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February 9, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via Hand Delivery

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

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

Dear Ms. Salas:

Please find for filing an original and nine (9) copies of the Comments of Long Lines, Ltd. in the above-referenced proceeding. An extra copy is enclosed and I ask that you stamp it as received and return it to the messenger for our records.

Thank you for your assistance. If I may be of assistance, please telephone me.

Very truly yours,


James H. Lister

cc: Donald Johnson, Commercial Wireless Division, Wireless Telecommunications Bureau
Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau
Tony Mau, Long Lines, Ltd.

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FEB 9 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF LONG LINES, LTD.

Long Lines, Ltd. ("Long Lines"), the holder of a block C PCS license covering portions of rural western Iowa, respectfully submits these Comments in response to the Commission's Notice of Proposed Rulemaking on spectrum leases.¹

The Commission's proposal to confirm the lawfulness of spectrum leases is very much in the public interest. The Commission should be careful, however, to avoid delaying achievement of this objective through an attempt to resolve in a single *Order* the myriad of issues (such as the impact of leasing on the spectrum cap rules) collaterally related to spectrum leasing. Far and away the first priority should be to update the 1963 *Intermountain Microwave*² standard so that parties may safely proceed with spectrum lease transactions which do not implicate some other Commission rule.

¹ *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000). Long Lines holds a Block C PCS license for a portion of BTA No. 421 (Call Sign WPON423).

² *Intermountain Microwave*, 24 R.R. (Pike & Fischer) 983 (1963) ("Intermountain Microwave").

1. Leasing Expeditiously Puts Spectrum to its Most Efficient Use.

As many and quite possibly all commenting parties will tell the Commission, there is no good reason to limit leasing as a tool to facilitate voluntary business deals that increase the use of spectrum and encourage investment in wireless networks. Long Lines and other licensees in June, 2000 filed a Request for Clarification asking that the Commission specifically authorize them to lease spectrum. The Commission put the Request out for comment and all eight (8) commenting parties supported the Request.³

Spectrum leasing accommodates the common situation in which (1) the holder of the license retains a long-term interest in managing or using the spectrum it purchased, but (2) another entity, the potential lessee, is in a position to put the spectrum to a more valuable use in the short or medium term. A rule permitting spectrum leasing thus encourages the use of spectrum for the provision of services to the public as soon and as efficiently as possible. By contrast a rule forbidding spectrum leasing forces the licensee to choose between an outright sale and no transaction at all. If the licensee is unwilling to sell the spectrum outright, because of the licensee's long-term interest in it, the spectrum may well be unused or be underused for many years.

Spectrum leasing also accommodates the situation in which the company with the best business plan for using the spectrum cannot afford to buy the spectrum outright or is unwilling to take the risk of doing so. It allows the market demand for new services, applications and new equipment to be tested without the cost burden and added risk associated with a license acquisition. Under a lease transaction, the lessee can "pay as

³ See "Wireless Telecommunications Bureau Seeks Comment on Request for Clarification of De Facto Control Policy and Proposed Spectrum Lease Agreement," Public Notice, DA 00-1953 (rel. Aug. 24, 2000). A copy of the *Request for Clarification* is attached and the arguments in it are hereby incorporated into these Comments.

you go”, without having to transfer a huge sum of cash up front or committing to pay for the entire value of the license over time, whether or not the lessee’s venture succeeds.

II. Licensees Will Want to Retain Fundamental Control of Leased Spectrum.

The Commission should act cautiously in mandating specific lease terms, for the licensee’s natural incentives will be to negotiate lease terms that leave it with fundamental long-term authority over the spectrum, such that the lease does not constitute a transfer of control. For example, under the Commission’s proposal, a license could be revoked if a lessee fails to meet a build-out requirement, operates in excess of power limits, or takes any action inconsistent with the terms of the license or the Commission’s Rules. The licensee thus would have a powerful incentive to negotiate the right to terminate the lease if the lessee fails to meet any of these requirements. Additionally, the licensee will want to be paid rent during the lease and get the spectrum back at the end of the lease in the most valuable form possible, and so has the incentive to ensure that the lessee makes progress towards marketing a revenue-producing service. The licensee’s basic power to refuse to renew a lease obviously provides substantial leverage.

Of course, to the extent the Commission feels that these incentives are not enough and that it needs to require and/or prohibit specific lease terms to ensure that no “transfer of control” occurs, it should do so. Limited spectrum leasing is better than no spectrum leasing. Consequently, Long Lines has attached the draft spectrum lease that it submitted to the Commission with its *Request for Clarification* discussed above. The lease contains provisions explicitly giving the licensee “the right to approve or disapprove of certain fundamental matters ... include[ing] (1) network design, and (2) system construction and

build-out.”⁴ It also gives the licensee powers to enforce compliance with FCC rules. These provisions are likely far more than is necessary to preserve the licensee’s long-term control rights, but are examples of terms the Commission could require if it is so inclined.⁵

III. The Commission Should Promptly Authorize Spectrum Leasing as a General Matter, Before Resolving Issues Pertinent Only to Specific Categories of Lease Transactions.

Given the unanimous or near-unanimous support for the basic concept of spectrum leasing, the greatest danger is that the Commission will spend so much time on collateral questions raised by spectrum leasing that it delays issuing the core ruling confirming that spectrum leases are not transfers of control. During such a delay, economically beneficial transactions will be put on hold and spectrum will lie fallow as parties wait for the Commission to act. Because of the upcoming build-out deadlines faced by many licensees, and the need to put business agreements such as leases in place prior to construction, minimizing delay is critical.

A prime example of an interesting but tangential issue is the impact of spectrum leasing on the spectrum cap rules. Could a party be found in violation of a spectrum cap based on spectrum it is leasing? Could a licensee avoid a cap violation by leasing out spectrum to a third party? These questions may well be worthy of serious consideration.

⁴ Attached Spectrum Use Agreement at 4.

⁵ By way of analogy, commercial real estate leases generally limit the activities of the tenant in order to safeguard the owner’s long term interest in the property. Typically the tenant cannot tear down a building, violate zoning laws, disturb other tenants, or use the property for a purpose not contemplated in the lease. The commercial real estate market is largely unregulated, but the parties nonetheless will generally negotiate lease terms giving substantial power to the owner.

However, as to a great many spectrum lease transactions, the spectrum caps will be utterly irrelevant. Some transactions will involve wireless services for which there are no caps. Many more will involve parties who hold too little spectrum for caps to matter.

Another example of a tangential issue is the impact of spectrum leasing on the designated entity rules, which permitted small companies to obtain a discount in the original auction of various classes of spectrum. Again, only some wireless services have designated entity preference rules, and only some transactions involving those services will be leases from an entity eligible for a preference to an entity which is not eligible. Even as to leases from designated entities to non-designated entities, the dollar amount of the bid preference may be small enough to justify a decision to go ahead with the lease and pay the unjust enrichment penalty if the Commission for some reason later determines that a lease is the equivalent of a sale for the purpose of the designated entity rules.⁶

To permit the majority of transactions to proceed unhindered by uncertainties relating to a few, the Commission should issue a *First Report and Order* clarifying that spectrum leases as a general matter are lawful and reserve for *the Second Report and Order* the spectrum cap, designated entity, and any other issues that may require additional consideration.

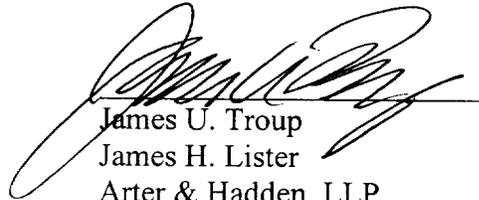
⁶ Long Lines (a qualified small business) suggests that the lease be treated as the equivalent of a sale for purposes of the designated entity rules only where (1) the licensee has no ownership interest in the lessee, and (2) the lease is terminable only for cause and has a long term (at least 15 years). If the licensee will be participating in the business of the lessee through an ownership interest in the lessee or will be getting back the spectrum, unjust enrichment payments are inappropriate.

Conclusion

The Commission should promptly issue an Order confirming that spectrum leases are lawful.

Respectfully submitted

Long Lines, Ltd.,



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Its attorneys

Dated February 9, 2001

CERTIFICATE OF SERVICE

I certify that on this 9th day of February, 2001, I caused the foregoing Comments of Long Lines, Ltd. to be served (without attachments) by facsimile and by first-class U.S. mail, postage-prepaid, on the following:

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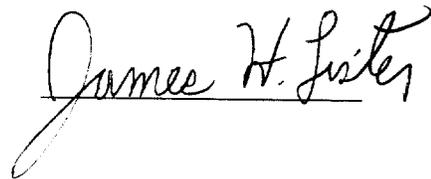


EXHIBIT 1

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June 30, 2000

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Ms. Magalie Roman Salas, Secretary
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Washington, DC 20554

ATTN: Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Room 3-C252

Re: Request for Clarification of De Facto Control Policy and Request for Authority to Operate Broadband PCS and LMDS Facilities Pursuant to Spectrum Lease Arrangement

Dear Ms. Salas:

On behalf of Golden West Telecommunications Cooperative, Inc. ("Golden West"), Sully Buttes Telephone Cooperative, Inc. ("Sully Buttes"), and Long Lines, Ltd. ("Long Lines"), (collectively, the "Rural Carriers"), we hereby submit an original and four (4) copies of the Rural Carriers' request for clarification.

Please contact the undersigned counsel if you have any questions. Questions regarding Long Lines should be directed to James Troup or James Lister at 202-775-7100.

Sincerely,



John A. Prendergast
D. Cary Mitchell

Counsel to Golden West and Sully Buttes.

cc: See attached list

cc:

Kathleen O'Brien Ham
Dale Hatfield
Paul D'Ari
Lisa Gaisford
Gary D. Michaels
Kelly A. Quinn
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Jack Brown
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June 30, 2000

By Hand Delivery

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SE, Room 3-C252
Washington, DC 20554

Re: Request for Clarification of *De Facto* Control Policy and Request for Authority to Operate Broadband PCS and LMDS Facilities Pursuant to Spectrum Lease Arrangement

Dear Mr. Sugrue:

Golden West Telecommunications Cooperative, Inc. ("Golden West"), Venture Wireless, Inc. ("Venture") a subsidiary of Sully Buttes Telephone Cooperative, Inc., and Long Lines, Ltd. ("Long Lines"), an affiliate of Northwest Iowa Telephone Company (collectively, the "Rural Carriers"), pursuant to Section 1.925 of the Commission's Rules, hereby request clarification of the Commission's *de facto* control policy to permit an innovative spectrum lease and joint operating arrangement for broadband Personal Communications Service ("PCS") and Local Multipoint Distribution Service ("LMDS") facilities licensed to the Rural Carriers in various Iowa and South Dakota Basic Trading Areas ("BTAs").

The proposed arrangement is consistent with the public interest because it will permit the Rural Carriers, and others who may join the venture in the future, to pool their resources and share in the costs of designing, financing, constructing and operating a jointly-owned wireless network, while individually retaining ownership and control of their licensed spectrum.

By sharing costs in this manner, the Rural Carriers will be able to provide the public with faster and more affordable access to advanced telecommunications and information services in rural and underserved areas. In more densely populated areas within the licensed BTAs, the proposed arrangement will promote market entry by the Rural Carriers and allow them to compete on a more equal footing in a marketplace that has become increasingly dominated by multi-billion dollar nationwide carriers.

As discussed below, the parties believe that the proposed spectrum lease arrangement is consistent with the *de facto* control policies set forth in the Commission's 700 MHz Guard Band Order, as well as its recently formulated flexible spectrum use policy and principles set forth in the *Volunteers in Technical Assistance* ("VITA") line of cases. Out of an abundance of caution, and because the Commission has the matter of spectrum lease arrangements under consideration in a number of contexts, the parties respectfully request the Bureau's guidance in helping to structure an arrangement that is acceptable from a regulatory perspective, yet which recognizes the business realities faced by small and rural carriers who seek to enter the market for providing advanced telecommunications and information services.

The Parties

Golden West Telecommunications Cooperative, Inc.

Golden West is a South Dakota membership corporation that is in the business of providing local exchange telephone and other telecommunications services in the State of South Dakota. Golden West is the parent company of GW Wireless, Inc. ("GWW"), a South Dakota corporation and qualified small business under the Commission's Rules that holds a 30 MHz C-Block PCS license in the Rapid City, South Dakota BTA (Call Sign WPOJ758), a 10 MHz E-block PCS license in the Mitchell, South Dakota BTA (Call Sign WPOJ757), and A-Block LMDS licenses in the Watertown and Rapid City, South Dakota BTAs (Call Signs WPOH478 and WPOH939), and rural portions of the Aberdeen and Huron BTAs.

Venture Wireless, Inc.

Venture is a South Dakota corporation and a qualified very small business under the Commission's Rules that was created in 1997 to participate in FCC auctions and thereafter to construct and operate wireless telecommunications systems. It is a wholly-owned subsidiary of Sully Buttes Telephone Cooperative, Inc. ("Sully Buttes"), a South Dakota membership corporation that is in the business of providing local exchange telephone and other telecommunications services in the State of South Dakota. Venture holds A-Block LMDS licenses in the Sioux City and Iowa City, Iowa BTAs (Call Signs WPOH440 and WPOH441), the Aberdeen and Huron, South Dakota BTAs, (Call Signs WPOH689 and WPOH935) and in rural portions of the Rapid City BTA.

Long Lines, Ltd.

Long Lines is an Iowa corporation that is a qualified small business under the Commission's rules. Long Lines is owned by Charles A. Long, Kristine L. Long and Elizabeth J. Long, and provides local exchange telephone and other telecommunications services through its affiliate, Northwest Iowa Telephone Company, Inc. ("Northwest Iowa") Long Lines holds a partitioned 30 MHz of C-Block PCS license for portions of the Sioux City, Iowa BTA (Call Sign WPON423)

The Rural Carriers Seek to Retain their Licensed Spectrum Yet to Benefit from the Economies of Joint Operation

Since late last year, the Rural Carriers have been engaged in discussions relating to the joint operation of their PCS and LMDS systems. In particular, these companies are exploring a new technology that would allow them to combine their PCS and LMDS spectrum capabilities in a way that would provide multiple voice lines and Internet access to each customer, as part of a combined service offering. In order for these small businesses to succeed in an increasingly competitive marketplace, and to bring advanced wireless services to less populated areas, they must forge relationships that make sense from a business perspective, and that are not laden with regulatory complexity. Each seeks the advantages of developing their licensed facilities as part of a jointly managed regional network, but each is reluctant to transfer its spectrum to a jointly-owned entity. This is because the licenses have unequal value to the parties, the licenses have significant unrealized value, and each of the Rural Carriers may want to use their licenses in the future to provide services that are different than those offered by the joint operation.

The Commission should recognize that competition and the economic realities of providing advanced telecommunications services in rural America will require licensees in many cases to pool their resources and to enter into strategic arrangements such as proposed by the Rural Carriers. However, small businesses will be forced to forgo individual business opportunities, and rewards from their spectrum investments never be fully realized, if an inflexible application of regulatory policies prevents them from retaining exclusive ownership of their licensed spectrum.

The Licenses are of Unequal Value

The Rural Carriers are establishing a limited liability company ("LLC") which they have determined is best suited to their business needs.¹ It is contemplated that each licensee/member will receive a membership interest in a joint operating company ("Operating Company"). Such interests will be allocated in proportion to the value of the capital and property that each Rural Carrier contributes to the enterprise. However, if the FCC licenses must be transferred to the Operating Company, many difficult issues would be raised by the widely divergent and speculative value of the licenses involved. As one example, the original C-Block auction winner for the Sioux City BTA license (a company unrelated to any of the Rural Carriers) obtained its spectrum with the use of bid credits and installment financing for 80% of its net high bid. While these benefits contributed to significantly higher valuations for the spectrum during the initial C-Block auction, they could also be passed on to qualified successors in interest (such as Long Lines). In

¹ In case the Commission determines that the parties must assign their licenses to the LLC, or use a management agreement to accomplish their proposed arrangement, and that such arrangements would be "attributable" for purposes of auction bid credits, the parties have structured the LLC as a "small business consortium" to preserve the bid credits received by the Rural Carriers as small business auction participants to the greatest extent possible. It is respectfully submitted that in the spectrum lease concept proposed herein, the issue of bid credits should not arise, since each party would retain control and ownership of its licenses, as well as the ability to use the licensed spectrum outside of the proposed arrangement.

contrast, Golden West obtained its Rapid City BTA C-Block license in a later auction where installment financing was not available. While the Members may be able, in theory, to value the licenses according to common terms for purposes of assigning LLC membership interests, this valuation would be wholly speculative because the systems are not yet providing service. It is therefore unlikely that a distribution of equity and voting interests based on a re-valuation of their spectrum would meet each individual member's needs or expectations for return on their investment. By allowing each Rural Carrier to retain its FCC licenses and the Operating Company to lease spectrum capacity, the LLC membership interests could be allocated more equitably (in accordance with other capital contributions) and each licensee would be fairly compensated by the operating company in the form of reasonable lease payments. The operating company could then avoid making significant capital calls on its Members to pay for licenses that its individual Members already own, at a time when the Operating Company has no revenue flow.

The Licenses Have Unrealized Value

Compensating each Rural Carrier with an appropriate proportion of LLC membership interests is further complicated by the fact that technologies such as LMDS are still very new, and a widespread market for rural LMDS service is unlikely to develop for quite some time. Until residential subscriber equipment is widely available, and until viable business models for rural LMDS spectrum are developed, the full value of any LMDS licenses contributed to an operating company will remain unrealized. It is only fair that this value be recovered by the licensee that bore the risk and made the initial investment in the spectrum. If the Rural Carriers must contribute their licenses to the Operating Company, their owners (in most cases, their rural subscribers) would not be fairly compensated for their risk; and the incentive for such entities to participate in future auctions would be significantly reduced.

Individual Licensees May Want to Provide Other Services in the Future

Finally, the individual licensees should be allowed to retain their FCC licenses because they may want to provide different services or make different use of their spectrum in the future. While each licensee will participate in the determination of how its licensed spectrum is used by the operating company, there are foreseeable instances where a rural telephone licensee may want to use its spectrum in a manner that serves the public interest but that is not likely to be profitable, if at all, for quite some time (*e.g.*, to serve individual isolated customers, or to provide backup service for wireline facilities that are damaged by fire, flood, or severe weather). Moreover, the technologies involved (PCS and LMDS) are expected to give rise to new services and capabilities, which the LLC may or may not want to pursue. By permitting individual licensees to retain ownership of their spectrum, the Rural Carriers can deploy these valuable wireless services quickly, in the event that the Operating Company is not interested in expanding its offerings. Forcing each Rural Carrier to assign its licenses to the LLC outright may result in underuse of licensed spectrum, and loss of a potentially valuable service for the Rural Carriers and their customers.

The Commission is Contemplating Spectrum Lease Arrangements in Other Contexts and Proceedings

Joint operation of wireless facilities into a combined regional network will be one of the keys to bringing new and advanced telecommunications services to rural areas and to the hopeful success of the Rural Carriers' joint enterprise in an increasingly competitive marketplace. However, another key to the Rural Carriers' individual and collective success will be whether the FCC expands its recently enunciated policies that encourage the formation of strategic relationships and that preserve economic incentives for companies seeking to provide service in high cost areas. Short of assigning their licensed spectrum to a joint operating company, the Rural Carriers have two options if they want to conduct joint operations. They can either (1) enter into a traditional management/resale agreement, or (2) enter into a straight forward spectrum lease arrangement with the Operating Company. Among these options, a spectrum lease is by far the best arrangement, because it would permit joint operations to be set up quickly and easily while preserving the economic incentives for individual carriers to invest in spectrum licenses and new technologies. As discussed below, the Commission is moving forward with the spectrum lease concept in a number of other contexts and proceedings, spearheaded by the Bureau's efforts to implement a market-based licensing and spectrum use scheme. The Bureau should further embrace this policy initiative, which is vital in the auction licensing context, and clarify that the Rural Carriers have authority to conduct their joint operations pursuant to the attached Spectrum Use Agreement.

700 MHz Guard Band Proceeding

The FCC has recently taken a big step towards a pure spectrum lease concept by adopting a "band manager" scheme for the 700 MHz guard-band spectrum, scheduled to be auctioned this September.² Under the rules for this service, the Commission established the "Guard Band Manager" as a new class of commercial licensee who will be engaged in the business of leasing spectrum for value to third parties on a for-profit basis. The Guard Band Manager will have the flexibility to subdivide its spectrum in any manner it chooses and make it available to any system operator, or directly to any end user for fixed or mobile communications, without having to secure approval for the transfer or assignment of its license. Moreover, although the Guard Band Manager will be required under the Commission's Rules to provide substantial service during the term of its license, it will be able to meet this standard by leasing its spectrum, rather than by incurring the substantial capital costs associated with system buildout.

The Commission made a significant policy clarification when it found that the Guard Band Manager concept is consistent with the requirement in Section 310(d) of the

² In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, WT Docket No. 99-168 (*rel.* March 9, 2000) ("*Guard Band Order*"). The Commission has postponed its 700 MHz guard band auction ("*Auction No. 33*") until September 6, 2000. *See, Public Notice DA 00-941 (rel. May 2, 2000).*

Communications Act that licensees retain ultimate *de facto* control of their licenses.³ Significantly, the Commission found that the Guard Band Manager has “a clear financial stake in the operation of [its] systems” through its lease agreement with the third-party spectrum user.⁴

Guided by principles set forth in the Commission’s *Guard Band Order*, the Rural Carriers have drafted a model spectrum use agreement (“Agreement”) for use in connection with their proposed joint operations.⁵ The Agreement sets forth the terms and conditions of the Spectrum User-Licensee relationship and provides that the licensee/lessor (“Licensee”) will have full authority and the duty to take whatever actions are necessary to ensure the operations of the spectrum user/lessee (“Spectrum User”) remain in compliance with the Act and the Commission’s rules. In particular, the Agreement provides the Spectrum User with the right to use certain frequencies in its service area, as identified in the contract (Sec. 1); the duration of Agreement does not extend beyond the term of the Licensee’s FCC authorization (Sec. 2); the Spectrum User is required to maintain accurate records detailing the operating parameters of the Spectrum User’s system and to allow the Licensee unfettered access to such records (Sec. 4); the spectrum user must agree to operate its system in compliance with all technical specifications for the system consistent with Commission policy, and must use FCC-approved equipment where appropriate (Sec. 5). Moreover, the Agreement requires the Spectrum User to comply with all applicable Commission rules and to accept FCC oversight and enforcement consistent with the Licensee’s FCC authorization and to cooperate fully with any investigation or inquiry conducted by either the Commission or the Licensee (Sec. 5). The Licensee may conduct onsite inspections of all transmission facilities, and shall have the authority to suspend operation of the system immediately if it is determined by the Licensee or the FCC that such operations are causing harmful interference or are otherwise being conducted in violation of relevant statutes, regulations, policies or license conditions (Sec. 4). If the Spectrum User refuses to comply with a suspension or termination order, the Licensee shall have the authority to use all legal means necessary to enforce the order (Sec. 4).

The Guard Band Manager licensing scheme represents an innovative spectrum management approach that should enable parties to more readily acquire spectrum for varied uses, while streamlining the Commission’s spectrum management responsibilities. The same holds true for the spectrum lease arrangement proposed by the Rural Carriers. Although the Rural Carriers have no current plans to lease their spectrum capacity to individuals or entities other than the Operating Company (of which they will each be a Member), the proposed spectrum lease will enable Members to acquire spectrum for varied uses without involving the Commission’s Staff in the review of multiple spectrum

³ *Guard Band Order*, at paragraph 46.

⁴ *Id.*

⁵ See *Guard Band Order* at paragraphs 48-51. A copy of the proposed Agreement is provided below as *Attachment A*.

assignment of license applications⁶ whenever Members want to pursue individual opportunities.

Flexible Spectrum Use Policy Statement

The Commission set forth guiding principles for its spectrum management activities in the new millennium in a policy statement that it issued on November 22, 1999.⁷ In this *Flexible Use Policy Statement*, the Commission acknowledged that the tremendous growth of the telecommunications industry “would not have been possible without the availability of additional spectrum for new technologies and relaxed restrictions on the licensing of spectrum.”⁸ The Rural Carriers applaud the efforts of the Commission and the Wireless Bureau in making a significant amount of spectrum available for carriers seeking to provide innovative wireless telecommunications services, and for adopting licensing rules which promote opportunity for small businesses and rural telephone companies that participate in the FCC’s auctions. However, in order for these designated entities to turn their licensed spectrum into viable businesses, the FCC and Wireless Bureau will need to relax their policies with respect to the operation of licensed spectrum. By permitting the Rural Carriers to lease some or all of their licensed spectrum to the Operating Company, each will have the freedom to pursue larger (and more innovative) business opportunities while retaining the flexibility (and security) of being able to respond quickly to immediate spectrum needs.

Although the spectrum lease concept is not expressly mentioned in the text of the *Flexible Use Policy Statement*, such arrangements clearly advance the same goals of promoting greater efficiency in spectrum markets and making more spectrum available to meet increased demand. The spectrum lease arrangement proposed by the Rural Carriers serves efficiency interests by allowing each to use the license(s) that it obtained at auction (or in the secondary market) to provide emergency backup service within their wireline service area while at the same time dedicating the spectrum in larger markets to the Operating Company. Under a spectrum lease, more spectrum capacity can be made available to the public with less regulatory or administrative delay. As a result, more spectrum will be “unlocked” from areas that are currently underserved and made available to meet increased public demand. If and when spectrum lease arrangements become more popular, the law of supply and demand should help to create a robust “spot market” for wireless spectrum capacity and thereby significantly reduce spectrum acquisition costs for rural carriers. These savings may then be used for other purposes, such as for network construction or for otherwise reducing the costs of service to consumers. On May 31, 2000, the Commission held a public forum to address issues

⁶ Such applications may include emergency requests for special temporary authority when immediate access to spectrum is needed for individual operation.

⁷ *Policy Statement, Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, FCC 99-354 (*rel.* November 22, 1999) (“*Flexible Use Policy Statement*”).

⁸ *Id.* at paragraph 1.

related to the development of secondary markets for radio spectrum.⁹ During this public forum, several industry members advised the Commission's staff that spectrum lease arrangements would provide licensees and the public with a valuable tool to achieve their communications needs.

Software Defined Radio Notice Of Inquiry

The Commission recently began an inquiry into the use of software defined radios – or SDRs – which permit operations over a broad range of frequencies, bandwidths, and transmission standards.¹⁰ SDR technology has the potential to vastly improve the efficiency of spectrum usage at a time when the demand for wireless communications services is rapidly increasing.

The Commission recognized that SDRs could expand access to broadband communications for all persons and increase competition among telecommunication service providers.¹¹ While it is impossible at this point for the Rural Carriers to determine exactly how spectrum lease arrangements will be used in conjunction with SDRs, the Commission has speculated that “the licensee of a block of spectrum that is not fully utilized might negotiate with a second party to permit the use of a portion of the spectrum at times when it is available.”¹² Under this sort of scenario, it is apparent that the Commission is contemplating the use of lease arrangements in conjunction with licensed spectrum.

Taken together, the *Guard Band Order*, the *Flexible Use Policy Statement*, and the *SDR NOI* cover a wide range of forward-looking spectrum management proposals. A common thread among these matters is the evolution of the Commission's existing *de facto* control policies, as embodied in the *Intermountain Microwave* decision.¹³ In this regard, the Rural Carriers believe that their participation in the control structure of the Operating Company, combined with the numerous public interest objectives that will be served by their proposal, are factors consistent with a line of cases known as the *Volunteers in Technical Assistance* (“VITA”) decisions. These decisions appear to indicate that the Commission has already moved toward a more flexible approach in applying its *de facto* control standards (especially concerning payment of expenses) to less conventional arrangements where the public interest and other important policy objectives are served. Along with the *Guard Band Order*, the Rural Carriers believe that the *VITA* line of cases, described below, provides further support for permitting the proposed arrangement.

⁹ See *Public Notice*, DA 00-862 “FCC Announces Public Forum on Secondary Markets in Radio Spectrum,” (rel. April 13, 2000).

¹⁰ In the Matter of Inquiry Regarding Software Defined Radios, *Notice of Inquiry*, ET Docket 00-47 (rel. March 21, 2000) (“*SDR NOI*”).

¹¹ *Id.* at paragraph 1.

¹² *Id.* at paragraph 16.

¹³ *Intermountain Microwave, Order*, 24 Rad. Reg. (P&F) 983 (1963) (“*Intermountain*”).

In the first *VITA* case,¹⁴ the Chief of the International Bureau granted authority to VITA to construct, launch, and operate a non-voice, non-geostationary ("NVNG") mobile satellite service ("MSS") system in specific frequency bands below 1 GHz. VITA's application described its proposed arrangement with CTA Incorporated ("CTA"), pursuant to which CTA would construct, launch and own VITASAT 1 in exchange for rights to use half of VITA's satellite capacity to provide commercial service. Although evidence showed that CTA would play a substantial and influential role in the venture, the International Bureau rejected the argument that CTA's involvement with VITA amounted to a *de facto* change in ownership.

As part of its *de facto* control analysis, the International Bureau took into consideration the fact that the arrangement between VITA and CTA did not appear to be "structured to avoid Commission requirements, such as ownership limits," and the similarity of the arrangement in question to excess-capacity leasing arrangements between non-commercial educational and commercial "wireless cable" service providers.¹⁵ In making this latter comparison, the Bureau noted that VITA would retain control over the content of the 50% of VITASAT 1's capacity that is dedicated to VITA's non-profit humanitarian purpose. Accordingly, the International Bureau conditioned the grant of VITA's license to provide NVNG MSS services on VITA maintaining use of 50% capacity, establishing the technical specifications for the satellite, directing the operation and use of signals, determining the specification for tracking, telemetry & command ("TT&C"), directing and supervising significant changes in space station configuration, and discharging its responsibility as licensee consistent with Commission rules and regulations.¹⁶ Thus, VITA had to retain a great deal of control over the operation of its satellite (*i.e.*, its licensed facilities) and could not simply "hand the keys" to CTA. VITASAT-1 was subsequently destroyed in a launch failure in August of 1995.

A year and a half later, the International Bureau granted VITA authority to launch and operate VITASAT-1R as a replacement for VITASAT-1.¹⁷ In *VITA II*, the International Bureau ruled on various petitions to deny VITA's authority to construct and launch VITASAT-1R. The petitioners took issue with an agreement between VITA and Final Analysis, Inc. ("FAI"), under which FAI would construct and operate a satellite with two payloads – one that would operate on frequencies licensed to VITA (VITASAT-1R), and the other on frequencies licensed on an experimental basis to FAI (FAISAT-2V). The International Bureau performed an *Intermountain* analysis of the VITA-FAI proposal and upheld the arrangement. In paragraph 35 of *VITA II*, the Bureau stated as follows:

¹⁴ VOLUNTEERS IN TECHNICAL ASSISTANCE Application for Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile-Satellite System, 11 FCC Rcd 1358 (July 21, 1995) ("*VITA I*").

¹⁵ See, e.g., 47 C.F.R. § 74.931

¹⁶ *VITA I*, at paragraph 50.

¹⁷ Order, 6 CR 1417 (March 7, 1997) ("*VITA II*").

VITA has struggled for years to launch and operate a Little LEO satellite system to further its humanitarian mission of providing essential educational, health, environmental, disaster relief and technical communication services in developing countries. Its non-profit status, coupled with the unfortunate loss of its first satellite in a launch failure, has presented VITA with peculiar roadblocks to the initiation of its planned services. VITA is, however, now prepared to move forward expeditiously with the provision of its service. Consequently, we find that these are sufficient public interest reasons to justify the grant of VITA's replacement satellite.

In September of 1997, the full Commission ruled on an Application for Review of *VITA I* that was filed by Leo One USA Corporation ("Leo One").¹⁸ In *VITA III*, the Commission found that the International Bureau had applied the *Intermountain* factors properly, and correctly concluded that the arrangement between VITA and CTA did not constitute a change in ownership.

The Commission's endeavor to compare the VITA arrangement to a spectrum lease agreement in the first VITA case is a positive example of the FCC "thinking out of the box," when confronted with a situation that did not fit squarely into the *Intermountain* criteria, but which promised to advance public interest goals. The joint operations proposed by the Rural Carriers should be viewed in the same light. Although the Operating Company and each of the Rural Carriers will operate on a for-profit basis, these entities are together seeking to provide advanced telecommunications services to rural and underserved areas. Section 309(j)(3)(A) of the Communications Act of 1934, as amended (the "Act") directs the Commission to use its licensing authority to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."¹⁹ Permitting the Rural Carriers to operate their combined PCS and LMDS systems as proposed herein promotes each of these goals. Section 309 (j) of the Act also directs the Commission to use this licensing authority to promote economic opportunity and competition by small businesses and rural telephone companies.²⁰ Since each of the Rural Carriers is eligible for both small business and rural telephone company status, permitting them to operate their licensed systems in a manner that will reduce operating costs and increase their business opportunities is in the public interest.

Finally, Section 706 of the Telecommunications Act of 1996 (the "1996 Act") directs the FCC to ensure that advanced telecommunications capability is made available to all Americans in a reasonable and timely fashion. The proposed joint operating arrangement provides each of the Rural Carriers with the opportunity and the means to rapidly deploy high speed services to its existing customers, as well as to customers in new areas served by the Operating Company. Therefore, the arrangement will promote the objectives sought by Congress in promulgating Section 706.

¹⁸ *Memorandum Opinion and Order*, 7 CR 820 (September 11, 1997) ("*VITA IIP*").

¹⁹ *See* 47 U.S.C. § 309(j)(3)(A) (1996).

²⁰ *See* 47 U.S.C. § 309(j)(3)(B) (1996).

CONCLUSION

For the reasons expressed herein, the Rural Carriers respectfully request that the Wireless Bureau grant their request to operate their licensed systems through the proposed Operating Company and spectrum lease arrangement.²¹

No party to this request has been convicted of drug possession or trafficking, such that the Applicant is subject to a denial of federal benefits under Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §862.

Respectfully submitted,

Golden West Telecommunications
Cooperative, Inc.
410 Crown Street
Wall, SD 57790
(605) 279-2161

**GOLDEN WEST TELECOMMUNICATIONS
COOPERATIVE, INC.**

By: _____

Sully Buttes Telephone Cooperative,
Inc.
218 Commercial Avenue, S.E.
Highmore, SD 57354-0157
(605) 852-2224

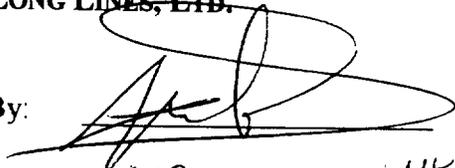
**SULLY BUTTES TELEPHONE
COOPERATIVE, INC.**

By: _____

Long Lines, Ltd.
501 Fourth Street
Sergeant Bluff, IA 51054
(712) 271-2710

LONG LINES, LTD.

By: _____


DIRK JON WINKKEL, CEO

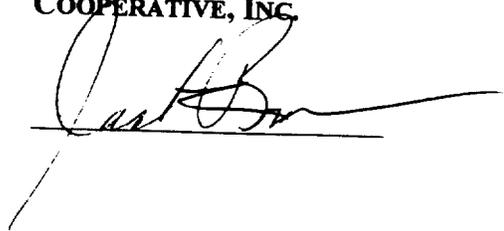
²¹ In the alternative, the Rural Carriers respectfully request that the Commission grant them a waiver that would permit them to conduct their joint operations as proposed herein. Such a waiver would be in the public interest because it would allow the rapid delivery of advanced telecommunications services to rural customers as well as promote the efficient and intensive use of licensed radio spectrum.

No party to this request has been convicted of drug possession or trafficking, such that the Applicant is subject to a denial of federal benefits under Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §862.

Respectfully submitted,

**GOLDEN WEST TELECOMMUNICATIONS
COOPERATIVE, INC.**

By:



SULLY BUTTES TELEPHONE COOPERATIVE, INC.

By:

LONG LINES, LTD.

By:

No party to this request has been convicted of drug possession or trafficking, such that the Applicant is subject to a denial of federal benefits under Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §862.

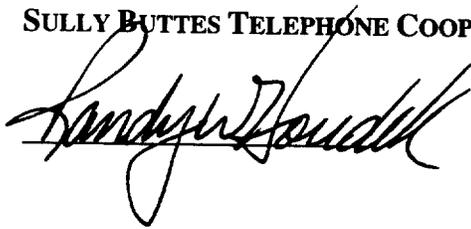
Respectfully submitted,

**GOLDEN WEST TELECOMMUNICATIONS
COOPERATIVE, INC.**

By: _____

SULLY BUTTES TELEPHONE COOPERATIVE, INC.

By:

A handwritten signature in black ink, appearing to read "Randy Boudak", is written over a horizontal line.

LONG LINES, LTD.

By: _____

EXHIBIT 2

SPECTRUM USE AGREEMENT

THIS AGREEMENT is entered into this ___ day of _____, 2000, by and between _____, L.L.C., a South Dakota limited liability company (“Spectrum User”) and [Name of FCC Licensee], a _____ corporation (“Licensee”), with regard to the joint operation of certain broadband Personal Communications Service (“PCS”) and Local Multipoint Distribution Service (“LMDS”) facilities in various Iowa and South Dakota Basic Trading Areas (“BTAs”).

WHEREAS, Licensee has been granted a license by the Federal Communications Commission (FCC) under Call Sign _____ to provide [PCS / LMDS] on Frequency block ___ as allocated under Part [24 / 101] of the FCC’s Rules, in the _____ BTA (“Subject BTA”) (hereinafter the “FCC License” or “Licensed Spectrum”); and

WHEREAS, Licensee has entered into a limited liability company operating agreement (“Operating Agreement”) whereby Licensee is a Member of the Spectrum User and will participate in the ownership and management of a South Dakota limited liability company that will design, plan, finance, construct operate and manage a wireless communications network that will make use of the Licensed Spectrum; and

WHEREAS, Spectrum User recognizes that Licensee has certain rights and obligations pursuant to its FCC License with respect to the design, construction and operation of its wireless network, which include compliance with the Communications Act of 1934, as amended, (the “Act”) as well as the policies and rules of the FCC; and

WHEREAS, Licensee wishes to lease spectrum to Spectrum User in a way that will provide it with maximum flexibility to conduct its operations throughout the Subject BTA consistent with the terms of such FCC License;

NOW THEREFORE, in consideration of the mutual promises and obligations set forth below, the parties agree as follows:

1. **Permissible Operations.** Subject to Licensee's supervision and control as set forth in Paragraph 4 below and the terms and conditions of the FCC License and this Agreement, Spectrum User shall be allowed to use the Licensed Spectrum in its network to provide any communications service permitted under the relevant FCC Rules.
2. **Initial Term.** This Agreement shall become effective upon the date of its execution and unless terminated shall extend through the expiration date of the FCC License ("Initial Term"). Subject to renewal of Licensee's FCC License, this Agreement shall thereafter be extendable by mutual consent of the parties for additional ten (10) year terms.
3. **Compensation.** Spectrum User shall compensate Licensee for its use of the Licensed Frequencies according to the formula shown below, which is designed to pay (over a ten-year period) half of the Licensee's cost of obtaining its FCC License, plus a ten percent annual return on the outstanding balance:

$$\text{Annual Compensation} = \text{Fixed Payment} + 10\% \text{ Annual Return}$$

Where

$$\text{Fixed Payment} = .05X$$

$$10\% \text{ Annual Return} = 0.1 * [0.5X - \text{Sum of all prior year Fixed Payments actually made}]$$

$$X = \text{net high bid / cost of obtaining FCC License}$$

By way of example, where the cost of the FCC License is one million dollars, and all payments are made as scheduled, the annual compensation amount would be calculated as follows:

License Cost \$ 1,000,000

Lease Year	Fixed Payment	10% Return	Total Payment
1	\$ 50,000	\$ 50,000	\$ 100,000
2	\$ 50,000	\$ 45,000	\$ 95,000
3	\$ 50,000	\$ 40,000	\$ 90,000
4	\$ 50,000	\$ 35,000	\$ 85,000
5	\$ 50,000	\$ 30,000	\$ 80,000
6	\$ 50,000	\$ 25,000	\$ 75,000
7	\$ 50,000	\$ 20,000	\$ 70,000
8	\$ 50,000	\$ 15,000	\$ 65,000
9	\$ 50,000	\$ 10,000	\$ 60,000
10	\$ 50,000	\$ 5,000	\$ 55,000

The first annual payment is due 30 calendar days following execution of this Agreement and subsequent annual payments are due on that same month and day. If the payment due date is not a business day, payment is due on the next business day.

In addition, if payment is 30 calendar days late, a late fee equal to 5% of the full amount of the payment shall be due. Finally, if payment is 90 calendar days late, Licensee may elect to terminate this Agreement by written notice to Spectrum User.

4. Oversight and Control. Licensee and Spectrum User acknowledge and agree that Licensee shall at all times maintain oversight and control over Spectrum User's operation on the Licensed Frequencies in accordance with the policies and rules of the FCC. In furtherance hereof, Licensee shall have the right to approve or disapprove of certain fundamental matters within Licensee's geographic service area. These matters include (1) network design; and (2) system construction and buildout timetable. Spectrum User shall maintain among its records an accurate list of the location of all transmission and control facilities which operate on the Licensed Frequencies, and the technical parameters of such facilities. Licensee shall be given at least 30 days' prior notice of the construction of any facilities that will use the Licensed Frequencies, and shall have the right to approve or disapprove of any proposed transmission sites. Licensee shall have unfettered access and authority to inspect Spectrum User's records and operating facilities upon 24 hours prior written notice to Spectrum User, and shall have the authority to suspend Spectrum User's operation on the Licensed Frequencies immediately if it is determined by Licensee that such operations are causing harmful interference or otherwise operating in a manner that violates relevant statutes, regulations, policies or license conditions.

5. Regulatory Compliance. The parties shall cooperate, as necessary, in the preparation, review and approval of any legal and/or regulatory filings that are

deemed necessary by the parties for the construction and operation of a network to operate on the Licensed Frequencies. Spectrum User recognizes that Licensee remains ultimately responsible for ensuring that all operations on its Licensed Frequencies are in compliance with the policies and rules of the FCC and the Act. Spectrum User therefore agrees that it shall comply with all applicable laws and regulations, including but not limited to FCC rules and the Act, and that it shall assist Licensee in obtaining and maintaining all appropriate government Licenses. Spectrum User also agrees that it shall use only equipment that has been type accepted by the FCC for operation on the Licensed Frequencies, or for which type acceptance is not required. Licensee agrees that it shall keep its license valid and in full effect, and shall make any necessary installment payments on its FCC License. Each party agrees to notify the other in writing within five days after becoming aware of the commencement of any action, suit or proceeding, or of the issuance of any order, writ, injunction or decree of any court, agency or other governmental instrumentality, which could have a material adverse effect on the operations of the Spectrum User network or the operations or financial condition of Licensee.

6. System Construction Requirements. Spectrum User recognizes that the FCC Rules impose construction requirements that the Licensee must meet as a condition of its FCC License. Failure to meet these requirements may result in forfeiture or non-renewal of the FCC License and the Licensee will be ineligible to regain it. Spectrum User agrees that it will assist Licensee in meeting the construction requirements on the Licensed Frequencies by implementing its network in

accordance with the Buildout Plan set forth in Exhibit A hereto. Spectrum User agrees that it shall furnish to Licensee a report on December 1 and on June 1 of each year that this Agreement is in effect, detailing its progress toward meeting the benchmarks set forth in the Buildout Plan. In the event that Licensee determines that Spectrum User is not meeting these benchmarks or is otherwise putting Licensee at risk of failing to meet the FCC's construction requirements, Licensee may complete construction of the planned system on its own or build alternative facilities that will meet the FCC construction requirements. If Licensee constructs such facilities pursuant to this Paragraph, then Licensee shall be entitled to either (1) retain all revenues generated by the operation of the Licensed Frequencies, or (2) receive full reimbursement from Spectrum User for Licensee's cost of meeting the FCC construction requirements.

7. Installment Payment Obligations. If the Licensee has obtained installment financing to pay for its FCC License, then nothing in this Agreement shall relieve Licensee of its obligation to make full and timely payments to the government for its FCC License, including any late payment fees that may be imposed. If Licensee fails to make any quarterly installment payment in timely fashion, then Spectrum User may elect to make such installment payment on behalf of the Licensee and to deduct the amount paid from its subsequent lease payment(s). If Licensee has missed three (3) consecutive quarterly installment payments, then Licensee is deemed to have triggered the right of first refusal under Section 9 of this Agreement, with the offering price for the FCC License set at the Licensee's

purchase price. Any such transfer or assignment of the FCC License shall be subject to the prior approval of the FCC.

8. **Operation by Licensee.** Nothing in this agreement shall prevent Licensee from constructing and operating its own communications network to operate on the Licensed Frequencies in any portion of the BTA that is not being served by Spectrum User, or at any location that does not cause harmful interference to Spectrum User's operations. To protect against harmful interference to the wireless system operated by Spectrum User, Licensee shall give Spectrum User at least seven days' advance notice of such operations.

9. **Limitation on Transfer; Right of First Refusal.** Licensee recognizes that the ongoing viability of Spectrum User's business is dependent on having access to the Licensed Frequencies. For this reason, before Licensee sells, transfers, assigns or exchanges (collectively "transfer" or "transfers") any part of its FCC License to a non-affiliate of such Licensee, it shall offer that interest to Spectrum User and its Members for the value at which and the terms under which such non-affiliate has offered to pay for such interest pursuant to a bona-fide offer in writing. A transfer to an affiliate shall not be subject to this right of first refusal but shall be subject to the duty of transferee to assume the obligations of the agreement as further described below. An affiliate of Licensee is an entity or individual that, directly or indirectly, controls, is controlled by or is under common control with Licensee. Such offer shall be in the form of a written notice that is first sent to Spectrum User. Spectrum User shall have ten (10) business days to accept or decline such offer in a written response to the Licensee. If Spectrum User accepts the offer, the parties shall use

good faith efforts in the negotiation and execution of a definitive agreement and the preparation of an application for FCC consent to assign the Licensed Frequencies to Spectrum User. If Spectrum User declines the offer, Licensee shall offer such interest to each of the Members of Spectrum User individually, with each Member entitled to purchase that fraction of the offered interest equal to its membership interest in Spectrum User divided by the membership interests of all non-selling Members. If any Member(s) declines to exercise its right of purchase hereunder, the other Member(s) may elect to purchase that portion of the interest intended to be sold that has been declined by the other Member(s) in amounts determined by reapplication of the principles set forth in this Section 8, excluding from consideration the membership interests of the selling and declining Members. Each non-selling Member shall notify the Licensee in writing of its intention to exercise or not to exercise its purchase rights hereunder within ten (10) business days following receipt of the offer of sale. The Licensee shall promptly notify each Member of the elections by the other Members. Each non-selling Member shall then provide written notifications of its intention to exercise or not to exercise its purchase rights with respect to such remaining interests within ten (10) business days following receipt of notice of the last Members' election. If any Members of Spectrum User accept the offer, the parties shall use good faith efforts in the negotiation and execution of a definitive agreement and the preparation of an application for FCC consent to assign the Licensed Frequencies to such Member(s). If neither Spectrum User nor its Members accept the Licensee's offer, the Licensee may transfer, sell or assign its FCC License to a non-affiliate. Licensee shall under no

circumstance be required to sell only a portion of the relevant license as a result of this paragraph, unless the original offer from the non-affiliated entity contemplates sale of a portion of the FCC License. In any case in which Licensee transfers all or part of its license, whether pursuant to this paragraph or otherwise, the transferee shall take the spectrum subject to this agreement, and Licensee shall prior to consummating the transfer procure the transferee's execution of a document acceptable to Spectrum User (which acceptance shall not be unreasonably withheld) in which the transferee assumes the obligations of the agreement.

10. Termination. This agreement can be terminated by either party on one (1) year's written notice, or in the case of Licensee, such shorter amount of time as may be required by the action of any regulatory agency or court affecting the FCC License. This agreement shall terminate on forfeiture, default or non-renewal of the FCC License.

11. Entire Agreement. This writing constitutes the entire agreement between the parties, and can be changed only by written amendment signed by the parties. This agreement shall be governed by and interpreted under the Communications Act of 1934, as amended, the rules and regulations of the FCC, and the laws of the state of South Dakota, as appropriate. This agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties have executed this agreement as of the above date, and the persons signing warrant that they are duly authorized to do so.

[Spectrum User]

By: _____

[FCC Licensee]

By: _____

274344.1