National Spectrum Managers Association
Remarks of FCC Commissioner Kathleen Q Abernathy
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As prepared for delivery.

Thank you for the opportunity to join you today – these are exciting times for spectrum management (and most people would not necessarily link the word exciting with spectrum) but both from where you sit and from the Commission's perspective – these are "big times" for spectrum policy. I have spent much of my career addressing spectrum issues – at COMSAT, Airtouch, in private practice and my prior stint at the Commission. It is a fascinating and complicated subject – and its importance grows at a time when American communications policy is crying out for innovation and the birth of new broadband pipes. We are looking to satellite and wireless policy to provide competitive alternatives.

Why? Because we currently have two broadband platform competitors – cable and wireline telephony. As a regulator – I believe – there may be no more important spectrum issue than facilitating the development of a spectrum-based pipe to challenge the two incumbent providers. The tremendous impact on the broadband marketplace would be swift, substantial and directly benefit consumers. And it is with an eye on that result, that I will review the major spectrum dockets that we are looking at today.

Any spectrum policy must begin with the recognition that – we are not starting with a blank slate. Decades of decisions -- on broadcast spectrum, federal government and defense use, and Commission allocations to services that have not quite worked out – have and will continue to limit our policy options. BUT we have also learned a great deal. For example, interleaved spectrum bands at 800 MHz don't make sense any more, detailed ownership and service restrictions are largely a thing of the past, the days of comparative hearings, lotteries and installment payments are over – AND we still have lots to learn. I would like to outline some of the contours of what I believe a successful spectrum policy should look like and touch on some of the Commission's major proceedings along the way.

Some have argued that all of our spectrum management policies can be solved if we only turned licenses into pure property rights or create a massive common so that all providers are required to share. Some have even argued that the government should get more involved in the inner workings of licensees to "help" them become more efficient or provide the "right" services. As much as I would like to be able to tell you that there is a spectrum management silver bullet out there – I am afraid I can't. Instead I believe we must use a variety of approaches to maximize overall spectrum utility and overcome legacy inefficiencies.

I see spectrum management policy along a continuum from a pure legal rights driven model – suggesting auctions, and property-like rights – to the other extreme which is a pure technology-driven model – that contemplates technology overcoming the challenges of sharing a common resource – and that second model is used in our unlicensed bands. Both models have proven very successful – indeed the CMRS marketplace is by far the most competitive market in the Commission's purview. Similarly our three unlicensed bands at 900, 2.4, and 5.8 have been tremendous success stories at driving innovation and delivering consumer products.

In the interest of ensuring that everyone gets to have lunch at some point today, I will focus my remarks on our licensed spectrum policy despite the many important and intriguing issues that arise in the unlicensed context.

For licensed bands, I believe the better regulatory model is rights driven. And that means the role of government is to define clearly the bundle of rights associated with a license and then protect the licensee from interference from other users – much as government protects your right to enjoy your land, or drive your car.

So let me begin with perhaps the most significant responsibility government has – to craft and enforce rules that prevent harmful interference to our licensees. Government, for the most part, has done a reasonably good job as the interference police. But this job becomes more complex by the day – and the recent public safety interference problems illustrate the challenges we face going forward.

As most of you know, we have issued a very open-ended NPRM on the 800 MHz band and the record we received has produced a broad set of proposals – HOWEVER -- in going forward our first priority has got to be to limit to the extent possible any future interference issues with public safety licensees. Next I believe we should attempt to resolve the interference issues at 800 MHz within the 800 MHz band if at all possible. To the extent we have to look to other bands, our goal should be to minimize the disruption created by our solution. I believe we also need to be sensitive not to impose significant costs on licensees who have not caused and do not suffer from significant interference. I hope we will be able to move promptly on this docket and put into place a mechanism to correct these interference problems and allow for the productive commercial and public safety use of the bands.

Once the Commission has stepped up to serve as "interference police" I believe our role should be to maximize the flexibility afforded to current licensees. Artificially limiting flexibility through government fiat does not assist anyone – in fact, it essentially results in government holding onto rights it cannot use and artificially limiting the spectrum market. I am very reluctant for government to hold back certain rights from licensees in order to "steer" them into providing certain perceived "desirable" services. So I fought hard to secure mobile rights for MMDS/ITFS providers. Once it was established that MMDS/ITFS licensees could not share with a third party mobile provider, I believe we faced a key decision in spectrum management – would we grant these rights to the incumbent – or continue to withhold this flexibility to allow other uses

in the bands. I believe we did the right thing in granting "mobile" flexibility to the incumbent operators so that the American people can enjoy whatever services market demand warrants from that band. Indeed, it would be a great result if one day fixed wireless broadband type services will evolve from MMDS/ITFS – but I am not prepared to limit those licensees to that business plan based on the goals of some government "market vision."

In contrast, in the Northpoint proceeding, we concluded that introducing a third party licensee was feasible – and in turn, that the Commission should auction off those rights to whomever valued the terrestrial rights the most. Here too the government shed itself of at least the perception that it "held" the terrestrial rights – and has now placed those rights into the marketplace to enable additional services to the American people.

We will soon face a similar choice with respect to ancillary terrestrial uses for satellite licensees. We have gathered an extensive record to assess whether sharing with third party terrestrial providers and a satellite system is feasible. I will take a very careful look at the record – to assess whether sharing is technically feasible. If it is, I think the Commission should hold an auction to allow those rights to evolve to the highest valued use (including potentially being bought by the satellite companies). But if third party sharing is not possible or if there would be tremendous inefficiencies caused by introducing a third party, I do believe ancillary terrestrial use makes sense. But it will be important to ensure the uses are truly ancillary so that these policies do not become a back door way to evade our statutory auction obligation in cases of mutually exclusive terrestrial applications. Either way, we need to get spectrum rights into the hands of those that can use them because it maximizes the utility of spectrum for the American people. The only alternative would be to artificially limit certain bands to certain uses – and that makes no sense for the public interest.

For better or worse, Government is -- by statute -- in the middle of spectrum trading, buying and selling. And we must do our job better. The FCC sometimes has taken too long to pass on transactions and hindered marketplace developments with prophylactic rules like the soon-to-be-retired spectrum cap. Similarly the Commission has been struggling with its secondary market policy for some time now.

Some key features will be essential to an effective secondary markets approach. I think a two track approach is warranted – first the Commission must ensure that transactions that amount to a transfer of control are addressed swiftly when they do not raise competitive concerns – which is the case for the vast majority of the 585,000 applications processed by the wireless bureau last year. So we should develop safe harbors that give some certainty to the marketplace about the types of routine transfers that do not warrant and will not receive significant Commission attention.

Second the Commission needs to clearly articulate when a lease does amount to a transfer of control. Obviously if a leasing arrangement does not trigger a transfer there is no need for government intervention, so long as our licensee is in charge. For the past 40 years we have relied on the complex and unevenly applied Intermountain Microwave test

to determine when a lease amounts to a transfer of control that requires government action. Yet Intermountain Microwave and its multi-factor multi-part test -- are vestiges of a bygone era on spectrum management. For example, Intermountain asks – among other things – does the licensee have unfettered use of the facilities and equipment, do they control daily operations, who pays financial obligations, who receives monies and profits -- and other badges of "control" that seem far removed from the actual statutory test of control and the realities of the current spectrum marketplace. We need to modernize the Intermountain Microwave test to focus on what the Commission licenses – which is spectrum – not the physical assets of some business concern. In a time when Software Defined Radio is no longer just a dream – how much sense does it make to tie control of spectrum to a piece of equipment or to a magic number of employees? The spectrum world of tomorrow will allow licensees and consumers to dynamically access the spectrum that is available right at the moment they need it for the lowest possible price. I believe that world requires a "control" test that focuses on the spectrum rights the Commission grants - that is, the ultimate control and responsibility for compliance of a particular amount of spectrum for a particular time over a particular geographic area. In other words, it cannot be the case that a licensee who holds a ten year license for 20 MHz of spectrum nationwide – loses control when leasing 5 MHz of spectrum for a month in the state of Missouri for a special project on crop performance. There is no doubt that these questions are difficult and I look forward to further refining my beliefs as we roll up our sleeves to get this important docket done.

And while we are on the topic of secondary markets – I do want to take a moment to discuss the Commission's current use of band managers as a method of facilitating secondary spectrum deployment. Band Managers are an important arrow in the Commission's spectrum management quiver. Some have argued that Band Managers amount to some sort of impermissible delegation of Commission responsibility – I simply cannot agree. Everyday big CMRS providers manage their spectrum license so that thousands of consumers and businesses can utilize their airwaves in their daily lives – and in turn CMRS providers make a profit by using the public's airwaves. Yet some have implied that the same conduct by a band manager amounts to an unlawful delegation of authority and some sort of nefarious act. Specifically, some argue that the revenue generated by leasing of spectrum rights to third parties should not be permitted.

Similarly some have attacked band managers because they are "only interested in profit" and will focus on their personal interests instead of the public interest. But remember, all licensees focus on their own personal interests and that is OK – so long as the Commission ensures that spectrum is allocated in such a way to maximize the public interest. Ultimately we rely on the personal interests in spectrum-based businesses to drive new products and services to consumers. In fact, I believe our goal of advancing the public interest is most effectively achieved when we harness the energy and drive of private interests in pursuit of those public goals. And if, for example, the band managers offer incentives to private land mobile licensees to use spectrum efficiently and dynamically –they serve the public interest.

I believe it is important that we not artificially limit spectrum use based on who owns which piece of equipment or the identity of the various payors and payees in these business transactions. As I discussed earlier, our test is appropriately a statutory one that rests on ultimate control. In the end, there are many instances where band managers serve the public interest because they allow the scarce spectrum resource to be managed more efficiently, and dynamically than is possible through specific government allocation.

Criticism based on the lack of any requirement that band managers provide "communications services" themselves is similarly off target. Band managers, like all Commission licensees, are subject to build out and service requirements. At the end of the day, so long as that service gets provided – I do not believe government should be particularly concerned about the business arrangements that result in that beneficial service to the American people. Band managers are ultimately responsible for fulfilling all of our regulatory mandates and requirements – if they fail to do so, they will be fined or have their licenses revoked. It is essential that the Commission hold band mangers to these requirements – but I do not believe it is essential that the Commission artificially limit band managers' rights as licensees.

Finally I want to emphasize that so long as government is in the middle of these secondary market issues and while that market continues to evolve – the FCC must keep in mind that one size does not fit all. That is, in economic terms, so long as initial allocations matter – and they do -- because folks don't do that much selling and leasing after they first buy spectrum licenses – it matters great deal how the Commission slices up the spectrum pie to distribute the various parts of it. In the future the Commission must continue to look at licensed and unlicensed approaches, site by site as well as geographic, nationwide licenses and RSA/MSAs, large spectrum blocks and narrow slivers, paired and unpaired. This every shape and size philosophy is complex to implement but I believe it is the only way to meet the increasing demands placed on government spectrum management policies today.

There are so many more issues out there – E911, UWB, homeland security, 700 MHz auctions – but I think its best I stop there – and open it up for questions.