

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

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**COMMENTS OF**  
**BLOOSTON, MORDKOFKY, DICKENS, DUFFY AND PRENDERGAST**

The law firm of Blooston, Mordkofsky, Dickens, Duffy and Prendergast, Washington, D.C., submits these comments in response to the *Notice of Proposed Rulemaking* ("NPRM") in the above-captioned proceeding (FCC 00-402, *released* November 27, 2000) on behalf of the following rural telecommunications carriers: Golden West Telecommunications Cooperative, Inc. ("Golden West"); Kerrville Telephone Company, Kerrville, Texas ("KTC"); Lincoln County Telephone System, Inc., Pioche, NV ("Lincoln County"); Peñasco Valley Telephone Cooperative, Artesia, NM ("PVT"); Sully Buttes Telephone Cooperative, Highmore, SD ("Sully Buttes"); and Townes Telecommunications, Inc., Lewisville, AR ("Townes") (hereinafter, the "Blooston Rural Carriers")

The Blooston Rural Carriers applaud the efforts of the FCC and, in particular, the Office of Engineering and Technology<sup>1</sup> and the Wireless Telecommunications Bureau,<sup>2</sup> in facilitating industry discussions over the past year regarding spectrum leasing and other secondary market arrangements. These discussions have led the Blooston Rural Carriers (and no doubt many

<sup>1</sup> See Public Notice "FCC Announces Agenda for Public Forum on Secondary Markets in Radio Spectrum," DA 00-1139, 19 FCC Rcd 18667 (2000).

<sup>2</sup> See Public Notice "Wireless Telecommunications Bureau Seeks Comment on Request for Clarification of De Facto Control Policy and Proposed Spectrum Lease Agreement," DA 00-1953,

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others) to “think outside of the box” and to consider non-traditional business plans and strategic alliances to make better use of their licensed spectrum and to take advantage of more efficient new technologies. These arrangements will be helped along by the removal of various regulatory barriers in response to the *NPRM*. However, in order for the Commission’s secondary market initiatives to make a real difference in rural and underserved areas, where few large carriers have found sufficient economic incentives to provide service and where license disaggregation and/or partitioning transactions have proven to be unpopular, the Commission will need to go further. Along with adopting a policy whereby small businesses licensees can lease their spectrum without jeopardizing eligibility status or entitlement to bidding credits, the Commission should adopt further incentives, such as reduced license payment obligations or enhanced buildout credits, for licensees that partition their licenses to or that enter into long-term lease arrangements with rural telephone companies that seek to provide service to rural or underserved territories. In support of these proposals, the Blooston Rural Carriers provide the following comments:

**I. THE RURAL CARRIERS SUPPORT THE COMMISSION’S SECONDARY MARKET INITIATIVES GENERALLY**

The need for effective secondary markets, as explained in the Commission’s recent *Secondary Markets Policy Statement*,<sup>3</sup> goes without question. Demand for spectrum has increased dramatically as a result of explosive growth in wireless technologies and services. This “spectrum crunch” will only be compounded by the growing interest in broadband services, including wireless Internet, high speed data, mobile telemedicine, and other advanced capabilities that will be enabled by “third generation” (“3G”) wireless technology. However, the

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<sup>3</sup> *Policy Statement*, “In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets,” FCC 00-401 (*rel.* December 1, 2000) (“*Secondary Markets Policy Statement*”).

Commission must ensure that these advanced services will be available to all Americans. Because of the trend toward allocating larger geographic licenses for broadband wireless services,<sup>4</sup> partitioning and spectrum leasing may be the only realistic opportunity for rural carriers to obtain spectrum rights. While secondary market mechanisms such as geographic partitioning and spectrum disaggregation are available in auctionable radio services, the Blooston Rural Carriers agree with the Commission's conclusion that the secondary market today remains largely undeveloped. Relaxation of the policies and rules that have previously stood in the way of innovative spectrum use arrangements (*e.g.*, through a clarification or modification of the Commission's *de facto* control policies as to common carrier wireless providers, embodied by Intermountain Microwave case and its progeny) would go a long way toward eliminating unnecessary inhibitions on the operation of secondary market processes. Moreover, creating attractive incentives for larger carriers to partition or lease to rural telcos would help to spur the rapid deployment of services to all areas of the country.

## **II. THE COMMISSION SHOULD PERMIT WIDER USE OF SPECTRUM LEASING AND JOINT OPERATING ARRANGEMENTS FOR LICENSED SPECTRUM**

As an initial matter, the Blooston Rural Carriers agree with the Commission's tentative conclusion that wider use of spectrum leasing would promote the public interest by increasing the efficiency of spectrum use.<sup>5</sup> The Blooston Rural Carriers also agree with the fundamental tenants of spectrum usage rights as set forth by the Commission in the *Spectrum Use Policy Statement*: In particular, that licensees (and spectrum users) should have clearly defined usage rights to their spectrum, with sufficient license terms and reasonable renewal expectancy to promote long-term investment; that licenses and spectrum usage rights should be easily

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<sup>4</sup> As an example, the 700 MHz band licenses to be awarded in Auction No. 31 will convey rights to serve one of six giant Economic Area Groupings ("EAGs").

<sup>5</sup> *NPRM* at ¶ 18.

transferable, for lease or sale, by division or aggregation; that licensees and spectrum users should have flexibility in determining the services to be provided and technology used for operation, so long as their operation falls within applicable technical guidelines; and that licensees and spectrum users have an obligation to protect against and the right to be protected from interference to the extent provided in the Commission's rules.<sup>6</sup> Within this framework, and in light of the economic realities of providing advanced telecommunications services in rural America, the FCC should recognize that rural carriers often have limited resources and that many will find it necessary to enter into joint operating arrangements or other strategic alliances in order to provide advanced services to their customers in an economically feasible manner.

In this regard, the Blooston Rural Carriers support, and hereby incorporate by reference, a request for clarification of the Commission's *de facto* control policies that two of them, Golden West and Sully Buttes, filed with the Wireless Bureau on June 30, 2000. In the request for clarification, which became the subject of a *Public Notice* by the Wireless Bureau seeking industry comment,<sup>7</sup> the parties demonstrated that their proposed spectrum lease arrangement would be consistent with the *de facto* control policies set forth in the Commission's 700 MHz Guard Band proceeding, as well as its recently formulated flexible spectrum use policy and principles set forth in the *Volunteers in Technical Assistance* ("VITA") line of cases. For the convenience of participants in the instant proceeding, a copy of the June 30, 2000 request for clarification is attached hereto.

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<sup>6</sup> *Secondary Markets Policy Statement* at 9. *NPRM* at ¶ 25.

<sup>7</sup> *Supra*, Note 2

**III. THE COMMISSION SHOULD SEEK TO REMOVE DISINCENTIVES TO SMALL BUSINESS AND SMALL BUSINESS CONSORTIUM PARTICIPATION IN SPECTRUM LEASE ARRANGEMENTS**

- A. *Unjust enrichment penalties should not apply where a small business licensee enters into a bona-fide spectrum lease arrangement with a non-small business.*

The Blooston Rural Carriers believe that operation pursuant to a spectrum leasing arrangement should not have any effect on the small business (or very small business) status of any individual licensee or consortium, and therefore a lease arrangement involving the lease of spectrum rights to a non-small business (including a long-term lease agreement) should not trigger unjust enrichment payment obligation. Under a bona-fide lease arrangement, the Commission should view the licensee as having retained full ownership and *de facto* control of its license(s).

Allowing small businesses to retain the full value of their bidding credits when leasing their spectrum will promote greater opportunity for small businesses, because it will encourage these carriers to enter into a variety of business ventures, including ventures with larger businesses. It will also promote greater efficiency in the market for leased spectrum capacity. The FCC has always viewed radio spectrum as a scarce resource, and promulgated policies and rules to promote its efficient and intensive use. Allowing small business licensees to lease their spectrum freely, and to enter into non-attributable joint venture arrangements to put their spectrum to use, will create a larger pool of available spectrum for all potential users. This will help to create a larger and more robust market for wireless spectrum. The ability to retain their bidding credits will permit small businesses to make their spectrum available to potential users at a lower cost. Companies that seek to enter into spectrum lease arrangements will also benefit from having greater flexibility to obtain access to the amount of spectrum, in terms of quantity,

length of time, and geographic area, that best suits their needs.<sup>8</sup> Of course, if a lease is not a bona fide, arms-length agreement, then an attribution issue may arise, just as such issue would arise if a “passive” investor in a small business licensee had undue power to control the licensee’s operation. However, the Commission should not assume *ab initio* that a lease to a larger carrier will confer undue control so as to affect the licensee’s eligibility for bid credits.

*B. Licensees that exercise reasonable care should be protected from liability for a spectrum user’s compliance with the Commission’s Rules*

In the *NPRM*, the Commission has proposed that the licensee / lessor of spectrum retain ultimate responsibility for ensuring that the spectrum lessee complies with the Communications Act and any applicable technical and service rules.<sup>9</sup> The Blooston Rural Carriers generally agree with this approach but are concerned that large regional licensees (*e.g.*, the eventual holders of spectrum for advanced “3G” services) will be reluctant to enter into long term lease arrangements with rural carriers if in doing so they may expose themselves to potential FCC enforcement action, including possible license forfeiture, for violations by a lessee that they are not in a position to prevent. Instead, the Commission should clarify that the nature of a licensee’s liability for a spectrum user’s regulatory compliance is only secondary, and that the licensee will have fully discharged its oversight responsibilities (and protected itself from liability arising from FCC enforcement activities involving the spectrum user’s operations) if it includes certain express covenants in its lease agreement. Such covenants should make it clear that the spectrum user’s operations will be subject to any relevant FCC rules and enforcement

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<sup>8</sup> See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, FCC 00-90 (*rel.* March 9, 2000) at paragraph 31; William E. Kennard, *A New FCC for the 21<sup>st</sup> Century* 20 (August 1999) (citing as a key policy initiative, the exploration of innovative assignment mechanisms, such as Band Managers, that promote efficiency through market forces and enable users to easily aggregate and disaggregate spectrum for varied uses); Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 99-101 (1997).

<sup>9</sup> *NPRM* at ¶ 27.

authority, and that the licensee retains full authority and duty to take whatever actions necessary to ensure the spectrum lessee's compliance with the Act and the Commission's rules.

The Blooston Rural Carriers believe the Commission should not impose onerous "due diligence" requirements or sanctions on licensees, if they have included an appropriate regulatory compliance certification as part of their written lease agreement; have made the lessee familiar with the applicable Commission policies and rules; have imposed a contractual duty on the lessee to report any violations; have made the lessee aware of the Commission's jurisdiction over its use of the spectrum pursuant to Section 304 of the Act; and take prompt action to force lessee compliance if a violation should occur.

Subleasing arrangements should likewise be permitted so long as the spectrum lessee agrees to comply with all applicable Commission rules (including those that may be imposed at a later date) and accepts FCC oversight and enforcement consistent with the terms of the licensee's authorization. Moreover, with respect to subleasing arrangements, the spectrum lessee and sublessee should each have primary responsibility (and liability) for potential FCC enforcement actions, and the licensee should be found to have fully discharged its oversight duties, if the above-described terms are included in its spectrum lease agreement.

**IV. THE COMMISSION SHOULD ADOPT A VARIETY OF FINANCIAL AND REGULATORY INCENTIVES TO PROMOTE GEOGRAPHIC PARTITIONING AND LONG-TERM LEASE ARRANGEMENTS IN RURAL AND UNDERSERVED MARKETS**

The Blooston Rural Carriers agree with the Commission's conclusion that the existing licensing and regulatory scheme for wireless services does not always give licensees the ability or the incentive to respond to opportunities for meeting the growing demand for wireless services and may not be enough to ensure the optimally efficient use of spectrum. For this reason, and to promote the statutory objective of ensuring that advanced telecommunications capability is

available to all Americans in a reasonable and timely fashion, the Commission should adopt a variety of regulatory and financial incentives to promote geographic license partitioning and/or long-term lease arrangements with carriers that seek to provide service in rural areas. Such incentives would help to fulfill the Commission's obligation under Section 309 (j) of the Act, to ensure the participation of rural telephone companies in the provision of advanced telecommunications services. These incentives should apply to partitioning as well as leasing arrangements. The Blooston Rural Carriers believe that spectrum leases will be a valuable tool, especially in situation such as that proposed by Golden West and Sully Buttes, cited above. However, in a number of situations, carriers will need the certainty and permanence of licensee status that can only be provided by a true partitioning arrangement, before a board of directors or financing source will approve the expenditure of resources on a substantial telecommunications system.

*A. Enhanced "Rural Partitioning" Bidding Credits*

Under the scheme that is preferred by the Blooston Rural Carriers, auction winners will receive financial incentives, by way of a reduction in their final license payment obligation, for entering into bona-fide license partitioning transactions with non-affiliated businesses that have agreed to extend service to rural markets. In this instance, rural markets could be defined as areas that are (1) contiguous with a Rural Statistical Area ("RSA"), or a BTA which has a population of no more than 1,000,000 pops; or (2) centered around the certificated rural telephone service area of the partitioning carrier. The amount of a licensee's final payment reduction would be equal to the percentage of partitioned coverage in relation to the entire service area (measured by the number of pops). As an example, the hypothetical winner of an EAG license with a net high bid of \$10,000,000 would be provided with an opportunity (*e.g.*, upon submission of its long-form license application) to indicate whether and to what extent it

wanted to partition rural areas from its license. Assuming that 30% of the EAG consisted of RSA or rural BTA territory, the auction winner would be able to indicate its desire to receive a license payment reduction of 30%, upon agreeing to partition these areas to rural telephone companies within the EAG. If this auction winner instead sought a 25% rural partitioning credit, preferring to keep some of the rural area for itself, it would receive a 25% credit. The licensee would have one year from the initial grant date of its license to enter into bona-fide partitioning arrangements with qualified rural telephone companies, and its final payment obligation would be reduced accordingly. The licensee would be permitted to negotiate any arms-length partitioning arrangement it wanted, offering it to the highest qualified bidder in a secondary market transaction or simply electing to give the spectrum away to qualified rural carriers for the value of the credit. At the one year anniversary of the license grant, the licensee would be required to submit evidence that it had filed partial assignment applications covering the percentage of territory it had agreed to partition, or to repay the FCC for the balance of the discount attributable to any area it was not able to partition, plus interest.

*B. Licensees Should Receive Buildout Credit Like a Band Manager for Spectrum User's Construction and Operation*

The Blooston Rural Carriers support the idea of giving the underlying licensee credit toward meeting its buildout obligation for any construction by its lessee(s). Without such credit, licensees will have a *disincentive* against leasing their spectrum, because in many cases such leases would make it more difficult for the licensee to find population clusters needed for its own coverage requirements.

*C. Enhanced Buildout Credit for Entering Into Rural Partitioning or Bona-Fide Long-Term Lease Agreements*

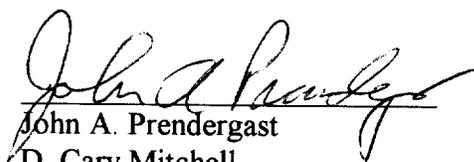
Currently, the only incentive for a licensee to partition its spectrum to a rural carrier is the ability to reduce its coverage and service obligations proportionally. However, because rural

service areas are by definition sparsely populated, this reduction in buildout obligation is generally small enough that larger carriers have found little or no incentive to enter into rural partitioning agreements. In order to make the partitioning mechanism meaningful, the Commission should provide that the partitioning licensee will receive triple, quadruple or quintuple credit for the population partitioned. A similar incentive (perhaps reduced to double or triple) should be offered when a licensee enters into a long-term, binding lease agreement with a rural carrier. Such lease agreement must provide that in the event the licensee sells its overall license, the purchaser must honor the term of the lease arrangement. In the event of license forfeiture, the Commission should either allow the rural carrier to purchase its leased area as a partitioned license (at the per-pop bid price paid by the original licensee); or should allow the rural carrier to continue operation on its leased spectrum until the license is reauctoned. The latter option would prevent a disruption of service, and give the rural carrier an opportunity to negotiate a similar lease arrangement with the subsequent auction winner while its long-form application is pending.

### **Conclusion**

It is respectfully submitted that the Commission adopt the foregoing suggestions as part of its secondary markets initiative.

Respectfully Submitted,



John A. Prendergast

D. Cary Mitchell

Blooston, Mordkofsky Dickens, Duffy & Prendergast

2120 L Street, NW Suite 300

Washington, DC 20037

(202) 659-0830

Counsel for the Blooston Rural Carriers.

Dated: February 9, 2001

## **Attachment A**

June 30, 2000, Request for Clarification of *De Facto* Control Policy  
and Proposed Spectrum Lease Agreement

LAW OFFICES  
BLOOSTON, MORDKOFKY, JACKSON & DICKENS  
2120 L STREET, NW  
WASHINGTON, DC 20037

RECEIPT

HAROLD MORDKOFKY  
BENJAMIN H. DICKENS, JR.  
JOHN A. PRENDERGAST  
GERARD J. DUFFY  
RICHARD D. RUBINO  
MARY J. SISAK  
D. CARY MITCHELL  
MICHAEL B. ADAMS, JR.  
SARAH LEEPER\*

(202) 659-0830  
FACSIMILE: (202) 828-5568

AFFILIATED SOUTH AMERICAN OFFICES

ESTUDIO JAUREGUI & ASSOCIATES  
BUENOS AIRES, ARGENTINA

ROBERT M. JACKSON  
OF COUNSEL

PERRY W. WOOPFER  
LEGISLATIVE CONSULTANT

EUGENE MALISZEWSKY  
DIRECTOR OF ENGINEERING  
PRIVATE RADIO

SEAN A. AUSTIN  
DIRECTOR OF ENGINEERING  
COMMERCIAL RADIO

ARTHUR BLOOSTON  
1914 - 1999

\* ADMITTED ONLY IN CALIFORNIA  
SUPERVISION BY JOHN PRENDERGAST,  
A MEMBER OF THE DC BAR

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JUN 30 2000  
June 30, 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**WRITER'S CONTACT INFORMATION**

202-828-5540  
jap@bmd.com

*By Hand Delivery*

Ms. Magalie Roman Salas, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
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**  
**James Troup**  
**James Lister**  
**Jon Winkel**  
**Randy Houdek**  
**Jack Brown**  
**Jason Brown**

June 30, 2000

*By Hand Delivery*

Thomas J. Sugrue, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>3</sup> *Guard Band Order*, at paragraph 46.

<sup>4</sup> *Id.*

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

assignment of license applications<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> 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

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

<sup>7</sup> *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*”).

<sup>8</sup> *Id.* at paragraph 1.

related to the development of secondary markets for radio spectrum.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> 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.

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

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

<sup>11</sup> *Id.* at paragraph 1.

<sup>12</sup> *Id.* at paragraph 16.

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

In the first *VITA* case,<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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:

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<sup>14</sup> 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*").

<sup>15</sup> See, e.g., 47 C.F.R. § 74.931

<sup>16</sup> *VITA I*, at paragraph 50.

<sup>17</sup> 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").<sup>18</sup> 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."<sup>19</sup> 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.<sup>20</sup> 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.

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

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

<sup>20</sup> *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.<sup>21</sup>

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

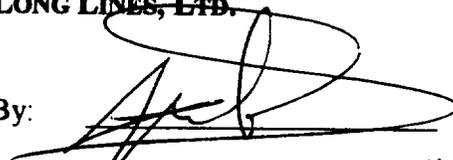
**SULLY BUTTES TELEPHONE  
COOPERATIVE, INC.**

By: \_\_\_\_\_

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

**LONG LINES, LTD.**

By: \_\_\_\_\_

  
DIRK JON WINKGEL, CEO

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<sup>21</sup> 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.

## SERVICE LIST

Thomas Sugrue, Chief \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 3-C252  
Washington, DC 20554

Kathleen O'Brien Ham, Deputy Chief \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 3-C255  
Washington, DC 20554

Margaret Wiener, Chief\*  
Auctions Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-A669  
Washington, DC 20554

Paul Murray\*  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-B442  
Washington, DC 20554

Don Johnson\*  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-A332  
Washington, DC 20554

Office of Public Affairs \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room CY-C314  
Washington, DC 20554

ITS \*  
1231 20<sup>th</sup> Street, NW  
Washington, DC 20036

\* via hand delivery