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

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

COMMENTS OF SALMON PCS, LLC ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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Summary

Salmon PCS LLC ("Salmon"), a very small business designated entity ("DE") which is initiating services and building PCS systems in the 45 markets for which it received licenses in Auction No. 35,[1] is commenting on the *Further Notice of Proposed Rulemaking* released by the Commission in WT Docket No. 00-230 (Secondary Markets). Salmon submits that additional Commission actions are necessary in order to accord DEs a meaningful opportunity to take advantage of the increased flexibility that the Commission's new spectrum leasing rules and policies were intended to provide.

The Commission took an important first step toward promoting the development of secondary markets by relaxing the Intermountain Microwave *de facto* control standard in the context of spectrum leases. But, by retaining the prior stricter *de facto* control standard for assessing DE eligibility in other contexts, the Commission effectively precludes DEs from benefiting from the new flexibility. In the interest of fairness, and to assist DEs in keeping with the statutory mandate, the Commission should abandon the outmoded Intermountain Microwave standard for all purposes in favor of the new standard contained in Section 1.9010 of the rules.

The Commission also needs to revise the affiliation rules applicable to DEs to make clear that a *bona fide* spectrum lease - - in which the licensee lessor maintains responsibility for compliance with the FCC's technical and licensing rules, and all interactions with the Commission - - shall not be deemed to create an affiliation.

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[1] Subsequent to the completion of Auction No. 35, Salmon assigned those licenses to its operating subsidiary, Salmon PCS Licensee, LLC.

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

To: The Commission

COMMENTS OF SALMON PCS, LLC ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

Salmon PCS, LLC ("Salmon"), by its attorneys, hereby comments on the Commission's *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-captioned proceeding.[2] As is set forth in detail below, Salmon respectfully submits that additional actions need to be taken by the Commission in order to promote the effective development of secondary markets in a manner that promotes the statutory objective of providing meaningful spectrum-based opportunities to "a wide variety of applicants, including small businesses".[3] The following is respectfully shown:

I. BACKGROUND

Salmon is a designated entity ("DE") that was formed to participate in the broadband PCS spectrum Auction No. 35. When that auction closed, Salmon was the

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2 *Report and Order and Further Notice of Proposed Rulemaking* (WT Docket No. 00-230), FCC 03-113 (rel. October. 6, 2003) (the "*Spectrum Leasing Order*").

3 47 U.S.C. § 309(j)(3)(B).

high bidder on 79 licenses in 77 markets.[4] Salmon's bids, which totaled approximately $2.4 billion, made it the third largest proposed acquirer of PCS spectrum in the auction. After the auction closed, the Commission found Salmon to be qualified as a "very small business"[5] and released a *Public Notice* indicating it was prepared to grant 45 of the licenses on which Salmon had submitted winning bids in Auction 35.[6] Salmon timely paid its full winning bid amounts for these 45 licenses and the Commission granted the licenses to Salmon.[7] Since that time, Salmon has developed and is implementing its service plan. Salmon has completed construction in multiple markets and is planning to bring many additional markets on line in the near term.

The remaining 34 licenses on which Salmon submitted winning bids in Auction 35--which included most of the larger markets in which Salmon sought to operate[8] -- were entangled in the ongoing litigation between the Commission, NextWave Personal

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4 *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, DA 01-211 (rel. Jan. 29, 2001).

5 *See* 47 C.F.R. § 24.720(b).

6 *Wireless Telecommunications Bureau Announces it is Prepared to Grant Forty-Five C and F Block Broadband Personal Communications Services (PCS) Licenses Upon Full and Timely Payment*, DA 01-2216, Report No. AUC-35 (rel. Sept. 21, 2001). Salmon subsequently assigned these licenses to its operating subsidiary, Salmon PCS Licensee, LLC.

7 *Wireless Telecommunications Bureau Grants Forty-Five C and F Block Broadband Personal Communications Services (PCS) Licenses,* DA 01-2355, Report No. AUC-35 (rel. Oct. 10, 2001).

8 These ungranted licenses included Atlanta GA, Baltimore MD, Boston MA, Dallas TX, Denver CO, Houston TX, Los Angeles CA, Minneapolis MN, Richmond VA, Tampa FL and Washington DC, among others.

Communications, Inc. ("NextWave") and others.[9] Ultimately, Salmon was unable to acquire the additional licenses because of this NextWave litigation. After a series of extraordinary delays and adverse court rulings, the Commission invited all of the Auction 35 applicants to dismiss their long-pending Auction 35 applications that remained ungranted and still were tied up in the NextWave litigation.[10] Salmon opted to do so, a decision that later was vindicated when, in January of 2003, the U.S. Supreme Court issued its ruling in the NextWave litigation.[11] This decision affirmed the D.C. Circuit decision holding that the Commission was without authority to cancel the NextWave licenses and reauction the spectrum in Auction 35.

Salmon recites its licensing history in some detail here because it provides compelling evidence of the need for the Commission to adopt flexible policies that will enable licensees and other service providers to adapt to dynamic and often unforeseen market forces. In Salmon's case, there is a dramatic difference between the business plan that would make sense if it were initiating service in 77 markets – covering a population of nearly 80 million people across the entire U.S. -- and the plan that makes commercial sense now that Salmon is implementing service in 34 smaller geographically dispersed markets containing less than 12 million in population. Adapting to unexpected changes of this nature is particularly challenging for a very small business DE which must rely

[9] Those proceedings are described in greater detail in *Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made in Auction No. 35*, 17 FCC Rcd. 23354, 23355-57 paras. 2-4 (2002).

[10] *Id.*

[11] *NextWave Personal Communications, Inc. v. FCC*, 123 U.S. 832 (2003).

heavily on borrowed funds to finance the construction of capital intensive communications networks. In light of the federal statutory policy in favor of promoting the meaningful participation of small and very small businesses in the provision of spectrum based services,[12] it is incumbent upon the Commission to do what it can to accord DEs the flexibility they need to succeed in a tumultuous telecommunications market. To this end, there are additional changes the Commission can and should make in its rules and policies to further promote the development of spectrum leasing and other secondary market alternatives that will have the incidental benefit of helping DEs succeed.

II. THE *INTERMOUNTAIN MICROWAVE DE FACTO* CONTROL STANDARD MUST BE FURTHER REASSESSED

Historically, the Commission has used the criteria set forth in the 1963 *Intermountain Microwave* decision[13] to assess whether a licensee retained the requisite *de facto* control over licensed facilities. Under this standard, the Commission determines whether the licensee: (1) has unfettered use of all facilities and equipment; (2) controls daily operations; (3) determines and carries out policy decisions, including preparing and filing applications with the Commission; (4) is in charge of employment, supervision, and dismissal of personnel; (5) is in charge of payment of financial obligations, including expenses arising out of operation; and (6) receives monies and profits from the operations of the facilities.

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[12] See 47 U.S.C. § 309(j).

[13] *Intermountain Microwave*, 24 R.R. 983 (1963).

The problem with the *Intermountain Microwave* standard is its indefiniteness. The Commission itself has acknowledged that there is "no exact formula to ascertain *de facto* control" under this standard, because it calls for analysis on a "case-by-case" basis taking into consideration the "totality of the circumstances and all relevant factors."[14] The analysis is further complicated by holdings indicating that "no single factor [from the *Intermountain Microwave* checklist] is dispositive",[15] which leads to a balancing of factors that makes the outcome difficult if not impossible to predict in advance.

Salmon's early licensing experience confirms the practical difficulties that the indefiniteness of the *Intermountain Microwave de facto* control standard can cause. Salmon is a limited liability company controlled by Crowley Digital Wireless LLC, ("Crowley"), a very small business. Salmon has a non-DE eligible strategic investor -- Cingular Wireless LLC ("Cingular"). In crafting the initial Salmon PCS operating agreement, both Crowley and Cingular were well aware of the *Intermountain Microwave* criteria. Both strived, with the assistance of experienced communications counsel, to craft an agreement that, in both parties' views, met the FCC's DE-control requirements. Nonetheless, the Commission required the parties to make changes to their business deal as a condition to granting the Salmon licenses. These changes, in Salmon's view, have led to a more cumbersome and expensive operating structure than the parties originally envisioned. That aside, the important point here is that non-eligible investors are actively discouraged from investing in DE-controlled businesses when they are unable to

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[14] *Baker Creek Communications, L.P.*, 13 FCC Rcd. 18,709 para. 7 (1998).

[15] *Volunteers In Technical Assistance*, 12 FCC Rcd. 3094 para. 24 (1997).

ascertain with reasonable certainty in advance what the final business arrangement will look like after the FCC has finished applying the indefinite *Intermountain Microwave* criteria.[16]

The *Spectrum Leasing Order* takes an important step toward mitigating this problem by moving away from the *Intermountain Microwave* criteria when assessing *de facto* control under a spectrum lease. The expressly stated objective is to adopt a standard that will accord lessors and lessees more flexibility in crafting workable business arrangements.[17] The revised *de facto* control standards applicable to spectrum leases are codified in new Section 1.9010 of the FCC rules. In comparing the new *de facto* control standard to the *Intermountain Microwave* criteria, the following distinctions can be found:

- The *Intermountain Microwave* standard obligated the licensee to have unfettered use of all station facilities and equipment; the new standard obligates the licensee to have a right to inspect the lessee's operations;
- *Intermountain Microwave* obligated the licensee to control the daily operations; the new standard obligates the licensee to maintain a reasonable degree of actual working knowledge about the spectrum lessee's activities and facilities;
- The *Intermountain Microwave* standard obligated the licensee to carry out all key policy decisions; the new standard obligates the licensee to oversee policy decisions related to compliance with technical rules (*i.e.*, interference protection), licensing requirements (*i.e.*, environmental rules,

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[16] Notably, since DE eligibility determinations generally are made only after an applicant has been identified as the high bidder in an auction, the potential penalties for failing to accommodate any FCC-mandated agreement changes can be severe, *e.g.* loss of license, loss of bidding credits and/or related forfeiture penalties.

[17] *Spectrum Leasing Order*, para. 51.

FAA requirements, frequency coordination, etc.) and safety regulations (*e.g.* rf exposure limits);

- The *Intermountain Microwave* standard obligated the licensee to prepare and file all applications with the Commission; the new policy retains this requirement but recognizes the right of the licensee to use agents (*e.g.* attorneys, engineering consultants) in carrying out these responsibilities;

- The *Intermountain Microwave* standard obligated the licensee to control the employment, supervision, and dismissal of personnel; the new standard makes no mention of this criteria; and

- The *Intermountain Microwave* standard obligated the licensee to remain ultimately responsible for the payment of expenses arising out of the operation of the facilities, and to receive monies and profits from the operations of the facilities; the new standard makes no mention of these criteria.

Because the newly stated criteria are narrower and less onerous than the old *Intermountain Microwave* criteria, it will be easier for licensees to understand and apply them as they draft business arrangements that meet FCC requirements.

There is, however, an unfortunate "catch 22" for DEs. Paragraph 315 of the *Spectrum Leasing Order* provides: "[W]e are at present limiting application of our newly adopted *de facto* control standard to the leasing context. Thus, the facilities-based *Intermountain Microwave* standard for evaluating *de facto* control continues to be the prevailing standard in other regulatory contexts that call for assessment of the exercise of *de facto* control over an applicant or licensee, such as in the case of designated entity and entrepreneur eligibility and management agreements." Candidly, Salmon is having great difficulty understanding what this means in practice. New rule Section 1.9020(d)(4) provides that DEs must continue to avoid having a non-eligible become a "controlling interest" of the company, with this determination being made using the previous

Intermountain Microwave de facto control standard. Absent clarification from the Commission, it is difficult to imagine how a DE licensee could relinquish significant responsibilities over the day-to-day operations of facilities to a lessee without risking an adverse finding that the lessee had become a "controlling interest."

The solution is for the Commission to abandon the *Intermountain Microwave* test for all purposes. Because the *Intermountain Microwave* criteria were an agency construct developed long ago in a very different telecommunications marketplace, the Commission has the authority to revisit the standard for good cause. Here, the good cause for change is provided by the need to accord DEs the same flexibility that will be enjoyed by other licensees when pursuing spectrum leasing and other secondary market transactions.

There is no statutory barrier keeping the Commission from applying a pragmatic *de facto* control standard for all purposes to DE licensees. Ultimately, Section 310 of the Communications Act deals with the obligation of the Commission to specify who has control of each "station license."[18] The Commission recognized this fact by allowing spectrum lessors to delegate to lessees certain day-to-day responsibility over the

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[18] 47 U.S.C. § 310(a). Section 310(d) of the Communications Act of 1934, as amended, (the "Act") requires prior FCC approval of the assignment, transfer or disposition directly or indirectly of any "station license *or any rights thereunder*." 47 U.S.C. § 310(d) (emphasis supplied). Since the statute does not specify the subsidiary "rights" under a license that are subject to this approval requirement, the Commission has the authority to utilize its expertise to ascertain which particular licensing rights fall under this provision. Moreover, the Commission has the authority under Section 10(a) of the Act to forebear from applying any provision of the Act to a telecommunications carrier if it finds that such forbearance will serve the public interest and not harm consumers. 47 U.S.C § 160. Here, the conditions for forbearance are met.

underlying facilities while retaining control over the spectrum license itself.[19] There is no reason for the Commission to reach an alternative conclusion with regard to the *de facto* control standard applied to DE licensees in other contexts. And, the approach taken by the Commission in new Section 1.9010 of the rules is the correct one. If the licensee is held responsible for compliance with all of the FCC's technical and licensing rules and policies, and all interactions with the Commission pertaining to the license, a self-policing framework will be in place that creates proper incentives for licensees to retain and exercise effective control over their station licenses.

III. THE TEST FOR DETERMINING DESIGNATED ENTITY AFFILIATION UNDER THE RULES SHOULD CHANGE

The *FNPRM* correctly notes that, at present, the rules for determining affiliation under the DE and entrepreneur policies largely incorporate the *Intermountain Microwave de facto* control test.[20] The Commission asks whether the new standard for assessing *de facto* control adopted in the *Spectrum Leasing Order* should also be employed for assessing affiliation and eligibility for DE and entrepreneur status.[21] The answer is "Yes".

The definition of "affiliate" that is used for the purpose of determining DE eligibility is extremely expansive, and expressly encompasses situations in which two entities have an "identity of interest",[22] "common investments",[23] "common facilities",[24]

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[19] *FNPRM*, para. 64.

[20] *FNPRM*, para. 317. *See also* new FCC Rule Section 1.9020(d)(4).

[21] *FNPRM*, paras. 71-81.

[22] *See* FCC Rule Section 1.2110(c)(5)(D).

and/or significant "contractual relationships.[25] Absent clarification, the breadth of these affiliation rules is problematic in the spectrum leasing context. If a licensee lessor is relying upon the facilities constructed by a carrier lessee to meet license build-out requirements, a concern arises whether the parties have become affiliated through "common facilities". And, if a licensee lessor leases 100% of its spectrum to a single operator, a question might arise whether they have a sufficient identity of interest and/or contractual relationships to create an affiliation. Simply put, by maintaining the broad existing affiliation rule, and retaining the *Intermountain Microwave* criteria for some purposes, the Commission clearly is dampening the prospect that a DE will be able to enjoy the flexibility that the *Spectrum Leasing Order* was intended to provide.

Note, however, that the Commission cannot address this problem simply by abandoning the *Intermountain Microwave de facto* control standard in favor of the new standard. Rather, the Commission must specifically amend the above-listed sections of

(...continued)

[23] *See* FCC Rule Section 1.2110(c)(5)(iii), which provides: "Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity will be treated as though they were one person."

[24] *See* FCC Rule Section 1.2110(c)(5)(viii), which provides: "Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern."

[25] *See* FCC Rule Section 1.2110(c)(5)(ix), which provides: "Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern."

the affiliate rule to make it clear that *bona fide* lessee/lessor relationships -- in which the licensee lessor maintains the requisite responsibility for FCC rule compliance and the interactions with the Commission -- shall not be deemed to create an affiliation under any subsection of Section 1.2110(c)(5) of the rules.

WHEREFORE, the foregoing premises having been duly considered, Salmon respectfully requests that the Commission abandon the *Intermountain Microwave de facto* control standard for all DE purposes and make the aforementioned changes in the DE affiliation rules in order to permit DEs to enjoy the same flexibility as other licensees in crafting leasing and other secondary market arrangements.

Respectfully submitted,

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