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.

* * *

* * * * *

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).