LEASING SPECTRUM USE: A MIDDLE PATH BETWEEN "PROPERTY" AND "COMMONS"

The FCC has only discussed two alternatives for spectrum management: turning licenses into property interests and permitting more unlicenced uses as a "spectrum commons." Both these approaches represent radical departures from existing policy and, if fully implemented, may permanently freeze U.S. spectrum policy in a paradigm that doesn't work but cannot be reversed.

Media Access Project (MAP) and New America Foundation (NAF) propose a different approach. The FCC should expand the available spectrum for unlicenced uses so that technology can continue to mature. At the same time, the FCC should increase the flexibility of existing licenses so that existing licensees can offer Internet service to subscribers. Instead of having an auction and selling licenses, however, the FCC should lease licenses for terms long enough to provide certainty to investors, but which allow the spectrum to be reclaimed if new technology makes exclusive licenses obsolete. Leases also avoid many of the problems of auctions – such as high up-front costs and nonpayment due to bankruptcy. Leases also permit the FCC to prevent warehousing or other forms of speculation that prevent those willing to exploit the spectrum from doing so. Finally, both the Communications Act and the First Amendment prohibit permanent exclusive licenses.

Experts agree that use of the wireless spectrum holds great potential of providing "last mile" broadband connections. The potentially low cost of deployment (potentially a single receiver in the subscriber's home) and resulting possibilities for competition by multiple "facilities based" providers makes wireless an ideal choice for rural areas, poor urban areas, and other places where telephone companies and cable companies find it less profitable to deploy. Even where wireline alternatives exist, wireless offers potential competition that can only benefit subscribers. Until recently, however, the Federal Communications Commission (FCC) has tightly controlled both who may use the wireless spectrum and in what fashion. This has inhibited the development of wireless as a genuine means of providing high-speed broadband connectivity at the "last mile" between the subscriber and the Internet backbone.

An FCC task force recently proposed converting licenses into property as a means of promoting flexibility. The task force proposed that the FCC auction available spectrum and create secondary markets so that licensees could sell their licenses freely. Existing licenses would also be granted property status and flexibility. Even if the Communications Act permitted such an approach (the task force acknowledged it would require Congressional action to make licenses real property, but proposed ways for the FCC to "game" the rules to achieve the same result) it is totally unnecessary for the goal of achieving flexibility and Internet deployment.

Instead, MAP and NAF have proposed that the FCC expand the flexibility of licensees by leasing spectrum rather than selling. Existing and new licensees would receive new, flexible long-term licenses, but with a definite and set expiration/renewal period. As they do now, licensees would have an expectation of renewal and could transfer their licenses subject to FCC approval. In exchange, the licensee would pay an annual "rent" based on revenue. Congress mandated this approach in 1996 with regard to non-broadcast services provided by digital television broadcasters using DTV spectrum. In addition, Congress has usually used a leasing approach for management of public resources (*e.g.*, grazing land, oil and natural gas). This allows private companies to develop public resources while retaining ultimate ownership and control of the public resource with the American people.

The property approach presents the following real difficulties:

Auction turn out to be less efficient than everyone thought. In 1993, Congress authorized the FCC to allocate spectrum licenses by auction. With ten years of experience, it appears that auctions are not as efficient as everyone thought. Bidders must put up huge sums before they can hope to turn a profit, excluding all but the wealthiest or those willing to take on mammoth debt. Worse, the bidder must guess the value of the spectrum without any guidance. As a result, the FCC's auctions have produced a combination of massive overbids (with accompanying bankruptcies or exclusion of small businesses) or underbids. Worse from a fiscal standpoint, ***the Treasury may never receive the money***. As a result of the Supreme Court's decision this year in *Nextwave v. FCC*, a bidder may declare bankruptcy, avoid payment on a license, and the FCC cannot cancel the license and re-auction it. In the *Nextwave* case, Nextwave bid $4.5 billion for its spectrum, but paid only a fraction of this.

Property gives too much power to a limited number of Spectrum "landlords." If the auction winner chooses to speculate against the value of the spectrum rather than deploy services, the public loses the benefit of the spectrum. Even if the winners do deploy, the licensee may thwart the entry of competitors in the same way that incumbent telephone companies and incumbent cable companies have attempted. A license conveys a government monopoly on spectrum use in a region. If a given region has only one or two licensees (post-auction and post-consolidation), the spectrum monopolist or duopolist can dictate the nature of deployment and its rate without oversight.

Property runs counter to the First Amendment. Spectrum is not a physical resource, like land or steel. A license is a government enforced monopoly on use of the electromagnetic spectrum. The only reason the Constitution permits such a limitation on personal action is because if everyone tried to broadcast, each signal would interfere and prevent any use of the spectrum. *Red Lion Broadcasting v. FCC,* 395 U.S. 367 (1969). This is, however, a technological limitation. The First Amendment does not permit the FCC to make this government monopoly on who may speak permanent, or without restriction.

Others have proposed a "commons" approach, wherein the FCC permits greater unlicenced use of the spectrum. Even the limited unlicenced use of the spectrum allowed today has facilitated new communications possibilities, such as Wi-Fi. While MAP and NAF encourage allocation of spectrum for unlicenced use, the technology remains in its infancy. It is too early to tell whether the FCC can abandon exclusive licensing altogether. The leasing approach proposed by MAP and NAF, however, leaves open the possibility that spectrum may be reclaimed for the commons as technology evolves.

For more information, see the MAP Website at and the NAF website at www.newamerica.net.