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Federal Communications Commission
Washington, D.C. 20554

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FEB - 6 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of	)	
	)	
Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures	)	WT Docket No. 97-82
	)	
Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use	)	ET Docket No. 94-32
	)	
4660-4685 MHz	)	

To: The Commission

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.415 and 1.419, hereby files comments on certain proposed rules governing Designed Entities contained in the Commission's December 31, 1997 Third R&O and Second FNPRM[1] in the above-captioned dockets. In support hereof, the following is respectfully shown:

I. STATEMENT OF INTEREST

Western is a publicly traded corporation which, through its operating subsidiaries, holds licenses throughout the western United States for cellular radio, microwave, PCS and one-way paging facilities. Western's combined cellular and PCS licenses, along with its 49.9 percent

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[1] In the Matter of Amendment Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, and Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rule Making, FCC 97-413 (Dec. 31, 1997) ("Third R&O and Second FNPRM").

investment with Cook Inlet Regional, Inc. and other investors in a Designated Entity ("DE") licensee named Cook Inlet Western Wireless PV/SS PCS, L.P. ("Cook/Western"), cover approximately 66 million people and well over 60 percent of the geographical area of the continental United States. Western owns and operates cellular systems in 18 western states, serving over 89 primarily Rural Service Area ("RSA") and small MSA markets with an aggregate population of about seven million.

Through its subsidiary, Western PCS Corporation ("Western PCS"), Western holds PCS licenses for seven A and B Block Major Trading Areas ("MTAs")[2] and 104 D and E Block Basic Trading Areas ("BTAs"). In addition, Western holds, through Cook/Western, a non-controlling interest in 14 C Block and seven F Block BTA licenses. Western also is a limited partner in a partnership controlled by more than 100 rural telephone companies in Iowa, which limited partnership will upon closing hold one partitioned A Block MTA and four D Block BTA licenses. In the Cook/Western markets, Western provides technical and management services, and its expertise and suggestions relative to service offerings, terms and pricing are valued by the general partner and are key components of the relationship. Though Western will not manage the Iowa markets, it will provide input to the general partner as to service offerings, terms and pricing. All markets which Western owns or in which it holds or will hold non-controlling interests are or will be operated on a Global Systems for Mobile Communications ("GSM") platform under Western's "Voice Stream" label.

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[2] Western PCS subsidiaries hold the following MTA licenses : Portland, Oregon (MTA No. 30-A); Des Moines-Quad Cities, IA (MTA No. 32-A); Oklahoma City, OK (MTA No. 41-A); Salt Lake City, UT (MTA No. 36-A); El Paso-Albuquerque, TX-NM (MTA No. 39-A); Honolulu, HI (MTA No. 47-A); and Denver, CO (MTA No. 22-B).

With existing DE relationships already in place and the reauction of the C Block scheduled for September 29, 1998,[3] the Commission's proposed changes to the DE rules, particularly those concerning attribution of revenues (and possibly assets) of a DE's investors and affiliates, are of the utmost of importance to Western. The scheduled C Block reauction will present probably the last best opportunity for DEs in particular (and PCS carriers in general) to fill holes in the national footprint of their chosen digital standard. Equally important, DEs holding the F Block and other PCS carriers holding 10 MHz spectrum blocks who are committed to a particular digital standard need flexibility to pool their spectrum and resources in specific markets in ways that will enhance their ability to compete with larger entrenched wireless carriers. While it is not the Commission's job to favor one technology or one competitor over another, the existence of these significant competitive forces is an important factor supporting the Commission's proposal to afford greater flexibility to DEs. It is imperative, however, that any rules ultimately adopted actually provide the desired flexibility and do not result in unintended restrictions upon existing DE relationships or their future opportunities.

II. IF A "CONTROLLING INTEREST" STANDARD IS ADOPTED IN PCS, IT SHOULD NOT BE COUPLED WITH MORE RESTRICTIVE ATTRIBUTION RULES FOR MANAGEMENT AND JOINT MARKETING AGREEMENTS.

Under proposed rule Section 1.2110(c)(H) and (I), the Commission will attribute the ownership of a DE investor that provides management services to, or is involved in joint marketing with, a DE applicant or licensee, if that investor "has authority to make decisions or otherwise

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[3] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order, WT Docket No. 97-82 (rel. Jan. 7, 1998), para. 3.

engage in practices or activities that determine or significantly influence[:]"

(i) the nature or type of services offered by such an applicant or licensee;

(ii) the terms upon which such services are offered; or

(iii) the prices charged for such services.[4]

Nowhere in the text of the Third R&O and Second FNPRM does the Commission explain why a liberalization of minimum equity ownership requirements for a PCS control group, for example, or for qualifying investors in such a control group, would need to be coupled with the new onerous restrictions that the above proposed rule sections represent. It appears that the Commission may have unwittingly proposed to engraft an attribution test it uses for CMRS spectrum cap purposes[5] upon a DE control analysis without considering the different regulatory objectives in each case or the unintended consequences of implementing such a restrictive regime. The proposed limitations may make sense for spectrum attribution purposes because in that circumstance, the involvement of a system manager or joint marketer in pricing and product decisions could potentially create the same kind of anticompetitive effect in a market as one carrier being licensed for an excessive amount of spectrum. The spectrum caps were designed to thwart such a concentration in a single carrier's hands. Such involvement, by itself, however, should have no bearing upon the Commission's ascertainment of an applicant's financial size for purposes of eligibility. To make that determination, the Commission relies upon *Intermountain*[6] and other service-specific criteria to find

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[4] *See* Third R&O and Second FNPRM, Appendix E at 3.

[5] *See* 47 C.F.R. § 20.6(d)(9) and (10); *see also* Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Fourth Report and Order, 9 FCC Rcd 7123 (1994) (CMRS Fourth Report and Order), paras. 25 and 31.

[6] *See* Intermountain Microwave, 24 RR 983 (1963).

the locus of control within a PCS licensee or applicant The Commission itself made precisely this distinction in adopting the CMRS spectrum caps,[7] and it has been the Commission's goal since the inception of licensing DEs in PCS to make available to them the full range of turnkey management and marketing services that experienced telecommunications companies have to offer.[8] The Commission has recognized that such services would likely be vital to the success of DE enterprises.[9] Given the number of C Block DEs that have declared bankruptcy or are financially imperiled, the Commission should take no action that would in any way harm its C Block success stories, of which Cook/Western is one.[10] Forcing Cook/Western to alter its existing C Block relationship or prohibiting such a relationship in future PCS auctions could not possibly have been intended.

III. THE NEW RULES SHOULD AFFORD FLEXIBILITY TO OWNERS OF C AND F BLOCK LICENSEES TO RECONFIGURE THEIR OWNERSHIP INTERESTS OR ENTER INTO NEW BUSINESS RELATIONSHIPS AMONG THEMSELVES WITHOUT CREATING DISQUALIFYING AFFILIATIONS

The Commission has emphasized in the past that it has a "strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace."[11] For this reason it has held that "normal

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[7] *See* CMRS Fourth Report and Order, at para. 24-25.

[8] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, FCC 94-285, 10 FCC Rcd 403 (1994) (Fifth MO&O), para. 85.

[9] *Id.* at paras. 4 and 86; *see also* CMRS Fourth Report and Order, at paras. 4-6 ("We believe management agreements . . . can enhance the competitiveness of wireless service providers").

[10] On June 5, 1997 Cook/Western launched the Tulsa C Block system, the first major market to commence commercial PCS operations under the Commission's "Designated Entity" program.

[11] *See* Fifth MO&O, at para. 27.

projected growth of gross revenues or assets, or growth such as would occur as a result of a control group member's attributable investments appreciating, or as a result of a licensee acquiring additional licensees . . . would not generally jeopardize continued eligibility as an entrepreneurs' block licensee."[12] Similarly, the Commission has said that if a PCS control group is in compliance with the service-specific attribution and *de jure* and *de facto* control requirements, it would not apply its affiliation rules in a manner that defeats a DE's eligibility.[13] In other words, inherent in every DE relationship are one or more affiliations, which the Commission will not consider to be attributable if properly structured. In the same vein, in the Third R&O and Second FNPRM, the Commission amended Section 1.2110(b)(4)(x), 47 C.F.R. §1.2110(b)(4)(x), to clarify that the term "consortium," which is defined as a joint venture of independent businesses, each satisfying the PCS DE eligibility rules, will not be treated as a "joint venture" under its attribution standards.[14] Attribution resulting from a finding of affiliation among consortium members would be inconsistent with the Commission's goal of allowing small businesses to form such consortia to enhance their ability to form associations that would permit them to bid for licenses that would be too expensive for them individually. In all of the above examples the Commission has taken a pragmatic approach and not allowed rules to be applied in a manner that would defeat its regulatory objectives. The same guiding principle should prevail if the Commission adopts the proposed "controlling interest" standard.

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[12] *Id., see also* Second Report and Order, at para. 265.

[13] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order, FCC 94-215, 9 FCC Rcd 7245 (1994) ("Second MO&O"), para. 91.

[14] *Id.* at paras. 29-30.

Thus, for example, if the owners of a DE licensee were to realign their interests in the existing licensee under a "controlling interest" standard or create a new alignment in a separate entity for the upcoming auction, the affiliation rules should not be applied against them, based on their prior relationship or common investment, to defeat eligibility. Moreover, flexibility for DEs is particularly important if the public *and* F Block licensees are to realize the benefits of cooperative deployment of the D, E and F Block spectrum, which the Commission envisioned when it decided to auction this spectrum simultaneously in a single auction.[15] In order for F Block licensees to have access to at least 20 MHz of spectrum, which is the amount most experts generally believe is necessary to provide a service competitive with 25 MHz cellular incumbents or 30 MHz PCS incumbents,[16] F Block licensees — unless they were fortunate enough to have previously acquired the D and/or E Block in the auction — will have to pool their resources with non-DEs. This may take form in a variety of relationships pertaining to the use of the spectrum, the ownership, construction and maintenance of common facilities, as well as management, joint marketing or other agreements. All of these new relationships are potentially bases for finding affiliations under a strict reading of the Commission's rules, but here as elsewhere the Commission will have to find a pragmatic approach that advances the interests of DEs and enhances competition in the wireless industry.

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[15] *See* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96-278, 11 FCC Rcd 7824 (1996), paras. 143 - 149.

[16] *Id.*, para. 101.

IV. THE COMMISSION SHOULD CLARIFY PARAGRAPH 187

In paragraph 187 of the Third R&O and Second FNPRM the Commission states that if its proposed "controlling interest" standard is adopted, "passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule."[17] It is difficult to comment on this statement because its meaning is not clear. The language seems to suggest that a passive interest of an affiliate of a DE, whose ownership in the DE was formerly non-attributable, will become attributable under the proposed more relaxed standard. The statement appears to be inconsistent with the purpose of the new rules. In PCS, with limited exception,[18] the only affiliate of qualifying persons in a DE that could insulate its interest from attribution was one whose affiliation arose (under a technical reading of the rules) solely by virtue of its investment in the DE itself.[19] Otherwise, any affiliates of qualifying persons outside of the DE had to have their financial size attributed to the applicant.[20] If the Commission moves from a control group to a "controlling interest" standard as the basis for attribution in order to afford DEs greater flexibility, it would make no sense to suddenly attribute the financial size of passive investors outside of the "controlling

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[17] *Id.*

[18] *See e.g* 47 C.F.R. §24.720(l)(11) (excluding from affiliation coverage certain Alaska Indian tribes or corporations).

[19] *See e.g.* Third R&O and Second FNPRM at paras. 29-30.

[20] *See* Second MO&O, at para. 91

interest," where the only potential basis for finding an affiliation on the part of such investors was their investment itself.

Respectfully submitted,

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February 6, 1998

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