



Council Tree Communications, Inc.

Colorado Office
2919 17th Avenue, Suite 211
Longmont, Colorado 80503
Phone: (303) 678-1844
Fax: (303) 678-1859
www.counciltree.com

New York Office
The Chrysler Building
405 Lexington Avenue, 48th Floor
New York, New York 10174
Phone: (212) 286-8700
Fax: (212) 286-8702

December 29, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, DC 20554

Re: Written Ex Parte Presentation -
WT Docket No. 00-230

Dear Ms. Dortch:

Council Tree Communications, Inc. ("Council Tree") hereby gives notice of a written ex parte presentation in the referenced proceeding. The presentation is in the form of the attached Comments, which were filed in WT Docket No. 03-202 (rural spectrum proceeding) and which address, in part, matters relating to WT Docket No. 00-230 (secondary markets proceeding).

One copy of Council Tree's written presentation is being submitted electronically herewith pursuant to Section 1.1206(b)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(1).

Sincerely,

/s/ Steve C. Hillard

Steve C. Hillard

Enclosure

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Increasing Flexibility to Promote Access) WT Docket No. 03-202
to and the Efficient and Intensive Use of)
Spectrum and the Widespread Deployment)
of Wireless Services, and to Facilitate)
Capital Formation)

To: The Commission

**COMMENTS OF
COUNCIL TREE COMMUNICATIONS, INC.**

Steve C. Hillard
George T. Laub
COUNCIL TREE COMMUNICATIONS, INC.
2919 West 17th Avenue
Suite 211
Longmont, CO 80503
(303) 678-1834

Dated: December 29, 2003

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SUMMARY

Council Tree Communications, Inc. urges the Commission to use special measures to promote the participation of Alaska Native Corporations and Indian tribes in the provision of spectrum-based services in rural areas. The Commission is directed by statute to ensure the deployment of communications services to all people of the United States, including those residing in rural areas, to promote the participation of businesses owned by members of minority groups and women in the provision of spectrum-based services, and to foster the development of advanced telecommunications capabilities by removing barriers to infrastructure investment. Here, the Commission has the occasion to serve each of these mandates by crafting targeted provisions to promote tribal self-sufficiency and economic development and to encourage investment in the rural telecommunications services that are so important to tribal populations.

First, the Commission should waive application of the Rural Service Area cellular cross-interest rule for entities owned and controlled by Alaska Native Corporations or Indian tribes. Second, the Commission should offer a bidding credit (to be applied on top of any small business bidding credit already available under the Commission's rules) for entities owned and controlled by Alaska Native Corporations or Indian tribes that acquire rural area spectrum rights through competitive bidding. And third, the Commission should permit entities owned and controlled by Alaska Native Corporations or Indian tribes to lease rural area spectrum rights to any qualifying user without applying unjust enrichment repayment obligations or entrepreneur transfer restrictions. These measures will encourage the investment by Alaska Native Corporations and Indian tribes in rural area spectrum rights, which will advance the Commission's statutory directives to promote the participation of these groups in the provision of spectrum-based services and the extension of services to regions where they are needed.

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To: The Commission

**COMMENTS OF
COUNCIL TREE COMMUNICATIONS, INC.**

Council Tree Communications, Inc. (“Council Tree”), pursuant to Section 1.415(a) of the Commission’s Rules, 47 C.F.R. § 1.415(a), submits these Comments in response to the Notice of Proposed Rulemaking, FCC 03-222, adopted by the Commission on September 10, 2003 and released on October 6, 2003 (“NPRM”).¹

I. INTRODUCTION

Council Tree is an investment company organized to identify and develop telecommunications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that the prospects for business success can be predicated on the meaningful diversification of telecommunications facilities ownership. In particular, Council Tree has long been an active supporter of responsibly-managed government efforts to encourage the participation of businesses owned by Alaska Native Corporations and Indian tribes in the communications industry. As part of this work, Council Tree president Steve

¹ A copy of these Comments is also being filed in WT Docket No. 00-230 because they address, in part, matters relating to the Commission’s secondary markets proceeding.

C. Hillard is a member of the Commission's Federal Advisory Committee on Diversity in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

Here, the Commission continues to examine ways to promote the rapid and efficient deployment of quality spectrum-based services in rural areas.² In the NPRM, the Commission expresses the view that the deployment of wireless mobile services in the United States generally has been a "huge success,"³ crediting, among other things, the Commission's use of small business bidding credits as helping to increase competition and the types of services available to the public.⁴ At the same time, the Commission observes that "the inherent economic challenges of providing telecommunications services in sparsely populated, expansive rural areas are of significant importance to any carrier that serves or is considering serving these areas."⁵ The economic challenges identified by the Commission are even greater for new entrants.⁶ As the

² NPRM at ¶ 1.

³ Id. at ¶ 3.

⁴ Id. The Commission has long used small business preferences as a proxy for provisions directly benefiting businesses owned by members of minority groups and women. See, e.g., Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7833, 7844 (1996); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143, 158 (1996) ("Competitive Bidding Sixth Report and Order"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Eighth Report and Order, 11 FCC Rcd 1463, 1575 (1995).

⁵ NPRM at ¶ 4.

⁶ For example, according to the Commission, a "new entrant attempting to serve a niche market [in rural areas] might face barriers to entry arising from its inability to exploit economies of scale, and will inevitably have less bargaining power to secure equipment [and] supplies, or negotiate agreements." Id. at ¶ 7.

Commission undertakes to address these limitations, Council Tree urges it to use special measures to promote the participation of businesses owned by members of minority groups and women generally — and Alaska Native Corporations and Indian tribes specifically — in the provision of spectrum-based services in rural areas. Special measures for new entrants have contributed to the success of wireless mobile services in the United States, and, properly managed, such measures can have a similar impact on the development of wireless services in rural areas of the nation.

Against this background, Council Tree recommends three initiatives for Commission action. First, the Commission should waive application of the Rural Service Area (“RSA”) cellular cross-interest rule for entities owned and controlled by Alaska Native Corporations or Indian tribes. Second, the Commission should offer a bidding credit (to be applied on top of any small business bidding credit already available under the Commission’s rules) for entities owned and controlled by Alaska Native Corporations or Indian tribes that acquire rural area spectrum rights through competitive bidding. And third, the Commission should permit entities owned and controlled by Alaska Native Corporations or Indian tribes to lease rural area spectrum rights to any qualifying user without applying unjust enrichment repayment obligations or entrepreneur transfer restrictions. These measures will encourage the investment by Alaska Native Corporations and Indian tribes in rural area spectrum rights, which will advance the Commission’s statutory directives to promote the participation of these groups in the provision of spectrum-based services and the extension of telecommunications services to regions where they are needed.

II. THE COMMISSION HAS RECOGNIZED ITS UNIQUE RELATIONSHIP WITH ALASKA NATIVE CORPORATIONS AND INDIAN TRIBES

As a threshold matter, the Commission has long recognized its unique relationship with Alaska Native Corporations and Indian tribes, which provides the legal and policy underpinnings for focused action in this context. In a Policy Statement issued in June, 2000, for example, the Commission made clear that it “recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes,”⁷ and the Commission pledged to sustain this federal policy through its actions and activities.⁸

One such action has been the application of the Commission’s tribal affiliation exemption for competitive bidding preferences. Early in the development of its broadband personal communications service (“PCS”) competitive bidding rules, the Commission adopted an exemption from its small business preference affiliation rules for entities owned and controlled by Alaska Native Corporations or Indian tribes.⁹ In particular, the Commission noted that Congress had directed the Small Business Administration (“SBA”) to calculate the size of an entity owned by an Indian tribe “without regard to the concern’s affiliation with the Indian tribe.”¹⁰ As part of its detailed use of these SBA standards in the broadband PCS context, the

⁷ Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd 4078, 4081 (2000) (footnote omitted).

⁸ Id. at 4082.

⁹ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427 (1994) (“Competitive Bidding Fifth Memorandum Opinion and Order”).

¹⁰ Id. at 428. Pursuant to the direction of Congress, see 15 U.S.C. § 636(j)(10)(J)(ii)(II), the SBA’s Rules provide that, for size determination purposes, “concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims

Commission established its own tribal affiliation exemption in 1994 to “mirror[] this congressional mandate.”¹¹

After 1994, the Commission consistently reaffirmed the tribal affiliation exemption. Most prominently, when the Commission eliminated many of its race-based competitive bidding preferences in response to the Supreme Court’s 1995 decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, the Commission made clear that its tribal affiliation exemption was unaffected by the high court ruling, explaining that the “decision to exempt Indian tribes generally from our affiliation rules was premised on the fact that Congress has imposed unique legal restraints on the way they can utilize their revenues and assets”¹² and that the exemption had an independent basis in the Indian Commerce Clause of Article 1 of the United States Constitution.¹³ Thereafter — in the wake of the Adarand decision — the FCC applied or confirmed the application of the tribal affiliation exemption in multiple competitive bidding events.¹⁴ Today, the tribal affiliation exemption is codified in the Commission’s Part 1 rules that apply to all competitive bidding proceedings.¹⁵

Settlement Act (43 U.S.C. 1601) . . . are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.” 13 C.F.R. § 121.103(b)(2) (2003). The same exemption is included in the SBA’s size standard guidelines for its 8(a) Program. See 13 C.F.R. § 124.109(c)(2)(iii) (2003).

¹¹ Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428.

¹² Competitive Bidding Sixth Report and Order, 11 FCC Rcd at 156.

¹³ Id.

¹⁴ See, e.g., Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, Order on Reconsideration, 12 FCC Rcd 6424, 6429 (1997) (applying the exemption to the FCC’s LMDS rules); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd 10785, 10879 (1997)

The Commission, therefore, has actively undertaken to promote tribal self-sufficiency and economic development through its licensing processes, which approach takes on even greater importance when rural area services are implicated. The Commission has recognized that tribal areas tend to be geographically remote and to have sparse population clusters, low income levels, and high unemployment rates.¹⁶ It frequently falls to Alaska Native Corporations and Indian tribes to see to the welfare of those who live in these rural areas.¹⁷ Meanwhile, under the Communications Act of 1934 and the Telecommunications Act of 1996, the Commission is directed, *inter alia*, to ensure the deployment of communications services to all people of the United States,¹⁸ including those residing in rural areas,¹⁹ to promote the participation of

(applying the exemption to the FCC's WCS rules). In 1996, the SBA completed a comprehensive, post-Adarand overhaul of its small business affiliation rules in which it retained the tribal affiliation exemption on which the Commission's rule is based. See 61 Fed. Reg. 3280, 3287 (1996).

¹⁵ See 47 C.F.R. § 1.2110(c)(5)(xi). Thus, where the Commission makes preferences available to small or very small businesses that participate in competitive bidding events and defines a "small" or "very small" business to include "affiliates" of the business, Section 1.2110(c)(5)(xi) operates to exclude Alaska Native Corporations, Indian Tribes, and entities owned and controlled thereby from the "affiliation," permitting subsidiaries of Corporations or Tribes to qualify as "small" or "very small" businesses. See, e.g., Application of Alaska Native Wireless, L.L.C., Order, 17 FCC Rcd 4231, 4234 n.22 (Wir. Tel. Bur. 2002).

¹⁶ See Extending Wireless Telecommunications Services to Tribal Lands, Report and Order, 15 FCC Rcd 11794, 11798-99 (2000) ("Tribal Lands Order").

¹⁷ Alaska Native Corporations, for example, were formed at the direction of Congress under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, which represents a novel approach to U.S.-Native American relations. Rather than form a system of reservations, Congress directed that thirteen regional Alaska Native Corporations be established, that Alaska Natives be enrolled to these corporations, and that the corporations issue to its members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status. They became the owners of corporations which, at the direction of Congress, hold the collective results of their settlements with the federal government. In turn, the corporations are assigned the challenge of earning profits for those shareholders and attending to the shareholders' real social and economic needs.

businesses owned by members of minority groups and women in the provision of spectrum-based services,²⁰ and to foster the development of advanced telecommunications capabilities by removing barriers to infrastructure investment.²¹ Here, the Commission has the occasion to serve each of these mandates by crafting targeted provisions to promote tribal self-sufficiency and economic development and to encourage investment in the rural telecommunications services that are so important to tribal populations.

III. THE COMMISSION SHOULD WAIVE APPLICATION OF THE RSA CELLULAR CROSS-INTEREST RULE FOR ALASKA NATIVE CORPORATIONS AND INDIAN TRIBES

In the NPRM, the Commission (a) tentatively determines to retain the cellular cross-interest rule as it applies in RSAs with three or fewer commercial mobile radio service (“CMRS”) competitors and (b) seeks comment on removing the rule as it applies to other RSAs and to non-controlling investments in all RSA licensees.²² Regardless of its treatment of the cellular cross-interest rule as it applies generally, the Commission should waive application of the RSA cellular cross-interest rule for entities owned and controlled by Alaska Native Corporations or Indian tribes.

¹⁸ 47 U.S.C. § 151.

¹⁹ Id., § 309(j)(3)(A).

²⁰ Id., §§ 309(j)(3)(B); 309(j)(4)(D).

²¹ Id., § 157 nt.

²² NPRM at ¶ 97.

The Commission acknowledges that “Congress has imposed unique legal restraints on the way [Alaska Native Corporations and Indian tribes] can utilize their revenues and assets,”²³ and the Commission has undertaken to give force to the federal policy of promoting tribal self-sufficiency and economic development through its approaches to spectrum allocation. In 2001, meanwhile, the Commission expressed the view that its CMRS spectrum cap did “nothing in and of itself to create opportunities for entrepreneurs” and may actually harm these new entrants by limiting access to capital and management expertise.²⁴ Giving Alaska Native Corporations and Indian tribes special incentives to invest rural cellular service operators and facilities will help them to overcome federally-imposed limitations on the use of their assets. At the same time, it will help to fulfill the Commission’s obligation to promote the participation of new entrants in the provision of spectrum-based services and to serve its goal of encouraging investment in rural services.

This limited exception to the RSA cellular cross-interest rule would not raise meaningful concerns regarding competitive conditions for CMRS offerings in the subject markets. Earlier this year, the Commission concluded that, “despite the differing structure of rural markets, effective CMRS competition does exist in rural areas.”²⁵ Though the Commission determined in 2001 to retain the cellular cross-interest rule for RSAs on the theory that a combination of

²³ Competitive Bidding Sixth Report and Order, 11 FCC Rcd at 156; Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428.

²⁴ 2000 Biennial Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, Report and Order, 16 FCC Rcd 22668, 22694-95 (2001) (“Spectrum Cap Order”).

²⁵ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eighth Report, 18 FCC Rcd 14783, 14837-38 (2003) (footnote omitted) (“CMRS Eighth Report”).

interests in cellular licensees in a rural area could threaten to diminish competition there,²⁶ the Commission acknowledged that there may be RSAs where mergers and acquisitions would not create a significant likelihood of substantial competitive harm.²⁷ The Commission indicated that it would entertain requests for waiver of the application of the cellular cross-interest rule in those circumstances.²⁸

The Commission resolved, however, to eliminate application of its CMRS spectrum cap nationally, and application of its cellular cross-interest rule in Metropolitan Statistical Areas (“MSAs”), in favor of case-by-case review of the competitive effects of such spectrum aggregation transactions by the Commission and the Department of Justice.²⁹ In doing so, the Commission determined that it was not appropriate to maintain *a priori* limitations that may prevent spectrum aggregation transactions that are in the public interest. The prospects for CMRS development and investment, the Commission found, outweighed the potential benefits to be gained from applying a bright-line rule in MSAs,³⁰ particularly where any impact on CMRS competition could still be evaluated and, if necessary, addressed.

The same result is appropriate here. By applying a limited exception to the bright-line RSA cellular cross-interest rule for Alaska Native Corporations and Indian tribes, the Commission can serve multiple federal and Commission policies and the public interest. At the same time, the Commission may rely on case-by-case review of the competitive effects of a

²⁶ Spectrum Cap Order, 16 FCC Rcd at 22709.

²⁷ CMRS Eighth Report, 18 FCC Rcd at 14838.

²⁸ Spectrum Cap Order, 16 FCC Rcd at 22710.

²⁹ Id. at 22696, 22708.

³⁰ Id. at 22693-94.

spectrum aggregation transaction in which this limited exception is invoked. The number of transactions involving such a narrow exception is likely to be small, and the Commission need not expect that its administrative resources will be disproportionately taxed by cases requiring such review. Indeed, compared to the volume of other CMRS transactions requiring case-by-case evaluation in the wake of the Spectrum Cap Order, the incremental addition to the Commission's workload from such an exception will almost certainly be minor. The benefits to the public interest, however, will be substantial, and Council Tree urges the Commission to establish this exception without delay.

IV. THE COMMISSION SHOULD OFFER A BIDDING CREDIT FOR ALASKA NATIVE CORPORATIONS AND INDIAN TRIBES THAT ACQUIRE RURAL AREA SPECTRUM RIGHTS THROUGH COMPETITIVE BIDDING

In addition to creating incentives for Alaska Native Corporations and Indian tribes to invest in existing rural cellular service operators and facilities, the Commission should also encourage these entities to acquire rural spectrum rights through competitive bidding. As noted above, Section 309(j)(3) of the Communications Act directs the Commission to design systems of competitive bidding, *inter alia*, to promote the development of new services for the benefit of those residing in rural areas³¹ and to promote the participation of businesses owned by members of minority groups and women in the provision of spectrum-based services.³² In turn, Section 309(j)(4) directs the Commission to prescribe regulations to further the objectives in Section 309(j)(3).³³ According to the Commission, "Congress intended that Section 309(j)(4) would

³¹ 47 U.S.C. § 309(j)(3)(A).

³² Id., § 309(j)(3)(B).

³³ Id., § 309(j)(4).

provide the Commission ‘flexibility to utilize any combination of techniques that would serve the public interest.’”³⁴

On this basis, the Commission today offers bidding credits for smaller businesses participating in many spectrum auctions,³⁵ which credits are intended to help those that lack ready access to capital participate in the provision of spectrum-based services. The Commission also offers bidding credits for spectrum auction winners, whether they are smaller businesses or not, that commit to deploy facilities to serve qualifying tribal lands.³⁶ Under these combined policies, those qualifying as smaller businesses under the Commission’s rules eligible for a bidding credit to help them compete for licenses in competitive bidding and for a separate credit when they commit to develop facilities on certain tribal lands. This “combination of techniques” helps to advance separate Commission policies.

The Commission should pursue a similar combination in this circumstance. In December, 2000, the Commission published the results of a series of market entry barrier studies that examined the participation of businesses owned by members of minority groups and women in Commission-regulated businesses. One study concluded that the ability of members of minority groups to acquire wireless licenses in the Commission’s spectrum auctions had been

³⁴ Tribal Lands Order, 15 FCC Rcd at 11802 (quoting H.R. Rep. No. 111, 103d Cong., 1st Sess. 1993, at 255).

³⁵ See, e.g., 47 C.F.R. § 1.2110(f)(1)-(2). The Commission has also developed a spectrum auction bidding credit for “new entrants” in the broadcast field, regardless of business size. See id., § 73.5007.

³⁶ See id., § 1.2210(f)(3).

enhanced by the availability of post-auction installment payment plans,³⁷ which the Commission generally no longer offers.³⁸ According to a second study:

It is suggested that a national policy of auctioning spectrum, without remedying discrimination in capital markets, is a national policy of discrimination against minorities and women in the allocation of spectrum licenses. This is because the auctions of the FCC require up-front payments and because spectrum licenses go to the highest bidder. When there is capital market discrimination, minorities will be capital constrained and less likely to qualify for any auction and less likely to win auctions. The data presented suggest that minorities are less like to win wireless licenses after controlling for relevant variables.³⁹

And a third study found that the lack of access to capital reported by businesses owned by members of minority groups and women is the dominant barrier to entry to the capital intensive wireless industry for these entities,⁴⁰ something that the Commission has long recognized.⁴¹ The Commission developed spectrum auction bidding credits for smaller businesses to address this barrier, and it expressly undertook to ensure that entities owned and controlled by Alaska Native Corporations and Indian tribes were eligible to benefit from these measures.

³⁷ See Ernst & Young, LLP, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions 4, 11, 13 (Dec. 5, 2000) (prepared for the Federal Communications Commission).

³⁸ See, e.g., Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Fifth Report and Order, 15 FCC Rcd 15293, 15322 (2000).

³⁹ William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes 27 (Dec. 5, 2000) (emphasis added).

⁴⁰ See Ivy Planning Group LLC, Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 2, 17, 126 (Dec. 2000) (prepared for the Federal Communications Commission Office of General Counsel).

⁴¹ See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2389-90 (1994).

Now, the Commission continues to examine ways to promote the rapid and efficient deployment of quality spectrum-based services in rural areas. In addition to offering bidding credits to smaller business participating in the Commission's spectrum auctions, the Commission should offer a separate 10 percent bidding credit for entities owned and controlled by Alaska Native Corporations or Indian tribes that acquire rural area spectrum rights through competitive bidding. The Commission has long acknowledged that legal constraints on the use and disposition of the revenues and assets of Alaska Native Corporations and Indian tribes place these entities "at a disadvantage vis-à-vis other minority groups with similar revenues and assets,"⁴² and the Commission's spectrum auction affiliation exemption is meant to help address that disadvantage.

A separate, cumulative bidding credit to be applied when these entities acquire rural area spectrum rights through Commission auctions will promote investment in these regions by businesses that are uniquely interested in and capable of providing service. Such a credit would be unlike the Commission's tribal land bidding credit because it would not be available to all auction winners based on license area characteristics and construction commitments. Instead, this cumulative bidding credit would be targeted to advance the dual Commission goals of promoting tribal economic development and self-sufficiency and advancing the provision of wireless services in rural areas. Such credits would represent the combination of techniques to serve the public interest that Congress envisioned in drafting Section 309(j)(4).

⁴² Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428 (footnote omitted).

V. THE COMMISSION SHOULD PERMIT ALASKA NATIVE CORPORATIONS AND INDIAN TRIBES TO LEASE RURAL AREA SPECTRUM RIGHTS WITHOUT APPLYING UNJUST ENRICHMENT REPAYMENT OBLIGATIONS OR ENTREPRENEUR TRANSFER RESTRICTIONS

Finally, the Commission should give Alaska Native Corporations and Indian tribes special flexibility in the way that they deploy rural area spectrum. In its recent Secondary Markets Order, the Commission resolved to apply unjust enrichment repayment obligations and entrepreneur transfer restrictions when designated entities undertake to enter so-called long-term *de facto* transfer leasing arrangements.⁴³ In the Further Notice of Proposed Rulemaking accompanying the Secondary Markets Order, the Commission requested comment on the merits of altering this policy and as to whether any such alteration could be done consistent with its statutory obligation to prevent unjust enrichment.⁴⁴ If the Commission chooses not to lift unjust enrichment repayment obligations and entrepreneur transfer restrictions for all long-term *de facto* transfer leasing arrangements as part of its secondary markets proceeding, Council Tree urges the Commission to do so for entities owned and controlled by Alaska Native Corporations or Indian tribes when rural area spectrum rights are involved.

In the NPRM, the Commission observes that “the inherent economic challenges of providing telecommunications services in sparsely populated, expansive rural areas are of significant importance to any carrier that serves or is considering serving these areas.”⁴⁵

⁴³ See 47 C.F.R. § 1.9030(d)(4) (effective January 26, 2004); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-113, ¶ 145 (rel. Oct. 6, 2003) (“Secondary Markets Order”).

⁴⁴ Secondary Markets Order at ¶ 323.

⁴⁵ NPRM at ¶ 4.

The Commission also explains that it has separately undertaken to facilitate spectrum leasing on the belief that the development of secondary markets would, *inter alia*, promote investment in such rural areas.⁴⁶ Permitting entities owned and controlled by Alaska Native Corporations and Indian tribes freely to lease rural area spectrum rights to non-designated entities would help to fulfill this expectation by giving these entities a wider range of options in developing business plans and accessing sources of capital for competitive bidding or other license transactions. In addition, the revenue to be generated from leasing arrangements could be used to develop and extend wireless networks in regions that are expensive to serve. Licensees that wish to lease spectrum to fund system build out or existing operations will have a larger market in which to do so if it is not limited to designated entities, and they will be saved the transaction costs associated with evaluating the designated entity qualifications of those with which they do business. Removing these barriers to infrastructure investment⁴⁷ will help to promote investment in and deployment of needed services.

At the same time, permitting entities owned and controlled by Alaska Native Corporations and Indian tribes freely to lease rural area spectrum rights to non-designated entities would not be inconsistent with the purpose of the Commission's unjust enrichment rules. According to the Commission:

[T]he Commission crafted unjust enrichment provisions designed to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of provisions and policies meant to encourage their participation in the provision of spectrum-based services. These rules were intended to deter designated entities from prematurely transferring licenses obtained through the

⁴⁶ Id. at ¶ 3. See also Secondary Markets Order at ¶ 45.

⁴⁷ See 47 U.S.C. § 157 nt.

benefit of provisions designed to create opportunities for such designated entities in the provision of spectrum-based services.⁴⁸

If unjust enrichment rules were intended to encourage those benefiting from special measures to retain their licenses and to participate in the provision of spectrum-based services, that purpose is served by allowing them to participate in the Commission's secondary markets for spectrum alongside other licensees. For so long as non-designated entity licensees may lease spectrum to other parties without limitation and still be considered the licensee of record, then the same policy should apply to designated entity licensees.⁴⁹ For so long as a licensee owned and controlled by Alaska Native Corporations or Indian tribes remains the licensee of record and complies with the requirements of the Commission's spectrum leasing rules, no unjust enrichment payments should be required.

Equally, permitting entities owned and controlled by Alaska Native Corporations and Indian tribes freely to lease rural area spectrum rights to non-designated entities would not be inconsistent with the purpose of the Commission's entrepreneur transfer restrictions. The Commission developed the entrepreneurs' block to give new entities an opportunity to participate in the provision of spectrum-based services, consistent with the mandate of Congress and motivated by the need to disseminate licenses among a wide variety of applicants. The goals of the entrepreneurs' block provisions, therefore, were to reduce the competitive disadvantage

⁴⁸ Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Memorandum and Order, 9 FCC Rcd 7245, 7265 (1994).

⁴⁹ Spectrum *usage* is quite distinct from license *ownership*, and, once licensed under the Commission's rules, designated entities should enjoy no fewer spectrum *usage* rights than other licensees in the same service. Thus, if the ability to lease spectrum is part of the bundle of rights awarded to all licensees in a particular service, the Commission should treat that right no differently than any other, and the Commission should not impair the exercise of right because of the status of a particular licensee.

faced by designated entities in participating in Commission auctions and to help them “compete once they win licenses.”⁵⁰ Allowing Alaska Native Corporations and Indian tribes to use the licensed spectrum to the same extent and in the same manner as other licensees is wholly consistent with these policies.

VI. CONCLUSION

For these reasons, Council Tree urges the Commission to waive application of the RSA cellular cross-interest rule for entities owned and controlled by Alaska Native Corporations or Indian tribes, to offer a cumulative bidding credit for these entities when they acquire rural area spectrum rights through competitive bidding, and to permit these entities to lease rural area spectrum rights to any qualifying user without applying unjust enrichment repayment obligations or entrepreneur transfer restrictions.

Respectfully submitted,

COUNCIL TREE COMMUNICATIONS, INC.

By: /s/ Steve C. Hillard
Steve C. Hillard
George T. Laub
COUNCIL TREE COMMUNICATIONS, INC.
2919 West 17th Avenue
Suite 211
Longmont, CO 80503
(303) 678-1834

December 29, 2003

⁵⁰ Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5585 (1994).

CERTIFICATE OF SERVICE

I, Steve C. Hillard, certify that a true and correct copy of the foregoing Comments was delivered to the following by electronic mail on December 29, 2003:

Qualex International
Portals II
445 Twelfth Street, S.W.
CY-B402
Washington, DC 20554
qualexint@aol.com

/s/ Steve C. Hillard
Steve C. Hillard