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August 6, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S. W.
Room TW-A325
Washington, D. C. 20554

**Re: Notice of Ex Parte Presentation**
**WTB Docket No. 00-230**

Dear Ms. Salas:

On Friday, August 3, 2001, I spoke with Jim Schlichting and David Furth of the Wireless Telecommunications Bureau ("WTB") on behalf of Alaska Native Wireless ("ANW"). My conversations focused on the comments filed by ANW in the above-referenced proceeding, which are attached to this letter.

A copy of this notice of ex parte presentation has been provided to Messrs. Schlichting and Furth. An original and one copy of this letter are submitted for inclusion in the proceeding of record.

Sincerely,

Ari Q. Fitzgerald

Enclosures
cc: James Schlichting
David Furth

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FEDERAL COMMUNICATIONS COMMISSION
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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets | ) ) ) | WT Docket No. 00-230 |

To: The Commission

# COMMENTS OF ALASKA NATIVE WIRELESS, L.L.C.

Conrad N. Bagne
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301 Arctic Slope Avenue
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February 9, 2001

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## SUMMARY

As the Commission evaluates ways to implement its spectrum leasing proposals, Alaska Native Wireless, L.L.C. urges the Commission to ensure that there is sufficient flexibility in its final rules to increase the participation of businesses owned by members of minority groups and women in the wireless industry. A series of recent studies published by the Commission confirm that barriers to entry to these entities remain substantial, and the Commission itself has observed that there is very little unencumbered spectrum available for new uses or users. At the same time, the Commission's current partitioning and disaggregation policies do not present designated entities with meaningful opportunities to acquire additional spectrum. To the extent that the Commission intended that its partitioning and disaggregation provisions would help "to overcome entry barriers through the creation of smaller, less capital-intensive licenses," therefore, the Commission should now look to flexible spectrum leasing policies to serve these goals.

Providing meaningful flexibility for businesses owned by members of minority groups and women means first ensuring that the market determines the amount of a licensee's spectrum that may be leased. Entities should be free to acquire spectrum suited to their financial and operational means, allowing market forces to rationalize the allocation of wireless resources. Notwithstanding the need for flexibility in that regard, the Commission will enhance the opportunities available to designated entities through flexible spectrum leasing policies if it makes clear the requirements of the law that will govern the lessor-lessee relationship. Standard, Commission-defined leasing contractual terms defining the basic rights, obligations, and responsibilities of licensees and lessees will serve to simplify the workings of the secondary

market, for licensees that are otherwise inclined to lease spectrum to designated entities may not do so if the requirements of the law are not readily-discernible.

Second, as part of a flexible spectrum leasing policy, the Commission should not apply duplicate ownership or bidding credit qualifications to lessees. Licensees in the Commission's broadband personal communications service entrepreneur's blocks and licensees that utilized the Commission's spectrum auction bidding credits should be permitted to lease spectrum to interested parties in the same measure as non-entrepreneurial or non-bidding credit qualified entities. Spectrum usage is quite distinct from license ownership, and, once licensed under the Commission's rules, designated entities should enjoy no fewer spectrum usage rights than other licensees in the same service. Thus, if the ability to lease spectrum is part of the bundle of rights awarded to all licensees in a particular service, the Commission should treat that right no differently than any other, and the Commission should not impair the exercise of that right because of the status of a particular licensee.

Finally, providing meaningful flexibility for businesses owned by members of minority groups and women means ensuring that spectrum aggregation limits should not apply to spectrum lessees. The Commission originally intended that a spectrum cap would help to avoid the excessive concentration of licenses, and, having applied the cap for that purpose, the Commission should not now inhibit the value of the licensed spectrum by applying the same aggregation limits to lessees. Particularly with the advent of third generation wireless systems, the demand for spectrum will almost certainly increase in the coming years, though the scope and timing of specific needs may be difficult to predict. If the Commission truly desires to promote a "robust secondary market" for spectrum, therefore, it should not apply a blunt instrument like a spectrum aggregation limit in that market.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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To: The Commission

**COMMENTS OF**
**ALASKA NATIVE WIRELESS, L.L.C.**

Alaska Native Wireless, L.L.C. ("ANW"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the captioned Notice of Proposed Rulemaking, FCC 00-402, released by the Commission on November 27, 2000 ("NPRM").[1]

## I. INTRODUCTION

ANW is an applicant for certain broadband personal communications ("PCS") licenses that were offered in the Commission's recently-completed Auction 35. ANW is owned and controlled by Arctic Slope Regional Corporation, Sealaska Corporation, and Doyon, Limited, which are Alaska Native Regional Corporations organized by Congress under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. Together, these companies are owned by nearly 40,000 Alaska Native shareholders, constituting more than 40 percent of the Alaska Native population of the United States. The addition of these Alaska Native shareholders to the ranks of Commission licensees represents a significant step forward in the Commission's continuing

[1] A summary of the NPRM was published in the Federal Register on December 26, 2000. See 65 Fed. Reg. 81475 (2000).

effort to ensure that opportunities to participate in the provision of spectrum-based services are available to businesses owned by members of minority groups and women.

Many of the proposals in the Commission's NPRM represent another potential step forward. In the NPRM, the Commission proposes "to clarify Commission policies and rules, and revise them where necessary, to establish that wireless licensees have the flexibility to lease all or portions of their assigned spectrum in a manner, and to the extent, that it is consistent with the public interest and the requirements of the Communications Act."[2] According to the Commission, "we believe that leasing of such rights will advance more efficient and innovative use of spectrum generally."[3] Among other things, therefore, the Commission seeks comment on the "potential benefits" of its spectrum leasing proposals[4] and the potential effects of its spectrum leasing proposals on small businesses.[5] If the Commission's proposals are properly implemented, the benefits and effects may be substantial.

As a threshold matter, it is apparent that opportunities for businesses owned by members of minority groups and women to participate in the provision of spectrum-based services are becoming more scarce. A series of recent studies published by the Commission confirm that barriers to entry to these entities remain substantial, and the Commission itself has observed that there is very little unencumbered spectrum available for new uses or users. Meanwhile, though well intended, the Commission's current partitioning and disaggregation policies do not present meaningful opportunities to acquire additional spectrum. For these reasons, the Commission

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[2] NPRM at ¶ 14.

[3] Id.

[4] Id. at ¶ 23.

[5] Id. at ¶ 55.

should take affirmative steps to increase the participation of businesses owned by members of minority groups and women in the wireless industry through its spectrum leasing policies.

As discussed more fully below, increasing this participation means providing flexibility for each entity to acquire spectrum suited to its financial and operational means, allowing market forces to rationalize the allocation of wireless resources. Similarly, the Commission should give businesses owned by members of minority groups and women the freedom to lease to others spectrum for which they are licensed — in whole or in part. In each case, the Commission should not apply duplicate ownership or bidding credit qualifications to lessees. Licensees in the Commission's broadband PCS entrepreneur's blocks and licensees that utilized the Commission's spectrum auction bidding credits should be permitted to lease spectrum to interested parties in the same measure as non-entrepreneurial or non-bidding credit qualified entities, for the Commission should not make spectrum usage right distinctions based on the status of a licensee. For similar reasons, the Commission also should not apply unjust enrichment penalties in the spectrum leasing context, nor should the Commission subject lessees to spectrum aggregation limits that already apply to licensees.

In August, the Commission made clear that "[w]e believe that Section 309(j) of the Communications Act requires us to explore ways of responding to the investment capital needs of small, minority-owned and women-owned businesses. . . . [W]e remain open to proposals that would result in even greater participation by these entities."[6] Appropriate flexibility in the Commission's spectrum leasing policies will, in fact, contribute to the greater participation of small, minority-owned, and women-owned businesses in the provision of spectrum-based

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[6] Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Fifth Report and Order, 15 FCC Rcd 15293, 15322-23 (2000) ("Part 1 Fifth Report and Order").

services. For these reasons, and for the reasons discussed more fully below, ANW urges the Commission to craft its spectrum leasing policies in a manner that will benefit these designated entities and that will further the Commission's goals of fostering even greater enjoyment of valuable spectrum rights.

## II. THE COMMISSION SHOULD USE ITS SPECTRUM LEASING POLICIES TO FOSTER THE PARTICIPATION OF BUSINESSES OWNED BY MEMBERS OF MINORITY GROUPS AND WOMEN IN THE WIRELESS INDUSTRY

### A. Flexible Spectrum Leasing Policies Will Help to Increase the Wireless Industry Participation of Groups that are Currently Underrepresented

As the Commission evaluates ways to implement its spectrum leasing proposals, ANW urges the Commission to ensure that there is sufficient flexibility in its final rules to increase the participation of businesses owned by members of minority groups and women in the wireless industry, for there is much to be done. In December, the Commission published the results of a series of market entry barrier studies that examined the participation of businesses owned by members of minority groups and women in Commission-regulated businesses. Among other things, one study concluded that the ability of members of minority groups to acquire wireless licenses in the Commission's spectrum auctions had been enhanced by the availability of post-auction installment payment plans,[7] which the Commission generally no longer offers.[8] According to a second study:

> It is suggested that a national policy of auctioning spectrum, without remedying discrimination in capital markets, is a national policy of discrimination against minorities and women in the allocation of spectrum licenses. This is because the auctions of the FCC require up-front payments and because spectrum licenses go

[7] See Ernst & Young, LLP, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions 4, 11, 13 (Dec. 5, 2000) (prepared for the Federal Communications Commission).

[8] See, e.g., Part 1 Fifth Report and Order, 15 FCC Rcd at 15322.

> to the highest bidder. When there is capital market discrimination, minorities will be capital constrained and less likely to qualify for any auction and less likely to win auctions. The data presented suggest that minorities are less like to win wireless licenses after controlling for relevant variables.[9]

And a third study found that the lack of access to capital reported by businesses owned by members of minority groups and women is the dominant barrier to entry to the capital intensive wireless industry for these entities,[10] something that the Commission has long recognized.[11]

Meanwhile, the Commission several times has recognized that the spectrum being offered in its auctions is in increasingly high demand. For example, in the Policy Statement that accompanied the release of the NPRM, the Commission wrote:

> In the United States, virtually all spectrum, particularly in the most sought after bands below 3 GHz, has been allocated for various services. Consequently, with the exception of several small bandwidth segments of only a few megahertz each that are not sufficient to support high volume operations, there is very little unencumbered spectrum available for new uses or users.[12]

Indeed, in August, the Commission reported to Congress on the increasing demand for spectrum,[13] and it made part of the previously set aside broadband PCS C block open to all

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[9] William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes 27 (Dec. 5, 2000) ("Bradford Study") (emphasis added).

[10] See Ivy Planning Group LLC, Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 2, 17, 126 (Dec. 2000) (prepared for the Federal Communications Commission Office of General Counsel).

[11] See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2389-90 (1994).

[12] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, Policy Statement, FCC 00-401, ¶ 7 (rel. Dec. 1, 2000) (emphasis added).

[13] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fifth Report, 15 FCC Rcd 17660, 17685 (2000).

bidders to accommodate the need for spectrum to address congestion, new technology, and competitive pressures.[14] In these circumstances, it is cannot reasonably be disputed that opportunities for businesses owned by members of minority groups and women to participate in the provision of spectrum based services are becoming more scarce.

Against this background, the Commission should take affirmative steps to increase the participation of businesses owned by members of minority groups and women in the wireless industry through its spectrum leasing policies. Among other things, the Commission should maximize the opportunity for these entities to lease as much spectrum as needed from existing licensees to support their own wireless operations. Maximizing these opportunities means providing the flexibility for each entity to acquire spectrum suited to its financial and operational means, allowing market forces to rationalize the allocation of wireless resources. Similarly, the Commission should give businesses owned by members of minority groups and women the freedom to lease to others spectrum for which they are licensed — in whole or in part. Indeed, given the capital intensive nature of the wireless telecommunications industry, many new entrants may need the ability to fund existing or contemplated operations by leasing portions of their licensed spectrum with as few limitations as possible.

It is important to note that the Commission's current partitioning and disaggregation policies do not achieve these goals. When the Commission proposed its partitioning and

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[14] See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, 16275 (2000); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Further Notice of Proposed Rulemaking, 15 FCC Rcd 9773, 9789 (2000) ("based on the demand for spectrum to satisfy congestion, new technology and competitive needs, we tentatively conclude that it would serve the public interest to make some additional spectrum available to all interested bidders").

disaggregation policy for broadband PCS, for example, it explained that the policy was intended "to enable a wide variety of broadband PCS applicants . . . to overcome entry barriers through the creation of smaller, less capital-intensive licenses that are within the reach of smaller entities."[15] In reality, though, very little spectrum is within reach of smaller entities in this fashion. Mindful of the growing need for and value of spectrum, many licensees are unwilling to surrender their spectrum rights by permanently splintering existing authorizations, preferring instead to retain all available spectrum for future needs. Even licensees that could otherwise raise funds by partitioning or disaggregating an authorization generally have little incentive to do so for fear of diminishing the value of the license as a whole.

Thus, to the extent that the Commission intended that its partitioning and disaggregation provisions would help "to overcome entry barriers through the creation of smaller, less capital-intensive licenses," the Commission should now look to flexible spectrum leasing policies to serve these goals. Rather than diminish the effectiveness of the Commission's efforts to encourage wireless industry participation by small, minority-owned, and women-owned businesses, appropriately flexible spectrum leasing options will help these entities to participate more-fully in the provision of spectrum based services by increasing the ways in which they can acquire and deploy spectrum. The Bradford Study released by the Commission in December "recommended that the FCC develop and maintain programs that seek and encourage the

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[15] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Notice of Proposed Rulemaking, 11 FCC Rcd 10187, 10195 (1996). See also Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, 21843 (1996) ("Smaller or newly-formed entities . . . may enter the market for the first time through partitioning.").

participation of minorities and women in the ownership of broadcast and spectrum licenses."[16] By undertaking to maximize the flexibility that these entities have under the Commission's spectrum leasing policies, the Commission will have provided just such encouragement.

### B. The Market Should Determine the Amount of a Licensee's Spectrum that May be Leased

First, providing meaningful flexibility for businesses owned by members of minority groups and women means ensuring that the market determines the amount of a licensee's spectrum that may be leased.[17] Subject to the proviso that a spectrum lessee shall have no greater spectrum usage rights than the underlying licensee, the Commission should not attempt to prejudge the amount of spectrum will be in demand in any contemplated secondary market. In the case of smaller businesses or businesses owned by members of minority groups or women (collectively, "designated entities") undertaking to enter the industry, this type of flexibility will be critical. Among other things, a designated entity may choose to lease a part of its spectrum as a way to fund build out or operations on spectrum that it retains. A designated entity may also choose to lease all of its spectrum while it works to build out a market and then reclaim the exclusive use of the spectrum when it has developed the necessary infrastructure. The same

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[16] Bradford Study at 27. ANW generally agrees with the Commission's findings that preferences for small business frequently aid minority and women-owned businesses without raising substantial constitutional implications. See, e.g., Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, 12 FCC Rcd 16802, 16920-21 (1997); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, 11 FCC Rcd 6280, 6292 (1996); 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, 11 FCC Rcd 7824, 7833, 7844 (1996); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Eighth Report and Order, 11 FCC Rcd 1463, 1575 (1995); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143, 158 (1996).

[17] See NPRM at ¶ 25.

designated entity could also choose to lease spectrum from other parties to augment its own operations. All of these options should be readily available in the Commission's contemplated secondary market.

That notwithstanding, the Commission will enhance the opportunities available to designated entities through flexible spectrum leasing policies if it makes clear the requirements of the law that will govern the lessor-lessee relationship. For example, standard, Commission-defined leasing contractual terms defining the basic rights, obligations, and responsibilities of licensees and lessees[18] will serve to simplify the workings of the secondary market, for licensees that are otherwise inclined to lease spectrum to designated entities may not do so if the requirements of the law are not readily-discernible. Similarly, designated entities could be left behind in the secondary market if they are required to engage in costly or complex transactions to lease spectrum to other parties. Thus, as part of its effort to use spectrum leasing policies for the benefit of designated entities, the Commission should make the requirements of its leasing policies clear to all, and the Commission should undertake to simplify the workings of the secondary market by establishing standard contractual terms to be employed by all parties.

### C. The Commission Should Not Apply Duplicate Ownership or Bidding Credit Qualifications to Lessees

Second, as part of a flexible spectrum leasing policy, the Commission should not apply duplicate ownership or bidding credit qualifications to lessees.[19] Licensees in the Commission's broadband PCS entrepreneur's blocks and licensees that utilized the Commission's spectrum auction bidding credits should be permitted to lease spectrum to interested parties in the same

[18] See id. at ¶ 30.

[19] See id. at ¶¶ 44, 47, 53-54.

measure as non-entrepreneurial or non-bidding credit qualified entities. Spectrum usage is quite distinct from license ownership, and, once licensed under the Commission's rules, designated entities should enjoy no fewer spectrum usage rights than other licensees in the same service. Thus, if the ability to lease spectrum is part of the bundle of rights awarded to all licensees in a particular service, the Commission should treat that right no differently than any other, and the Commission should not impair the exercise of right because of the status of a particular licensee.

To be certain, to do otherwise would be inconsistent with the underlying purposes of the entrepreneur's block and bidding credit policies.[20] The Commission developed the entrepreneurs' block to give new entities an opportunity to participate in the provision of spectrum-based services, consistent with the mandate of Congress and motivated by the need to disseminate licenses among a wide variety of applicants.[21] As the Commission wrote in 1994:

> [W]e believe a special effort must be made to enable minority and women-owned enterprises to enter, compete and ultimately succeed in the broadband PCS market. These designated entities face the most formidable barriers to entry, foremost of which is lack of access to capital. In our effort to provide opportunities for minorities and women to participate in PCS via the auctions process, we strive for a careful balance. On one hand, our rules must provide applicants with the flexibility they need to raise capital and structure their businesses to compete once they win licenses. On the other hand, our rules must ensure that control of the broadband PCS applicant, both as a practical and legal

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[20] See id. at ¶ 47.

[21] Section 309(j)(3)(B) of the Communications Act directs the Commission to "promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Similarly, Section 309(j)(4)(C) requires the Commission, in promulgating its regulations, to "prescribe area designations and bandwidth assignments that promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(4)(C). Most significantly, Section 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." 47 U.S.C. § 309(j)(4)(D).

matter, as well as a meaningful measure of economic benefit, remain with the designated entities our regulations are intended to benefit.[22]

The goals of the entrepreneurs' block and bidding credits provisions, therefore, were to reduce the competitive disadvantage faced by designated entities in participating in Commission auctions and to help them "compete once they win licenses."[23]

Having assisted designated entities in becoming licensees, the Commission should not now prohibit these entities from using the licensed spectrum to the same extent and in the same manner as other licensees. Thus, a designated entity should have the freedom to choose to lease a part of its spectrum as a way to fund build out or operations on spectrum that it retains, to lease all of its spectrum while it works to build out a market and then to reclaim the exclusive use of the spectrum when it has developed the necessary infrastructure, or to lease spectrum from other parties to augment its own operations. If these options will be available to non-designated entities, then the Commission should ensure that these options will be available to entities that required the Commission's "special effort" to join the ranks of licensees in the first instance. Restricting the universe of parties to which designated entities could offer these leasing options is not consistent with that goal.

Finally, if the Commission established that designated entity licensees would not be permitted to lease spectrum except to other similarly-qualified entities, designated entity licensees would be faced with having to evaluate the qualifications of prospective lessees under the Commission's rules. Indeed, in the NPRM, the Commission proposes that "a wireless

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[22] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 405 (1994).

[23] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5585 (1994).

licensee entering into a leasing arrangement must . . . certify that each spectrum lessee (or sublessee) meets all applicable eligibility requirements . . . ."[24] In contrast to the license transfer or assignment process in which the Commission establishes the qualifications of particular license applicants, however, the instant spectrum leasing proposals do not appear to contemplate pre-lease Commission review. If the Commission requires entrepreneurial licensees to "certify" that prospective lessees meet license ownership or bidding credit qualifications,[25] therefore, enforcing specialized ownership or bidding credit qualifications against lessees will require entrepreneurial licensees to undertake potentially complex pre-lease qualification reviews solely by virtue of their own special status. That is not consistent with a flexible spectrum leasing policy.

In a related matter, the Commission should not apply unjust enrichment repayment obligations when entrepreneurial licensees lease spectrum in the contemplated secondary market.[26] According to the Commission:

> [T]he Commission crafted unjust enrichment provisions designed to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of provisions and policies meant to encourage their participation in the provision of spectrum-based services. These rules were intended to deter designated entities from prematurely transferring licenses obtained through the benefit of provisions designed to create opportunities for such designated entities in the provision of spectrum-based services.[27]

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[24] NPRM at ¶ 79.

[25] See id. at ¶ 48.

[26] See id. at ¶¶ 53-55.

[27] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Memorandum and Order, 9 FCC Rcd 7245, 7265 (1994).

It would be fundamentally inconsistent with the purpose of these unjust enrichment rules to establish here a spectrum leasing right the exercise of which would trigger the application of unjust enrichment penalties under other Commission rules. If unjust enrichment rules were intended to encourage designated entities to retain their licenses and to participate in the provision of spectrum-based services, the Commission should not penalize these entities for participating in the Commission's secondary markets for spectrum alongside other licensees. As noted above, the rights and obligations that accompany Commission licenses should not feature distinctions based on the status of the licensee; if non-designated entity licensees may lease spectrum to other parties without limitation and still be considered the licensee of record, then the same policy should apply to entrepreneurial licensees. For so long as a designated entity licensee remains the licensee of record, therefore, no unjust enrichment payments should be required.

Thus, ANW urges the Commission to make clear that entrepreneurial licensees and licensees that utilized the Commission's spectrum auction bidding credits may lease spectrum to all to interested parties in the same measure as non-entrepreneurial or non-bidding credit qualified entities. Consistent with that policy, the Commission should make clear that there will be no bidding credit repayment or unjust enrichment payment in a spectrum leasing environment for so long as the entity that utilized the bidding credit or acquired a set aside authorization remains the licensee. The Commission's entrepreneur's block and bidding credit policies were intended to assist certain entities in becoming Commission licensees, with the very same rights and responsibilities as other licensees in the same service. The Commission should not now limit those rights as they would apply in a "robust" secondary market for spectrum.

### D. Spectrum Aggregation Limits Should Not Apply to Lessees

Finally, providing meaningful flexibility for businesses owned by members of minority groups and women means ensuring that spectrum aggregation limits should not apply to spectrum lessees.[28] According to the Commission:

> We adopted the 45 MHz CMRS spectrum cap . . . in order to "discourage anti-competitive behavior while at the same time maintaining incentives for innovation and efficiency." We were concerned that "excessive aggregation [of spectrum] by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."[29]

Notably, in the same order, the Commission also indicated that:

> Our 45 MHz spectrum cap also furthers the goal of diversity of ownership that we are mandated to promote under Section 309(j). Section 309(j) directs us, in specifying eligibility for licenses and permits, to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants. The statute further states that in prescribing regulations, the Commission must, inter alia, prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants. A spectrum cap is one of the most effective mechanisms we could employ to achieve these goals. More than provisions such as bidding credits and installment payments . . . a spectrum cap set at an appropriate level will ensure that the licenses for any particular market are disseminated among diverse service providers.[30]

To the extent, therefore, that a spectrum cap is intended to avoid the excessive concentration of licenses, the Commission should not now inhibit the value of the licensed spectrum by applying ownership aggregation limits to lessees. Particularly with the advent of third generation wireless systems, the demand for spectrum will almost certainly increase in the coming years, though the

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[28] See NPRM at ¶ 49.

[29] 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, 11 FCC Rcd 7824, 7869 (1996) (footnotes and citations omitted) ("CMRS Spectrum Cap Report and Order").

[30] Id. at 7873-74 (footnotes omitted).

scope and timing of specific needs may be difficult to predict. If the Commission truly desires to promote a "robust secondary market" for spectrum, therefore, it should not apply a blunt instrument like a spectrum aggregation limit in that market.

Moreover, designated entities will stand to benefit if the Commission's spectrum aggregation limits do not apply to lessees. Designated entities with existing licenses will have greater freedom to augment their operations by leasing spectrum when and to the extent needed, helping them to compete in the provision of spectrum-based services. This is particularly true in the case of developing third generation services, the spectrum demands of which are not yet fully known. Alternatively, designated entity licensees that wish to lease spectrum to fund build out or existing operations will have a larger market in which to do so if it does not count against the spectrum aggregation limit of prospective lessees. In either case, designated entities will enjoy greater benefits of spectrum ownership, and the Commission will avoid counting spectrum against the limits of more than one entity, each of which will aid in the promotion of a robust secondary market for spectrum in the coming years.

## III. CONCLUSION

For these reasons, ANW urges the Commission to adopt flexible spectrum leasing policies for the benefit of designated entities consistent with the comments presented here.

Respectfully submitted,

ALASKA NATIVE WIRELESS, L.L.C.

By: /s/ Conrad N. Bagne

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February 9, 2001