupled with the ease of deployment and operational flexibility provided by our rules, will foster the development of a wide range of new and innovative unlicensed devices and lead to further wireless broadband access and investment.

The FCC also recently affirmed its decision to allow ultra-wideband devices on an unlicensed basis to be deployed in a large portion of the lower frequency bands. Ultra-wide band holds great promise for many applications. For instance, one company that demonstrated its product at the Wireless Innovations Exhibit is able to provide through wall technology that allows, for example, police officers to locate hostages and hostage takers in buildings. We can only imagine some of the other possibilities ---

In addition, the Commission is continuing to look for additional spectrum to make available for use by unlicensed devices, including at 70, 80 and 90 GHz. I fully support these and other efforts aimed at examining whether additional spectrum can be made available for such users.

The final area that I would like to discuss with you is my belief that to the extent that we are able to provide greater flexibility in our rules for wireless licensees that improves incentives to develop and provide new technologies and services where there is consumer demand. The FCC has recently taken several actions which I believe supports this approach.

First, in April we adopted an order providing flexibility to public safety licensees in their use of the 4.9 GHz band for mobile and fixed broadband applications. We also provided for interoperability in the band so that public safety licensees can pursue strategic partnerships with both traditional public safety entities, such as the federal government, and non-traditional public safety entities, such as utilities. These partnerships must be in support of their missions regarding homeland security and the protection of life and property. Such flexibility will allow each public safety licensee the

ability to deploy systems in a manner that best serves the service and technological needs of their community and possibly at reduced costs due to the partnering opportunity.

Another key action the FCC recently took to promote further flexibility in our wireless service rules was issuing a NPRM on MMDS and ITFS services. As you may know, over a year ago we added a mobile allocation to the MMDS/ITFS band – so that licensees could structure either mobile and/or fixed service offerings in the band. We wanted licensees to be able to determine the most appropriate products to offer consumers, thus maximizing the value of the spectrum resource. This NPRM goes a step farther by requesting comment on the creation of a regime that allows licensees greater flexibility in creating services choices and permits more efficient use of the 2.5 GHz band. We believe that ultimately by affording such flexibility we should see more efficient utilization of the spectrum resource in this band and the introduction of new services and technologies to consumers. The FCC’s challenge is continue to examine our service rules across all bands to ensure that such flexibility is afforded to other licensees, where warranted.

In sum, and to borrow once again from “Field of Dreams”, the FCC must continue to “seize the moment” by creating a regulatory environment that fosters the introduction of innovative technologies and services to consumers. While we have made significant advances in this area as demonstrated by the examples I discussed today, I am hopeful that we will progress farther. I would be very happy to hear from you, the innovators, as to what additional efforts you think that the FCC should take to achieve this goal.

Once again, I would like to thank you for inviting me here today and I am happy to take any questions you may have.