

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

In the Matter of)
)
Implementation of the Commercial Spectrum)
Enhancement Act and Modernization of the) WT Docket No. 05-211
Commission's Competitive Bidding Rules and)
Procedures)
)

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

The Commission has taken its first steps toward reasoned examination and reform of the long-standing designated entity program with the new rules it adopted on April 25, 2006¹ and the Order on Reconsideration adopted on June 2, 2006.² Cook Inlet Region, Inc. ("Cook Inlet")³ looks forward to continuing to participate in this important process. At this stage, however, Cook Inlet has serious concerns about the scope and impact of the Commission's initial

¹ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second Report and Order* (the "Order") and *Second Further Notice of Proposed Rulemaking* (the "Second Further NPRM"), WT Docket No. 05-211, FCC 06-52 (Apr. 26, 2006).

² See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Order on Reconsideration of the Second Report and Order* (the "Order on Reconsideration"), WT Docket No. 05-211, FCC 06-78 (June 2, 2006).

³ Cook Inlet is an Alaska Native Regional Corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* Cook Inlet is owned by more than seven thousand Alaska Native shareholders of Eskimo, Indian, and Aleut descent, many of whom live below the poverty line. In addition to its for-profit business ventures, the proceeds of which are distributed to these individual shareholders as dividends, Cook Inlet has established a number of not-for-profit organizations that provide social services to the residents of Alaska, including education, career training, health, elder care and housing services.

rules on the future viability of the designated entity program. Cook Inlet also continues to be concerned about the potential – and detrimental – retroactive effect these new rules will have on existing designated entities and their licenses. For this reason, Cook Inlet is filing this petition for reconsideration and clarification of the Commission’s grandfathering provisions.⁴

I. THE COMMISSION SHOULD CLARIFY THE GRANDFATHERING PROVISIONS IN THE ORDER TO PROTECT AGAINST THE UNFAIR RETROACTIVE APPLICATION OF ITS NEW RULES.

In response to Cook Inlet’s initial comments in this proceeding, the Commission has made efforts to ensure that the new rules adopted in the *Order* do not effect retroactively designated entity licensees and their commercial relationships that existed prior to the date of these new rules.⁵ Thus, the Commission has agreed to “grandfather” certain commercial relationships.⁶ In the *Order on Reconsideration*, similarly, the Commission helpfully clarified that the new unjust enrichment schedule would be applied solely to licenses issued after April 25, 2006.⁷

Yet the grandfathering provisions in the *Order* remain insufficiently clear to the extent they relate to designated entities that seek to transfer or assign certain licenses. Cook Inlet respectfully requests that the Commission formally clarify or reconsider this issue.

⁴ Cook Inlet continues to harbor concerns about certain of the policies that the Commission has reaffirmed in the *Order on Reconsideration*. It may raise those concerns after it has had an opportunity to review that decision, which was released on Friday, June 2, prior to the date upon which petitions for reconsideration of the *Order* were due. Cook Inlet raises the issues set out in this petition today, however, because they pertain to the *Order* rather than the *Order on Reconsideration*. Out of an abundance of caution, we are raising these issues on the date upon which petitions for reconsideration of the *Order* would be due.

⁵ See *Order* at ¶¶ 28-30, 41 (“Finally, we agree with Cook Inlet’s general concern that retroactive penalties not be imposed upon pre-existing designated entities.”).

⁶ See *id.*

⁷ See *Order on Reconsideration*, ¶ 41.

The Commission has clearly stated that it will not apply its new rules to past licenses to the extent a designated entity licensee maintains the status quo.⁸ However, the Commission has left open the possibility that the designated entity status of a licensee that qualified under the prior rules could be re-examined under the new rules the moment it seeks to assign or transfer control of a license to any third party.⁹ Retroactive consideration of a designated entity's qualifications in such a manner would be fundamentally unfair. This retroactive application also would discourage a designated entity licensee from participating in the secondary market for spectrum licenses without jeopardizing its designated entity status. If a designated entity faces a potential reexamination of its status simply because it seeks to divest a single license, the designated entity will be substantially less likely to divest *any* of its licenses, even where such divestiture makes commercial sense and would promote the prompt introduction of service to the consumer. The Commission should not inadvertently discourage permissible market activity.

The Commission should clarify that the status of a designated entity that was qualified under the new rules will not be re-examined to the extent that licensee is assigning or transferring a license to a third party.¹⁰ This clarification will lend certainty to the designated entity program in general, and particularly to past auction participants such as Cook Inlet who

⁸ *See id.* at 28 (“[W]e will grandfather the existence of impermissible and attributable material relationships that were in existence before the release date of this [*Order*].”).

⁹ *See id.* at ¶ 29 (“Such relationships, are not, however, generally grandfathered for the purposes of determining an applicant’s eligibility . . . for the purposes of determining eligibility for benefits in the context of an assignment, [or] transfer of control . . .”).

¹⁰ Cook Inlet is less concerned about, and takes no position with respect to, whether a previously qualified designated entity that seeks to obtain a license on the secondary market, as the assignee or transferee, must qualify under the new rules or could retain its eligibility as a designated entity under the old rules.

hold designated entity licenses and who, for legitimate business reasons, may seek to divest certain licenses in the secondary market. Without this certainty, the Commission risks chilling the sale of certain licenses by designated entities.

Cook Inlet already has suffered directly from the chilling effect of these new rules. Prior to the release of the *Order*, Cook Inlet was in confidential discussions with another qualified designated entity to partition one of its Auction 36 licenses. These discussions were put on hold, however, when the *Order* was released, because of the uncertainty it created about Cook Inlet's own designated entity status and whether filing an application would trigger a re-examination of its qualification by Commission staff, not only with respect to the license at issue but with respect to all of the Auction 36 licenses held by Cook Inlet. Ultimately, these discussions disintegrated and the deal fell through.

Applying these rules retroactively to existing licenses would fundamentally alter the market for wireless spectrum. The secondary market is an important supplement to the auction process in order to ensure that spectrum is awarded to those participants most likely to provide commercial service to the consumer. The secondary market gives each auction participant a further opportunity to acquire spectrum it failed to win at auction or divest spectrum it was awarded that falls outside the scope of the participant's business plan, as plans do continue to evolve along with changing commercial and marketplace realities. The secondary market also provides an important escape valve for failed applicants that overspent at auction or otherwise are unable to fund the operation of their businesses. By threatening the designated entity status of certain licensees, the Commission may prevent these critical market corrections from taking place. As a result, certain licensees may hold onto spectrum that they do not value or cannot use,

to the detriment of the public interest and to the Commission's paramount interest of speeding the introduction of new services to consumers.

By narrowly applying these grandfathering provisions, the Commission would undermine Congress's fundamental requirements in establishing the Commission's auction authority – that the Commission provide sufficient time after establishing auction rules “to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.”¹¹ It is especially critical to give small companies sufficient time to attract financing through carefully developed business plans that create acceptable risks to the financial community. By upsetting the very premises on which those business plans were based, the Commission jeopardizes the viability of existing designated entities as well as the stability of the designated entity program.

¹¹ 47 U.S.C. § 309(j)(E)(ii).

II. CONCLUSION.

Cook Inlet applauds the Commission's efforts to examine and reform the designated entity program to the extent appropriate, but it remains concerned that some of the Commission's new rules will operate to undermine the opportunities available to designated entities rather than expand them. The Commission should reconsider and clarify its grandfathering provisions to prevent any unfair application of new rules to licenses that were awarded under the previous regime.

Respectfully submitted,

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