

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of)
)
Amendment of Part 1 of the)
Commission's Rules --)
Competitive Bidding Procedures)
)
Allocation of Spectrum Below)
5 GHz Transferred from)
Federal Government Use)
)
4660-4685 MHz)

WT Docket No. 97-82

ET Docket No. 94-32

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To: The Commission

REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby files reply comments concerning certain proposed rules governing Designed Entities contained in the Commission's December 31, 1997 Third R&O and Second FNPRM.^{1/} As shown below, it is critically important that the Commission further clarify the scope and content of its proposed attribution and affiliation rules. Moreover, any such rules which are ultimately adopted should be applied in a manner that actually affords greater flexibility to applicants and licensees and does not retroactively impose additional regulatory burdens. By the same token, any new rules adopted should not be available to cure basic qualifying

^{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").

defects which may have existed within the ownership structure of an applicant or licensee under the rules that governed prior auction licensing processes. In support hereof, the following is respectfully shown:

I. THE COMMISSION MUST CLARIFY WHETHER IT INTENDS THE PROPOSED "CONTROLLING INTEREST" STANDARD TO APPLY TO PCS AND IT MUST DEFINE THE TERMS OF ATTRIBUTION MORE CAREFULLY

By proposing "to adopt uniform rules and definitions for the attribution of gross revenues and affiliates for *all* auctionable services"^{2/} and specifically contrasting the existing control group requirements for PCS with the proposed "controlling interest" standard,^{3/} the Commission invited the inference that PCS was within the ambit of the proposed rules. Nevertheless, while Appendix E contains specific proposed rules under Part 1 to codify the "controlling interest" standard, it contains no similar proposed rules under Part 24. The Commission should clarify the scope of its proposal in relation to PCS and specifically whether it is intended that the new standard would be applicable to the upcoming "C" Block reauction.

In addition to clarifying the scope of the proposed rules, the Commission should also clarify their content. Western agrees with the Rural Telecommunications Group ("RTG") that proposed rule Section 1.2110(c)(2)(i), defining "controlling interest," should be modified to remove the word "includes," which suggests that individuals or entities who do not possess either *de jure* or *de facto* control might nonetheless be deemed to hold a controlling interest.^{4/} In addition, the rule should be framed in the disjunctive so that only parties who possess either *de jure* or *de facto* control are

^{2/} Id., at para. 183 (emphasis added).

^{3/} Id.

^{4/} Comments of the Rural Telecommunication Group (Feb. 6, 1998), at 18.

deemed to be holders of controlling interests. Western also agrees with RTG that proposed Section 1.2110(c)(2)(ii)(F), attributing the interests of officers and directors of an entity, should be modified.^{5/} The litmus test of the proposed more flexible standard for attribution must be control. Otherwise, the new rule yields no benefit in terms of marketplace flexibility or simplicity of administration by the Commission. Only where an officer or director, alone or in alignment with others, possesses *de jure* or *de facto* control or the power to exercise such control, should his or her interest be attributed.

No commenting party has disagreed with Western on its position concerning attribution under management and joint marketing agreements, and the Commission should modify its proposed rules consistent with Western's comments and comments filed by Cook Inlet Region, Inc.^{6/}

Finally, the Commission should eliminate the arguable loop hole on affiliation which may have been exploited by venture capital firms in LMDS. Except where existing rules already provide a specific exclusion, the Commission should look at the affiliates of controlling interest holders themselves, and not just at the affiliates of the applicant. In most cases, the applicant is a newly formed entity which has no affiliates, and a failure to look at affiliates of its controlling principals invites abuse of the designated entity regime.

II. THE NEW ATTRIBUTION AND AFFILIATION RULES SHOULD NOT BE APPLIED WHERE THE EFFECT WOULD BE DETRIMENTAL TO A PCS LICENSEE PROPERLY STRUCTURED UNDER THE COMMISSION'S ORIGINAL RULES

Under no circumstances should the Commission allow new rules adopted in this proceeding to be applied in a manner that would jeopardize *bona fide* designated entity relationships already in

^{5/} Id. at 20-21.

^{6/} Comments, Cook Inlet Region, Inc. (Feb. 6, 1998).

place. Obviously that would defeat a primary purpose of this rule making. As Western noted in its comments, however, there may be benefit in affording existing licensees the additional flexibility of a "controlling interest" standard in order to enhance the possibilities for new forms of cooperation among existing designated entity partners or investors. Such added flexibility would maximize the designated entity's opportunities for success in its already licensed markets and in pursuing new auction opportunities. In no event, however, should the Commission permit any designated entity to use the new rules to cure disqualifying defects in its ownership structure that existed during the pertinent auction or at the time it received a grant of its license from the Commission.

Respectfully submitted,

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