

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

**COMMENTS OF COOK INLET REGION, INC.**

The Commission has taken its first steps toward reform of the long-standing designated entity program with the new rules it adopted on April 25, 2006<sup>1</sup> and the Order on Reconsideration adopted on June 2, 2006.<sup>2</sup> Cook Inlet Region, Inc. ("Cook Inlet")<sup>3</sup> continues to urge the Commission to take all necessary steps to preserve the important designated entity program and to avoid overbroad or unwarranted reforms that would eliminate the participation

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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 Alaska natives and Native Americans residing in Alaska, including education, career training, health, elder care and housing services.

by small businesses in future spectrum auctions. It is primarily to urge caution, and a careful examination of the underlying justifications for designated entity reform, that Cook Inlet submits these comments in response to the *Second Further NPRM*.

**I. THE COMMISSION SHOULD EXAMINE THE JUSTIFICATION FOR REFORM BEFORE IMPLEMENTING CHANGES TO THE DESIGNATED ENTITY PROGRAM, AND SHOULD ENSURE THAT REFORMS ARE NARROWLY TAILORED TO ADDRESS ACTUAL PROBLEMS.**

Cook Inlet continues to urge caution as the Commission considers reform to the designated entity program. Action taken in the name of reform, absent evidence of abuse or fraud and without consideration of both the future and retroactive impact of such reform on the program, could decimate future small business participation in spectrum auctions.

To date, there has been no concrete evidence presented of past abuses of the Commission's designated entity rules. While some parties who have participated in this proceeding have alleged abuse, to date the only evidence the Commission has received consists of statistical evidence of large wireless carrier investment in designated entity applicants in past auctions. But empirical evidence of participation is not *ipso facto* evidence of a violation of the Commission's rules. The fact of large wireless carriers' participation is not even evidence of a violation of the underlying policies of the designated entity program. Unless the Commission can more carefully and specifically identify a problem with past designated entity applicants, it will be difficult to adopt any reform that is not overly broad or inappropriately tailored to a conceived problem. The Commission should take care that it does not adopt sweeping reform that either bypasses any problems with the program or undercuts valid participation by viable small business applicants in a highly competitive, financially intensive industry.

In the *Second Further NPRM*, the Commission has requested comment on whether it should expand the universe of its restrictions (as originally proposed in this

proceeding) to exclude designated entity partnerships with incumbent wireless carriers, telecommunications carriers or even other large companies.<sup>4</sup> If the Commission does decide to adopt any such restrictions, however, the Commission would do so without regard for the fact that there is no greater incentive for wireless carriers to abuse the Commission's rules than for any other telecommunications company or small investor that partners with a small business. If in fact large wireless carriers agree to invest in designated entity applicants to obtain improper control over spectrum that is not otherwise accessible to them, there is no reason why this incentive would exist for large wireless carriers but not for any other investor. In fact, Council Tree itself has presented to the Commission as alleged evidence of abuse in the designated entity program a newspaper story of participation in the designated entity program by a high net worth individual and his company, not by a large wireless carrier.<sup>5</sup> In any investment relationship there is always a tension inherent in the scope of business control available to a minority financial investor. The wireless industry is no different. But restricting access to capital investment for small companies will not improve the program. By failing to identify a problem with its program, the Commission risks new rules that are discriminatory - against small businesses who choose to partner with large wireless carriers - or that are too far sweeping - prohibiting all partnerships with the very companies that are best able to provide financing for a capital-

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<sup>4</sup> See *Second Further NPRM* at ¶¶ 59-62.

<sup>5</sup> See Letter from George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (Jan. 13, 2006), attachment at 15-17 (article from the *Wall Street Journal* describing a case alleging Mario Gabelli, a "wealthy money manager and mutual fund impresario," and his companies perpetrated a fraud on the Commission by investing in designated entities that participated in various auctions, published on Dec. 27, 2005).

intensive industry. The end result may simply be the demise of designated entity participation in future spectrum auctions.

The Commission similarly is seeking comment on whether it should implement special restrictions prohibiting investments in designated entities in the same geographic region as the investor.<sup>6</sup> But parties pushing this particular reform have similarly failed to explain why an investor in a designated entity is more likely to abuse the investment relationship and the Commission's rules governing control if it already holds a spectrum license in the same region for which the designated entity is bidding than if it is not. If the Commission accepts as true the proposition that designated entities have become merely fronts for large carriers to access spectrum, then it seems irrelevant whether that carrier already has access to spectrum in a given market. In fact, in the absence of a spectrum cap, it seems more likely that an incumbent carrier would abuse its relationship with a designated entity to obtain access to spectrum where its own spectrum resources are scarce than where it may already has spectrum resources in a given market.

The Commission's best approach to preserve the integrity of the designated entity program is to examine carefully, on a case-by-case basis, the material relationships that may exist between a small business applicant and its financial investors, regardless of the business in which the financial investor participates. The designated entity program has flourished because of the inherent flexibility the Commission has given to small businesses in raising money and structuring their relationships with third parties. The Commission should take steps to preserve

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<sup>6</sup> See *Second Further NPRM* at ¶¶ 68-70.

this flexibility. By eliminating entirely certain material relationships, the Commission risks jeopardizing valid and compliant designated entity participation in the name of reform.

The Commission certainly should examine material relationships between a small business applicant and its financial investors.<sup>7</sup> In fact, it already performs this analysis using the control test, a flexible policy tool based on decades of the Commission's regulatory expertise that carefully balances the needs of small business applicants with the Commission's concerns regarding control and abuse. There is no reason to abandon this analytical tool in favor of a bright line rule that restricts certain types of reasonable commercial relationships for designated entities.

Cook Inlet looks forward to reviewing the comments that will be filed in response to the Second Further NPRM, and hopes that these comments help to identify a concrete problem with the designated entity program that requires reform. At that point, other parties may well have viable proposals to eliminate that problem. The Commission should take care to avoid sweeping, untargeted changes to its rules that are intended to address vague criticisms of the designated entity program that fail to identify with specificity any actual abuses that have occurred. It may be prudent for the Commission to look to the success stories of the designated entity program to weigh the opportunities that would not have otherwise been available for various small businesses to participate in the wireless industry against the need for reform.

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<sup>7</sup> See *Second Further NPRM* at ¶¶ 78-86.

**II. THE COMMISSION SHOULD ELIMINATE CLEARLY ANY RISK THAT ITS NEW RULES WILL AFFECT RETROACTIVELY EXISTING LICENSES AND LICENSEES.**

As Cook Inlet has noted in previous filings in this proceeding,<sup>8</sup> any modification of the existing designated entity rules may have unintended and retroactive effects on existing designated entity licensees and the licenses they continue to hold. At a minimum, it is unfair to hold licenses awarded in past auctions, when a different regulatory regime was in place, to more strict or different standards adopted in this proceeding. For example, while the disposition of previous licenses by a designated entity may well be subject to any new rules adopted by the Commission to the extent those rules limit the scope of eligible acquirers of those licenses, the disposition should not facilitate or justify reopening and reexamining the existing structure of the original designated entity licensee under those new rules. The Commission should recognize that designated entities that participated in past auctions were properly structured under previous rules; these entities that qualified under prior rules should not be subject to new rules that may require dramatic corporate reorganization or that may otherwise jeopardize their existence. In addition, previous license holders should be free to undertake a company reorganization, which may involve pro forma assignments or transfers of control of previous licenses, without running afoul of new standards for transfer or assignment. Similarly, small businesses and larger financial investors alike should not be precluded from participating in future spectrum auctions in accordance with whatever rules apply to such auctions simply because these companies were eligible designated entities in past auctions under the rules that were applicable at the time.

Even subjecting past designated entity licenses to new reporting requirements raise questions that require further clarification. For example, if a designated entity license was

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<sup>8</sup> See Comments of Cook Inlet filed Feb. 24, 2006; Petition for Reconsideration and Clarification of *Second Order* filed June 5, 2006.

issued more than five years ago under the prior rules and before the new rules take effect, is that license now subject to more stringent reporting requirements, restrictions on transfer, and other rules? Or does the fact that this license was released from all restrictions applicable to designated entity licenses prior to the implementation of any new rules mean that this license is no longer treated as a designated entity license for any purpose, even under new rules that apply to licenses for ten years from the date of initial issuance? It is Cook Inlet's view that any new rule or reporting requirement should not reach back to apply to designated entity licenses that, but for the rule change, are no longer subject to designated entity restrictions. Finally, the Commission should preserve the ability of a designated entity licensee to freely transfer or assign its licenses once it has satisfied the necessary construction deadlines, an important exception to the Commission's unjust enrichment rules that encouraged the rapid deployment of commercial services to consumers.

The Commission has not yet addressed some of these retroactivity concerns that have been raised by Cook Inlet in past filings, although the *Order on Reconsideration* takes some critical steps in this direction with respect to unjust enrichment payments.<sup>9</sup> However, a bright line distinction between past and future designated entity licenses and the applicable regulatory treatment of these licenses must be made. The Commission should strive to eliminate unfair retroactive application of its existing reforms as well as carefully consider how it can circumscribe the retroactive effect of any new rules it adopts in this proceeding.

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<sup>9</sup> See *Order on Reconsideration* at ¶ 41.

**III. 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,

**COOK INLET REGION, INC.**



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