

Information Technology and Innovation Foundation
700 K Street NW, Suite 600
Washington, DC 20001

Comments of ITIF
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)
Partitioning, Disaggregation, and Leasing of)
Spectrum)
)

WT Docket No. 19-38

February 28, 2022

INTRODUCTION AND SUMMARY

Wireless connections have become increasingly integral to Americans' lives. They form the basis of entire sectors of the economy in urban and suburban areas while also providing an economically viable means of broadband service in rural areas. Ensuring the marketplace for spectrum licenses works efficiently to drive frequencies to their most productive use is a central piece in any policy framework that seeks to sustain and grow the wireless ecosystem. The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on the Commission's efforts to encourage efficient partitioning, disaggregation, and leasing of spectrum.¹ The Further Notice of Proposed Rulemaking (Further Notice or FNPRM) is, in concept, a laudable step toward increased spectrum productivity, but some details of the Further Notice are at odds with the best possible outcomes the proposal could deliver.

INCENTIVIZING SECONDARY-MARKET TRANSACTIONS IS CRITICAL TO SPECTRUM PRODUCTIVITY

The Commission should be commended for taking tangible steps to incentivize secondary market transactions in spectrum licenses. The Further Notice's stated goal of "providing a path to removing unnecessary regulatory barriers to facilitate secondary market transactions and easing administrative burdens for stakeholders and the Commission" is precisely the right one to facilitate the development of sustainable wireless services and productive use of spectrum.²

The public interest is best served when spectrum is used as intensively as possible, and markets are the best way to drive licenses to productive uses.³ Indeed, as the Commission recognizes, there are many rural areas that could be served more efficiently and with more interest by companies who do not currently hold a license to operate in that area. A partition, disaggregation, or lease of a portion of the license is mutually beneficial in such cases. While, in the absence of transaction costs, we would expect such transactions to occur

¹ Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, <https://itif.org/about>.

² Partitioning, Disaggregation, and Leasing of Spectrum, WT Docket No. 19-38, Further Notice of Proposed Rulemaking (Nov. 2021), para. 59, <https://ecfsapi.fcc.gov/file/111949194160/FCC-21-120A1.pdf> (hereinafter "FNPRM").

³ Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2, (1959), <http://www.jstor.org/stable/724927>.

spontaneously, the Commission's processes often impose immense transaction costs such that consummating the partition, disaggregation, or lease often becomes infeasible.⁴ The incentives in the FNPRM's enhanced competition incentive program (ECIP), lengthen the license term and period to complete buildout requirements, are positive steps to change this calculation and make more secondary-market deals worthwhile to participants.

The benefits of efficient spectrum allocation are realized by consumers regardless of the Commission's underlying regulatory goals, but, in this case, the special goals noted by the Commission—serving rural and tribal areas—are indeed positive side effects of a more robust secondary market for spectrum licenses.

LIMITATIONS ON PROGRAM PARTICIPANTS COULD LIMIT ECIP'S EFFECTIVENESS

The ECIP program is a good idea, but the Commission should commit to it fully rather than limiting it with special qualification prongs. For example, while small and tribal carriers joining the wireless marketplace is beneficial, it is unclear why the Commission should help them to the exclusion of other carriers. Managing spectrum in the public interest means ensuring that it works to the benefit of consumers, not to any particular class of wireless company. Admittedly, the rural service prong would encompass a large swath of potential carriers, but to maximize the benefits of the ECIP program, the Commission should err on the side of fewer requirements for qualification, not more.

LIMITATIONS ON QUALIFYING TRANSACTIONS WOULD UNDERMINE ECIP'S GOALS

The Commission is right to incentivize partitioning, aggregation, and leasing of spectrum to rural and tribal areas, but some of the Further Notice's proposals unnecessarily limit the public-interest benefits of the program.

For example, the proposed requirement that a qualifying transaction “include a minimum of 50% of the licensed spectrum for each license(s) that is part of the transaction in a geographic area” is counterproductive.⁵ Given the Commission's topline goal of serving rural and tribal communities, it should not matter how much of the license is transferred as long as this goal is accomplished. A more flexible and open approach to transactions within the overall goal of rural and tribal service would allow for participants to find innovative ways to meet that goal. The Commission's stated rationale for this proposal is to ensure “sufficient spectrum is available for the provision of advanced telecommunications services” and to prevent transfers of “de minimis

⁴ See generally Joe Kane, “Comments to the FCC in the Matter of Partitioning, Disaggregation, and Leasing of Spectrum,” (R Street Institute, 2019), <https://ecfsapi.fcc.gov/file/10530585006150/R%20Street%20Partitioning%20Disaggregation%20and%20Leasing%20Comments.pdf>.

⁵ FNPRM, paras. 19, 26.

spectrum amounts...solely to obtain ECIP benefits.”⁶ But if a carrier can find a way to provide advanced telecommunications services with less spectrum, that is cause for celebration, not exclusion from ECIP. It is no sham to transfer the amount of spectrum needed to achieve the policy goals of ECIP, even if that amount happens to be small. Moreover, the Further Notice envisions that transferees will be under enforceable buildout requirements, so they have every incentive to ensure they have sufficient spectrum to meet their service obligations.

For similar reasons, the Commission should reconsider the proposal to require the minimum geography for ECIP transactions under the rural-focused prong.⁷ If there is a geographic area of fewer than 300 square miles that is in need of service, allowing that small transaction promotes the policy goals of ECIP, and blocking that transaction would hinder the achievement of those goals. The FNPRM’s own analysis describes the additional complexities and drawbacks of this approach by pointing out that license areas may not be uniformly rural, so the Commission would have to determine the collective amount on non-contiguous blocks of rural or tribal land to determine if a transaction meets the eligibility threshold.⁸ This additional layer of consideration would add administrative burdens for the Commission and transaction costs for market participants. The end result of such an approach would thus be to prevent a geographically small area from getting coverage simply because it is small. Instead of prescriptive rules that will tend to block potentially beneficial transactions, the Commission should rely on after-the-fact enforcement actions to prevent and punish the perpetrators of sham transactions without unnecessarily hampering legitimate efforts to provide coverage.

A parallel problem exists with the proposed “holding period” and minimum lease terms. As the Commission recognizes, the time between transfers of spectrum rights and the duration of leases exist within the “realities of the market” which “often result in early termination.”⁹ But rather than letting these “realities,” i.e., changes in the productive use of spectrum, play out as the norm, the Further Notice proposes treating all transactions as presumptively abusive if they do not transfer rights over a long period of time. For rural and tribal areas to see the most benefits from wireless services, there should be a robust a vibrant market for spectrum licenses, one that is able to react to the demand for wireless services and route spectrum to those carriers who can use it most productively. Mandatory five-year holding periods or lease terms would inject sclerosis into a system that should be tuned for dynamism. Rapid and frequent transfer of spectrum rights is a feature, not a bug. Here, again, the Commission would be better served to allow bona fide transfers and leases of any frequency

⁶ FNPRM, para. 19.

⁷ FNPRM, para. 27.

⁸ Id.

⁹ FNPRM, para. 41.

and duration, and then to allow third parties or the Commission itself to challenge those transfers that present concrete reasons for suspicion.

THE COMMISSION IS RIGHT TO REEVALUATE BUILDOUT REQUIREMENTS

Though the Commission’s buildout requirements are a common tool to combat anticompetitive spectrum warehousing, the Further Notice correctly identifies some of their weaknesses and helpfully tees up a broad reevaluation of such requirements for all WRS flexible use licensees.¹⁰ The goal of serving rural areas and niche locations (like oil refineries, railroads, or farms) is at odds with buildout requirements based on serving a percentage of the geographic area or population within a license area. The FNPRM’s proposed safe harbor for such activities only serves to highlight the futility of top-down buildout requirements.¹¹ It has always been the case that there could be benign or even beneficial reasons not to deploy to the same degree in every part of a license area. The only malign threat from a lack of buildout is a concerted anticompetitive effort to withhold spectrum from rivals. While this concern is not negligible, it would be better addressed by facilitating a robust secondary market that imposes substantial opportunity costs on such practices, rather than imposing buildout requirements as a matter of course and then providing exemptions for benign practices.¹²

The ECIP is itself a step in the right direction on this front—providing incentives that grease the wheels of the secondary market. The Commission should commit to the theoretical basis embodied by ECIP and seek to further incentivize secondary market transactions where they would enhance spectrum productivity.

The Commission also asks about “use or share” models.¹³ A use-or-share mechanism would provide significant benefits by making spectrum more available and facilitating more intensive use. A successful use-or-share regime is also a good substitute for buildout requirements since spectrum lying fallow in a manner that is inefficient or anticompetitive is impossible when anyone can use a license area to the extent that the licensee does not use it. The main barrier to the immense benefits of use-or-share is a lack of consistent technological capabilities. Use-or-share would be a beneficial supplement to the existing market for licenses with the right to exclude harmful interference, and it can only work if the primary licensee can be confident that it will get the usage rights it paid for. Therefore, the Commission should seek to encourage development

¹⁰ FNPRM, para. 52.

¹¹ FNPRM para. 54.

¹² That is, given a robust secondary market, a licensee that seeks to warehouse spectrum will have to turn down potentially lucrative offers from other players who seek to deploy under that license, thus forgoing a significant benefit and eroding the net benefits of the anticompetitive scheme.

¹³ FNPRM, para. 65.

of more reliable use-or-share systems and implement them to the extent that the technology can realize the benefits of opportunistic use without hampering the rights of incumbent licensees.

CONCLUSION

ITIF supports the FCC's efforts to grease the wheels of the secondary market for spectrum rights and heartily agrees with the Commission's evaluation that the proposal "will reduce regulatory burdens with less frequent renewal obligations and will properly incentivize secondary market transactions." The Commission should commit to the productivity-enhancing nature of dynamic spectrum markets by declining to adopt those proposals that would reduce the number of beneficial transactions ECIP could otherwise deliver.

Joe Kane
Director of Broadband and Spectrum Policy
Information Technology and Innovation Foundation
700 K Street NW, Suite 600
Washington, DC 20001