No. 10-834

In the Supreme Court of the United States

COUNCIL TREE INVESTORS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The court of appeals concluded that the Federal Communications Commission (FCC), in issuing two rules related to small business bidding credits for spectrum license auctions, had not complied with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* As a remedy for those violations, the court vacated both rules. The question presented is as follows:

Whether the court of appeals erred by not also setting aside two multi-billion dollar spectrum license auctions that the FCC had conducted while the two rules were in force.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 619 F.3d 235. A prior decision of the court of appeals in this case is reported at 503 F.3d 284. The decisions of the Federal Communications Commission are reported at 21 F.C.C.R. 4753, 21 F.C.C.R. 6703, and 23 F.C.C.R. 5425.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2010. On November 8, 2010, Justice Alito extended the time for filing a petition for a writ of cer-

[1] The Commission's orders are not included in the appendix to the petition for a writ of certiorari but are reproduced as an appendix to this brief.

tiorari to and including December 22, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, authorizes the Federal Communications Commission (FCC or Commission) to award licenses to permit use of the electromagnetic spectrum to provide communications services. 47 U.S.C. 307, 309. Since 1993, the Communications Act has required the FCC to award many spectrum licenses "through a system of competitive bidding," *i.e.*, by auction. 47 U.S.C. 309(j)(1).

The statute directs the Commission, in designing auction procedures, to seek to promote a variety of sometimes competing objectives. These objectives include developing and deploying new technologies and services for the benefit of the public "without administrative or judicial delays"; promoting economic opportunity and competition by avoiding "excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," including "designated entities" (DEs) such as small businesses and rural telephone companies; and avoiding "unjust enrichment." 47 U.S.C. 309(j)(3)(A)-(C); see 47 U.S.C. 309(j)(4) (directing the Commission to prescribe regulations to achieve these objectives). In implementing the auctions program, the Commission has sought "to find a reasonable balance" among the statute's competing goals. App., *infra*, 7a.

To promote the participation of DEs in spectrum license auctions, the Commission has awarded such entities bidding credits—that is, "percentage discounts on

winning bid amounts." App., *infra*, 8a.[2] An applicant for these benefits must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below certain service-specific caps. *Id.* at 8a-9a (citing 47 C.F.R. 1.2110(b)). Since 2000, the FCC has applied a standard that attributes to an applicant its own gross revenues, as well as those of its "controlling interests" (*i.e.*, those entities that have *de jure* or *de facto* control over the applicant), its affiliates, and the affiliates of its controlling interests. *Id.* at 12a.

To ensure that small-business benefits are available only to bona fide small businesses, the agency has sought to "prevent companies from circumventing the objectives of the designated entity eligibility rules." Further Notice of Proposed Rulemaking, *Implementation of the Commercial Spectrum Enhancement Act & Modernization of the Commission's Competitive Bidding Rules & Procedures*, 21 F.C.C.R. 1753, 1757 (para. 6) (2006) (*Further Notice*). For example, the Commission has adopted unjust-enrichment rules requiring a DE that has benefitted from bidding credits to return some or all of those credits if it subsequently transfers its license to a non-DE or otherwise loses its eligibility for such benefits. At various times, the FCC's auction rules have required repayment of the entire bidding credit if the licensee lost its DE eligibility during

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[2] The Commission's rules define the term "designated entities" as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies." 47 C.F.R. 1.2110(a). Following this Court's decision in *Adarand Constructors* v. *Pena*, 515 U.S. 200 (1995), which addressed the constitutionality of certain government affirmative action programs, DE benefits have been available only to small businesses, including rural telephone companies. See App., *infra*, 3a-4a n.8.

the ten-year license term.[3] At the time the Commission commenced the rulemaking challenged in this case, its rules required repayment if a licensee lost its eligibility during the first five years after winning the license. App., *infra*, 128a.

2. In administering the auction program, the FCC became aware that some putative DEs were "put[ting] themselves forward as small companies in order to qualify for auction discounts," despite having entered into agreements to lease their prospective spectrum rights to other entities that were not entitled to such benefits. See *Further Notice*, 21 F.C.C.R. at 1771 (Statement of Comm'r Copps). Other bidders reportedly had acquired discounted licenses not for the purpose of pursuing "actual business operations" but rather "as investments to be later sold for profit in the after-market." *United States* v. *Gabelli*, 345 F. Supp. 2d 313, 321-322 (S.D.N.Y. 2004); see John R. Wilke, *Gabelli, U.S. Discuss Settlement in Fraud Case; Pact to End Investigation of Cellular-Spectrum Bids Is Likely to Top $100 Million*, Wall St. J., June 1, 2006 at A3.

In February 2006, after petitioner Council Tree Communications, Inc., submitted a proposal to tighten some of the eligibility rules for DE benefits, the Commission issued a notice of proposed rulemaking. That

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[3] See, *e.g.*, Sixth Report and Order, *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 11 F.C.C.R. 136, 180 (1995) (requiring total reimbursement of bidding credits if eligibility was lost at any time during the ten-year license term); Report and Order, *Amendment of the Commission's Rules to Establish Part 27, the Wireless Commc'ns Serv.*, 12 F.C.C.R. 10,785, 10,918-10,919 (1997) (providing for 100% reimbursement for loss of eligibility during the first five years of the license term, with declining reimbursement obligations for years five through ten).

notice sought comment on measures to "prevent companies from circumventing the objectives of the designated entity eligibility rules" and to ensure that DE benefits are "available only to bona fide small businesses." *Further Notice*, 21 F.C.C.R. at 1757.

In April 2006, after reviewing comments in response to the *Further Notice*, the Commission issued its *Second Report and Order*. That order tightened the agency's auction rules for designated entities in two relevant respects. First, with respect to leasing and resale arrangements, the Commission adopted two new eligibility restrictions designed to ensure that every recipient of DE benefits uses its licenses to provide telecommunications services directly to the public. App., *infra*, 20a-25a. One restriction—the 25% Attribution Rule—provided that "if a DE leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee's or purchaser's revenues to its own to determine continued eligibility for DE credits." Pet. App. 33a. The other restriction—the 50% Impermissible Relationship Rule—"ma[de] license applicants or holders ineligible for DE benefits if they lease or resell (including at wholesale) more than 50% of their spectrum capacity" on an aggregate basis. *Id.* at 38a.

Second, to address concerns about license "flipping"—attempts by DEs "to immediately monetize their bidding credits by selling their spectrum licenses at market prices" (Pet. App. 5a)—the Commission strengthened its "unjust enrichment" rules by returning to a ten-year (rather than five-year) unjust enrichment period. This change meant that a DE that transferred its license to a non-DE or otherwise lost eligibility for those benefits during the first ten years of its license would

have to repay some or all of its bidding credits (the Ten-Year Repayment Schedule). See *id.* at 17a, 43a.

On May 5, 2006, Council Tree and its co-petitioners filed a request for expedited reconsideration of the *Second Report and Order*. See App, *infra*, 99a n.2. Because a major auction (the Advanced Wireless Services (AWS) auction) was impending, the Commission on its own motion issued an order on reconsideration before the comment period on Council Tree's request for reconsideration was closed. In that order, the FCC reaffirmed the new DE rules, while clarifying them in several respects. *Id.* at 98a-138a. Although the sua sponte order on reconsideration responded to all of Council Tree's arguments about the rules adopted in the *Second Report and Order*, Council Tree's request for reconsideration remained formally pending at the agency.

3. On June 7, 2006, petitioners filed a petition for review in the Third Circuit, challenging the *Second Report and Order*, the *Reconsideration Order*, and a public notice regarding the timing of the AWS auction.[4] See Pet. App. 24a. Petitioners also asked the court of appeals to stay the FCC's new DE rules and the upcoming AWS auction pending judicial review on the merits. *Ibid.* On June 29, 2006, the court of appeals denied petitioners' stay request, concluding that "[t]he public interest * * * militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date." No. 06-2943, at 5 n.1, 6 (3d Cir. June 29, 2006). After briefing on the merits, the court of appeals dismissed the petition for review because petitioners had filed it before *Federal Register* publication of the

[4] Public Notice, AU Docket No. 06-30, *Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006*, 21 F.C.C.R. 5598 (2006) (Auction Public Notice).

Reconsideration Order and while their own request for reconsideration was still pending at the agency. *Council Tree Commc'ns, Inc.* v. *FCC*, 503 F.3d 284, 287 (3d Cir. 2007).

4. Because petitioners' jurisdictional misstep led to a four-year gap between the filing of their initial petition for review and issuance of the decision on the merits of their claim, the FCC conducted several spectrum auctions while the revised DE rules were in effect.

In 2006 the FCC held the AWS auction.[5] That auction raised nearly $14 billion in winning bids (net of bidding credits). Pet. App. 26a. More than $375 million in proceeds from the AWS auction have already been spent by federal agencies to pay for the relocation of their users from the spectrum that the auction reassigned for commercial use.[6] In addition, winning bidders from that auction are now using the spectrum they won to provide service to millions of customers.[7]

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[5] Following the Commission's practice of designating auctions by number, this auction is referred to in the relevant Commission orders and the decision below as "Auction 66."

[6] See U.S. Department of Commerce, *Relocation of Federal Radio Systems from the 1710-1755 MHz Spectrum Band: Third Annual Progress Report* 3 (Mar. 2010), http://www.ntia.doc.gov/reports/2010/CSEA_Report_20100407. pdf.

[7] See, *e.g.*, Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 F.C.C.R. 11,407, 11,485 (para. 116) (2010) (*Fourteenth Wireless Competition Report*) (noting T-Mobile's use of AWS spectrum to deploy advanced wireless services to U.S. cities covering hundreds of millions of people by the end of 2010); *id*. at 11,462-11,463 (para. 72) (noting that Leap Wireless used, *inter alia*, AWS licenses to expand coverage from 53.9 million people in October 2008 to 80.5 million people in October 2009, and that MetroPCS used such licenses to expand coverage during the same period from 56 million people to 84.6 million people).

In early 2008, the Commission conducted another major auction. That auction involved the reapportionment of the 700 MHz spectrum that television broadcasters had relinquished in converting from analog to digital broadcast. The 700 MHz auction (referred to in the FCC's orders as "Auction 73") raised approximately $19 billion in winning bids, nearly doubling congressional estimates of its likely proceeds. News Release, FCC, *Statement by FCC Chairman Kevin J. Martin* 2 (March 18, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280887A1.pdf (*Martin Statement*); see Pet. App. 27a. The proceeds of the auction have been transferred to the United States Treasury, as required by statute, to support public safety and digital television transition initiatives.[8] 700 MHz license winners are now providing service using this spectrum in many markets.[9]

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[8] See Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 F.C.C.R. 15,289, 15,296, 15,405 (paras. 15, 318) (2007) (*700 MHz Service Rules Order*) (citing the Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, Tit. III, 120 Stat. 21), petition for review dismissed, *Council Tree Commc'ns, Inc.* v. *FCC*, 324 Fed. Appx. 3 (D.C. Cir. 2009); *Martin Statement* at 1.

[9] See, *e.g.*, *Fourteenth Wireless Competition Report*, 25 F.C.C.R. at 11482 (para. 112) (noting that Verizon Wireless expected "to launch [advanced wireless services] in 25-30 markets in 2010 using its 700 MHz Band spectrum, and to expand [such] coverage to 210 markets covering 285 million people by 2013"); *id*. at 11,484-11,485 (para. 115) (noting that AT&T planned to conduct trials for similar advanced mobile services using 700 MHz Band and AWS spectrum in 2010 and to begin deployment in 2011).

There was robust DE participation in both the AWS and 700 MHz auctions. In the AWS auction, DEs accounted for 166 of 252 auction applicants; 100 of the 168 total qualified bidders; and 57 of the 104 total winning bidders. Pet. App. 26a. DEs submitted $551 million in winning bids. *Ibid*. Two DEs were among the top ten winners in dollar amount. *Ibid*. In the 700 MHz auction, 119 of the 214 total qualified bidders and 56 of 101 total winning bidders were DEs. *Id.* at 27a. In all, DEs won 35% of the individual licenses auctioned in the 700 MHz auction. *Ibid*. While the dollar value of the licenses won by DEs in these auctions was less than in some prior auctions, the court of appeals noted that such "data must be considered in light of the absence from [these two auctions] of the set-asides by which, in prior auctions, only DEs had been permitted to purchase certain spectrum blocks." *Id.* at 27a n.4. In addition, "the purpose of the instant rulemaking from its inception was to disqualify sham DEs, which would be expected to reduce the number of qualifying DEs." *Ibid*.

5. After the Commission formally denied petitioners' reconsideration petition (App., *infra*, 151a-153a), whose pendency had required dismissal of their first petition for review, petitioners filed a new petition for review in the Third Circuit. That petition, filed shortly after the 700 MHz auction ended,[10] led to the opinion at issue in this case. Petitioners contended that the new DE rules violated the Communications Act, were arbitrary and capricious, and were issued in violation of the

[10] Petitioner Council Tree attempted to seek review in the D.C. Circuit of the Commission's application of the modified DE rules to the 700 MHz auction, but, like its earlier petition in the Third Circuit, that petition was dismissed on jurisdictional grounds. See *Council Tree Commc'ns, Inc.* v. *FCC*, 324 Fed. Appx. 3, 4 (D.C. Cir. 2009).

notice-and-comment requirements of the Administrative Procedure Act (APA). Petitioners asked that the rules be vacated and that the court nullify both the AWS and 700 MHz auctions and order that those auctions be conducted again under revised DE rules. Pet. App. 33a, 47a.

The court of appeals granted the petition in part and denied it in part. Pet. App. 1a-51a. The court rejected petitioners' contention that the revised DE rules were inconsistent with the Communications Act. *Id.* at 28a-29a n.7. The court noted that, although the statute required that the Commission's auction rules allow for the "disseminat[ion] [of] licenses among a wide variety of applicants, including small businesses [and] rural telephone companies," the statute also included other, competing requirements. *Ibid.* (quoting 47 U.S.C. 309(j)(3)(B)). The court of appeals explained that, "[g]iven the general agreement that the DE program can be abused, as well as the continuing participation by DEs in auctions held under the new rules, we cannot conclude that the FCC has failed to promote small-business participation at all." *Id.* at 29a n.7.

Turning to petitioners' APA claims, the court reached different conclusions for different rules. The court rejected petitioners' notice-and-comment and arbitrary-and-capricious challenges to the 25% Attribution Rule, and it accordingly upheld that rule. Pet. App. 33a-37a. The court determined, however, that the Commission had provided inadequate notice of the 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule. *Id.* at 38a-46a.[11] Having reached that

[11] The court found no notice defect with respect to the Ten-Year Repayment Schedule insofar as it applied to the 25% Attribution Rule,

conclusion, the court found it unnecessary to consider petitioners' further argument that those rules were arbitrary and capricious. *Id.* at 42a n.8, 46a n.10.

In considering the appropriate remedy for the violations it had found, the court of appeals noted that petitioners had urged it to vacate the DE rules, while the FCC had urged it to "remand the matter without vacatur to permit [the FCC] to correct the defects." Pet. App. 47a. The court also noted that the parties disagreed on its authority to remand the DE rules without vacatur: the FCC had argued that this remedy was within the court's equitable authority, while petitioners had contended that the APA required it "to vacate any rules we find in violation of the APA." *Id.* at 49a & n.13. The court "express[ed] no view as to whether [it was] authorized to" remand the DE rules without vacating them because it found such a remedy "inappropriate on the facts of this case." *Id.* at 49a n.13. Because the court viewed the APA notice violations as "serious," and because it believed that vacatur of the two rules would not be disruptive, the court agreed with petitioners that the rules should be vacated. *Id.* at 50a ("[E]ven assuming we have the authority to remand the matter without vacatur, we would decline to do so here.").

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since "there was more than adequate notice that the new repayment schedule would apply to any *new* rules adopted by the FCC." Pet. App. 46a n.10. But because the court concluded that notice was insufficient to apply the new schedule to *pre-existing* DE eligibility restrictions—and the court saw "no way to sever the FCC's legitimate adoption of the ten-year schedule with respect to the 25% rule from its unlawful application of the rule to other situations"—the court vacated the Ten- Year Repayment Schedule in its entirely and specified that the effect of such vacatur would be to restore the pre-existing five-year schedule. *Id.* at 46a n.10, 50a.

The court of appeals noted that petitioners had requested, as a separate remedy, that the court "exercise [its] equitable authority to rescind Auctions 66 and 73." Pet. App. 47a. The court also noted (*id.* at 48a n.12; see *id.* at 27a n.5) that the federal respondents and other parties had contested the court's jurisdiction to review the auctions, which were distinct proceedings with their own agency orders that petitioners had not timely challenged. The court determined that it need not address those jurisdictional arguments because, in exercising its "equitable authority" to fashion an appropriate remedy, it "would decline to exercise any jurisdiction [it] may have to rescind the auction results." *Id.* at 48a n.12.

The court of appeals explained that petitioners' request to rescind the AWS and 700 MHz auctions was "vigorously opposed" by intervenors and *amici*, some of which had won licenses in those auctions and were "innocent third parties in relation to" the notice defects in the DE rulemaking. Pet. App. 47a-48a. The court pointed out that rescinding the auctions "would involve unwinding transactions worth more than $30 billion, upsetting what are likely billions of dollars of additional investment made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers." *Id.* at 48a. Such potential "large-scale disruption in wireless communications," the court observed, "would have broad negative implications for the public interest in general." *Ibid*.

The court of appeals further determined that petitioners' proposed solution to the disruption—allowing the winning bidders "to keep their licenses unless and until they are won by another bidder at re-auction"—"might mitigate the chaos of a rescission, but it could not eliminate the massive uncertainty, waste, and frozen develop-

ment that would occur" during the period preceding any re-auction. Pet. App. 48a. For all these reasons, the court concluded that, under the circumstances, it would be "imprudent and unfair to order rescission of the auction results." *Id.* at 49a.

ARGUMENT

Petitioners contend that, once the court of appeals found that the FCC had violated the APA's notice-and-comment provisions in promulgating two of the challenged DE rules, 5 U.S.C. 706(2) required the court not only to vacate those rules but also to rescind two multi-billion dollar spectrum license auctions that had taken place while the rules were in force. The court of appeals correctly declined to impose that extraordinarily disruptive remedy, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, petitioners did not argue below that Section 706(2) of the APA required the court of appeals to nullify the auctions, so the principal contention in their petition has been waived. Further review is not warranted.

1. Petitioners ask the Court to address what they claim is a division in the circuits on whether the APA permits courts that find procedural defects in agency rules to remand those rules to the agency for correction without vacating them, or instead requires automatic vacatur upon a finding of error. Pet. 15-23. That question is not presented here. Although the federal respondents asked the court of appeals for a remand of the DE rules without vacatur, the court *declined* to limit its remedy in that manner. Pet. App. 49a-50a. Instead, it vacated the two DE rules whose promulgation it found defective, just as petitioners asked it to do. *Id.* at 50a.

In addressing this remedial question, the court of appeals noted petitioners' contention that the APA "required [it] to vacate any rules [it] f[ou]nd in violation of the APA." Pet. App. 49a n.13. The court "express[ed] no view" on that question, however, because it found remand without vacatur inappropriate "on the facts of this case." *Ibid.* Petitioners identify no sound reason for this Court to review a question on which petitioners prevailed below.[12]

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[12] Although the court of appeals found it unnecessary to address the question in this case, other circuits have held that, in appropriate circumstances, a court of appeals that finds an agency rule to have been invalidly promulgated may remand that rule to the agency without vacating it. See, *e.g.*, *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). Contrary to petitioners' contention (Pet. 19-21), the Tenth and Federal Circuits have not held to the contrary. *Forest Guardians* v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999), involved 5 U.S.C. 706(1), not 5 U.S.C. 706(2). 174 F.3d at 1187. When Section 706(2) is at issue, the Tenth Circuit holds that it has the authority to remand without vacating. *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1205, 1207 (2001); see *Qwest Corp.* v. *FCC*, No. 99-9546, Order of Clarification 4 (10th Cir. filed Aug. 27, 2001) (explaining that its reported opinion "did not vacate the rules" at issue, which "may remain in effect * * * pending the completion of * * * proceedings on remand"). The court in *PGBA, LLC* v. *United States*, 389 F.3d 1219 (Fed. Cir. 2004), did not address whether Section 706(2) permits a reviewing court to remand without vacating an agency order. The court in that case was construing another statute, which incorporated by reference the APA's substantive arbitrary-and-capricious standard but did not incorporate Section 706's remedial standards. *Id.* at 1225-1226. By contrast, when the Federal Circuit has directly addressed the question whether the APA permits remand without vacatur, it has held that "[a]n inadequately supported rule * * * need not necessarily be vacated." *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1380 (2001) (quoting *Allied-Signal*, 988 F.2d at 150, 151).

Petitioners now attempt to shift their Section 706(2) argument to the completely separate remedial question decided by the court of appeals, *i.e.*, whether the court should have nullified both the AWS and 700 MHz auctions in addition to vacating the two DE rule changes. Before the court of appeals, however, petitioners did not contend that Section 706(2) required the auctions to be unwound once a procedural defect in the DE rules was identified. Their contention that Section 706(2) made vacatur mandatory was made exclusively in service of their argument that the DE rules themselves should be vacated, rather than merely remanded. See Pet. 2008 C.A. Br. 25 n.43. With respect to rescission of the relevant auctions, petitioners did not argue below that Section 706(2) required that remedy; they contended only that the court should "exercise its equitable authority" to impose it. Pet. App. 47a; Pet. 2008 C.A. Br. 26-37. The court of appeals accordingly did not consider the question whether Section 706(2) required rescission of the auctions.[13] Petitioners' waiver of the principal claim they now advance is a sufficient reason to deny their petition. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

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[13] Petitioners state that "[t]he Third Circuit did not question that the auctions in this case—conducted pursuant to unlawfully issued rules—constituted unlawful agency action subject to Section 706's 'shall . . . set aside' command." Pet. 29. The Third Circuit had no occasion to "question" that proposition, however, because petitioners never advanced it.

Even if petitioners had preserved this contention, it would fail on the merits. The provision on which petitioners rely provides that a "reviewing court shall * * * hold unlawful and set aside *agency action*, findings, and conclusions found to be * * * without observance of procedure required by law" or arbitrary and capricious. 5 U.S.C. 706(2) (emphasis added). For two independent reasons, this provision did not require nullification of the auctions. First, with respect to the auctions, the court of appeals did not have properly before it any "agency action" that could have been "set aside." In a case like this, a timely petition for review of an FCC "order" is the exclusive basis of a court of appeals' jurisdiction. 47 U.S.C. 402(a); 28 U.S.C. 2342(1). Here, petitioners eventually filed a proper petition for review challenging the modifications to the FCC's generally applicable DE rules. They did not, however, timely challenge any order regarding the AWS or 700 MHz auctions.[14] The

[14] Petitioners attempted to challenge an auction notice scheduling the AWS auction, but their effort was untimely. Petitioners timely challenged that public notice as part of their 2006 petition for review, but when the court of appeals dismissed that petition, they did not ask the court to retain jurisdiction over the public notice. Instead, they sought to challenge it anew in 2008, but the 60-day window for challenging that notice, 28 U.S.C. 2344, had closed more than two years earlier. The period for seeking review was not tolled by petitioners' request for administrative reconsideration, which pertained only to the DE rulemaking orders and not the public notice. In their petition for review in this case, petitioners did not even attempt to challenge any order regarding the 700 MHz auction. They did so in the D.C. Circuit, but, as noted, that petition was dismissed on jurisdictional grounds. *Council Tree Commc'ns*, 324 Fed. Appx. at 4; see note 10, *supra*.

court of appeals accordingly lacked jurisdiction to provide any remedy regarding those distinct proceedings.[15]

Second, petitioners' claim would fail even if there had been an auction order properly before the court of appeals because that court nowhere found that the Commission's decision to hold the auctions under its revised DE rules violated any provision of the APA. Accordingly, even if petitioners were correct in arguing that Section 706(2) mandates vacatur of any agency action found to be unlawful, petitioners would at most be entitled to vacatur of the orders modifying the DE rules (a remedy that the court of appeals awarded in any event as an exercise of discretion). Section 706(2) would not require the court to "set aside" *separate* "agency action[s]," such as the auctions in this case, that the court had *not* "found to be" "arbitrary [or] capricious" or "without observance of procedure required by law." 5 U.S.C. 706(2).

Finally, petitioners identify no court of appeals decision that has accepted the argument they now advance —*i.e.*, that the APA requires a court that finds procedural error in the promulgation of agency rules to "set aside" not only the rules themselves, but also the outcome of entirely separate proceedings, with their own orders and agency docket numbers and in which the court found no legal error. Absent any conflict in the

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[15] To the extent that petitioners claim that the FCC's award of licenses from the auctions was the "agency action" before the court of appeals, Pet. 29 n.22, that contention fails for multiple reasons. Petitioners never made that argument below; they did not challenge any order granting licenses in the court of appeals; and the D.C. Circuit has exclusive jurisdiction over appeals by "any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying," *inter alia*, any license application, 47 U.S.C. 402(b)(6).

circuits on this question, petitioners' claim would not warrant this Court's review even if that claim had been properly preserved.

2. In the alternative, petitioners contend that the court of appeals abused its equitable discretion in declining to nullify the auctions. Pet. 28-34. The court of appeals' record-intensive resolution of that question does not conflict with any decision of this Court or of any other court of appeals. Moreover, for the reasons stated above, the court of appeals was without jurisdiction to nullify the auctions because petitioners failed to timely challenge any auction order.[16] In any event, the court of appeals correctly declined to provide petitioners with the extraordinarily disruptive remedy they sought.

As the court of appeals noted, rescinding the auctions "would involve unwinding transactions worth more than $30 billion, upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers." Pet. App. 48a. Such a step would also directly harm "innocent third parties." *Id.* at 47a-48a. Among them would be customers whose mobile devices would stop working when their providers lost their licenses, as well as companies that secured spectrum licenses in the auctions, including DEs that filed an amicus brief in the court of appeals "vigorously" opposing rescission as directly contrary to their interests. *Ibid.*; Atlantic Wireless 2008 C.A. Br. 8-10 (discussing irreparable harm auction rescission would cause to innocent small and medium-size companies that had won licenses in AWS auction). Un-

[16] The court of appeals did not find it necessary to reach this jurisdictional question since it found that rescission of the auctions would be unwarranted even assuming it had jurisdiction. Pet. App. 27a n.5.

winding the auctions would cause enduring systemic harms as well. Taking away spectrum licenses years after the auctions were held, the licenses had issued, companies had spent billions of dollars building facilities, and millions of customers had begun utilizing resulting services would significantly undermine confidence in the auction system as a whole and make bidders significantly less likely to participate in the future.

Petitioners have suggested that the court of appeals should "nullify the auction results, but permit the winning bidders to keep their licenses unless and until they are won by another bidder at re-auction." Pet. App. 48a. As the court below correctly recognized, that approach "might mitigate the chaos of a rescission, but it could not eliminate the massive uncertainty, waste, and frozen development that would occur from the time of the rescission until the re-auction." *Ibid.* "A re-auction * * * would unfairly require [auction winners] to pay sums that they may not have in order to protect investments they have already made, and perhaps cannot recoup without the relevant spectrum licenses." *Id.* at 49a.

Finally, the relief petitioners sought was especially inappropriate because their own failure to comply with jurisdictional requirements in 2006 led to dismissal of their first petition for review and a multi-year postponement of a decision on the merits. The 700 MHz auction took place during that interval, and reliance by both licensees and customers on the results of both auctions steadily increased during that time period. As a matter of equity, petitioners should not be allowed to leverage their own litigation mistakes into a claim for more expansive and disruptive relief. In sum, the court of appeals correctly concluded that "it would be imprudent

and unfair to order rescission of the auction results." Pet. App. 49a.

Petitioners are also wrong in contending (Pet. 29) that the court of appeals "declined to provide any remedy at all to petitioners injured by the unlawful agency action." The court of appeals vacated the rules whose issuance it found procedurally improper. Pet. App. 50a. Petitioners thus secured the remedy that courts of appeals typically provide when they find agency regulations to have been unlawfully promulgated. Indeed, when the court of appeals issued its decision, petitioner Council Tree recognized the significance of the relief it had obtained, stating that the decision had "restored a pathway for wireless competition, innovation and diversity by ensuring the 'dissemination of licenses among a wide variety of applicants' envisioned by Congress in establishing the FCC's wireless auction authority." TRDaily, *Third Circuit Vacates, Remands Portion of FCC's 'DE' Regulations* (Aug. 24, 2010).

Because the court of appeals vacated the 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule, petitioners may participate in future auctions of spectrum licenses without being subject to those restrictions. An auction of additional licenses in the 700 MHz Band currently is scheduled for July 2011, Public Notice, AU Docket No. 10-248, *Auction of 700 MHz Band Licenses Scheduled for July 19, 2011*, DA 10-2298 (Dec. 15, 2010), and more significant auctions are on the horizon, see Office of the White House Press Secretary, *President Obama Details Plan to Win the Future through Expanded Wireless Access* (Feb. 10, 2011), http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access.

Moreover, a DE that was one of the top ten winning bidders in the AWS auction and in which Council Tree's principals have had an acknowledged ownership interest,[17] already has received a tangible benefit from the decision below. On December 27, 2010, that winning bidder transferred to a non-DE its control of a portion of the AWS license it had won at auction. In doing so, the winning bidder paid the reduced unjust enrichment payment associated with the five-year repayment schedule that the court of appeals had reinstated, rather than the greater payment that would have been required under the now-vacated 10-year schedule.[18] In short, there is no basis for petitioners' contention that the court's failure to rescind the AWS and 700 MHz auctions left petitioners without any remedy.

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[17] Public Notice, *Auction of Advanced Wireless Service Licenses Closes*, 21 F.C.C.R. 10,521, 10,582 (2006); see Gov't 2006 C.A. Br. 44 n.57; Pet. 2006 Reply Br. 27 n.26.

[18] See FCC File No. 0004404302, Application for Transfer of Control of Denali Spectrum License Sub., LLC (filed Oct. 1, 2010), available at http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applMain.jsp?applID=5732431. An attachment to the application (scroll to Attachments and click on the link "Calculations for Unjust enrichment payment") provides unjust-enrichment calculations showing a payment of 50% of relevant bidding credit calculated, pursuant to the five-year repayment schedule of 47 C.F.R. 1.2111(d)(2)(ii)(C), rather than the 100% unjust enrichment payment that would have been applicable under the vacated Ten-Year Repayment Schedule (see 47 C.F.R. 1.2111(d)(2)(i)(A)). See generally RCRWireless, *Leap Completes Denali Acquisition* (Dec. 28, 2010), http://www.rcrwireless.com/article/20101228/carriers/101229949/leap-completes-denali-acquisition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WT Docket No. 05-211

IN THE MATTER OF IMPLEMENTATION OF THE COMMERCIAL SPECTRUM ENHANCEMENT ACT AND MODERNIZATION OF THE COMMISSION'S COMPETITIVE BIDDING RULES AND PROCEDURES

Adopted: Apr. 25, 2006
Released: Apr. 25, 2006

SECOND REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Comment Date: 60 days after publication in the Federal Register

Reply Comment Date: 90 days after publication in the Federal Register

By the Commission: Chairman Martin and Commissioner Copps issuing separate statements; and Commissioner Adelstein approving in part, dissenting in part, and issuing a separate statement.

I. INTRODUCTION

1. In this *Second Report and Order* and *Second Further Notice of Proposed Rule Making* ("*Second Further Notice*"), we address our rules concerning the eligibility of applicants and licensees for designated entity benefits. In the *Second Report and Order*, we modify our rules in order to increase our ability to ensure that the recipients of designated entity benefits are limited to those entities and for those purposes Congress intended.[1] In the *Second Further Notice*, we seek comment on a variety of additional measures that might further augment the effectiveness of our rules in this regard. We take all of these steps with the goal of enhancing our ability to carry out Congress's dual directives with regard to designated entities: (1) that we ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services;[2] and (2) that, in providing such opportunity, we prevent unjust enrichment.[3] With regard to the second directive, our particular intention is to ensure that entities ineligible for designated entity incentives cannot circumvent our rules by obtaining those benefits indirectly, through their relationships with eligible entities.

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[1] "Designated entities" are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. 47 C.F.R. § 1.2110(a). In an effort to eliminate some past inconsistency in nomenclature, we clarify that, unless otherwise noted, when referring to "designated entities," we include as a subgroup "entrepreneurs" eligible to bid for "set-aside" broadband Personal Communications Service ("broadband PCS") licenses offered in closed bidding. *See id.* §§ 1.2110(a), 24.709.

[2] 47 U.S.C. § 309(j)(4)(D); *see also id.* § 309(j)(3)(B).

[3] *Id.* § 309(j)(4)(E); *see also id.* § 309(j)(3)(C).

2. In the *Further Notice of Proposed Rule Making* in this docket ("*Further Notice*"), we tentatively concluded that we should restrict the award of designated entity benefits to an otherwise qualified applicant where it has a "material relationship" with a "large in-region incumbent wireless service provider."[4] We sought comment on how we should define the elements of such a restriction.[5] We further sought comment on whether we should restrict the award of designated entity benefits where an otherwise qualified applicant has a "material relationship" with a large entity that has a significant interest in communications services, and if so, how we should define the elements of such a restriction.[6]

A. *Second Report and Order*

3. As discussed fully below, we revise our general competitive bidding rules ("Part 1" rules)[7] governing benefits reserved for designated entities[8] to include cer-

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[4] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Further Notice of Proposed Rule Making*, 21 FCC Rcd 1753 (2006) ("*Further Notice*").

[5] *Id.* at 1754-55 ¶ 1.

[6] *Id.* In response, we received 37 comments and 18 reply comments. Two parties who filed initial comments in response to the Commission's Public Notice relating to AWS auction procedures (AU-06-30) also raised issues with respect to the Commission's designated entity program. We also received *ex parte* filings in response to the *Further Notice* from various parties including the Congressional Black Caucus, the U.S. Department of Justice and Council Tree. Appendix A contains a list of full and abbreviated names of commenting parties.

[7] *See* 47 C.F.R. § 1.2101 *et. seq.*

[8] *See id.* § 1.2110. The Commission establishes special small business size standards on a service-specific basis, taking into consideration the

tain "material relationships" as factors in determining designated entity eligibility. Specifically, we adopt rules

characteristics and capital requirements of the particular service. 47 C.F.R. § 1.2110(c)(1). In the *Part 1 Fifth Report and Order,* the Commission, in light of the *Adarand* decision, declined to adopt special provisions for minority- and women-owned businesses but noted that minority-and women-owned businesses that qualify as small businesses may take advantage of the provisions the Commission has adopted for small businesses. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15319 ¶ 48 (2000) ("*Part 1 Fifth Report and Order*") (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). On several occasions, the Commission has declined to adopt bidding credits for large telephone companies that serve rural areas. *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 457-58, 462-63 ¶¶ 100, 111 (1994) ("*Competitive Bidding Fifth MO&O*"); Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Notice of Proposed Rule Making,* 15 FCC Rcd 15293, 15320-21 ¶¶ 51-52 (2000); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022, 1090-91 ¶ 176 (2002). The Commission determines eligibility for its small business provisions based on an entity's size determined pursuant to attribution rules. 47 C.F.R. § 1.2110(b)(1)-(3). *But see* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10180, 10191-94 ¶¶ 16-18 (2003) (establishing exemption for rural telephone cooperatives from the requirement that gross revenues of entities controlled by an applicant's officers and directors be attributed to the applicant), *modified on reconsideration, Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005); 47 C.F.R. § 1.2110(b)(3)(iii) (exempting rural telephone cooperatives from attributing the gross revenues of its officers and directors).

to limit the award of designated entity benefits, as explained in more detail below, to any applicant or licensee that has "impermissible material relationships" or an "attributable material relationship" created by certain agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity. These definitions of material relationships are necessary to strengthen our implementation of Congress's directives with regard to designated entities and to ensure that, in accordance with the intent of Congress, every recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.[9]

4. We also adopt rule modifications to strengthen our unjust enrichment rules so as to better deter entities from attempting to circumvent our designated entity eligibility requirements and to recapture designated entity benefits when ineligible entities control designated entity licenses or exert impermissible influence over a designated entity.[10] Similarly, to ensure our continued ability to safeguard the award of designated entity benefits, we provide clarification regarding how the Commission will implement its rules concerning audits,

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[9] In the legislative history of Section 309(j), Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter "participation in the licensing process by those who have no intention of offering service to the public." H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993)).

[10] *See* 47 C.F.R. § 1.2111.

and we refine our rules with respect to the reporting obligations of designated entities.

5. The rules we adopt today will apply to all determinations of eligibility for all designated entity benefits, including bidding credits and, as applicable, set-asides[11] and installment payments, unless excepted by the grandfathering provisions described in detail below.[12] These rules will be applied to any application filed to participate in auctions in which bidding begins after the effective date of the rules adopted herein and to all long-form applications filed by winning bidders after such auctions,[13] as well as to all applications for an authorization, an assignment or transfer of control, a lease, or reports of events affecting a designated entity's ongoing eligibility,[14] including "impermissible material relationships" or "attributable material relationships," filed on or after release of this *Second Report and Order*. These rules will become effective thirty days after their publication in the Federal Register.

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[11] Broadband Personal Communications Services entrepreneurs will be subject to these new rules as described below.

[12] *See* discussion *infra* ¶¶ 28-30.

[13] The rules adopted herein, therefore, will not apply to the upcoming auction of 800 MHz Air-Ground Radiotelephone Service licenses, scheduled to begin on May 10, 2006, nor to the Form 601 applications to be filed subsequent to the close of that auction by the winning bidders. *See* Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 65, *Public Notice*, 21 FCC Rcd 1278 (2006).

[14] *See* discussion *infra* note 116 and accompanying text.

B. *Second Further Notice of Proposed Rule Making*

6. In reviewing the record in this proceeding, including the requests of various parties to conduct a further inquiry,[15] we issue this *Second Further Notice* to consider whether we should adopt additional restrictions, beyond those we adopt herein, to further safeguard the benefits reserved for designated entities.[16]

II. BACKGROUND

7. Throughout the history of the auctions program, the Commission has endeavored to carry out its Congressional directive to promote the involvement of designated entities in the provision of spectrum-based services.[17] Congress recommended that the Commission, in assisting designated entities, consider the use of various mechanisms such as tax credits and bidding preferences.[18] Yet, in so doing, Congress also mandated that the Commission safeguard the award of the benefits it distributed to "prevent unjust enrichment as a result of the methods employed to issue licenses."[19]

8. The challenge for the Commission in carrying out Congress's plan has always been to find a reasonable balance between the competing goals of, first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, sec-

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[15] *See, e.g.*, Comments of NHMC at 17-18; Reply Comments of Consumers Union at 1-2.

[16] *See supra* note 8 (discussing the Commission's designated entity benefits).

[17] *See* 47 U.S.C. § 309(j)(4)(D); *see also* 47 C.F.R. § 1.2110(a).

[18] 47 U.S.C. § 309(j)(4)(D).

[19] *Id.* § 309(j)(4)(E).

ond, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses.[20] The changes in the Commission's designated entity rules over time have been the result of the Commission's continuing effort to maintain this balance effectively in the face of a rapidly evolving telecommunications industry, legislative changes, judicial decisions, and the demand of the public for greater access to wireless services.

9. The Commission's primary method of promoting the participation of designated entities in competitive bidding has been to award bidding credits—percentage discounts on winning bid amounts—to small business applicants.[21] The Commission also has utilized other incentives, such as installment payments and, in the broadband Personal Communications Services ("broadband PCS"), a license set-aside, to encourage designated entities to participate in spectrum auctions and in the provision of service.[22] In order to qualify for these benefits, an applicant must demonstrate that its gross revenues (and, in some cases, its total assets), in combination with those of its "attributable" interest holders, fall be-

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[20] *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5582 ¶ 159 (1994) ("*Competitive Bidding Fifth Report and Order*").

[21] *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391-92 ¶¶ 241-44 (1994) ("*Competitive Bidding Second Report and Order*").

[22] *See id.* at 2389-91, 2392 ¶¶ 231-40, 245-48.

low certain service-specific financial caps.[23] Thus, in determining eligibility for size-based benefits, it is critical to decide which investors' gross revenues (and total assets) must be attributed.

10. During the early years of the designated entity program, the Commission adopted often complicated attribution rules on a service-specific basis. For broadband PCS attribution, the Commission had a "general rule"—its financial caps[24]—and four exceptions to the rule.[25] Two of these exceptions came to be known as the "control group exceptions"—a 25 percent equity exception and a 49.9 percent equity exception.[26] Both exceptions required the applicant to form a "control group"[27] within which "qualifying investors"[28] owned at least 50.1 percent of the applicant's voting interests.[29] Under the 25 percent equity exception, the applicant's control group was required to own at least 25 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 15

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[23] *See* 47 C.F.R. § 1.2110(b).

[24] *See id.* § 24.709(a)(1)-(2).

[25] *See id.* § 24.709(b)(1)(i)-(iv).

[26] *See id.* § 24.709(b)(1)(iii), (iv).

[27] A control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee. *See id.* § 24.720(k).

[28] A qualifying investor is a person who is (or holds an interest in) a member of the applicant's control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the entrepreneurs' block gross revenues and total assets limits. *Id.* § 24.720(n).

[29] *Id.* § 24.709(b)(1)(v)(A)(2), (b)(1)(vi)(A)(2). If the applicant was a partnership, the control group was required to hold all of its general partnership interests. *Id.*

percent of the applicant's total equity.[30] Under the 49.9 percent equity exception, the applicant's control group was required to own at least 50.1 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 30 percent of the applicant's total equity.[31] If these and certain other requirements were met, the gross revenues and total assets of non-controlling investors were not attributed to the applicant.[32] These two exceptions to the general rule were widely used; however, the other two exceptions—one for publicly-traded corporations with widely dispersed voting stock ownership and the other for small business consortia[33]—were seldom invoked.

11. The Commission used the control group approach in broadband PCS for determinations of small business eligibility and also for determinations of "entrepreneur" eligibility. In broadband PCS, the Commission originally "set aside" C and F block licenses for "entrepreneurs,"[34] small entities whose gross revenues and total assets, when aggregated with those of their attributable interest holders, fell below certain financial

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[30] *Id.* § 24.709(b)(1)(v)(A), (b)(1)(v)(A)(1).

[31] *Id.* § 24.709(b)(1)(vi)(A), (b)(1)(vi)(A)(1).

[32] *Id.* § 24.709(b)(1)(iii)-(vi). The equity ownership requirements under both exceptions were somewhat relaxed for entities that had been operating and earning revenues for at least two years prior to December 31, 1994. *Id.* §§ 24.709 (b)(1)(v)(B), 24.709(b)(1)(vi)(B), 24.709(b)(6)(ii), 24.720(h).

[33] *See id.* § 24.709(b)(i), (ii).

[34] In some non-PCS services, the Commission uses the term "entrepreneur" to refer to a level of small business eligibility for bidding credits. *See, e.g., id.* §§ 22.229, 27.702, 101.538, 101.1107, 101.1112, 101.1429.

caps.[35] A variation of this control group approach was employed for narrowband PCS.[36] In determining whether applicants for the 900 MHz specialized mobile radio ("SMR") service qualified as small businesses, the Commission attributed the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of the applicant.[37] For virtually all other services, the Commission used a "controlling interest"[38] or "controlling principal"[39] standard much like the attribution standard used today. Under this earlier standard, the Commission attributed to the applicant the gross revenues of its controlling interests and their affiliates in assessing whether the applicant was qualified to take advantage of

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[35] In the context of Broadband PCS, an applicant or licensee generally qualifies as an entrepreneur if it, together with its affiliates, persons or entities that hold interests in the applicant or licensee, and their affiliates, has combined total assets of less than $500 million and has had combined gross revenues of less than $125 million in each of the last two years. *Id.* § 24.709(a)(1).

[36] Under this standard, the gross revenues and affiliations of an investor in the applicant were not considered so long as the investor held 25 percent or less of the applicant's passive equity and was not a member of the applicant's control group. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Proceeding, WT Docket 97-60, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5702 ¶ 26 (1997) ("*Part 1 Order*").

[37] 47 C.F.R. § 90.814(g) (2001); *see Part 1 Order*, 12 FCC Rcd at 5703 ¶ 27.

[38] *See, e.g.*, 47 C.F.R. §§ 1.948, 1.2105, 1.2110, 1.2112, 20.6, 21.38, 22.223, 22.225.

[39] *See*, *e.g.*, *id.* §§ 1.2110, 22.223, 27.210, 90.814, 90.912, 90.1021, 101.1109.

the Commission's small business provisions, such as bidding credits.[40]

12. Since 2000, the Commission has applied the current "controlling interest" standard to all services when making attribution determinations.[41] Under this standard, the Commission attributes to an applicant the gross revenues of it, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests.[42] A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control.[43] *De jure* control is typically evidenced by the holding of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests.[44] *De facto* control is determined on a case-by-case basis[45] and includes the criteria set forth in *Ellis Thompson*.[46] Under the

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[40] *See Part 1 Order*, 12 FCC Rcd at 5703 ¶ 27.

[41] *See generally Part 1 Fifth Report and Order*, 15 FCC Rcd at 15293.

[42] *Id.* at 15323 ¶ 59.

[43] 47 C.F.R. § 1.2110(c)(2).

[44] *Id.*

[45] *Id.*

[46] In *Ellis Thompson*, the Commission identified the following factors used to determine control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; (5) control of financial obligations; and (6) receipt of monies and profits. Application of Ellis Thompson Corporation, *Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd 7138, 7138-7139 ¶ 9 (1994) (citing the Commission's decision in *Intermountain Microwave*, Applications for Microwave Transfers to Teleprompter Approved with Warning, *Public Notice,* 12 FCC 2d 559 (1963) ("*Intermountain Microwave* ") (1963)). *See also* Application of Baker Creek Communications, L.P. for Authority to

controlling interest standard, the officers and directors of any applicant are considered to have a controlling interest in the applicant.[47] The Commission has declined to impose minimum equity requirements on controlling interests, believing that such requirements would dictate that a person or entity identified as a controlling interest must retain some level of equity in the applicant, thereby reducing the amount of equity the applicant could offer to non-controlling interests in exchange for financing and making it more difficult for the applicant to attract sufficient investment to compete in the marketplace.[48]

13. In applying the controlling interest standard, the Commission's intent has been to provide designated entities with increased flexibility and simplicity in structuring their businesses, while continuing to ensure that size-based benefits are reserved solely for qualified entities. In making the change, the Commission acknowledged the complexity of the broadband PCS control group approach, emphasizing that the controlling interest standard would be "simpler" and "more straightforward to implement."[49] Also, the Commission explained, application of the controlling interest standard would

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Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (Wireless Tel. Bur. 1998) (discussing in detail the factors constituting *de facto* control); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 316-17 (1991).

[47] 47 C.F.R. 1.2110(c)(2)(ii)(F); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325-26 ¶¶ 65-66.

[48] *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325-26 ¶ 65.

[49] *Id.*

allow "legitimate small businesses . . . to attract passive financing in a highly competitive and evolving telecommunications marketplace,"[50] while ensuring "that only those entities truly meriting small business status qualif [ied] for [the Commission's] small business provisions."[51]

III. SECOND REPORT AND ORDER

A. Background

14. In the *Further Notice*, we tentatively concluded that we should restrict the award of designated entity benefits to an otherwise qualified applicant where it has a "material relationship" with a "large in-region incumbent wireless service provider."[52] We sought comment on how to define the specific elements of such a restriction.[53] Further, we sought comment on whether such a restriction on the award of designated entity benefits should apply where a designated entity applicant has a "material relationship" with a large entity that has a "significant interest in communication services," and whether we should include in such a definition a broad category of communications-related businesses or instead exclude or include certain types of entities.[54] In addition, we sought comment on whether we should

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[50] Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 478 ¶ 186 (1997) ("*Part 1 Third Report and Order*").

[51] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15293, 15323-24 ¶ 58.

[52] *Further Notice*, 21 FCC Rcd at 1754-57 ¶¶ 1, 3-5.

[53] *Id.* at 1754-55, 1759-62 ¶¶ 1, 12-18.

[54] *Id.* at 1754-55, 1762-63 ¶¶ 1, 19.

adopt unjust enrichment provisions that would require reimbursement of designated entity benefits in the event that a designated entity makes a change in its material relationships or makes any other changes that would result in the loss of or change in its eligibility subsequent to acquiring a license with a designated entity benefit.[55] Finally, in the *Further Notice*, we sought comment on changes to the Commission's auction application rules to facilitate the application of any rule modifications to upcoming auctions.[56]

B. Material Relationship

15. As discussed fully below, we revise our Part 1 rules to consider certain relationships as factors in determining designated entity eligibility. In so doing, we seek to improve our ability to achieve Congress's directives with regard to designated entities and to ensure that, in accordance with the intent of Congress, every recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.[57] Specifically, except as grandfathered below, an applicant or licensee has "impermissible material relationships" when it has agreements with one or more other

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[55] *Id.* at 1763 ¶ 20.

[56] *Id.* at 1763-64 ¶ 21.

[57] In the legislative history of Section 309(j), Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter "participation in the licensing process by those who have no intention of offering service to the public." H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993)).

entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 50 percent of its spectrum capacity of any individual license. Such "impermissible material relationships" render the applicant or licensee (i) ineligible for the award of designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis. Furthermore, except as grandfathered below, an applicant or licensee has an "attributable material relationship" when it has one or more agreements with any individual entity, including entities and individuals attributable to that entity, for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee. The "attributable material relationship" with that entity will be attributed to the applicant or licensee for the purposes of determining the applicant's or licensee's (i) eligibility for designated entity benefits, and (ii) liability for unjust enrichment on a license-by-license basis.

16. *Further Notice*. To define "material relationship," the *Further Notice* sought comment on the specific nature of the types of additional relationships that should trigger a restriction on the availability of designated entity benefits.[58] For instance, Council Tree initially proposed that the Commission should restrict a designated entity applicant's "material relationships," including both financial and operational agreements, in order to more carefully ensure that designated entity

[58] *Further Notice*, 21 FCC Rcd at 1760 ¶ 13.

benefits are awarded only to bona fide eligible entities.[59] In this regard, we sought comment on what might constitute a "material financial" or "material operational" relationship. Moreover, insofar as our current rules already attribute the gross revenues of those that have relationships with designated entity applicants that confer either *de jure* and *de facto* control, we also sought comment on the type of attribution standard that we should apply to any rule modification.[60]

17. The *Further Notice* also sought comment on whether restricting certain agreements as a "material relationship" would be too harsh or unnecessarily limit a designated entity applicant's ability to gain access to capital or industry expertise.[61] Additionally, the *Further Notice* sought comment on whether there might be instances where the existence of either a "material financial agreement" or a "material operational agreement" might be appropriate and might not raise issues of undue influence.[62] In this regard, the *Further Notice* asked whether the Commission should allow designated entity applicants to obtain a bidding credit or other benefits if they had only a "material financial agreement" or only a "material operational agreement" but not both, and what factors we should consider in determining the types of relationships that might not adversely affect an applicant's designated entity eligibility.[63] Finally, we sought comment on whether a spectrum leasing arrangement should be defined as a "material relation-

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1761 ¶ 15.

[62] *Id.*

[63] *Id.*

ship," and whether we should consider any other arrangements for the purposes of such a definition.[64]

18. *Comments*. Commenters are generally split regarding the level of specificity with which the Commission should define "material relationship." Several commenters urge the Commission to narrowly tailor the definition so as not to "inadvertently hinder the flow of capital" to designated entity applicants.[65] For example, Wirefree Partners argues that the Commission should "narrowly and specifically define what constitutes a material relationship" because "[s]mall businesses need the flexibility to enter into reasonable commercial agreements with other participants in the communications industry."[66] Others maintain that the reach of the Commission's policies should be very broad and that we should define "material relationship" to include both financial and operational agreements.[67] For example, Council

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[64] *Id.* at 1761 ¶ 16.

[65] *See, e.g.*, Comments of STX at 2; *see also* Comments of Antares at 4 ("the Commission needs to balance the public policy goal of continuing to encourage small business participation within the wireless industry against the very real need for qualified small businesses to raise capital in order to participate in wireless service auctions."); Comments of Cook Inlet at 3 ("it is particularly challenging for small companies to obtain access to financial resources necessary to support bidding and paying for even one license in a given auction, much less to construct and operate a system within the time frame mandated by the Commission's rules."); Comments of NAB at 2 ("If the Commission were to adopt unnecessarily restrictive DE rules, small businesses would be more limited in their ability to raise capital and attract investors."); Reply Comments of Ericsson at 2-3 (arguing that the Commission should not constrain access to manufacturer financing).

[66] Comments of Wirefree Partners at 7.

[67] *See, e.g.*, Comments of Council Tree at 52; Comments of Leap at 15; Comments of MMTC at 2, 9.

Tree and other proponents of a broad definition maintain that the definition of material relationship should include, "without limitation, management agreements, trademark license agreements, joint marketing agreements, future interest agreements (such as puts, calls, options, and warrants), and long-term *de facto* and spectrum manager leasing arrangements."[68]

19. Rural service providers oppose the proposal to define "material relationship" in a manner that would preclude small businesses from entering into operational agreements with large wireless carriers.[69] As explained by one commenter, many small and rural wireless companies "have entered into management, marketing or other non-equity arrangements with large wireless carriers which enable them to provide quality wireless services to the rural areas they are licensed to serve."[70] Another commenter notes that "the Commission should not consider roaming agreements evidence of a 'material relationship' since to do so would eliminate almost every small rural carrier from enjoying DE status."[71]

20. In seeking comment on spectrum leasing, we asked "what, if any standard should be used to determine whether spectrum leasing is a material relationship for the purpose of any additional restriction on the

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[68] Comments of Council Tree at 52. *See also Further Notice*, 21 FCC Rcd at 1761 ¶ 9. A number of commenters also generally appeared to support the premise of Council Tree's proposals without specifically commenting on how the Commission might define "material relationship." *See, e.g.*, Comments of MobiPCS at 1; Comments of Suncom at 1; Comments of USCC at 2-3, 5.

[69] *See, e.g.*, Comments of NTCA at 7-8; Comments of RTG at 4-5.

[70] Comments of John Staurulakis, Inc. at 3.

[71] Comments of RTG at 5.

availability of designated entity benefits that we might adopt."[72] A few commenters argued that the Commission should not reverse the guidance provided in the *Secondary Markets* proceeding.[73] As noted above, a number of others generally agreed that the Commission should adopt Council Tree's proposal for material relationships, presumably including its suggestion that leasing should be included in the types of material relationships that should trigger a Commission restriction of the award of designated entity benefits.[74]

21. *Discussion.* In defining "material relationship," we seek to balance a designated entity applicant's need for flexibility to structure its business relationships against our statutory obligation to award these small business benefits only to entities intended by statute to be eligible. In our experience in administering the designated entity program over the last several years, we have witnessed a growing number of complex agreements between designated entities and those with whom they choose to enter into financial and operational relationships. Although some of these agreements may have contributed to the wireless industry becoming a thriving sector of the nation's economy, the relationships underpinning such contracts underscore the need for stricter regulatory parameters to ensure, as Congress intended, that: (1) benefits are awarded to provide opportunities for designated entities to become robust independent

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[72] *Further Notice*, 21 FCC Rcd at 1761 ¶ 16.

[73] *See, e.g.*, Comments of Wirefree Partners at 8-9; Comments of CTIA at 4.

[74] *See, e.g.*, Comments of Council Tree at 52; *see generally* Comments of MobiPCS at 1; Comments of Suncom at 1; Comments of USCC at 2-3, 5.

facilities-based service providers with the ability to provide new and innovative services to the public; and (2) the Commission employs methods to prevent unjust enrichment.[75]

22. We agree with commenters that certain agreements have the potential to significantly influence a designated entity licensee's decisions regarding its provision of service and, therefore, also have the potential to be abused, absent the appropriate safeguards. Yet, we also recognize the concerns of many, especially rural carriers, that argue that small businesses face practical difficulties in providing service and that stress that designated entity licensees must have the ability to enter into operational contracts, such as roaming, interconnection, and switch-sharing, with other, often large, providers in order to be in a position to provide valuable telecommunications service to the public.[76]

23. In considering how to evaluate which specific relationships should trigger additional eligibility restrictions, we conclude that certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent. In this regard, where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agreement, as op-

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[75] *See, e.g.*, Comments of MMTC at 6 ("some of the largest national incumbent wireless carriers have received from their DE partners exclusive access to valuable spectrum and network capacity that otherwise could have been used to offer new services and induce the national wireless incumbents to better respond to the needs of the marketplace.").

[76] *See, e.g.*, Comments of RTG at 5.

posed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress.

24. As we indicated in the *Secondary Markets Second Report and Order*, "Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license."[77] In that proceeding, the Commission stated that leasing by a designated entity licensee of "substantially all of the spectrum capacity of the licensee" would cause attribution that would likely lead to a loss of eligibility, and that the leasing of a "small portion" of such capacity where there was no other relationship between the parties likely would not result in a finding of attribution.[78] Although at least one commenter argues that the Commission's existing leasing rules provide adequate protection to ensure that the relationship between the parties "remains one of contract and not control,"[79] as articulated in the *Further Notice* and this decision, we are modifying our rules to include additional safeguards to our designated eligibility determinations that look beyond controlling relationships to those that have the

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[77] Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17538, 17541, 17544 ¶¶ 71, 76, 82 (2004) ("*Secondary Markets Second Report and Order*").

[78] *Id.* at 17541-42 ¶ 77.

[79] Comments of Wirefree Partners at 8.

potential to influence a designated entity in a manner contrary to that intended by Congress.

25. Building on our *Secondary Markets* policies and in consideration of the record we have before us, we modify our rules regarding eligibility for designated entity benefits for applicants or licensees that have agreements that create material relationships, as defined and explained herein. Specifically, except as grandfathered below,[80] we conclude that an applicant or licensee has "impermissible material relationships" when it has agreements with one or more other entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 50 percent of its spectrum capacity of any individual license. Such "impermissible material relationships" render the applicant or licensee (i) ineligible for the award of designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis. Furthermore, except as grandfathered below,[81] we find that an applicant or licensee has an "attributable material relationship" when it has one or more agreements with any individual entity, including entities and individuals attributable to that entity, for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee.[82] The "attributable

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[80] *See* discussion *infra* ¶¶ 28-30.

[81] *See id.*

[82] If a designated entity licensee disaggregates its license, determinations of impermissible and attributable material relationships will be

material relationship" with that entity will be attributed to the applicant or licensee for the purposes of determining the applicant's or licensee's (i) eligibility for designated entity benefits, and (ii) liability for unjust enrichment on a license-by-license basis.[83]

26. As stated above, our experience in administering the designated entity program and our review of the record developed in response to our *Further Notice* leads us to conclude that these definitions of material relationship are necessary to ensure that the recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public; that the Commission employs methods to prevent unjust enrichment; and that our statutory-based benefits are

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made based upon its remaining spectrum license. For example, if a designated entity licensee disaggregates 5 MHz of a 10 MHz license, it cannot have spectrum leasing or resale arrangements for more than 2.5 MHz of spectrum, pursuant to the "impermissible material relationships" restriction, and any spectrum leasing or resale arrangements with one individual entity for more than 1.25 MHz of spectrum will result in the attribution of revenues and assets, pursuant to the "attributable material relationships" restriction.

[83] During the first five years of the license term, broadband PCS entrepreneurs that have not yet met their five-year construction requirements will be prohibited from entering into any impermissible material relationships with entities of any size. They will also be prohibited from entering into attributable material relationships if those relationships bring their attributable gross revenues or total assets above the financial caps established in section 24.709. After build-out or the first five years of the license term, broadband PCS entrepreneurs that are participating in the installment payment plan and enter into impermissible or attributable material relationships will be subject to installment payment unjust enrichment pursuant to section 1.2111(c). *See* 47 C.F.R. §§ 1.2110, 1.2111, 24.709, 24.839.

awarded only to those that Congress intended to receive them.

27. Spectrum manager and *de facto* transfer leasing agreements and resale agreements (including wholesale arrangements) with a single entity for 25 percent and less of the designated entity licensee's total spectrum capacity on a license-by-license basis, or cumulative agreements with multiple entities for 50 percent or less of a designated entity licensee's total spectrum capacity on a license-by-license basis will continue to be reviewed under our existing designated entity eligibility rules and, pursuant to existing rules and policies, may result in unjust enrichment obligations.[84] Through the decisions we make today, we will ensure that a designated entity licensee will preserve at least half of its spectrum capacity of each of its licenses for which it has been awarded and retained designated entity benefits for the provision of service as a facilities-based provider for the benefit of the public, while still having flexibility to engage in agreements that are intended to provide it with access to valuable capital, thus better furthering the goals of the statutory designated entity program.

28. *Grandfathering and Applicability of Material Relationships*. Recognizing that there are numerous agreements in existence that might fall within our newly defined "impermissible material relationships" and "attributable material relationship," we will apply these eligibility restrictions on a prospective basis. Therefore, we will not employ our new restrictions to reconsider any designated entity benefits previously awarded to

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[84] *See Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538, 17541, 17544 ¶¶ 71, 76, 82.

licensees prior to the release date of this *Second Report and Order* or to determine designated entity benefits in an application for a license, an authorization, or an assignment or transfer of control or a spectrum lease that was filed with the Commission before the release date of this *Second Report and Order* that is still pending approval. Accordingly, we will grandfather the existence of impermissible and attributable material relationships that were in existence before the release date of this *Second Report and Order* for the purposes of assessing unjust enrichment payments on benefits previously awarded or pending award, as discussed above. In assessing the imposition of unjust enrichment for future events, if any, we will consider unjust enrichment implications on a license-by-license basis.

29. Such relationships, are not, however, generally grandfathered for the purposes of determining an applicant's eligibility for the award of designated entity benefits in future auctions or for the purposes of determining eligibility for benefits in the context of an assignment, transfer of control, spectrum lease or reportable eligibility event after the release date of this *Second Report and Order*. Except as limited by our grandfathering provisions, the rules we adopt today will apply to all determinations of eligibility for all designated entity benefits with regard to any application filed to participate in auctions in which bidding begins after the effective date of the rules, as well as to all applications for an authorization, an assignment or transfer of control, a spectrum lease, or reports of events affecting a designated entity's ongoing eligibility filed on or after the release date of

this *Second Report and Order*.[85] Grandfathering the eligibility of all prior designated entity structures that involve impermissible and/or attributable material relationships would allow these designated entities to continue to acquire additional licenses and designated entity benefits using a structure that the Commission has determined would permit a third party to leverage improper influence over a designated entity in a manner that is inconsistent with the Congressional purposes for the designated entity program. Applying our rules in this manner is consistent with how the Commission currently determines an applicant's eligibility for designated entity benefits and how it applies its unjust enrichment obligations.

30. To address concerns of several commenters, we will, however, grandfather certain relationships that were in existence before the release date of this *Second Report and Order* in the context of eligibility for future benefits. Specifically, an applicant will not be considered to be ineligible for benefits based solely on an "attributable material relationship" or "impermissible material relationships" of certain of its affiliates (as specifically defined in section 1.2110(c)(5)(i)(C)), provided that the

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[85] For example, if an applicant seeking to participate in an upcoming auction has an existing impermissible material relationship on a single license, it will be ineligible for the award of designated entity benefits in that auction, regardless of the significance of that one license in terms of the applicant's revenue or the scope of its operations. This is true even if the impermissible material relationship was entered into prior to the release of this order and thus grandfathered for purposes of unjust enrichment. Similarly, if it is an attributable material relationship at issue, then the gross revenues of the entity with which the applicant has such a relationship are counted against the applicant and may affect its eligibility.

agreement that forms the basis of the affiliate's "attributable material relationship" or " impermissible material relationship" is otherwise in compliance with the Commission's designated entity eligibility rules, was entered into prior to the release date of this *Second Report and Order*, and is subject to a contractual prohibition that prevents the affiliate from contributing to the designated entity's total financing. The purpose of this grandfathering is to provide a means for controlling interests of existing designated entities to have an ability to seek the award of designated entity benefits in future auctions or to acquire designated entity licenses in the secondary market through new and independent affiliates, even if it is affiliated with an existing designated entity that has impermissible and/or attributable material relationships that were in existence prior to the release date of the decision.[86] The attribution rules are not affected by this grandfathering.[87] In taking this action,

[86] For example, Newco is an applicant seeking designated entity status in an auction in which bidding begins after the effective date of the rules. Investor is a controlling interest of Newco. Investor also is a controlling interest of Existing DE. Existing DE previously was awarded designated entity benefits and has impermissible material relationships based on leasing agreements entered into before the release date of this order with a third party, Lessee, that were in compliance with the Commission's eligibility standards prior to the effective date of the rules adopted herein. In this example, Newco would not be prohibited from acquiring designated entity benefits solely because of the existing impermissible material relationships of its affiliate, Existing DE. Newco, Investor, and Existing DE, however, would need to enter into a contractual prohibition that prevents Existing DE from contributing to the total financing of Newco.

[87] *See* 47 C.F.R. § 1.2110(b). Under the example in the preceding note, Newco would have to attribute the gross revenues of its affiliate, Existing DE, in establishing eligibility for designated entity benefits, but would not have to attribute the gross revenue of Lessee.

we seek to ensure that the additional eligibility requirements we adopt today do not unnecessarily restrict applicants seeking designated entity benefits for relationships that were previously permissible under our rules.

C. Unjust Enrichment

31. We also make changes to our unjust enrichment rules to provide additional safeguards designed to better ensure that designated entity benefits go to their intended beneficiaries.[88] As discussed below, one of our primary objectives in administering our designated entity program is to prevent unjust enrichment.[89] Accordingly, in conjunction with the eligibility restrictions we adopt above, we also modify our rules and strengthen our unjust enrichment schedule for licenses acquired with bidding credits.

32. *Further Notice*. In the *Further Notice*, we sought comment on whether we should adopt revisions to our unjust enrichment rules, as proposed by Council Tree,[90] or whether we should adopt other revisions to our unjust enrichment rules.[91] The Commission also asked whether reimbursement obligations should apply

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[88] *See id.* § 1.2111(b)-(e).

[89] *See* 47 U.S.C. § 309(j)(4)(E); *see also id.* § 309(j)(3)(C).

[90] Council Tree suggested a reimbursement obligation on a licensee that acquires a license with a bidding credit and subsequently, in the first five years of its license term, makes a change in its "material relationships" that would result in its loss of eligibility for the bidding credit, or seeks to assign or transfer control of the license to an entity that would not qualify for the same level of bidding credits, pursuant to any eligibility restriction that we adopt. *Further Notice*, 21 FCC Rcd at 1763 ¶ 20; Council Tree Proposal at 15.

[91] *Further Notice*, 21 FCC Rcd at 1763 ¶ 20.

if a licensee takes on new investment, or also where it enters into any new financial or operational relationship that would render the licensee ineligible for a bidding credit.[92] Pursuant to any eligibility restriction that we might adopt, we asked over what portion of the license term such unjust enrichment provisions should apply.[93]

33. Additionally, we sought comment in the *Further Notice* on Council Tree's proposal that an unjust enrichment payment should not be required in the case of "natural growth" of the revenues attributed to an incumbent carrier above the established benchmark.[94] Instead, Council Tree suggests that the reimbursement obligation should apply only where the licensee takes on new investment, or enters into any operational agreement, that would have disqualified the licensee for the bidding credit at the time of the licensee's initial application.[95]

34. *Comments*. Of the commenters discussing proposed changes in the unjust enrichment policies, some contend that the Commission should continue to apply the current unjust enrichment standard.[96] These entities argue that the current unjust enrichment rules are sufficient and provide adequate protection. Thus, they

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*; Council Tree Proposal at 16.

[96] *See, e.g.*, Comments of Aloha Partners at 5; Comments of Carroll Wireless at 8; Comments of Wirefree Partners at 14-15; Comments of Council Tree at 59.

conclude that no increased regulation is needed or appropriate.[97]

35. Other commenters argue for the implementation of stricter unjust enrichment rules.[98] STX supports "stricter unjust enrichment rules so that the U.S. Treasury may be made whole in the event that a designated entity turns out to have been merely a front organized to secure bidding credits for a large incumbent wireless service provider."[99] MMTC suggests that the Commission should consider adjusting its reimbursement obligations to require 100 percent of the value of the bidding credit.[100] MMTC further suggests that "the Commission should consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years."[101]

36. *Discussion.* We agree with MMTC and STX that adoption of stricter unjust enrichment rules, applicable to all designated entities, will promote the objectives of the designated entity program. The designated entity and unjust enrichment rules were adopted to ensure the creation of new telecommunications businesses owned by small businesses that will continue to provide spectrum-based services.[102] In addition, the unjust enrichment rules provide a deterrent to speculation and

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[97] *See, e.g.*, Comments of Aloha at 5; Comments of Carroll Wireless at 8.

[98] *See, e.g.*, Comments of STX at 2; Comments of U.S. Wirefree at 4; Comments of MMTC at 15; Comments of Council Tree at 15-16.

[99] Comments of STX at 2.

[100] Comments of MMTC at 15.

[101] *Id.*

[102] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394 ¶ 258.

participation in the licensing process by those who do not intend to offer service to the public, or who intend to use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit.[103] By extending the unjust enrichment period to ten years, we increase the probability that the designated entity will develop to be a competitive facilities-based service provider.

37. We adopt the following ten-year unjust enrichment schedule for licenses acquired with bidding credits. For the first five years of the license term, if a designated entity loses its eligibility for a bidding credit for any reason,[104] including but not limited to, entering into an "impermissible material relationship" or an "attributable material relationship," seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that does not qualify for bidding credits, 100 percent of the bidding credit, plus interest, is owed. For years six and seven of the license term, 75 percent of the bidding credit, plus interest, is owed. For years eight and nine, 50 percent of the bidding credit, plus interest, is owed, and for year ten, 25 percent of the bidding credit, plus interest, is owed. If a designated entity loses its eligibility for the same level of bidding credit that it originally received for any reason,[105] including but not limited to, entering into an "impermis-

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[103] *Id.* at 2385, 2394 ¶¶ 211, 259. *See also* H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993)); *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

[104] *See* discussion *infra* note 116 and accompanying text.

[105] *See* discussion *infra* note 116 and accompanying text.

sible material relationship" or an "attributable material relationship," seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that does not qualify for the same level of bidding credits, this unjust enrichment schedule will be applied to the difference between the original bidding credit and the bidding credit for which the designated entity, assignee, or assignor is eligible.[106]

38. In addition to revising the unjust enrichment payment schedule, we will impose a requirement that the Commission must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any reason,[107] including but not limited to, entering into an "impermissible material relationship" or an "attributable material relationship," seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that is not eligible for bidding credits prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the license term have been met.[108]

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[106] We also note that the provisions of section 1.2112(e) of the Commission's rules may also apply. 47 C.F.R. § 1.2112(e) (discussing the assessment of unjust enrichment in the context of the partition and/or disaggregation of licenses).

[107] *See id.*

[108] Licensees may, under section 1.946(e) of our rules, request an extension of time to meet the applicable construction requirements. 47 C.F.R. § 1.946(e). Additionally, licensees may also request a waiver of the construction requirement, and this request must meet the requirements of section 1.925 of our rules. 47 C.F.R § 1.925. We note that we will undertake careful scrutiny of requests for extension of the construction requirements filed by designated entities consistent with our rules, obligations under the Communications Act, and legal precedent,

For example, if a designated entity seeks to assign a license with a bidding credit to an entity that is not eligible for bidding credits eight years after the grant of the license and prior to the filing of the construction notification, 100 percent of the bidding credit, plus interest, will be owed, rather than the 50 percent unjust enrichment payment that would have been due had the construction notification been on file with the Commission, pursuant to the revised unjust enrichment schedule, above.

39. We impose the above-mentioned reimbursement obligations on any licensee that acquires licenses with bidding credits and subsequently loses its eligibility for a bidding credit for any reason because the implementation of such a policy is consistent with the policies underlying the Commission's designated entity and unjust enrichment requirements. By expanding the unjust enrichment period and requiring full payment of the bidding credit until a license has been constructed, we are fulfilling Congress's mandate that designated entities are given the opportunity to participate in the provision of spectrum-based services, while ensuring that entities that are not eligible for designated entity benefits cannot benefit from the designated entity program by acquiring the licenses or entering into impermissible or attributable material relationships with a designated

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and that we will consider, as part of our review, whether the extension request is an effort to defeat the objectives of our designated entity program. If a designated entity is successful in obtaining an extension of the construction requirements beyond the initial license term, the requirement that the Commission must be reimbursed for the entire bidding credit amount, plus interest, prior to the filing of the notification informing the Commission that the applicable construction requirements will continue to apply until such notifications are filed.

entity after it acquires a license at auction or in the secondary market.[109]

40. We agree with Council Tree's proposal that unjust enrichment payments should not be required for licenses held by the designated entity in the case of "natural" or "permissible" growth of the gross revenues of either a designated entity or an investor in a designated entity. Currently, there are no permissible growth provisions associated with bidding credits.[110] However, Commission practice has been that a designated entity will not owe unjust enrichment for its licenses if the designated entity's increased gross revenues, or the increased gross revenues of any controlling interest or affiliate, are due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development, or expanded service.[111] Commission precedent states that the Commission evaluates an applicant's or licensee's eligibility for designated entity benefits and determines whether unjust enrichment is owed at the time the relevant application or notification (*e.g.,* transfer of control or assignment) is

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[109] *See* 47 U.S.C § 309(j)(4)(E); *see also* id. § 309(j)(3)(C).

[110] We note that, although the Commission did not adopt a permissible growth exception for bidding credit unjust enrichment, it did adopt a permissible growth exception for set-aside, or closed bidding, licenses and installment payments. *Compare* 47 C.F.R. § 1.2111(d) *with id.* §§ 1.2111(c)(2), *and id.* § 24.709(a)(2).

[111] *Cf.* 47 C.F.R. § 1.2111(c)(2) (establishing that "permissible growth" does not result in unjust enrichment in the context of installment payments); *id.* § 24.709(a)(2) (establishing that permissible growth does not result in the loss of eligibility to hold set-aside, or closed bidding, licenses).

filed.[112] Under the policies adopted in this *Second Report and Order*, the Commission similarly would evaluate an applicant's or licensee's eligibility for designated entity benefit at the time it files an application regarding a reportable eligibility event, as required in the new section 1.2114 that we adopt herein. Thus, if the designated entity seeks to acquire licenses on the secondary market or in future auctions, all of the designated entity's gross revenues, along with the gross revenues of its controlling interests and affiliates, will be attributed to the designated entity.[113]

41. Finally, we agree with Cook Inlet's general concern that retroactive penalties not be imposed upon preexisting designated entities. Thus, as discussed fully above, we grandfather the applicability of these rules under certain circumstances.[114]

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[112] *See* Applications of TeleCorp PCS, Inc., Tritel, Inc, and Indus, Inc., WT Docket No. 00-1589, *Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3737 ¶ 49 (Wireless Tele. Bur. 2000) ("*TeleCorp-Tritel Order*"); D&E Communications, Inc., *Order*, 15 FCC Rcd 61, 67 ¶ 12 (Auctions & Ind. Analysis Div., Wireless Tele. Bur. 1999) ("*D&E Communications*").

[113] *See* Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-8200-1589, *Memorandum Opinion and Order*, 14 FCC Rcd 20543, 20545-46 ¶¶ 6-8 (1999); *see also TeleCorp-Tritel Order*, 16 FCC Rcd at 3734 ¶ 46; *D&E Communications*, 15 FCC Rcd at 67 ¶ 12.

[114] *See* discussion *supra* ¶¶ 28-30 (discussing the grandfathering of impermissible and attributable material relationships that were in existence before the release date of this *Second Report and Order* for the purposes of assessing unjust enrichment penalties on benefits previously awarded).

D. Implementation

42. In this section, we explain how we intend to utilize the tools for preventing abuse of the designated entity program that are already at our disposal in our rules, and we describe certain minor rule modifications that we adopt in order to make these tools more effective. To achieve this purpose, we will use the following combination of existing and new measures to ensure that designated entity incentives benefit solely those parties intended to receive them under both our rules and section 309(j) of the Communications Act of 1934, as amended ("Communications Act"). First, we will review the agreements to which designated entity applicants and licensees are parties. Second, we will require that applicants and licensees seek advance Commission approval for all events that might affect their ongoing eligibility for designated entity benefits. Third, we will impose periodic reporting requirements on designated entities. Fourth, we will conduct audits, including random audits, of those claiming designated entity benefits. In this section we also provide guidance as to how our rules and procedures should be followed by applicants for the upcoming Advanced Wireless Services ("AWS") auction.

43. *Review of Agreements*. In applying our controlling interest standard, Commission staff has carefully reviewed agreements between applicants claiming designated entity status and other existing wireless carriers. In these cases, staff has usually undertaken discussions with such designated entity applicants in order to obtain revisions to agreements to ensure that entities with whom they have partnered are not an attributable controlling interest or affiliate obviating the applicant's

eligibility for designated entity benefits. This review is necessarily specific to each relationship, since no two sets of agreements and no two sets of factual circumstances are exactly the same.

44. In light of the steps we are taking in this *Second Report and Order* to aid our ability to ensure that only eligible entities obtain designated entity benefits, we will undertake a thorough review of the long-form application (FCC Form 601) filed by every winning bidder claiming designated entity benefits and will carefully review all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant. This review remains essential to our assessment of designated entity eligibility under the controlling interest standard and will be even more critical in ensuring that the rules and policies adopted in this *Second Report and Order* are fully effectuated. Thus, we will require that all designated entity applicants that are winning bidders at an auction file all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant as part of the long-form application (FCC Form 601). In order to implement this rule, we delegate to the Bureau the authority to determine the method for designated entities to submit the appropriate and relevant documents. We note, however, that no licenses will be granted until all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant are finalized.

45. Further, we will also thoroughly review all relevant contracts, agreements, letters of intent, and other such documents affecting an applicant, which claims designated entity eligibility, seeking to acquire licenses with designated entity benefits in the secondary market

(*e.g.,* transfers of control, assignments, spectrum manager leases). Commission staff has requested such documents from entities acquiring designated entity licenses in the secondary market, especially when the applicant is a newly-created entity that has not been passed on as a designated entity in the past or where it appears that the corporate structure of a designated entity has changed. Thus, we will, as we have in the past, request designated entity applicants to forward copies of their agreements to Commission staff for review.

46. *Event-Based and Annual Reporting Requirements.* In light of the changes that we are making to the designated entity rules, the Commission will require additional information from applicants and licensees in order to ensure compliance with the policies and rules adopted herein. We also hereby adopt rules as shown in Appendix B, authorizing modifications to be made, as necessary, to and the creation, if necessary, of FCC forms to implement the rule changes adopted herein. Although many of these rule changes are minor, we highlight the following changes to our rules. Specifically, we adopt a new rule, section 1.2114, to require that designated entities seek approval[115] for any event in which they are involved that might affect their ongoing eligibility,[116] even if the event would not have triggered a re-

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[115] Obtaining prior approval for events that could possible effect an entity's designated entity eligibility is consistent with our practices for reviewing applications for the assignment or transfer of control of designated entity licenses. *See* 47 C.F.R. § 1.948(c)(1)(i).

[116] Such events include changes in the ownership structure of the designated entity and agreements (*e.g.,* management, credit, trademark, marketing, and facilities agreements) entered into between designated entity licensees and third parties that the Commission has not previously reviewed. New section 1.2114(c) provides that such filings

porting requirement under our rules.[117] Such events—known as "reportable eligibility events"—will also include those that result in an "impermissible material relationship" or an "attributable material relationship." We note that applications seeking approval of these "reportable eligibility events" will be considered substantial (*i.e.,* not *pro forma*) pursuant to the Commission's rules or precedent and will not be approved until any applicable unjust enrichment is paid.

47. Additionally, we will revise section 1.2110 of the Commission's rule to require designated entity licensees to file an annual report with the Commission, which will, at a minimum, include a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. Annual reports will be filed no later than, and up to five business days before, the anniversary of the designated entity's license grant.[118]

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will be treated as if they are transfer of control applications under section 1.1102 for purposes of determining the appropriate application fees.

[117] 47 C.F.R. § 1.948(j).

[118] The record supports such an approach. *See, e.g.* Comments of Cook Inlet at 21 (suggesting that the Commission require each designated entity to submit an annual report detailing the actions it took during the past period with respect to the licenses it holds as well as any actions taken by its limited financial partners. It believes that the Commission would have some empirical evidence of the degree of day-to-day

48. We consider adoption of these reporting requirements to be a foreseeable component of the designated entity eligibility rules we adopt today, and we believe them to be necessary to the successful implementation of these rules. We also consider these requirements to be an extension of the existing responsibility of designated entities to retain and make available, on an ongoing basis, all agreements related to their eligibility.[119] Furthermore, we delegate to the Bureau the authority to implement the necessary modifications to FCC forms and the Universal Licensing System (ULS) to implement these rule changes and to determine the content of, and filing procedures for, the new annual filing requirement.

49. *Audits*. Pursuant to our existing rules, the Commission has broad power to conduct audits at any time and for any reason, including at random, of applicants and licensees claiming designated entity benefits.[120] In its comments, MMTC urges the Commission to employ its existing audit power and regularly conduct random audits to "uncover manipulation of the [designated entity] program irrespective of the type of business in which a [designated entity] applicant's partner is engaged."[121] MMTC recommends that these audits "incorporate site visits to offices and physical plants, interviews with staff and meaningful inquiries into the management of the licenses," explaining that these efforts would be "more likely to yield discoveries of improper

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control actually exercised by the parties who purport to be in *de facto* control of these designated entity licensees).

[119] *See* 47 C.F.R. § 1.2110(j).

[120] *See id.* § 1.2110(j), (n).

[121] Comments of MMTC at 13-14.

activity than cursory paper-base[d] audits which would allow the audited entity to craft creative responses to audit requests."[122] Cook Inlet, in suggesting the imposition of periodic reporting requirements, noted above, explains that such requirements, along with "the possibility of a further audit [,] might dissuade some abuse of the Commission's rules. . . . "[123]

50. We agree that our audit authority is an effective method by which to ascertain the initial and ongoing eligibility of the claimants of designated entity benefits. Applicants and licensees should therefore understand that the Commission can and will audit their continued designated entity eligibility as circumstances may necessitate or at will. Moreover, based on the significance of the upcoming AWS auction, we commit to audit the eligibility of every designated entity that wins a license in that auction at least once during the initial license term. In order to effectively conduct these audits, we delegate to the Bureau the authority to implement and create procedures to perform such audits.

51. *Pending Auction Provisions.* As noted in the *Further Notice*, we intend any changes adopted in this proceeding to apply to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006.[124] We noted that in light of the current auction schedule, any changes that we adopt in this proceeding may become effective after the deadline for filing appli-

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[122] *Id.* at 14.

[123] Comments of Cook Inlet at 21.

[124] Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures, AU Docket No. 06-30, *Public Notice*, 21 FCC Rcd 794 (2006).

cations to participate in that auction. We sought comment on our proposal to require applicants to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to section 1.2110 of the Commission's rules effective as of the date of the statement.[125] We also noted that in the event applicants fail to file such a statement pursuant to procedures announced by public notice, they will be ineligible to qualify as a designated entity.[126]

52. The vast majority of commenters did not address this issue.[127] Under Commission rules, applicants asserting designated entity eligibility in a Commission

[125] *Cf.* 47 C.F.R. 1.2105(a)(2)(iv) (parallel statement currently required as of the date of filing the short-form application). Pursuant to its delegated authority to conduct auctions, the Wireless Telecommunications Bureau will establish any detailed procedures necessary for making required amendments and announce such procedures by public notice. *See id.* §§ 0.131, 0.331.

[126] As noted in the *Further Notice*, while prior certifications may be a prerequisite to eligibility, applicants still must demonstrate compliance with all applicable Commission rules, including eligibility for any bidding credits, at the time the Commission is ready to grant a license, regardless of previously applicable rules. *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 909 n.84 (2006); *see also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002) (affirming Commission application of installment payment rules that were revised after initial grant of license).

[127] While CTIA expresses some concern regarding the amendment of short form applications, the public interest benefits associated with requiring entities to amend their applications and certify that they are qualified as a designated entity pursuant to our modified rules, outweigh any concerns raised in the record.

auction are required to declare, under penalty of perjury, that they are qualified as a designated entity under section 1.2110 of the Commission's rules.[128] After reviewing the record and considering the public interest benefits associated with our proposal, we will require entities applying as designated entities to amend their applications for the AWS auction on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to section 1.2110 of the Commission's rules effective as of the date of the statement.

IV. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

* * * * *

V. CONCLUSION

93. For all of the reasons set forth above, we modify our rules for determining the eligibility of applicants for size-based benefits in the context of competitive bidding and issue a *Second Notice of Proposed Rule Making* to consider whether we should adopt additional restrictions to further safeguard the benefits reserved for designated entities.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Analyses

94. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, the Commission has prepared a Final

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[128] *See* 47 C.F.R. § 1.2105(a)(2)(iv).

Regulatory Flexibility Analysis, set forth below at Appendix C.

95. An Initial Regulatory Flexibility Analysis ("IRFA") for the *Second Further Notice* is attached at Appendix D.[129] Comments on the IRFA should be labeled as IRFA Comments, and should be submitted pursuant to the filing dates and procedures set forth below.

B. Comment Filing Procedures

96. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments on or before 60 days after publication in the Federal Register and may file reply comments on or before 90 days after publication in the Federal Register. All filings related to this Second Further Notice of Proposed Rule Making should refer to WT Docket No. 05-211. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rule Making Proceedings, 63 FR 24121 (1998).

97. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rule making numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rule making number

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[129] *See* 5 U.S.C. § 603.

referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rule making number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

98. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

C. Paperwork Reduction Act Analysis

99. This *Second Report and Order* contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It has been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

100. In this *Second Report and Order*, we have assessed the effects of our new restriction on the award of designated entity benefits where an applicant or licensee has agreements, which create a material relationship, with one or more other entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of a portion of its spectrum capacity. We find that the rule we adopt will best ensure that the Commission can continue to award designated entity benefits to entities that Congress intended. While the new rule may impose a new information collection on small businesses, including those with fewer than 25 employees, we conclude that this information collection is

necessary to ensure that the benefits of the Commission's designated entity program are reserved only for legitimate small businesses.

101. This *Second Further Notice* contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after the date of publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Congressional Review Act

102. The Commission will include a copy of this *Second Report and Order* and *Second Further Notice* in a report it will send to Congress and the Government Ac-

countability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

E. Ordering Clauses

103. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 303(r), and 309(j), this *Second Report and Order* is hereby ADOPTED and Part 1 of the Commission's rules, 47 C.F.R. Part 1, is AMENDED as set forth below in Appendix B, effective 30 days after publication in the Federal Register, except for the grandfathering provisions which are effective upon release.

104. IT IS FURTHER ORDERED that pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 303(r), and 309(j), this *Second Further Notice of Proposed Rule Making* is HEREBY ADOPTED.

105. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

106. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order* and *Second Further Notice*, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Commenters

Comments

1. Aloha Partners, L.P. ("Aloha")
2. Antares, Inc. ("Antares")
3. Carroll Wireless, L.P. ("Carroll Wireless")
4. Centennial Communications Corp. ("Centennial")
5. Columbia Capital LLC ("Columbia Capital")
6. Communications Advisory Counsel ("CAC")
7. Comscape Telecommunications, Inc. ("Comscape")
8. Cook Inlet Region, Inc. ("Cook Inlet")
9. Council Tree Communications, Inc. ("Council Tree")
10. CTIA—The Wireless Association ("CTIA")
11. Dobson Communications Corporation ("Dobson")
12. Doyon Communications, Inc. ("Doyon")
13. Dull, Arvin D.
14. John Staurulakis, Inc.
15. Leap Wireless International, Inc. ("Leap")
16. Madison Dearborn Partners, LLC ("Madison Dearborn")
17. MetroPCS Communications, Inc. ("MetroPCS")
18. Minority Media and Telecommunications Council ("MMTC")

19. MobiPCS

20. National Association of Broadcasters ("NAB")

21. National Hispanic Media Coalition ("NHMC")

22. National Telecommunications Cooperative Association ("NTCA")

23. NTCH, Inc.

24. NTCH, Inc, dba Clear Talk ("Clear Talk")

25. Paging Systems, Inc. ("Paging Systems")

26. Patrick, Levi

27. Poplar Associates, LLC ("Poplar")

28. Rural Telecommunications Group, Inc. ("RTG")

29. STX Wireless, LLC ("STX")

30. Suncom Wireless, Inc. ("Suncom")

31. T-Mobile USA, Inc. ("T-Mobile")

32. United States Cellular Corporation ("USCC")

33. U.S. Wirefree

34. Verizon Wireless ("Verizon Wireless")

35. Wirefree Partners III, LLC ("Wirefree Partners")

36. Wireless Broadband Service Providers Association ("WBSPA")

37. Wireless Communications Association International, Inc. ("WCAI")

Reply Comments

1. Antares, Inc. ("Antares")
2. Blooston Rural De Colalition ("Blooston")
3. Cablevision Systems Corporation ("CSC")
4. Cingular Wireless, LLC ("Cingular")
5. Consumers Union
6. Cook Inlet Region, Inc. ("Cook Inlet")
7. Council Tree Communications, Inc. ("Council Tree")
8. Ericsson, Inc. ("Ericsson")
9. Leap Wireless International, Inc. ("Leap")
10. Minority Media and Telecommunications Council ("MMTC")
11. Royal Street Communications, LLC ("Royal Street")
12. Rural Carriers
13. T-Mobile USA, Inc. ("T-Mobile")
14. United States Cellular Corporation ("USCC")
15. U.S. Wirefree
16. Verizon Wireless ("Verizon Wireless")
17. Wirefree Partners III, LLC ("Wirefree Partners")
18. Wireless Broadband Service Providers Association ("WBSPA")

Notice of *Ex Parte* Presentations

1. Carroll Wireless et al ("Carroll")

2. Cook Inlet Region, Inc. ("Cook Inlet")*

3. Council Tree Communications, Inc. ("Council Tree")*

4. CTIA—The Wireless Association ("CTIA")

5. Doyon Communications, Inc. ("Doyon")

6. Madison Dearborn Partners, LLC ("Madison Dearborn")

7. Media Access Project ("MAP")*

8. MetroPCS Communications, Inc. ("MetroPCS")*

9. Minority Media and Telecommunications Council ("MMTC")

10. National Hispanic Media Coalition ("NHMC")*

11. National Telecommunications Cooperative Association ("NTCA")

12. Royal Street Communications, LLC ("Royal Street")*

13. T-Mobile USA, Inc. ("T-Mobile")*

14. Transactional Transparency and Related Outreach Subcommittee

15. U.S. Department of Justice

16. Verizon Wireless ("Verizon Wireless")*

17. Wirefree Partners III, LLC ("Wirefree Partners")

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* Indicates that more than one *ex parte* submission was filed.

APPENDIX B
Final Rules

PART 1—PRACTICE AND PROCEDURE

For the reasons discussed in the preamble, the FCC amends parts 1 of the Code of Federal Regulations to read as follows:

1. The authority citation for part 1 is revised to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

2. In § 1.913, paragraph (a) introductory text and the first sentence of paragraph (b) are revised and paragraph (a)(6) is added to read as follows:

§ 1.913 Application and notification forms; electronic and manual filing.

(a) Application and notification forms. Applicants, licensees, and spectrum lessees (see § 1.9003) shall use the following forms and associated schedules for all applications and notifications:

* * * * *

(6) FCC Form 609, Application to Report Eligibility Event. FCC Form 609 is used by licensees to apply for Commission approval of reportable eligibility events, as defined in § 1.2114.

(b) Electronic filing. Except as specified in paragraph (d) of this section or elsewhere in this chapter, all applications and other filings using the application and notification forms listed in this section or associated sched-

ules must be filed electronically in accordance with the electronic filing instructions provided by ULS.

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3. Revise paragraph (b) introductory text and add paragraph (b)(5) to § 1.919 to read as follows:

§ 1.919 Ownership information.

* * * * *

(b) Any applicant or licensee that is subject to the reporting requirements of §1.2112 or § 1.2114 shall file an FCC Form 602, or file an updated form if the ownership information on a previously filed FCC Form 602 is not current, at the time it submits:

* * * * *

(5) An application reporting any reportable eligibility event, as defined in § 1.2114.

* * * * *

4. Revise paragraph (a)(2)(ii)(B) of § 1.2105 to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) * * *

(ii)(B) Applicant ownership and other information, as set forth in 1.2112.

* * * * *

5. In paragraph § 1.2110, paragraphs (b)(1)(i)-(ii) and (j) are revised, paragraphs (n) and (o) are redesignated as paragraphs (o) and (p), and paragraphs (b)(3)(iv) and (n) are added to read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) * * *

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

(ii) If applicable, pursuant to § 24.709, the total assets of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or li-

censee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

* * * * *

(3) * * *

(iv) Applicants or licensees with material relationships.

(A) Impermissible material relationships. An applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

(B) Attributable material relationships. An applicant or licensee must attribute the gross revenues (and, if applicable, the total assets) of any entity, (including the controlling interests, affiliates, and affiliates of the controlling interests of that entity) with which the applicant or licensee has an attributable material relationship. An applicant or licensee has an attributable material rela-

tionship when it has one or more arrangements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

(C) Grandfathering.

(1) Licensees. An impermissible or attributable material relationship shall not disqualify a licensee for previously awarded benefits with respect to a license awarded before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006.

(2) Applicants. An impermissible or attributable material relationship shall not disqualify an applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006. Any applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed after April 25, 2006, or in an application to participate in an auction in which bidding begins on or after [30 days after Federal Register publication], need not attribute the material relationship(s) of those entities that are its affiliates based solely on section 1.2110(c)(5)(i)(C) if those affiliates entered into such material relationship(s) before April 25, 2006, and are subject to a contractual prohibition preventing them from contributing to the applicant's total financing.

Example to paragraph (C)(2): Newco is an applicant seeking designated entity status in an auction in which bidding begins after the effective date of the rules. Investor is a controlling interest of Newco. Investor also is a controlling interest of Existing DE. Existing DE previously was awarded designated entity benefits and has impermissible material relationships based on leasing agreements entered into before April 25, 2006, with a third party, Lessee, that were in compliance with the Commission's designated eligibility standards prior to April 25, 2006,. In this example, Newco would not be prohibited from acquiring designated entity benefits solely because of the existing impermissible material relationships of its affiliate, Existing DE. Newco, Investor, and Existing DE, however, would need to enter into a contractual prohibition that prevents Existing DE from contributing to the total financing of Newco.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements, including oral agreements, establishing, as applicable, de facto or de jure control of the entity or the presence or absence of impermissible and attributable material relationships. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a

copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates, and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

* * * * *

(n) Annual reports. Each designated entity licensee must file with the Commission an annual report within five business days before the anniversary date of the designated entity's license grant. The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. Annual reports will be filed no later than, and up to five business days before, the anniversary of the designated entity's license grant.

(o) Gross revenues. * * *

(p) Total assets. * * *

6. Revise paragraphs (a), (b) introductory text, the first sentence of paragraph (c)(2), the first sentence of paragraph (c)(3), (d)(1), and (d)(2) of § 1.2111 to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license (see § 1.948). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) Unjust enrichment payment: set-aside. As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of, or for entry into a material relationship (see §§ 1.2110, 1.2114) (otherwise permitted under the Commission's rules) involving, a license acquired by the applicant pursuant to a set-aside for eligible designated entities under § 1.2110(c), or which proposes to take any other action relating to ownership or control that will result in loss of eligibility as a designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire

transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No payment will be required if:

* * *

(c) * * *

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure or to enter into a material relationship (see § 1.2110) that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. * * *

(3) If a licensee seeks to make any change in ownership or to enter into a material relationship (see § 1.2110) that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. * * *

(d) * * *

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change or to enter into a material relationship (see § 1.2110) that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring or entry into a material relationship), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be 100 percent of the value of the bidding credit prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met. If the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met, the amount of the payments will be reduced over time as follows:

(A) A loss of eligibility in the first five years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 100 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(B) A loss of eligibility in years 6 and 7 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 75 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(C) A loss of eligibility in years 8 and 9 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 50 percent of the difference between the bidding credit received and the bidding credit for which it is eligible); and

(D) A loss of eligibility in year 10 of the license term will result in a forfeiture of 25 percent of the value of the

bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 25 percent of the difference between the bidding credit received and the bidding credit for which it is eligible).

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change, or reportable eligibility event (see §1.2114).

* * * * *

7. In § 1.2112, add new paragraphs (b)(1)(iii) and (b)(2)(vii), redesignate paragraph (b)(1)(iii) as (b)(1)(iv), and revise redesignated paragraph (b)(1)(iv) and paragraphs (b)(2)(iii) and (v) of to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

* * * * *

(b) * * *

(1) * * *

(iii) List all parties with which the applicant has entered into arrangements for the spectrum lease or resale (including wholesale agreements) of any of the capacity of any of the applicant's spectrum.

(iv) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: The applicant, its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship; and if a consortium of small businesses, the members comprising the consortium.

* * * * *

(2) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control or the presence or absence of impermissible and attributable material relationships. Such agreements and instruments include articles of incorporation and bylaws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

(iv) * * *

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, affiliates of its controlling interests, and parties with which it has attributable material relationships; and if a consortium of small businesses, the members comprising the consortium; and

(vi) * * *

(vii) List and summarize any agreements in which the applicant has entered into arrangements for the lease or resale (including wholesale agreements) of any of the spectrum capacity of the license that is the subject of the application.

8. Add new section 1.2114 to read as follows:

§ 1.2114 Reporting of Eligibility Event.

(a) A designated entity must seek Commission approval for all reportable eligibility events. A reportable eligibility event is:

(1) Any spectrum lease (as defined in § 1.9003) or resale arrangement (including wholesale agreements) with one entity or on a cumulative basis that would cause a licensee to lose eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under § 1.2110 and applicable service-specific rules.

(2) Any other event that would lead to a change in the eligibility of a licensee for designated entity benefits.

(b) Documents listed on and filed with application. A designated entity filing an application pursuant to this section must—

(1) List and summarize on the application all agreements and arrangements (including proposed agreements and arrangements) that give rise to or otherwise relate to a reportable eligibility event. In addition to a summary of each agreement or arrangement, this list must include the parties (including each party's affiliates, its controlling interests, the affiliates of its controlling interests, its spectrum lessees, and its spectrum resellers and wholesalers) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.

(2) File with the application a copy of each agreement and arrangement listed pursuant to this paragraph.

(3) Maintain at its facilities or with its designated agents, for the term of the license, the lists, summaries, dates, and copies of agreements and arrangements required to be provided to the Commission pursuant to this section.

(c) Application fees. The application reporting the eligibility event will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102.

(d) Streamlined approval procedures.

(1) The eligibility event application will be placed on public notice once the application is sufficiently complete and accepted for filing (see § 1.933).

(2) Petitions to deny filed in accordance with § 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the Public Notice listing the application as accepted for filing.

(3) No later than 21 days following the date of the Public Notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will grant the application, deny the application, or remove the application from streamlined processing for further review.

(4) Grant of the application will be reflected in a Public Notice (see § 1.933(a)(2)) promptly issued after the grant.

(5) If the Bureau determines to remove an application from streamlined processing, it will issue a Public Notice indicating that the application has been removed

from streamlined processing. Within 90 days of that Public Notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(e) Public notice of application. Applications under this subpart will be placed on an informational public notice on a weekly basis (see § 1.933(a)).

(f) Contents of the application. The application must contain all information requested on the applicable form, any additional information and certifications required by the rules in this chapter, and any rules pertaining to the specific service for which the application is filed.

(g) The designated entity is required to update any change in a relationship that gave rise to a reportable eligibility event.

APPENDIX C
Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[203] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Further Notice of Proposed Rule Making ("*Further Notice*") in WT Docket No. 05-211. The Commission sought written public comment in the Further Notice on possible changes to its competitive bidding rules, as well as on the IRFA.[204] One commenter addressed the IRFA. This Final Regulatory Flexibility Analysis conforms to the IRFA.[205]

A. Need for, and Objectives of, the Second Report and Order

This *Second Report and Order* adopts modifications to the Commission's rules for determining the eligibility of applicants for size-based benefits in the context of competitive bidding. Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules.[206] To that end, in determining whether to award

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[203] *See generally* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601—612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[204] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Further Notice of Proposed Rule Making*, 21 FCC Rcd 1753 (2006), 71 FR 6992 (February 10, 2006).

[205] *See generally* 5 U.S.C. § 604.

[206] *See, e.g.*, *Competitive Bidding Second Report and Order,* 9 FCC Rcd 2348 (1994); *Part 1 Fifth Report and Order*, 15 FCC Rcd 15293

designated entity benefits, the Commission adopted a strict eligibility standard that focused on whether the applicant maintained control of the corporate entity.[207] The Commission's objective in employing such a standard was "to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings."[208] The Commission intends its small business provisions to be available only to bona fide small businesses.

Consequently, the rules as modified by the *Second Report and Order* provide that certain material relationships of an applicant for designated entity benefits will be a factor in determining the applicant's eligibility. The *Second Report and Order* provides that if an applicant or licensee has agreements that together enable it to lease or resell more than 50 percent of the spectrum capacity of any individual licenses, the applicant or licensee will be ineligible for designated entity benefits. Further, the *Second Report and Order* also provides that if an applicant or licensee has agreements with any other entity, including entities or individuals attributable to that other entity that enable the applicant or licensee to lease or resell more than 25 percent of the spectrum capacity of any individual licenses, the other entity will be attributed to the applicant or licensee when determining the applicant's or licensee's eligibility for designated entity benefits. Finally, the modifications of the *Second Report and Order* strengthen the

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(2000); Application of ClearComm, L.P., *Memorandum Opinion and Order*, 16 FCC Rcd 18627 (2001).

[207] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2396, ¶ 277.

[208] *Id.* at 2397 ¶ 278.

Commission's unjust enrichment rules to better deter attempts at circumvention and to recapture designated entity benefits when there has been a change in eligibility on a license-by-license basis. Similarly, to ensure our continued ability to safeguard the award of designated entity benefits, we provide clarification regarding how the Commission will implement its rules concerning audits and we refine our rules with respect to the reporting obligations of designated entities.

These rule modifications will enhance the Commission's ability to carry out Congress's statutory plan in accordance with the intent of Congress that every recipient of designated entity benefits uses its licenses directly to provide facilities-based telecommunications services for the benefit of the public. In making these changes to the rules, the Commission takes another important step in fulfilling its statutory mandate to facilitate the participation of small businesses in the provision of spectrum based services.[209]

B. Summary of Significant Issues Raised By Public Comment in Response to the IRFA

The National Telecommunications Cooperative Association filed comments in response to the IRFA stating, among other things, that the Commission must take steps to minimize the economic impact of its proposed rules on small entities. NTCA asserts that the Commission must tailor its rules narrowly enough to target only real abuse, rather than capturing all rural telephone companies with any ties to a large in-region wireless

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[209] 47 U.S.C. §309(j)(4)(D).

provider, or it should exempt rural telephone companies from the rules' provision.[210]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[211] The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."[212] The term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[213] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[214] Nationwide, as of

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[210] Comments of NTCA at 9.

[211] 5 U.S.C. § 603(b)(3).

[212] *Id.* § 601(6).

[213] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

[214] *Id.* § 601(4).

2002, there were approximately 1.6 million small organizations.[215] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[216] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[217] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[218] Thus, we estimate that most governmental jurisdictions are small. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[219]

The changes and additions to the Commission's rules adopted in the *Second Report and Order* are of general applicability to all services, applying to all entities of any size that seek eligibility to participate in Commission auctions as a designated entity and/or that hold licenses won through competitive bidding that are subject to designated entity benefits. Accordingly, this FRFA provides a general analysis of the impact of the proposals on small businesses rather than a service by

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[215] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[216] 5 U.S.C. § 601(5).

[217] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[218] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[219] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1,975 out of a total of 3,545 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific services.[220] In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of changes in control, changes in material relationships or assignments or transfers, unjust enrichment issues are implicated.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Commission will require additional information from applicants in order to ensure compliance with the policies and rules adopted by the *Second Report and Order*. For example, designated entity applicants that have filed applications to participate in an auction for which bidding will begin on or after the effective date of the rules, will be required to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to the Commission's rules effective as of the date of the

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[220] This figure is as of March 29, 2006.

statement. In addition, the Commission adopts rules to make modifications, as necessary, to FCC forms related to auction, licensing, and leasing applications. Specifically, the modifications will require that designated entities report any relevant material relationship(s), as defined in newly adopted sections of 1.2110, reached after the date the rules are published in the Federal Register, even if the material relationship between the designated entity and the other entity would not have triggered a reporting requirement under the rules prior to this *Second Report and Order*.[221]

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule or any part thereof for small entities."[222]

The *Further Notice* sought comment on several options for modifying its designated entity eligibility rules and specifically sought comment from small entities.

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[221] *See generally* 47 C.F.R. §§ 1.948, 1.9020(i), 1.9030(h), (i).

[222] *See* 5 U.S.C. § 603.

The options included various ways to consider whether the Commission should award designated entity benefits where an applicant for such benefits also had financial or operational agreements with a larger entity. In considering these options, for the purposes of determining designated entity eligibility, the Commission defined the effect of entering certain agreements. By adopting the rules in the *Second Report and Order,* the Commission will enhance its ability to carry out Congress's statutory plan that every recipient of designated entity benefits uses their licenses directly to provide facilities-based telecommunications services, for the benefit of the public.

F. Report to Congress

The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.[223] In addition, the Commission will send a copy of the *Second Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.

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[223] *See id.* § 801(a)(1)(A).

APPENDIX D
Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[224] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Second Further Notice of Proposed Rule Making* ("*Second Further Notice*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in this *Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[225] In addition, the *Second Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.[226]

A. Need for, and Objectives of, the Proposed Rules

The initial *Further Notice* in this proceeding tentatively concluded that it should restrict the award of designated entity benefits to an otherwise qualified applicant where it has a "material relationship" with a "large in-region incumbent wireless service provider." The Commission sought comment on how it should define the elements of such a restriction. Based on the Commission's experience in administering the designated entity

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[224] *See generally* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[225] *See* 5 U.S.C. § 603(a).

[226] *See id.*

program and the record developed in response to the *Further Notice*, this *Second Further Notice* seeks further comment on those issues, including comment to obtain additional economic evidence regarding how and under what circumstances an entity's size might affect its relationships and agreements with designated entity applicants and licensees. The *Second Further Notice* also seeks comment on whether the Commission should adopt additional rule changes that would restrict the award of designated entity benefits under certain circumstances and in connection with relationships with certain types of entities and individuals with high personal net worth, including whether and how in-region relationships and personal net worth should be considered in determining eligibility for designated entity benefits.

Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules.[227] To that end, in determining whether to award designated entity benefits, the Commission adopted a strict eligibility standard that focused on whether the applicant maintained control of the corporate entity.[228] The Commission's objective in employing such a standard was "to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without

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[227] *See, e.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 (1994); *Part 1 Fifth Report and Order*, 15 FCC Rcd 15293 (2000); Application of ClearComm, L.P., *Memorandum Opinion and Order*, 16 FCC Rcd 18627 (2001).

[228] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2396 ¶ 277.

the delay of administrative hearings."[229] The Commission intends its small business provisions to be available only to bona fide small businesses.

B. Legal Basis

The proposed actions are authorized under Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), and 309(j).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[230] The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."[231] The term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[232] A small business concern is one which: (1) is independently owned and

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[229] *Id.* at 2397 ¶ 278.

[230] 5 U.S.C. § 603(b)(3).

[231] *Id.* § 601(6).

[232] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[233] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[234] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[235] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[236] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[237] Thus, we estimate that most governmental jurisdictions are small. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[238]

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[233] *Id.* § 601(4).

[234] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[235] 5 U.S.C. § 601(5).

[236] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[237] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[238] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at 40 (July 2002).

Any proposed changes or additions to the Commission's Part 1 rules that may be made as a result of the *Second Further Notice* would be of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. Accordingly, this IRFA provides a general analysis of the impact of the proposals on small businesses rather than a service by service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1,975 out of a total of 3,545 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific services.[239] In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Commission will not require additional reporting, recordkeeping or other compliance requirements pursuant to this *Second Further Notice*.

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[239] This figure is as of March 29, 2006.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.[240]

The initial *Further Notice* in this proceeding tentatively concluded that it should restrict the award of designated entity benefits to an otherwise qualified applicant where it has a "material relationship" with a "large in-region incumbent wireless service provider." The Commission sought comment on how it should define the elements of such a restriction. Based on the Commission's experience in administering the designated entity program and the record developed in response to the *Further Notice*, this *Second Further Notice* seeks further comment on those issues, including comment to obtain additional economic evidence regarding how and under what circumstances an entity's size might affect its relationships and agreements with designated entity applicants and licensees. The *Second Further Notice* also seeks comment on whether the Commission should

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[240] *See* 5 U.S.C. § 603.

adopt additional rule changes that would restrict the award of designated entity benefits under certain circumstances and in connection with relationships with certain types of entities and individuals with high personal net worth, including whether and how in-region relationships and personal net worth should be considered in determining eligibility for designated entity benefits. The *Second Further Notice* seeks guidance from the industry on how it should define the elements of any restrictions it might adopt regarding the award of designated entity benefits. Small entity comments are specifically requested.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

None.

STATEMENT OF CHAIRMAN KEVIN J. MARTIN

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rule Making.

We initiated this proceeding to examine our rules governing designated entities to better achieve the purpose of ensuring that small businesses have an opportunity to participate in the provision of spectrum-based services. Today's order adopts several measures to help accomplish that goal. Specifically, we strengthen our unjust enrichment and spectrum leasing rules for designated entities in order to provide additional incentives for small businesses receiving bidding credits to offer facilities-based service. We also further the integrity of the designated entity program by implementing random audits, additional document and transaction reviews, and periodic reporting. Together, these measures significantly strengthen the designated entity program.

In the further notice portion of this item, we ask whether additional safeguards are necessary to reduce the opportunity for manipulation of our rules governing the provision of bidding credits to small businesses. I look forward to working with my colleagues as we continue to develop the record in this proceeding.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rule Making.

In this age when telecommunications companies seem only to grow larger and larger, it is important to have programs that encourage competition from smaller entrepreneurs. This is exactly what the Designated Entity (DE) program is all about and it is why we must do everything we can to make this program perform as intended. Small companies must have a fighting chance to compete with industry giants to obtain valuable spectrum. In an era of consolidation, the program is especially important to rural areas that might otherwise remain underserved. Quite frankly, rural America seems too often to have been pushed off the big companies' radar scopes. This is a central reason why I remain strongly committed to small carriers' participation in spectrum auctions. It is good policy; it also happens to be the law.

But let's be candid. Whenever government attempts to provide incentive programs for small business, there are those who try to twist the rules in order to gain unwarranted entry into these programs. We have seen this in many business sectors and we have unfortunately experienced such chicanery and cheating in telecom too. We must not allow the bad apple to spoil the bushel, however. Instead we need good rules to curb the chicanery. Recent experience teaches us that we must move quickly to curb abuses of the DE program. News reports

indicate that, in prior auctions, entities with deep pockets helped themselves to discounts they were never meant to enjoy. This unacceptable behavior threatens the integrity of our auctions and, worse, it cheats consumers. It costs taxpayers millions of dollars in foregone revenue. It also means that spectrum goes to those most willing and able to manipulate the rules of the game, rather than to the entities Congress actually intended to benefit. And it denies consumers the benefits of new and all-too-rare competition. So, our job is to deny wealthy companies or individuals any opportunity to misuse the DE discount to outbid small carriers—the very carriers the DE program is meant to protect.

Today we take meaningful steps in the right direction. We do so in time to apply new rules to the large and important Advanced Wireless Services (AWS) auction scheduled for this summer. I am grateful to the Chairman for his role in moving this item along in time to have these rules apply to the AWS auction. And I am grateful to him and to my other colleagues for their support of strong measures to prevent fraud and unjust enrichment by those who would seek to abuse this valuable program. In particular, I am pleased that by strengthening our unjust enrichment rules we take away the incentive for speculators to try to masquerade as legitimate DEs. Under our new rules, bidders who benefit from the 25 percent discount must forfeit that discount if they then turn around and sell some or all of their license rights to someone else. By eliminating the payoff for this "flipping" of licenses, we discourage sham buyers from participating in the first place. And most importantly, we reserve the DE program for companies that actually intend to use their spectrum to serve customers.

I am also pleased that we commit to thoroughly review the application and all relevant documents for each and every winning bidder claiming DE status. Additionally, we pledge to audit every DE at least once during the initial license term. These are two important safeguards against sham bidders, and I am glad the Commission agreed to implement them as well.

There is more to do to ensure the ongoing integrity and credibility of the DE program. For instance, I have real questions about whether a company should be able to qualify for the DE discount if it is owned in large part by a multi-billion-dollar wireless company—or any multi-billion-dollar communications company, for that matter. I believe the unjust enrichment reforms we announce today will go a long way towards eliminating the worst abuses of this kind. But we still need to consider whether additional partnership restrictions are warranted.

At the same time, we must also be cautious about overshooting the mark and harming the very small carriers and entrepreneurs that Congress meant to protect. Legitimate DEs must have access to capital to compete meaningfully against the large carriers. I would not support any measures that improperly compromised their ability to do so.

The limited time available to us for consideration of this item did not allow us to resolve these questions. I would have preferred launching this proceeding last summer so as to facilitate a more thorough review in time for comprehensive action today. But given the importance of both the upcoming AWS auction and the DE program, I think that the item we announce today is the most prudent course to protect the core values of the

DE program. Certainly, we must be careful not to rush into further changes without full consideration of all their consequences, unintended as well as intended. I hope we will keep working on this program because another huge auction in the 700 MHz spectrum is not far off and we should have the program working as flawlessly as possible by then. In the meantime, I applaud the changes we make today to curb fraud and unjust enrichment and I thank my colleagues for their cooperative work to achieve these results.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rule Making.

I must dissent from a large portion of this decision because it fails to accomplish the very specific goals the Commission outlined in the Further Notice and Proposed Rule Making (FNPRM) in this proceeding. While I endorse the narrow adjustments to the Designated Entity (DE) program that we adopt today, the majority falls far short of making the meaningful modifications to the DE program that were almost universally supported by commenters in this proceeding. I am disappointed that we were unable to follow through on our tentative conclusion from earlier this year, and believe that the Second FNPRM we adopt today is unnecessarily broad and complicated, and significantly ignores the full and complete record before us.

On January 27, 2006, my colleagues and I adopted an FNPRM in which we tentatively concluded that we should modify our Part 1 rules to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a "material relationship" with a "large in-region incumbent wireless service provider." This position was supported by a large and di-

verse group of commenters ranging from DEs[241] to Tier II carriers,[242] the minority community[243] to rural tele-

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[241] "It is extremely positive and encouraging that the Commission has decided to take this opportunity to change its Designated Entity program rules so as to make available more fair and reasonable opportunities for bona fide designated entities to secure the critical spectrum necessary to compete in the face of ever-increasing industry consolidation dominated by large incumbent wireless service providers." Comments of STX Wireless, LLC.

[242] "It is not unreasonable or unfair for the Commission to update its designated entity program to take into account the greatly increased concentration of spectrum resources in the hands of the national wireless carriers. By limiting access of the national carriers to bid credit benefits, the Commission can effectively refocus its designated entity policies to expand opportunities for successful small business participation in the wireless industry." Reply Comments of United States Cellular Corporation at 2-3.

[243] "As carriers whose collective share of the wireless market is 89-90 percent, the five largest incumbents have the most to lose from the entry of facilities-based competitors into the wireless market, and therefore have the strongest incentives to manipulate the DE program in a manner that forestalls the competition that the DE program was meant to engender." Reply Comments of the Minority Media and Telecommunications Council (MMTC) at 3.

phone companies,[244] and even members of Congress[245] and the Department of Justice.[246]

Yet, in a troubling and curious reversal, less than three months later, I stand alone in dissenting from our decision today to not to close this obvious loophole. It is stunning that we have failed to take any meaningful action to specifically address the single biggest issue facing the DE program given the overwhelming support in the record to do so. We missed a real opportunity to shut down what almost everyone recognizes has the potential for the largest abuse of our DE program: giant wireless companies using false fronts to get spectrum on the cheap.

During the past month, there has been considerable discussion about an alternative proposal to our original

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[244] "The Commission's tentative conclusion that it should modify its Part 1 rules to restrict the award of DE benefits such as bidding credits to an otherwise qualified DE where it has a 'material relationship' with a large, in-region incumbent wireless service provider is consistent with Section 309(j) of the Communications Act of 1934, as amended." Comments of The Rural Telecommunications Group, Inc. and The Organization for the Promotion and Advancement of Small Telecommunications Companies.

[245] "It is important that DEs have sources of capital and industry experience on which to rely, but allowing national wireless carriers to perform these functions is no longer good policy in light of their overwhelming dominance in the industry." Letter from 10 Members of the Congressional Black Caucus to Chairman Kevin Martin (March 3, 2006).

[246] "The Department supports the Federal Communications Commission's proposal to deny designated entity benefits to entities that have a material relationship with a large in-region incumbent wireless service provider or a large entity that has a significant interest in communications services." *Ex Parte* Letter of the Department of Justice (March 17, 2006).

tentative conclusion—a limitation on investment in DEs by all providers of communications services over a given revenue threshold. While we do not vote on that proposal here, many commenters argued that this approach would not have tightened the DE program, but rather that the approach would have killed it. I certainly had concerns that the proposal, as structured, would have cast a wide net over the DE program—limiting funding to the DE community from almost all FCC-regulated companies, manufacturers, and service providers, whether circuit or IP-based. Not surprisingly, the proposal to adopt a low revenue threshold was loudly opposed by a number of significant voices including members of Congress,[247] two subcommittees of the FCC's own Advisory Committee on Diversity for Communications in the

[247] "It would be wholly inconsistent with the promotion of these objectives for the Commission to limit the sources of capital and expertise available to new entrants in the complex wireless industry beyond the largest national carriers identified in the rulemaking who dominate the industry." Letter from Congressman Edolphus Towns and Congresswoman Diane Watson to Commissioners Michael Copps and Jonathan Adelstein (April 7, 2006).

Digital Age,[248] current and former DEs,[249] and a quintet of Native Alaskan Corporation CEOs.[250] Some argue that so-called DE reform was really a disguise to eliminate an avenue of competition to incumbent wireless companies.[251]

Notwithstanding the flaws in this proposal, I have been willing to consider a variety of alternatives to our tentative conclusion that would have responded to com-

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[248] "The [Subcommittees] believe the Commission should receive the input of the full Committee before taking steps in response to the FNPRM released February 3, 2006 in WT Docket No. 05-211, recent reports regarding which suggest that the Commission may substantially undermine opportunities for diversity of ownership and other goals mandated by Section 309(j) of the Communications Act. Accordingly, the Subcommittee asks the Commission to convene the full Committee as soon as possible with respect to this matter." Statement of The Transactional Transparency and Related Outreach Subcommittee and the Career Advancement Subcommittee of the Advisory Committee on Diversity for Communications in the Digital Age (April 6, 2006).

[249] "Imposing severe new limitations on DEs sourcing investments from a broad category of companies defined as having revenues of $125 million or more will have the effect of killing the DE program." Ex Parte of Carroll Wireless, LP, CSM Wireless, LLC, Leap Wireless Int'l, Inc. United States Cellular Corp., TA Associates, 3G PCS, LLC, Royal Street Commc'ns, LLC, MetroPCS Commc'ns, Inc., Catalyst Investors and Council Tree Commc'ns, Inc. (April 5, 2006) ("Carroll Wireless et al").

[250] "Such ruling would effectively dismantle the DE Program as mandated by Congress. We urge the Commission to maintain the most important diversity tool at its disposal, stay with the clear record in this case and proceed with finalizing its Tentative Conclusion in this proceeding." Ex Parte of Doyon, Ltd., Koniag Development Corp., St. George Tanaq Corp. Chugach Alaska Corp., and Bethel Native Corp. (April 7, 2006).

[251] Ex Parte of Carroll Wireless et al.

plaints by large wireless carriers that they were being unfairly singled out or that we were ignoring our precedent of conducting market by market analyses in looking at spectrum issues. Moreover, if the wireless loophole was adequately addressed in a final decision, I was willing to consider a revenue-based restriction that affected all FCC regulatees provided that a revenue threshold was based on the record, not one that could indiscriminately shut down the DE program. But inexplicably, no deal could be struck. Ultimately, it was easier for the majority to make a few minor changes to the DE program than close the loophole that is recognized by almost everyone but this Commission.

Of course, I support the changes made in this item as DE reform has been an important issue to me for some period of time. In my separate statement to the FNPRM, I talked about a tighter review of DE applications involving large wireless carriers and am pleased that we have extended a thorough Wireless Telecommunications Bureau review to all DE applications. And I applaud the efforts of MMTC in highlighting the need for a more rigorous audit program and advancing proposals that form the basis for those we adopt today. MMTC, like many others in this proceeding, provided thoughtful comments and discussion on the DE program, and has helped create the record that allows us to make at least some changes to the DE program prior to the upcoming AWS auction.

Finally, I must add that I am troubled by the tone and approach of the Second FNPRM. I believe it disproportionally relies on the perceived status of the communications marketplace in assessing changes to the DE program. While I recognize the dual statutory goals

highlighted in the item of ensuring opportunities for DEs and preventing unjust enrichment, we also have an obligation to promote competition and innovation in the wireless industry pursuant to Section 309(j)(3)(B), and the DE program is an appropriate vehicle to further that objective. I worry that the Second FNPRM, instead of suggesting proposals that could promote the effectiveness and integrity of DEs, could ultimately lead to determinations that do more harm to potential competition in the communications marketplace than truly protect the program. The item seems to ignore the well-developed record in proposing an unnecessarily complicated and expansive review of perceived problems of the DE program when the solutions already are right in front of us.

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WT Docket No. 05-211

IN THE MATTER OF IMPLEMENTATION OF THE COMMERCIAL SPECTRUM ENHANCEMENT ACT AND MODERNIZATION OF THE COMMISSION'S COMPETITIVE BIDDING RULES AND PROCEDURES

Adopted: June 1, 2006
Released: June 2, 2006

ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER

I. INTRODUCTION

1. In this Order on Reconsideration, on our own motion, we clarify certain aspects of the *Second Report and Order* in this proceeding ("*Designated Entity Second Report and Order*").[1] We also address certain procedural issues raised in filings submitted in response to

[1] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) ("*Designated Entity Second Report and Order*" and *"Second Further Notice of Proposed Rule Making"*).

the *Designated Entity Second Report and Order*.[2] As the record on reconsideration has not yet closed, however, we may deal with additional issues raised by interested parties at a later date.

II. BACKGROUND

2. In the *Further Notice of Proposed Rule Making* in this docket,[3] we sought comment on a proposal by Council Tree that we restrict the award of designated entity benefits to designated entities that have what Council Tree only generally referred to as "material relationships" with large in-region incumbent wireless service providers.[4] We asked for comment on each of

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[2] *See, e.g.*, Petition for Expedited Reconsideration dated May 5, 2006 ("Petition for Expedited Reconsideration") filed jointly by Council Tree Communications, Inc. ("Council Tree"), the Minority Media and Telecommunications Council ("MMTC"), and Bethel Native ("Bethel Native"); Motion for Expedited Stay Pending Reconsideration or Judicial Review dated May 5, 2006 filed jointly by Council Tree ("Motion for Expedited Stay"), MMTC and Bethel Native; CTIA—The Wireless Association Opposition to Motion for Expedited Stay Pending Reconsideration or Judicial Review dated May 11, 2006; T-Mobile USA, Inc. Opposition to Stay dated May 12, 2006; Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration dated May 17, 2006, filed jointly by Council Tree, MMTC, and Bethel Native ("Supplement"); Further Supplement to Motion for Expedited Stay dated May 25, 2006, filed jointly by Council Tree, MMTC, and Bethel Native ("Further Supplement").

[3] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Further Notice of Proposed Rule Making*, 21 FCC Rcd 1753 (2006) ("*Further Notice*").

[4] *See* Letter from Messrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005) (Council Tree *ex parte*).

the elements of this proposal, including what types of "material relationships" should trigger a restriction on the availability of designated entity benefits and what types of entities other than large in-region incumbent wireless service providers should be covered.[5]

3. In the *Designated Entity Second Report and Order*, after reviewing the diverse comments filed in the record and taking into consideration what we have learned in administering the designated entity benefits program,[6] we revised our rules ("Part 1" rules)[7] to in

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[5] *Further Notice*, 21 FCC Rcd at 1760 ¶ 13.

[6] *See id.* § 1.2110. The Commission establishes small business size standards on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service. 47 C.F.R. § 1.2110(c)(1). In the *Part 1 Fifth Report and Order,* the Commission, in light of the *Adarand* decision, declined to adopt special provisions for minority- and women-owned businesses but noted that minority- and women-owned businesses that qualify as small businesses may take advantage of the provisions the Commission has adopted for small businesses. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15319 ¶ 48 (2000) ("*Part 1 Fifth Report and Order*") (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). On several occasions, the Commission has declined to adopt bidding credits for large telephone companies that serve rural areas. *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 457-58, 462-63 ¶¶ 100, 111 (1994) ("*Competitive Bidding Fifth MO&O*"); Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Notice of Proposed Rule Making,* 15 FCC Rcd 15293, 15320-21 ¶¶ 51-52 (2000); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd

clude certain "material relationships" as factors in determining designated entity eligibility. Specifically, we adopted rules to limit the award of designated entity benefits to any applicant or licensee that has "impermissible material relationships" or an "attributable material relationship" created by certain agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity. We found that these additional eligibility restrictions were necessary to meet our statutory obligations and to ensure that, in accordance with the intent of Congress, every recipient of the Commission's designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.[8] In particular, we deter

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1022, 1090-91 ¶ 176 (2002). The Commission determines eligibility for its small business provisions based on an entity's size determined pursuant to attribution rules. 47 C.F.R. § 1.2110(b)(1)-(3). *But see* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10180, 10191-94 ¶¶ 16-18 (2003) (establishing exemption for rural telephone cooperatives from the requirement that gross revenues of entities controlled by an applicant's officers and directors be attributed to the applicant), *modified on reconsideration, Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005); 47 C.F.R. § 1.2110(b)(3)(iii) (exempting rural telephone cooperatives from attributing the gross revenues of its officers and directors).

[7] *See* 47 C.F.R. § 1.2101 *et. seq.*

[8] Section 309(j)(4)(D) directs the Commission to issue regulations to "ensure" that designated entities "are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). We believe that the word "participate" in this directive contemplates significant involvement in the provision of services to the public, not merely passive ownership of a license to spectrum used by others to provide service. This view is supported by the legislative his-

mined that the relationships underpinning such leasing and resale agreements underscored the need for stricter regulatory parameters to ensure that benefits were reserved to provide opportunities for designated entities to become robust independent facilities-based service providers with the ability to provide new and innovative services to the public, and to prevent the unjust enrichment of unintended beneficiaries.[9]

4. In the *Further Notice*, we also sought comment on whether, if we adopted a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules. We asked over what portion of the license term the unjust enrichment provisions should apply if we decided to require reimbursement by licensees that, either through a change of "material relationships" or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt. In the *Designated Entity Second Report and Order*, after reviewing the filings in the record and taking into account our experience with spectrum auctions and licensing, we adopted rule modifications to strengthen our unjust enrichment rules in order to better deter entities from attempting to circumvent our designated entity eligibility requirements and to recapture designated entity benefits when ineligible enti-

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tory of Section 309(j), in which Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter "participation in the licensing process by those who have no intention of offering service to the public." H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993)).

[9] *Designated Entity Second Report and Order,* FCC 06-52, at ¶ 21.

ties control licenses held by designated entities or exert impermissible influence over a designated entity.[10] Specifically, as discussed fully below, we adopted a ten-year unjust enrichment schedule for licenses acquired with bidding credits.

5. Finally, in the *Designated Entity Second Report and Order,* in order to ensure our continued ability to safeguard the award of designated entity benefits, we explained how we will implement our rules concerning audits, particularly with respect to designated entities that win licenses in the upcoming AWS auction, and refined our rules with respect to the reporting obligations of designated entities. In the reconsideration order we adopt today, we provide guidance on these implementation rules as well as on the substantive rules mentioned above.

6. Since Federal Register publication of the *Designated Entity Second Report and Order*, several parties have submitted filings in this docket addressing various aspects of the order. As mentioned, we take note of several of these herein, including a series of filings submitted jointly by the Minority Media and Telecommunications Council ("MMTC), Council Tree Communications, Inc. ("Council Tree"), and Bethel Native Corporation ("Bethel Native") (together, "Joint Petitioners"), among which are a petition for expedited reconsideration and two supplements, a motion for expedited stay pending reconsideration or judicial review, and several lengthy *ex parte* notices. Other parties, including T-Mobile USA, Inc. ("T-Mobile") and CTIA have filed pleadings in opposition to those of Joint Petitioners.

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[10] See 47 C.F.R. § 1.2111.

III. DISCUSSION

7. On our own motion, we address arguments that it would violate section 309(j)(3)(E)(ii) of the Communications Act to apply the new designated entity rules adopted in the *Designated Entity Second Report and Order* to the licenses offered in Auction No. 66. We also address arguments that the Commission did not provide sufficient notice under the Administrative Procedure Act and Regulatory Flexibility Act before adopting its material relationship rules and new unjust enrichment rules. With respect to our material relationship rules, we clarify how we will evaluate impermissible and attributable material relationships, including those that are grandfathered, for the purpose of determining eligibility for designated entity benefits and the imposition of unjust enrichment. We also respond to arguments that our expansion of the unjust enrichment payment schedule to ten years, and requirement of reimbursement of the entire bidding credit amount by designated entities that lose their eligibility for a bidding credit prior to filing the applicable construction notification were arbitrary and capricious. In addition, we clarify that the ten-year schedule applies only to licenses granted after release of the *Designated Entity Second Report and Order*. Finally, we clarify that our new rule relating to reportable eligibility events includes events that might affect a designated entity's eligibility under either our new material relationship or existing controlling interest standards.

A. Section 309(j)(3)(E)(ii)

8. In this section, we address the claim by the Joint Petitioners that adoption of our new rules contravened

section 309(j)(3)(E)(ii) of the Communications Act.[11] Joint Petitioners specifically assert that our application of the new designated entity rules to the licenses offered in Auction No. 66 violates the section 309(j)(3)(E)(ii) directive that the Commission ensure that, after it issues bidding rules, "interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."[12] We disagree.

9. As an initial matter, we reject Joint Petitioners' basic assumption that the new designated entity rules implicate section 309(j)(3)(E)(ii) at all. While that provision instructs the Commission to promote the objective of ensuring that interested parties "after the issuance of bidding rules" have "a sufficient time to develop business plans, assess market conditions, and evaluate the availability of Federal Communications Commission equipment for the relevant services," the new designated entity rules do not constitute "bidding rules" for purposes of section 309(j)(3)(E)(ii). As the Commission has explained, this provision does not require the Commission "to postpone an auction until every external factor that might influence a bidder's business plan is resolved with absolute certainty."[13] Rather, we have indicated that the provision applies to "auction-specific information" and "specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of min-

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[11] Petition for Expedited Reconsideration at 22-23.

[12] *See* 47 U.S.C. § 309(j)(3)(E)(ii).

[13] Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 21, 2005, *Public Notice*, 20 FCC Rcd 7811 (2005).

imum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation."[14] In this case, the new designated entity rules included neither auction-specific information nor specific mechanisms relating to day-to-day auction conduct. Therefore, we do not believe that they fall under the rubric of section 309(j)(3)(E)(ii).

10. Even if, however, we were to agree with the Joint Petitioners that the new designated entity rules somehow implicate section 309(j)(3)(E)(ii), we would still reject their contention that the Commission's action here runs afoul of the statutory provision. We note that parties were on notice for many months of the Commission's intent to apply the changes to the designated entity rules adopted in this proceeding to licenses issued in Auction No. 66.[15] They thus had ample warning that a change in the designated entity rules was coming and should have been prepared to react as soon as the new rules were announced. Additionally, while the Joint Petitioners complain that the then-existing short-form filing deadline for Auction No. 66 was two weeks after the release of the new designated entity rules, auction appli-

[14] Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374, 448 (1997). At the same time, we retained the flexibility to announce minor changes and clarifications to such mechanisms at any time before the auction. *Id.* at 448-49.

[15] *See Further Notice* at ¶ 21.

cants are permitted, even after the short-form filing deadline, to take a variety of steps "to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services," including adding non-controlling investors at any time before or during the auction.[16]

11. In any event, the Commission has rescheduled the deadline for filing short-form applications to participate in Auction No. 66, and interested parties now have until June 19, 2006, or 54 days after the release of the *Designated Entity Second Report and Order* to file their applications.[17] The auction itself now is scheduled to take place on August 9, 2006, or more than three months after the Commission announced its new designated entity rules. In our expert judgment, even assuming that section 309(j)(3)(E)(ii) applies to these rules, this schedule provides applicants with more than sufficient time to adjust business plans and reevaluate market conditions

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[16] *See* 47 C.F.R. § 1.2105(c). As applicants are well aware, filing a short-form application does not commit an applicant to actually participate in the auction or to make any kind of payments to the Commission. *See, e.g.*, Time Warner Cable May Bid in Wireless Auction, MarketWatch.com, May 10, 2006 (www.marketwatch.com, visited May 22, 2006) ("The company added that filing the application 'does not obligate Time Warner Cable or other companies to bid in the auction, but it provides us the flexibility to take part should we decide it makes business sense to do so.'"). And while filing an application to participate in the auction does subject applicants to certain regulatory restrictions, in practice, these restrictions do not bar a wide array of potential changes parties might wish to make to their business plans.

[17] *See* Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006, Revised Schedule, Filing Requirements and Supplemental Procedures for Auction No. 66, *Public Notice*, FCC 06-71 (rel. May 19, 2006).

in light of the new designated entity rules.[18] Along these lines, we note that Joint Petitioners nowhere provide any estimate of what would be a sufficient period of time for designated entities to adjust to the new rules.[19] Rather, they appear to argue that so long as the new

[18] The third element covered by Section 309(j)(3)(E)(ii)—evaluation of equipment availability—is not relevant under the circumstances here; neither the change in the designated entity rules nor the delay in the Auction No. 66 schedule would have had any conceivable effect on a potential bidder's evaluation of equipment availability.

[19] We note that in its *Further Supplement to Motion for Expedited Stay* ("*Further Supplement*"), Joint Petitioners assert that "the Commission has established a standard practice that significant changes to the core bidding rules contained in Subpart Q will only become effective *sixty* days following publication in the *Federal Register*." *Further Supplement* at 2, n.2 (emphasis in original). Contrary to Joint Petitioners' assertion, the Commission always has evaluated how much time is needed in order to satisfy the Section 309(j)(3)(E)(ii) objectives as an *ad hoc* determination based on our expert assessment of all the factors, including the extent of the rule changes involved, the circumstances of the given auction and service at issue, the conditions of the market and the public needs during the general timeframe of the auction, and the potentially competing considerations of the other relevant statutory objectives in Section 309(j) (and in other applicable provisions) of the Communications Act. Rather than acknowledge this fact, the Joint Petitioners concoct a "standard practice" based solely on the Commission providing such a sixty-day period when it "established a uniform set of provisions for all auctionable services" by modifying rules governing status as a designated entity; governing auction application and payment issues; and governing competitive bidding design, procedure, and timing issues. *See* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making* in WT Docket No. 97-82, 13 FCC Rcd 374, 377-79 (1997) (three page "executive summary"). The scope of the *Designated Entity Second Report and Order* is hardly so broad. Finally, we note again that Auction No. 66 is now scheduled to commence more than three months after release of the *Second Report and Order*.

rules are in place, they will be unable to participate in the auction. For example, while Bethel Native Corporation contends that it will be able to participate in Auction No. 66 if the new rules were no longer to apply to the licenses awarded in the auction, nowhere does it make a similar representation that it would be able to participate in Auction No. 66 if given a sufficient period of time to adjust to the new rules, which is not surprising given Joint Petitioners' claim that the new rules "have the practical effect of eviscerating a designated entity's access to capital."[20] Likewise, Council Tree claims: "[I]t will be virtually impossible as a practical matter to reconstruct or develop new business plans or financing alternatives for Designated Entities so long as the new rules are on the books. A mere postponement of the AWS auction is not sufficient under these circumstances."[21] As a result, it is apparent that the Joint Petitioners' real objection is to the substance of the new rules and not to questions of timing under section 309(j)(3)(E)(ii).

12. Additionally, it is important to note that section 309(j)(3) requires the Commission to balance several statutory objectives. As the Commission has previously stated, "while Section 309(j)(3)(E) directs the Commission to provide interested parties adequate time to prepare prior to an auction, the statute also requires that the Commission promote several other objectives in ex-

[20] *Motion for Expedited Stay* at 4-5. As explained *infra*, the Commission strongly disagrees with this claim.

[21] *See* Declaration of Steve C. Hilliard, Council Tree Communications, Inc., at ¶ 8 (attached to *Further Supplement to Motion for Expedited Stay*). *See also Further Supplement to Motion for Expedited Stay* at 10 ("BNC's or Council Tree's circumstances would not and will not change until the FCC's rules change.").

ercising its competitive bidding authority, including the rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum and avoidance of unjust enrichment, and efficient and intensive use of the spectrum."[22] Two of these other statutory objectives are of particular importance here: (1) promoting the development and rapid deployment of new technologies, products, and services public; and (2) avoiding unjust enrichment. We believe that these objectives impose on us here an obligation to avoid unnecessary or unreasonable delays of Auction No. 66. We have evidence that potential bidders have an immediate need for the licenses that will be offered in Auction No. 66[23] and that delaying the auction would impair the rapid deployment of affordable wireless service to the public.[24] Indeed, there is evidence in the record that suggests that delaying the auction further will impede the ability of smaller entities to successfully obtain licenses in Auction No. 66,[25] even though Joint Petitioners claim that our new rules will deter small businesses from participating in the auction. The alternative proposed by the Joint Petitioners of holding Auction No. 66 as currently scheduled but setting aside our new designated entity rules with respect to the licenses offered

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[22] Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 21, 2005, *Public Notice*, 20 FCC Rcd 7811 (2005).

[23] *See, e.g.*, T-Mobile Reply Comments at 4.

[24] *See, e.g,*. Comments of T-Mobile USA, Inc., AU Docket No. 06-3 at 2 (filed Feb. 14, 2006).

[25] Comments of Rural Telecommunications Group and Organization for the Promotion and Advancement of Small Telecommunications Companies at 6.

in that auction,[26] would put us in the position of neglecting our statutory duty to avoid unjust enrichment by assuring that designated entity benefits go to those entities that use their licenses to provide facilities-based services for the benefit of the public.[27] The additional alternative proposed by Joint Petitioners of delaying the auction to allow further comment on the rules adopted in the *Designated Entity Second Report and Order*[28] would constitute unreasonable delay in light of our statutory obligation to promote the development and rapid deployment of services for the benefit of the public. For all of these reasons, we continue to believe that we have reasonably balanced the objectives set forth in section 309(j)(3) and that proceeding with the auction as scheduled would best serve the public interest.

13. Finally, it is worth noting that Council Tree, in its comments in this proceeding, previously supported the Commission's proposal to apply new designated entity rules to the licenses offered in Auction No. 66.[29] And, at the same time, Council Tree took the position that Auction No. 66 should not be delayed.[30] When Council Tree made these comments, it was well aware of the general timeframe under which the Commission was

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[26] Petition for Expedited Reconsideration at 4-8.

[27] *See, e.g.*, Ex Parte of the U.S. Department of Justice at 4 (supporting the strengthening of designated entity rules due to the fact that designated entities in the past have not always been truly independent competitive actors).

[28] Further Supplement at 2.

[29] *See* Council Tree Comments at viii, 61-62. Petitioner Minority Media and Telecommunications Council also espoused this view. *See* Comments of Minority Media and Telecommunications Council at 7-8.

[30] *See id.* at 61.

operating, both with respect to this proceeding as well as the date of the auction. Indeed, recognizing the potentially tight time window at issue, Council Tree even urged the Commission, if necessary, to make the new designated entity rules effective immediately upon publication in the Federal Register, rather than with the normal thirty-day delay, so that the new rules could apply to the licenses offered in Auction No. 66, and the auction could be held on time.[31] And this was despite the fact that Council Tree was advocating even broader changes to the designated entity rules than those the Commission ultimately decided to adopt. In light of this history, we believe that Council Tree's current claim that the Commission has violated section 309(j)(3)(E)(ii) by applying the new designated entity rules to the licenses offered in Auction No. 66 and delaying the auction for over one month runs afoul of what the United States Court of Appeals for the District of Columbia Circuit has termed the "chutzpah doctrine."[32]

B. Material Relationships

14. *Notice.* In their Supplement, Joint Petitioners argue that we violated the Administrative Procedure Act[33] by adopting the new material relationship rules.[34]

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[31] *See id.* at 61.

[32] *See, e.g.*, *Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd.*, 145 F.3d 1362 (D.C. Cir. 1998); *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 & n.5 (D.C. Cir. 1991) (subcontractor asserted contractor was negligent for relying on subcontractor's advice).

[33] Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration at 9.

[34] Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration at 7-10.

They contend, first, that we failed to give sufficiently specific notice, and thus sufficient opportunity for comment, on the new restrictions on leasing and resale arrangements. Second, they argue that we made certain aspects of the rules immediately effective without the requisite statutory notice. We find both claims unconvincing.

15. It is settled that an agency "is not required to adopt a final rule that is identical to the proposed rule."[35] In fact, "[a]gencies are free—indeed, they are encouraged—to modify proposed rules as a result of the comments they receive."[36] If they were not free to do so, agencies "could learn from the comments on [their] proposals only at the peril of subjecting [themselves] to rulemaking without end."[37] As long as parties could have anticipated that the rule ultimately adopted was "possible," it is considered a "logical outgrowth" of the original proposal, and there is no violation of the APA's notice requirements.[38]

16. Applying these standards, it is clear that there was ample notice of the new material relationship rules in this case. The *Further Notice* emphasized the Commission's ongoing commitment "to prevent[ing] companies from circumventing the objectives of the designated entity eligibility rules"[39] and to ensuring that "its small business provisions [are] available only to bona fide

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[35] *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Further Notice* ¶ 6.

small businesses."[40] After discussing existing rules, we noted Council Tree's concern that those rules did "not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses."[41] We then took note of Council Tree's specific proposal for addressing this concern, namely that designated entity benefits be withheld from any prospective licensee that has a "material relationship" with a "large, in-region incumbent wireless service provider."[42] While we tentatively proposed adoption of Council Tree's rule, we also sought comment "on whether other 'material relationships' . . . should trigger a restriction on the award of designated entity benefits."[43] Similarly, we asked whether limiting the prohibited "material relationships" to "large incumbent wireless service providers" or entities "with significant interests in communications services" would be "sufficient to address any concerns that

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[40] *Id.* ¶ 7.

[41] *Id.* ¶ 12.

[42] *Id.* ¶ 13.

[43] *Id.*; *see also id.* ¶ 19 (asking whether "additional entities" should be added to the list of those with which a designated entity may not have a "material relationship" without losing its status). We offered as an example of such a relationship one between "an otherwise qualified designated entity and an 'entity with significant interests in communications services.'" *Id.* ¶ 13. Our use of "such as" before this example makes clear that it was not the only one contemplated. In any event, insofar as the Commission sought comment on a far broader definition of the class of entities with whom a designated entity's material relationship might trigger the restriction of benefits, it should have been obvious to commenters that there was a possibility that an adopted restriction could apply to any relationships that the Commission deemed to be "material."

our designated entity program may be subject to potential abuse from larger corporate entities."[44]

17. In addition to contemplating a broad range of entities beyond the narrow category proposed by Council Tree, the *Further Notice* made clear that we were considering several approaches to defining a "material relationship." We noted that Council Tree proposed that a "material relationship" would exist based on, inter alia, "any material operational arrangement . . . (such as management, joint marketing, trademark, or other arrangements.)"[45] We did not tentatively propose adopting that definition, however, but instead broadly sought comment "on the specific nature of the relationship that should trigger such a restriction."[46]

18. Contrary to Council Tree's claim that it had no notice that an arrangement such as lease or resale could constitute a "material relationship," the *Further Notice* specifically contemplated it. We noted that in our Secondary Markets proceeding, we had concluded "that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee would cause the spectrum lessee to become an attributable affiliate of the licensee, thus rendering the licensee ineligible for designated entity benefits and making such a spectrum lease impermissible."[47] We then sought comment on whether we should follow a similar approach

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[44] *Further Notice* ¶ 15.

[45] *Further Notice* ¶ 13.

[46] *Id.*

[47] *Id.* ¶ 16. We noted that where "substantially all of the spectrum capacity of the licensee is to be leased" would effectively create an affiliate relationship between lessor and lessee, while lease of only "a small portion" of the capacity would not. *See id.* ¶ 16 n.38.

here: "We seek comment on what, if any, standard should be used to determine whether a spectrum leasing arrangement is a 'material relationship' for the purpose of any additional restriction on the availability of designated entity benefits that we might adopt."[48] We went on to ask "whether other arrangements should be taken into account" and "[i]f so, what arrangements should we consider?"[49]

19. The comments filed in response to the *Further Notice* reflected the broad scope of the questions posed there, and they ranged from those suggesting a complete overhaul of the Commission's designated entity eligibility rules to those recommending that we maintain the status quo.[50] Commenting parties clearly understood that the Commission was contemplating rule changes that would extend beyond material relationships with incumbent wireless carriers. For example, Dobson Communications Corporation noted that the Commission had sought comment "as to whether . . . restrictions should be placed on DEs that partner with other large companies that are not in-region wireless carriers."[51] Dobson urged the Commission to do so, arguing that "[i]f it is proven true that the benefits designed for small businesses are instead being realized by

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[48] *Id.*

[49] *Id.*

[50] *See, e.g.*, Comments of CTIA—The Wireless Association filed February 24, 2006; Comments of Verizon Wireless filed February 24, 2006; Comments of Cook Inlet Region, Inc. filed February 24, 2006; Comments of The Minority Media and Telecommunications Council filed February 24, 2006; Comments of National Hispanic Media Coalition filed February 24, 2006.

[51] Comments of Dobson Communications Corporation at 2 (filed February 24, 2006).

large strategic investors, it surely should not matter whether that investor is an in-region incumbent wireless service provider or not."[52] Council Tree, on the other hand, argued that the prohibition should remain narrowly circumscribed to only large incumbent wireless carriers.[53] Likewise, parties clearly understood that arrangements such as spectrum leases could constitute "material relationships" and commented on the subject.[54]

20. Based on a review of those comments, and given our experience in awarding designated entity benefits, we determined that we should modify our rules to achieve Congress's objectives of preventing unjust enrichment and promoting true participation by designated entities in the provision of spectrum-based services for the benefit of the public. We concluded that "certain agreements" between designated entities and others are "by their very nature . . . generally inconsistent with Congress's legislative intent," regardless of what other kind of entity they involve.[55] Specifically, we explained that "where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agree-

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[52] *Id.*

[53] Comments of Council Tree Communications, Inc. at 35-41 (filed February 24, 2006).

[54] *See, e.g.*, Comments of MMTC at 6 & n.16 (discussing spectrum lease and resale arrangements as examples of entities "manipulating the [DE] program"); Comments of Council Tree filed February 24, 2006, at 50 ("material operating arrangement" should cover all arrangements other than "non-discriminatory roaming" agreement or "short-term de facto transfer leasing arrangement"); Reply Comments of Council Tree filed March 3, 2006, at 31 (discussing resale arrangements between DEs and incumbent wireless carriers).

[55] *Designated Entity Second Report and Order* ¶ 23.

ment, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress."[56] Accordingly, we adopted rules in the *Designated Entity Second Report and Order* to limit the award of designated entity benefits to any applicant or licensee that has "impermissible material relationships" or an "attributable material relationship" created by agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity.

21. These rules were a logical outgrowth of the questions we asked in the *Further Notice* and are well within the scope of the inquiry initiated there. The fact that we elected to adopt a definition of material relationship that differed from that specifically proposed by Council Tree does not mean that we failed to provide notice of the rule modifications we ultimately adopted. We therefore reject Joint Petitioners' APA notice claim regarding the material relationship rules.

22. Second, we also disagree with the Joint Petitioners' contention that we made certain aspects of the rules immediately effective and find that such an argument is based on a gross misreading of the rule. The reference to the date of the release in the new rule did not impose any consequences on parties immediately following the date of release. Rather, once the rules became effective—30 days after Federal Register publication—actions taken following the release might affect a party's status, but only if not undone in the period before the

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[56] *Designated Entity Second Report and Order* ¶ 23.

rule became effective. Thus, parties had the requisite period of notice to adjust in response to the new rule.

23. *Requests for General Clarification.* In addition to the arguments raised by the Petitioners, after releasing the *Designated Entity Second Report and Order* staff received a number of questions seeking general advice regarding how the Commission intended to implement its rule modifications. We therefore clarify how we will consider: (1) the meaning of "spectrum capacity" in the context of material relationships, (2) grandfathering, and (3) applicability of the rules to particular services.

24. *Material Relationships.* A number of questions have been raised regarding how the Commission will evaluate impermissible and attributable material relationships for the purposes of determining eligibility for both designated entity benefits and the imposition of unjust enrichment. In the *Designated Entity Second Report and Order*, we concluded that an applicant or licensee has "impermissible material relationships" when it has agreements with one or more other entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any individual license. We decided that such "impermissible material relationships" would render the applicant or licensee (i) ineligible for the award of future designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis. We further concluded that an applicant or licensee has an "attributable material relationship" when it has one or more agreements with any individual entity, including entities and individuals

attributable to that entity, for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee. We decided that such an "attributable material relationship" would be attributed to the applicant or licensee for the purposes of determining the applicant's or licensee's (i) eligibility for future designated entity benefits, and (ii) liability for unjust enrichment on a license-by-license basis. As stated in the *Designated Entity Second Report and Order*, the Commission's policy is to assure that a designated entity preserves at least half of the spectrum capacity of each license for which the designated entity has been awarded and retained designated entity benefits in exchange for the provision of service as a facilities-based provider for the benefit of the public.[57]

25. *Meaning of Spectrum Capacity.* We also take this opportunity to clarify how we will measure compliance with the thresholds we adopted in our definitions of material relationships. The restrictions we adopted regarding impermissible and attributable material relationships require a designated entity to assess the percentage of its spectrum capacity that will be leased (under either spectrum manager or *de facto* transfer leasing arrangements) or subject to resale (including under a wholesale arrangement). Since release of the *Designated Entity Second Report and Order*, parties have asked us to clarify the meaning of "spectrum capacity." Accordingly, we provide additional guidance on deter-

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[57] *Designated Entity Second Report and Order* at ¶ 27.

mining the percentage of a designated entity's spectrum capacity involved in lease or resale agreements.

26. We observe, as an initial matter, that there are a number of ways "spectrum capacity" could be defined. It would be difficult for the Commission to enumerate every possible means by which a licensee could lease or make its spectrum capacity available to another party to resell. By adopting "spectrum capacity" as a measurement, we sought to provide licensees with some flexibility to tailor their agreements to their business needs. We thus are reluctant to employ only a single measure of "spectrum capacity." Nevertheless, to assist designated entities as they evaluate secondary market transactions, we clarify that if they meet the spectrum capacity thresholds on a MHz * pops basis, the Commission will find them in compliance. The MHz * pops basis is consistent with the Commission's current method of apportioning unjust enrichment when licenses are partitioned and/or disaggregated and provides a meaningful measure here.[58] However, while meeting the spectrum capacity thresholds on a MHz * pops basis is sufficient to comply with our rules, it is not the only means of compliance. In other words, any entity meeting the thresholds on a MHz * pops basis will be found in compliance, but entities not meeting the thresholds on a MHz * pops basis may also be found in compliance based on other factors. The MHz * pops measure is intended as a safe harbor; it is not meant to limit complying with the rules in other ways that we cannot fully anticipate at this time. We recognize that our decision not to enumerate all other means of compliance necessarily leaves some uncertainty, but we think that the MHz * pops safe har-

[58] *See* 47 C.F.R. §1.2111(e).

bor provides sufficient certainty while allowing licensees and the Commission flexibility to conduct a more contextual analysis.

27. *Grandfathering.* In the *Designated Entity Second Report and Order*, we explained that we would not employ our new restrictions to reconsider the eligibility for any designated entity benefits that had been awarded to licensees prior to the April 25, 2006, release date of the decision or to determine eligibility for designated entity benefits in an application for a license, an authorization, or an assignment or transfer of control, or a spectrum lease that had been filed with the Commission before, and was still pending approval on, that date.

28. We received a number of inquiries regarding how the Commission will consider future agreements that were "agreed upon" prior to the release date of our decision. We therefore offer the following explanation. Agreements entered into by a designated entity—and, to the extent required, approved by or pending approval by the Commission—no later than April 24, 2006 that concern the lease or resale of the designated entity's spectrum capacity after the release date of the *Designated Entity Second Report and Order* are grandfathered for the purposes of existing eligibility benefits and the imposition of unjust enrichment to the extent that the designated entity has no discretion as to the future lease or resale. For example, if a designated entity licensee had entered into an agreement on or before April 24, 2006 pursuant to which it was required to make 26 percent of its spectrum capacity available to Company B for resale purposes in 2007, that agreement would be grandfathered and therefore would not affect the licensee's eligibility for existing designated entity benefits

for that license nor would it trigger any future unjust enrichment obligations for that license. Even though Company B could not begin reselling the designated entity's spectrum until 2007, its unequivocal right to do so had been contractually established before the release date of the *Designated Entity Second Report and Order*.[59]

29. If, however, the agreement allowed the designated entity to decide at some future point in time whether it would make spectrum available to Company B for resale purposes, and the designated entity did not legally commit itself to the resale until after April 24, 2006, the agreement for resale would, on the date the designated entity made the legal commitment, give rise to an attributable material relationship and also would be considered in calculating whether the designated entity had entered into impermissible material relationships.[60] Accordingly, the agreement might have implications for the designated entity's ongoing eligibility for designated entity benefits for that license and unjust enrichment obligations. This result would occur even if the agreement had, prior to the release date of the *Designated Entity Second Report and Order*, already been reviewed and approved by the Commission. Thus, the applicability of grandfathering to the future lease or resale of spectrum in a pre-existing agreement depends on whether or not the provision was a "done deal" such

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[59] The agreement would still count toward any assessment of whether the designated entity retained a controlling interest in the license, however.

[60] We note that the designated entity would not be able to make this legal commitment without the advance approval of the Commission. *See* 47 C.F.R. § 1.2114.

that, prior to April 25, 2006, the decision to lease or to allow the resale of spectrum was no longer within the discretion of the designated entity.[61]

30. *Applicability of Material Relationships Rules to Certain Services.* There has also been some question about the applicability of the new material relationship rules with regard to agreements to lease spectrum in the 700 MHz Guard Band Manager Service and those other services not covered by our secondary market leasing policies.[62] Consequently, we clarify that the new material relationship rules will apply only to those services in which leasing is permitted under our secondary markets rules.[63]

C. Unjust Enrichment

31. *Notice.* In their petition for expedited reconsideration of the *Designated Entity Second Report and*

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[61] This analysis is analogous to the one we use for evaluating whether the future ownership interests of a designated entity's investor are to be treated as "fully diluted" and thus immediately attributable to the designated entity. *See Competitive Bidding Fifth MO&O,* 10 FCC Rcd at 454-56, ¶¶ 93-96.

[62] *See* Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17528-36 ¶¶ 51-66 (2004) ("*Secondary Markets Second Report and Order*").

[63] *See* 47 C.F.R. § 1.9005; Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Report and Order* and *Further Notice*, respectively), *Erratum*, 18 FCC Rcd 24817 (2003); *Secondary Markets Second Report and Order,* 19 FCC Rcd 17503 (2004).

Order, the Joint Petitioners argue that the Commission violated the Administrative Procedure Act by giving inadequate notice and opportunity for comment prior to adopting new unjust enrichment provisions.[64] This claim is refuted by the plain language of the *Further Notice* and by the Joint Petitioners' own filings in response to it.

32. In the *Further Notice*, we observed that the Commission's existing rules "require the payment of unjust enrichment when an entity that acquires its license with small business benefits loses its eligibility for such benefits or transfers a license to another entity that is not eligible for the same level of benefits."[65] We also noted that Council Tree had proposed extending this "reimbursement obligation" to any licensee that acquires a license with the help of a bidding credit but then "makes a change in its 'material relationships' or seeks to assign or transfer control of the license to an entity that would result in its loss of eligibility for the bidding credit pursuant to any eligibility restriction that we adopt."[66] According to Council Tree, strengthening the unjust enrichment rules was "necessary to fulfill the Commission's statutory obligation to prevent unjust enrichment."[67] The *Further Notice* sought comment both on Council Tree's specific proposal and on whether we should seek to strengthen the unjust enrichment rules

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[64] Petition for Expedited Reconsideration at 18-22. These parties also argue that the Commission released its new unjust enrichment provisions too close to the short-form application deadline for Auction No. 66. *Id.* at 5-6.

[65] *Further Notice* at ¶ 20.

[66] *Id.*

[67] *Id.*; *see* 47 U.S.C. § 309(j)(4)(E); 47 C.F.R. § 1.2111(d).

"in some other manner."[68] We also asked a series of questions about the scope of the reimbursement obligation, seeking comment on whether it should be triggered only "where the licensee takes on new investment" or also when it "enters into any new 'material financial relationship' or 'material operational relationship' that would have rendered the licensee ineligible for a bidding credit."[69] Finally, while we noted Council Tree's proposal for a five-year reimbursement obligation, we did not even tentatively propose adopting it; instead, we asked "over what portion of the license term should . . . unjust enrichment provisions apply?"[70]

33. Notwithstanding the broad scope of the questions asked by the *Further Notice*, Council Tree claims that parties had no notice that we were contemplating any changes to our unjust enrichment rules other than those specifically proposed by Council Tree. As the above discussion of the *Further Notice* makes clear, we did not put ourselves in such a straitjacket, and it would have been unreasonable for any party to believe that we had done so. Nowhere did we say we would consider only a five-year reimbursement obligation or that we would artificially limit the rule changes only to relationships with particular entities.

34. Indeed, the comments filed in response to the *Further Notice* demonstrate that parties did in fact understand the scope of the contemplated changes to the unjust enrichment rules. Council Tree itself squarely acknowledged that "[t]he Commission also seeks com-

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[68] *Further Notice* at ¶ 20.

[69] *Id.*

[70] *Id.*

ment regarding over what portion of the license term should the unjust enrichment provisions apply."[71] Council Tree went on to advocate retention of a five-year time period.[72] On the other hand, MMTC, another of the Joint Petitioners now claiming lack of notice, urged "the Commission [to] consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years."[73] MMTC also suggested that the Commission consider adjusting its reimbursement obligations to require repayment of 100 percent of the value of the bidding credit.[74] Similarly, STX supported "stricter unjust enrichment rules so that the U.S. Treasury may be made whole in the event that a designated entity turns out to have been merely a front organized to secure bidding credits for a large incumbent wireless service provider."[75]

35. The changes we ultimately adopted to our unjust enrichment rules were clearly within the scope of the revisions contemplated by the *Further Notice* or, at a minimum, a logical outgrowth of them. Indeed, had we only revised the five-year unjust enrichment schedule

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[71] Comments of Council Tree at 58 (citing the *Further Notice* at ¶ 20).

[72] *Id.*

[73] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 35, referencing the Comments of MMTC at 15. Without explanation, MMTC proposed that the Commission adopt such a change in its unjust enrichment rules only after "initiating a [new] inquiry," *i.e.* rule making. MMTC expressly acknowledged, however, that in the *Further Notice* "[t]he Commission asks whether it should expand the scope of its unjust enrichment rules[.]" Given acknowledgement of this request, it is unclear why MMTC sought a further proceeding to adopt its proposal.

[74] *Id.*

[75] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 35, referencing the Comments of STX at 2.

for certain types of transactions but not for others, we would have risked creating an illogical scheme that would have created an incentive for designated entities to prioritize certain types of transactions over others. For all of these reasons, we reject the Joint Petitioner's APA notice claim.

36. *Impact of New Rules.* In the *Designated Entity Second Report and Order*, we adopted changes to our unjust enrichment rules to ensure that designated entity benefits go to their only intended beneficiaries.[76] We agreed with commenters that the adoption of stricter unjust enrichment rules would increase the probability that the designated entity would develop into a competitive facilities-based service provider and deter speculation by those who do not intend to offer service to the public, or who intend to use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit.[77]

37. We therefore modified our unjust enrichment rules to expand the unjust enrichment payment schedule from five to ten years.[78] Further, we required that the Commission be reimbursed for the entire bidding credit amount owed if a designated entity loses its eligibility for a bidding credit prior to the filing of the applicable construction notifications.[79] Specifically, we adopted the

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[76] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 31; *see also* 47 C.F.R. § 1.2111(b)-(e).

[77] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 36.

[78] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 37.

[79] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 38.

following ten-year unjust enrichment schedule for licenses acquired with bidding credits. For the first five years of the license term, if a designated entity loses its eligibility for a bidding credit for any reason,[80] including but not limited to, entering into an "impermissible material relationship" or an "attributable material relationship," seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that does not qualify for bidding credits, 100 percent of the bidding credit, plus interest, is owed.[81] For years six and seven of the license term, 75 percent of the bidding credit, plus interest, is owed.[82] For years eight and nine, 50 percent of the bidding credit, plus interest, is owed, and for year ten, 25 percent of the bidding credit, plus interest, is owed.[83] We also imposed a requirement that the Commission must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any

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[80] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 46, n.116 (discussing additional events that could result in a possible loss of designated entity eligibility).

[81] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 37.

[82] *Id.*

[83] *Id.* If a designated entity loses its eligibility for the same level of bidding credit that it originally received for any reason, this unjust enrichment schedule will be applied to the difference between the original bidding credit and the bidding credit for which the designated entity, assignee, or assignor is eligible. *See id.* We also noted that the provisions of section 1.2112(e) of the Commission's rules may also apply. *See id.* n.106 (citing 47 C.F.R. § 1.2112(e) (discussing the assessment of unjust enrichment in the context of the partition and/or disaggregation of licenses)).

reason,[84] including but not limited to, entering into an "impermissible material relationship" or an "attributable material relationship," seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that is not eligible for bidding credits prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the license term have been met.[85]

38. Joint Petitioners assert that the new provisions will eliminate designated entities' access to capital and financing. For several reasons, these claims do not justify reconsideration of the recent rule changes.

39. First, Joint Petitioners contend that the new unjust enrichment rules "have the practical effect of eliminating a designated entity's access to capital by closing an accepted exit path if the business is not going well."[86] This is so because, according to Joint Petitioners, "private equity and other investors frequently adhere to three to seven year investment horizons, with five being an accepted average."[87] Joint Petitioner's

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[84] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 46, n.116 (discussing additional events that could result in a possible loss of designated entity eligibility).

[85] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 38. For example, if a designated entity seeks to assign a license with a bidding credit to an entity that is not eligible for bidding credits eight years after the grant of the license and prior to the filing of the construction notification, 100 percent of the bidding credit, plus interest, will be owed, rather than the 50 percent unjust enrichment payment that would have been due had the construction notification been on file with the Commission, pursuant to the revised unjust enrichment schedule, above. *Id.*

[86] Petition for Expedited Reconsideration at 3-4.

[87] Petition for Expedited Reconsideration at 10.

assertions regarding "accepted averages" do not demonstrate, however, that designated entities access to capital will be eliminated. Indeed, we are not convinced that three to seven years is a reasonable timeframe for investors to expect to recover their capital investments in facilities to provide spectrum-based services. In a recently concluded proceeding addressing the leasing of Educational Broadcast Service spectrum, a broad cross-section of commenters, including a private equity investment firm,[88] submitted evidence that insufficient capital would flow to businesses that want to develop that spectrum if the length of spectrum lease terms was limited to fifteen years.[89] These parties argued that lessees needed access to the spectrum for thirty years or more in order to provide the necessary certainty to justify capital investment in the band.[90] The Commission was "persuaded by the analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration" than thirty years.[91] Given our recent

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[88] Ex parte Letter from James N. Perry, Jr., Managing Director for Madison Dearborn Partners, LLC to Marlene H. Dortch, Federal Communications Commission (dated March 31, 2006) in WT Docket No. 03-66 at 1.

[89] S*ee, e.g.,* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Third Memorandum Opinion and Order,* FCC 06-46 (rel. April 27, 2006), at ¶¶ 258-60 (comments of Madison Dearborn Partners, Inc., various schools and universities, George Mason University Instructional Foundation, Inc.).

[90] Nextel Opposition to Petition for Reconsideration in WT Docket No. 03-66 at 18-19.

[91] *See, generally*, Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile

finding that access to Educational Broadcast Service spectrum for longer than fifteen years is essential to attract the capital needed to deploy facilities for spectrum based services, we are not convinced that the appropriate investment horizon for designated entity status should be only three to seven years.[92] Designated entity benefits are offered to ensure that small businesses have an opportunity to participate in the provision of spectrum-based services, not to ensure the short-term "exit strategies" of parties providing capital. The Commission strengthened its rules to ensure that those that receive such benefits were properly motivated to build out their spectrum and provide services for the benefit of the public by closing off the opportunity to sell licenses awarded with bidding credits for huge profits without ever having to provide actual facilities based services. The Joint Petitioners' predictions regarding the new rules' effect on venture capital alone are not a basis for reconsidering the rules.

40. Second, even if some sources of financing and capital would no longer be available on the same terms as before, the adoption of new rules is not arbitrary and capricious, or otherwise contrary to law. The Commission must balance the various statutory objectives of Section 309(j), and based on the record in response to the *Further Notice* and many years of experience, we

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Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Third Memorandum Opinion and Order,* FCC 06-46 (rel. April 27, 2006), ¶268 (permitting EBS licensees to enter into leases with terms of up to 30 years based on "analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration").

[92] *Id.*

found that the new unjust enrichment rules are necessary to increase the probability that designated entities will develop into facilities-based providers of service for the benefit of the public.[93] Again, it is neither the Commission's statutory responsibility nor its intent merely to provide small businesses with generalized economic opportunities in connection with spectrum licenses.[94] The Commission has not been charged with providing entities with a path to financial success, but rather with an obligation to facilitate opportunities for small businesses to provide spectrum based services to the public.[95] Therefore, it is our responsibility to create strong incentives for designated entities to use spectrum to provide facilities-based service to the public instead of holding their licenses and selling them for profit. We believe that our new rules create appropriate incentives in this regard while still affording designated entities the opportunity to achieve financial success by providing service to the public. It is important to remember that designated entities are provided with bidding credits in order to enable them to obtain spectrum and then provide facilities-based service to the public. To the extent that they do not do so, but instead sell their licenses to others in the marketplace at market prices, we believe that it is reasonable that they no longer be allowed to enjoy the benefit of obtaining spectrum at below-market prices.

41. *Clarification.* We believe that clarification is warranted of our statement in the *Designated Entity*

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[93] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 36.

[94] *Secondary Markets Second Report and Order* at ¶ 70.

[95] *See id.*

Second Report and Order that "retroactive penalties [will] not be imposed on preexisting designated entities."[96] Specifically, we clarify that the newly-adopted ten-year unjust enrichment schedule applies only to licenses that are granted after the release of the *Designated Entity Second Report and Order*.[97] Likewise, the requirement that the Commission be reimbursed for the entire bidding credit amount owed if a designated entity loses its eligibility for a bidding credit prior to the filing of the notifications informing the Commission that the construction requirements applicable at the end of the license term have been met applies only to those licenses that are granted on or after the April 25, 2006 release date of the *Designated Entity Second Report and Order*. We also make corresponding corrections to section 1.2111 of our rules.[98]

D. Review of Agreements, Annual Reporting Requirements, and Audits

42. We also take this opportunity to clarify and emphasize certain aspects of section 1.2114, our newly-adopted rule relating to reportable eligibility events.[99] As the rule expressly states, "[a] designated entity must seek Commission approval for all reportable eligibility events."[100] As discussed in the *Designated Entity Sec-*

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[96] *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 41.

[97] *See* Letter from Carl W. Northrop, counsel for Salmon PCS, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211 (filed May 11, 2006).

[98] *See* Rules Appendix.

[99] 47 U.S.C. § 1.2114.

[100] 47 C.F.R. § 1.2114(a).

ond Report and Order,[101] we emphasize that section 1.2114 requires prior Commission approval for a reportable eligibility event. We also clarify that a reportable eligibility event includes any event that might affect a designated entity's ongoing eligibility, under either our material relationship or controlling interest standards,[102] and we correct new section 1.2114(a) accordingly. Although we affirm that we have delegated authority to the Wireless Telecommunications Bureau ("Bureau") to implement our rule changes on reporting,[103] we anticipate that the Bureau's procedures will provide the means by which parties will apply for approval of all such arrangements. Such approval may require modifications to the terms of the parties' arrangements or unjust enrichment payments based on the impact of such arrangements on designated entity eligibility. We also take this opportunity to affirm our conclusions in the *Designated Entity Second Report and Order* with regard to the implementation of our regulations relating to the review of long-form applications and agreements to determine designated entity eligibility under the controlling interest standard. We also affirm our event-based and annual reporting requirements as well as our commitment to audit the eligibility of every designated entity that wins a license in the AWS auction at least once during the initial term.[104]

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[101] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 46, note 115 and accompanying text.

[102] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 47, note 116 and accompanying text.

[103] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 48.

[104] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶¶ 42-50.

E. Regulatory Flexibility Act

43. We also disagree with the claims of the Joint Petitioners that our recently adopted rules violate the Regulatory Flexibility Act ("RFA").[105] Among other things, the Joint Petitioners assert that we failed to provide adequate notice in the Initial Regulatory Flexibility Analysis ("IRFA") about the scope of the proposed rules, their application to current designated entity licensees, or the ten-year unjust enrichment schedule for licenses acquired with bidding credits. We note as an initial matter that the IRFA is not subject to judicial review. Section 611 of the RFA expressly prohibits courts from considering claims of non-compliance with the initial regulatory flexibility analysis requirement of RFA section 603.[106] Moreover, Joint Petitioners have not articulated the legal basis for their claim that a purported lack of notice constitutes an independent violation of the RFA. In any case, we have demonstrated above that the *Further Notice* (the substance of which was incorporated by reference in the IRFA) provided ample notice of the possible rule changes at issue here.[107] For the same reason, any claim about the sufficiency of

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[105] *See* Supplement of Council Tree, MMTC and Bethel Native at 3-7.

[106] 5 U.S.C. §§ 603, 611(a),(c). *See United States Cellular Corporation v. FCC*, 254 F.3d 78 (D.C. Cir. 2001); *Allied Local & Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000).

[107] *See Further Notice*, Initial Regulatory Flexibility Analysis, 21 FCC Rcd 1753 (2006). We also note that one of Joint Petitioners' primary claims—that retroactive application of the unjust enrichment rules violates the RFA—has been rendered moot by this *Order on Reconsideration*, which clarifies that the ten-year unjust enrichment schedule applies only to licenses initially granted to designated entities after April 25, 2006.

the Final Regulatory Flexibility Analysis ("FRFA") based on charges of inadequate notice and lack of opportunity for comment is also without merit.

44. We also disagree with the claims of the Joint Petitioners that we failed to describe significant alternatives to the rules we adopted in order to minimize any significant economic impact on small entities as required by the RFA. The Final Regulatory Flexibility Analysis ("FRFA") in the *Second Report and Order* referred to the substantive part of the Order, which discussed in great depth the impact of the rules on small businesses, alternatives considered, and why the Commission adopted the rules at issue. Reiteration of the discussion of the impact on small businesses in the FRFA is not required by the RFA,[108] and such reiteration would have been repetitive here, as analyses of alternatives related to small businesses infuse the decision. In adopting our rule modifications to better achieve Congress's plan, we fully explained that we were finding a "reasonable balance between the competing goals of first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses."[109] Consistent with previous changes we

[108] 108 *See* 5 U.S.C. § 605(a) ("Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.").

[109] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 8.

have made to our designated entity rules, the rule modifications at issue were the result of trying to maintain this balance in "the face of a rapidly evolving telecommunications industry, legislative changes, judicial decisions, and the demand of the public for greater access to wireless services."[110] Moreover, as evidenced by the expansive record compiled in this docket and our decision to defer the adoption of further rules, if any, until after we had provided additional opportunity for parties to comment, we adopted only those rules that we concluded were clearly warranted to deter abuse of the Commission's designated entity program.[111] Consequently, we believe that our analysis fully complied with the requirements of the RFA.[112]

IV. CONCLUSION

45. For all of the reasons set forth above, we clarify certain aspects of the S*econd Report and Order* as well as our rules for determining the eligibility of applicants for size-based benefits in the context of competitive bidding.

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[110] *Id.*

[111] *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 23.

[112] *United States Cellular Corporation v. FCC*, 254 F.3d 78 (D.C. Cir. 2001)(holding that "[p]urely procedural . . . RFA section 604 requires nothing more than that the agency file a FRFA demonstrating a 'reasonable good faith effort to carry out [RFA's] mandate.' *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000).").

V. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

46. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

B. Congressional Review Act

47. The Commission will include a copy of this Order on Reconsideration of the Second Report and Order in a report it will send to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

C. Effective Date

48. This Order on Reconsideration of the Second Report and Order and the accompanying rule changes are effective upon publication in the Federal Register. We find there is good cause under section 553(d)(3) of the Administrative Procedure Act[113] to make the changes we implement with this Order effective upon Federal Register publication, without the usual 30-day period, because these changes (with the possible exception of those concerning the unjust enrichment rules) constitute minor points of clarification of the rules adopted in the Designated Entity Second Report and Order, which

[113] 5 U.S.C. §553(d).

were published in the Federal Register on May 4, 2006.[114] As to the clarifying changes in our unjust enrichment rules,[115] these changes, at most, serve to "grant[ ] or recognize[ ] an exemption or relieve[ ] a restriction" and would therefore fall within the exception contained in section 553(d)(1).[116]

VI. ORDERING CLAUSE

49. IT IS ORDERED that pursuant to the authority granted in Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this Order on Reconsideration of the Second Report and Order, is hereby ADOPTED and Part 1, Subpart Q of the Commission's rules are amended as set forth in the Appendix, effective upon the publication of this Order on Reconsideration in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[114] 71 Fed. Reg. 26,245, May 4, 2006.

[115] 47 C.F.R. § 1.2111 as revised herein.

[116] 5 U.S.C. § 553(d)(1).

APPENDIX

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1 – PRACTICE AND PROCEDURE

For the reasons discussed in the preamble, the FCC amends part 1 of the Code of Federal Regulations to read as follows:

1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

2. Revise paragraphs (a), (b) introductory text, and (d)(2) of § 1.2111 to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for

the transfer or assignment of its license (see § 1.948). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) Unjust enrichment payment: set-aside. As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's rules) of, or for entry into a material relationship (see §§ 1.2110, 1.2114) (otherwise permitted under the Commission's rules) involving, a license acquired by the applicant pursuant to a set-aside for eligible designated entities under § 1.2110(c), or which proposes to take any other action relating to ownership or control that will result in loss of eligibility as a designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No Payment will be required if:

* * * * *

(d) * * *

(2) Payment schedule.

(i) For licenses initially granted after April 25, 2006, the amount of payments made pursuant to paragraph

(d)(1) of this section will be 100 percent of the value of the bidding credit prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met. If the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met, the amount of the payments will be reduced over time as follows:

(A) A loss of eligibility in the first five years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 100 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(B) A loss of eligibility in years 6 and 7 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 75 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(C) A loss of eligibility in years 8 and 9 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 50 percent of the difference between the bidding credit received and the bidding credit for which it is eligible); and

(D) A loss of eligibility in year 10 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 25 percent of the difference between the bidding credit received and the bidding credit for which it is eligible).

(ii) For licenses initially granted before April 25, 2006, the amount of payments made pursuant to paragraph

(d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) For a transfer in year 6 or thereafter, there will be no payment.

(iii) These payments will have to be paid to the United States Treasury as a condition of approval of the assign-

ment, transfer, ownership change, or reportable eligibility event (see §1.2114).

* * * * *

3. Revise paragraph (a) of §1.2114 to read as follows:

§ 1.2114 Reporting of Eligibility Event.

(a) A designated entity must seek Commission approval for all reportable eligibility events. A reportable eligibility event is:

(1) Any spectrum lease (as defined in § 1.9003) or resale arrangement (including wholesale agreements) with one entity or on a cumulative basis that might cause a licensee to lose eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under § 1.2110 and applicable service-specific rules.

(2) Any other event that might lead to a change in the eligibility of a licensee for designated entity benefits.

* * * * *

STATEMENT OF CHAIRMAN KEVIN J. MARTIN

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Order on Reconsideration of the Second Report and Order (WT Docket No. 05-211), FCC 06-78

These changes to our designated entity rules arose out of a last-minute proposal in the proceeding to adopt rules for the Advanced Wireless Services spectrum. While I supported examining potential changes to our designated entity rules for future auctions, I did not believe the rules needed to be changed, especially in advance of the auction this summer. Nevertheless, I agreed to the changes in order to obtain the support needed to establish the rules for wireless services that were essential to making the spectrum available for wireless broadband services this summer.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures (Order on Reconsideration of the Second R&O, WT Docket No. 05-211).

Today's reconsideration order reaffirms that this Commission will not tolerate unjust enrichment or fraud in the Designated Entity (DE) program. In light of allegations that some of our prior auctions were tainted by such practices, I believe we have a clear duty to take affirmative action to eliminate loopholes in our existing rules.

I repeat here what I have stated previously—we should have begun our consideration of these rules last summer. That would have given us an opportunity to reach consensus on the important question of which companies should be allowed to acquire a partnership interest in a DE. Unfortunately, revisiting that question at this point would mean further postponing the long-scheduled AWS auction. That we cannot do.

Study after study demonstrates that our nation's broadband infrastructure lags dramatically behind other industrialized nations. In order to reverse this trend, we must encourage "third pipe" technologies to provide some at least some challenge to the cable/telco broadband duopoly in our cities. In rural areas, the situation is even graver. The GAO recently announced that the Commission has not even properly *measured* the rural-urban broadband gap—a gap that no one disputes is both significant and deeply troubling. In underserved

rural regions of our country, AWS spectrum can provide a desperately needed "first pipe." The upcoming auction can be an important step in making this happen.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, CONCURRING IN PART

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures; Order on Reconsideration of the Second Report and Order; WT Docket No. 05-211

I support the specific clarifications in this Order on Reconsideration because they in part respond to legitimate concerns from designated entities regarding the possibly retroactive application of new rules. I have this lingering concern, though, that the Commission's course of action in this troubled proceeding, notwithstanding the legal maneuvering in this decision, may still leave other issues unresolved. As I have noted before, much of this uncertainty could have been avoided had we started this proceeding earlier and kept it more narrowly focused. I hope that the Commission's decisions over the past several months do not prove to be the undoing of our most significant auction in 10 years.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE
APPROVING IN PART, CONCURRING IN PART

Re: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Order on Reconsideration of the Second Report and Order (WT Docket No. 05-211)

Just last week, I was able to observe first-hand some of the most extraordinary applications of digital communications services in our country, from life-saving telemedicine in very remote villages, to the participation of a parent via satellite in a child's graduation hundreds of miles away. These experiences that we in the lower 48 states take for granted are major feats of coordination in Alaska. I also heard from many of those whose participation in the designated entity ("DE") program is critical to those same remote citizens. I am sympathetic to the concerns of DEs, who argue that requiring repayment of license discounts prior to the end of a ten year "hold period" will discourage investment and potentially limit a significant portion of designated entity participation in future spectrum auctions.

However, as always, our decision involves a balancing of interests. I therefore concur in this decision knowing that our efforts were to strengthen, not weaken, the purposes of the DE program to ensure against the potential for fraud, waste, and abuse, as well as to provide adequate notice in order that the AWS auction can occur in a timely and fair manner.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WT Docket No. 05-211

IN THE MATTER OF
IMPLEMENTATION OF THE COMMERCIAL SPECTRUM ENHANCEMENT ACT AND MODERNIZATION OF THE COMMISSION'S COMPETITIVE BIDDING RULES AND PROCEDURES

Adopted: Mar. 24, 2008
Released: Mar. 26, 2008

SECOND ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER

By the Commission:

1. In this Second Order on Reconsideration, we formally deny a Petition for Expedited Reconsideration ("Petition") filed in this proceeding by Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council (collectively, the "Joint Petitioners").[1]

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[1] Petition for Expedited Reconsideration, filed by Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council, dated May 5, 2006 (the "Petition").

2. The Petition sought reconsideration of various decisions we made in the *Second Report and Order* released on April 25, 2006, which modified our Part 1 competitive bidding rules governing designated entities, including rules on eligibility for benefits and unjust enrichment.[2] The *Second Report and Order* was published in the Federal Register on May 4, 2006.[3] Joint Petitioners filed their Petition on May 5, 2006. On June 2, 2006, prior to the deadline for filing petitions for reconsideration of the *Second Report and Order*,[4] we released, *sua sponte*, an *Order on Reconsideration*, which considered and rejected the arguments included in the Petition without formally denying the Petition.[5] The *Order on*

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[2] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) ("*Second Report and Order*"). "Designated entities" are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. *See* 47 C.F.R. § 1.2110(a). Unless otherwise noted, when referring to "designated entities," we include as a subgroup "entrepreneurs" eligible to bid for "set-aside" broadband Personal Communications Service licenses offered in closed bidding. *See id*. §§ 1.2110(a), 24.709.

[3] 71 Fed. Reg. 26,245 (May 4, 2006).

[4] *See* 47 C.F.R. §§ 1.4, 1.429.

[5] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd 6703 (2006) ("*Order on Reconsideration*"). Subsequent to adoption of the *Order on Reconsideration*, we received two additional timely petitions for reconsideration of the *Second Report and Order*. *See* Petition for Partial Reconsideration and/or Clarification, filed by the Blooston Rural Carriers, dated June 2, 2006; Petition for Reconsideration and Clarification, filed by Cook Inlet Region, Inc., dated June 5, 2006.

Reconsideration was published in the Federal Register on June 14, 2006.[6]

3. In a July 2006 letter to the Commission, Joint Petitioners stated that the Commission had already decided the merits of the Petition and that the Joint Petitioners were no longer seeking reconsideration.[7] Accordingly, they ask that we formally dispose of their Petition in order to take "the *de jure* action" we had already "taken *de facto*."[8] We agree with Joint Petitioners that we already decided the merits of the Petition in the *Order on Reconsideration*. As Joint Petitioners have stated, the *Order on Reconsideration* "was . . . a conclusive rejection of Petitioners' legal arguments,"[9] and, as such, we need go no further here.

4. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), the Petition is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[6] 71 Fed. Reg. 34,272 (June 14, 2006).

[7] Letter, filed by Dennis P. Corbett and S. Jennell Trigg, Counsel for the Joint Petitioners, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 24, 2006.

[8] *Id*. at 2.

[9] Petition for Writ of Mandamus, *In re Council Tree Communications, et al.*, 07-4124, at 20 (3d Cir. filed Oct. 23, 2007).