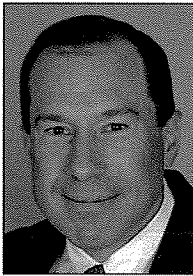


Spectrum-Leasing Marketplace Expands

By Russell H. Fox

It's been several years since the FCC adopted rules that permit licensees to lease spectrum to other entities. Since then, many entities have begun to lease spectrum, and those with spectrum needs have begun to take advantage of the new rules.



For years, licensees that wished to allow others to use their spectrum typically did so through management agreements. Those management

agreements were designed to allow others to operate a licensee's system (at least in theory); however, too often a management agreement was like trying to fit a square peg into a round hole. The entities involved wanted the manager to assume control over virtually all elements of a system's operations, but the FCC's rules prohibited licensees from transferring control of their operations.

The FCC's spectrum-leasing rules resolved this tension by recognizing that, at least in some cases, licensees can obtain permission from the FCC to transfer control of their stations, but remain the licensee of the station. This allows lessees to operate the system they want using the licensee's spectrum while adhering to the FCC's rules against unauthorized transfers of control, a win/win situation for business purposes.

Leasing Basics

Who can lease. Most wireless licensees can lease spectrum if they hold exclusive rights to that

spectrum. Most auctioned spectrum may be leased because auctioned spectrum is typically exclusive. In the land mobile services industry, nonauctioned, but exclusive spectrum at 800 MHz, 900 MHz, and 470-512 MHz may also be leased. Shared spectrum cannot be leased, principally because the lessee can obtain its own license for the same spectrum.

Types of leases. There are two types of spectrum leases. The most common is the *de facto* transfer spectrum lease. Under the *de facto* transfer lease, a licensee gives up operational control over its licensed spectrum to the spectrum lessee. Generally, this option is the business arrangement that most lessees have in mind. The other type of spectrum lease is a spectrum manager lease. Under this format, the licensee retains working control over the leased spectrum, although the lessee can make policy decisions regarding how it uses the spectrum. *De facto* transfer leases can be long term or short term. The duration of a long-term lease is one year or more, whereas a short-term *de facto* transfer lease is less than one year.

Filing for a spectrum lease. Spectrum-leasing applications are two-party applications (e.g., an application for assignment or transfer of control) and must be submitted electronically by a licensee and lessee. Leases for

spectrum manager arrangements do not require prior FCC approval, however, notifications of the lease must be submitted at least 21 days in advance of the beginning of the lease (at least 10 days in advance of the lease beginning for leases of a year or less). Once notice of a spectrum manager lease is filed, the FCC "accepts" the notification and references the submission of the notification in its weekly public notices.

Prior approval is required for *de facto* transfer leases. *De facto* transfer lease applications are subject to the general approval process, which generally results in FCC approval of the lease within 21 days from the time

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the application is referenced in a public notice, unless the FCC receives a petition to deny the lease or the applicant opts for the immediate approval process, which results in next-day FCC approval subject to the submission of petitions for reconsideration by third parties. To take advantage of the immediate approval

process, applicants cannot ask for a waiver, request the lease of spectrum to be used for interconnected mobile voice services in areas where the lessee already holds spectrum for that purpose, or be a "designated entity," a small business or similar entity that obtained spectrum at auction pursuant to a bidding discount.

Basic leasing guidelines. Leasing

rules are not a way to avoid eligibility restrictions. Leases must be in writing and contain particular provisions specified in the FCC's rules. Entities can generally only lease spectrum for which they would otherwise be eligible to license. Commercial entities cannot lease public safety spectrum or spectrum designated only for industrial/business use. Similarly, public safety entities cannot lease spectrum from a commercial entity, nor can a commercial entity lease spectrum designated for commercial purposes to a lessee that wishes to use it solely for internal communications needs. However, public safety entities (i.e., critical-infrastructure entities) can certainly be customers of commercial systems, in which case the nonpublic safety licensee retains control over the system operations. Critical-infrastructure and public safety licensees can lease spectrum to other similarly eligible entities. In addition, the FCC would likely be

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sympathetic to requests for waivers submitted by public safety or critical-infrastructure entities to lease commercial spectrum. Lessees are also generally subject to the rules governing the spectrum they are employing and the services they are providing.

Spectrum-leasing opportunities. For years, the FCC permitted instructional television fixed service (ITFS),

now the broadband radio service (BRS), licensees to lease their spectrum at 2.5 GHz when most other licensees could not. The FCC allowed ITFS licensees to engage in spectrum leasing because, among other reasons, the ITFS licensees had excess capacity even if they used their spectrum for educational video purposes.

The same rationale applies to most current leasing opportunities. Licensees are most likely to lease spectrum that constitutes either excess spectrum capacity or geographic coverage for them. The FCC has, for the past 10 years, licensed spectrum through auctions using broad geographic areas and large spectrum blocks. Licensees have found that they don't always need all the spectrum or the geography for which they are licensed. It may be more profitable to simply lease spectrum in an area than attempt to construct facilities using the spectrum

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and then attempt to sell service on that constructed system.

Licensees of fixed-wireless spectrum have been among the most active in leasing their spectrum. A significant amount of spectrum exists in the local multipoint distribution service (LMDS) 24 GHz and 28/31 GHz bands and the 39 GHz bands, and licensees of that spectrum have actively engaged in spectrum leasing.

Fixed-wireless spectrum is particularly susceptible to leasing because frequencies can be leased on a link-by-link basis, allowing a licensee to use or further lease the same spectrum in the same geographic area, provided the reused spectrum does not overlap the leased link. However, licensees and lessees of both fixed and mobile spectrum must carefully define the interference parameters for the leased spectrum so the spectrum can be re-leased or reused by the licensee. Similarly, lessees must be certain that their lease agreements

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specify the level of interference protection to which they are entitled from the licensee and other lessees of the same licensee.

Mobile wireless spectrum can also be leased, typically in areas where a licensee has no plans to use the spectrum. Some of the land mobile spectrum formerly designated exclusively for two-way paging purposes and recently licensed by the FCC through auction appears to be particularly attractive for leasing purposes. Small, local, and regional companies are sometimes more willing to lease spectrum than the larger nationwide wireless carriers that tend to hold the licenses.

In its spectrum-leasing proceeding, the FCC questions whether it should foster a spectrum-leasing exchange so that the needs of

spectrum lessees and the availability of spectrum for lease are more transparent. One commercial spectrum exchange is available, however, the FCC universal licensing system (ULS) generally provides all the tools necessary for a potential spectrum lessee to locate licensees of spectrum that they might want to lease.

As spectrum demands grow and both spectrum "haves" and "have-nots" become more familiar with leasing, spectrum leasing will continue to expand, fostering a true marketplace for spectrum. ■

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