No. 15-3754

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE INVESTORS, INC.

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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INTRODUCTION

A bidding credit is a discount on the amount a winning bidder must pay at auction to acquire a license to use electromagnetic spectrum to provide communications services in a specific geographic area. It is designed to ensure that "small businesses" are given "the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). For purposes of the FCC's Broadcast Incentive Auction, a small business is defined as one with average annual gross revenues over the previous three years of no more than $55 million.

In the order on review, the FCC implemented this statutory provision by making available bidding credits of up to $150 million to small business bidders in the Broadcast Incentive Auction. That means that a small business could bid as much as $1 billion for a license in that auction and receive the full amount of a 15% bidding credit.

Petitioner Council Tree believes that the $150 million bidding credit limit is insufficient. It believes the bidding credit cap should be higher – or that there should be no cap at all. Council Tree argues further that the Communications Act *entitles* it to higher bidding credits, and that it was unreasonable for the FCC to establish the cap at $150 million.

Council Tree is mistaken on both counts. On the basis of its overbroad and mistaken reading of the statute, Council Tree adopted a strategy to acquire significant spectrum in the Broadcast Incentive Auction by reliance on a presumed level of bidding credits that exceeds the cap that the FCC established. But nothing in the Communications Act mandates any particular level of bidding credits or requires the FCC to ensure that Council Tree successfully implements its bidding strategy, however ambitious that may be. The FCC's reasonable $150 million bidding credit cap in the Broadcast Incentive Auction surely gives small businesses "the opportunity to participate" in that auction, and thus is consistent with the statute. It is also a reasonable decision, reasonably explained.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the FCC's rule imposing a cap on the amount of bidding credits an eligible entity can receive in a spectrum auction is consistent with the Communications Act and reasonable.

JURISDICTION

Petitioner Council Tree Investors, Inc. seeks review of a *Report and Order* of the Federal Communications Commission that was released on July 21, 2015. *In the Matter of Updating Part I Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc and EchoStar for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and Procedures*, 30 FCC Rcd 7493 (2015) (JA --) ("*Order*"). A synopsis of the *Report and Order* was published in the Federal Register on September 18, 2015. 80 Fed.Reg. 56764. The petition for review was timely filed on November 13, 2015. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. SPECTRUM LICENSE AUCTIONS AND "DESIGNATED ENTITIES"

The Communications Act of 1934 authorizes the FCC to award licenses to use the electromagnetic spectrum to provide communications services. *See* 47 U.S.C. §§ 307, 309. Since 1993, the Act has required the Commission to award most spectrum licenses "through a system of competitive bidding," *i.e.,* by auction. 47 U.S.C. § 309(j)(1).

The statute directs the Commission to design auction rules and procedures that "balance a number of potentially conflicting objectives." *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999). These objectives include: " development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays," 47 U.S.C. § 309(j)(3)(A); "recovery for the public of a portion of the value of the public spectrum resource," while avoiding "unjust enrichment" of winning bidders as a result of the auction's design, *id.* § 309(j)(3)(C); ensuring the "efficient and intensive use of the electromagnetic spectrum," *id.* § 309(j)(3)(D); and "promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," including several statutorily prescribed groups commonly referred to as "designated entities" ("DEs"): "small

businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B).[1]

To ensure that these designated entities "are given the opportunity to participate in the provision of spectrum services," 47 U.S.C. § 309(j)(4)(D), the Commission, in addition to other things, has made them eligible for bidding credits in spectrum auctions. *Id.*[2] Such credits discount the payments designated entities are required to make for licenses they win at auction "in an amount measured as a percentage" of their winning bids. *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 239 (3d Cir. 2010), *cert. denied*, 563 U.S. 903 (2011) ("*Council Tree III*") (citing 47 C.F.R. § 1.2110(f)(2)(i) – (iii)). For example, if a company that meets the designated entity criteria qualifies for a 15 percent bidding credit in a particular auction,

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[1] Although the statute lists businesses owned by members of minority groups and women, and the FCC's implementing rules define "designated entities" to include such businesses, 47 C.F.R. § 1.2110(a), the Commission eliminated any designated entity benefits that were based on the race or gender of an applicant's owners after the Supreme Court ruled in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), that certain federal affirmative action programs were unconstitutional. *See Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996). Following *Adarand*, and until the adoption of a rural service provider bidding credit in the *Order* under review here, bidding credits have been available only to eligible small businesses based on specific size standards. See *Order* ¶133 (JA --).

[2] The Commission initially adopted additional policies to implement Section 309(j), including limiting bidding eligibility in some auctions to certain small business entities and providing other rules to enhance opportunities for women- and minority-owned businesses. *See Omnipoint*, 78 F.3d at 626.

and it makes a winning bid of $1 billion for a license in that auction, it will be required to pay only $850 million to obtain that license – in essence receiving a $150 million discount on the winning bid amount.

To qualify for a bidding credit, a small business must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below certain revenue thresholds that vary by auction, based on the capital requirements presented by the service and the inventory of licenses being auctioned. *See Order* ¶74 (JA --).[3] For purposes of assessing an applicant's eligibility for bidding credits, the Commission has since 2000 attributed to the applicant: the applicant's own gross revenues; those of its affiliates; those of its "controlling interests" (*i.e.,* those entities that have *de jure* or *de facto* control over the applicant); and those of the affiliates of its controlling interests. *Id.* ¶¶10, 29 (JA --).

The agency has also taken further steps to ensure that only legitimate small businesses reap the benefits of the Commission's designated entity program. *See Updating Part 1 Competitive Bidding Rules*, 29 FCC Rcd 1246 ¶42 (2014) (*Part 1 NPRM*) (JA --). For example, under the FCC's unjust enrichment rules, a designated entity that has used bidding credits to acquire a license must return some or all of the value of those credits if, in the five years after issuance of the license, it

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[3] 47 C.F.R. § 1.2110(b); *see, e.g.*, 47 C.F.R. §§ 1.2110(f)(2)(i)(C), 27.1301(a)(1) (providing for three tiers of small business bidding credits for entities that have average annual gross revenues for the preceding three years of $4 million, $20 million, and $55 million).

loses some or all of its eligibility for bidding credits or subsequently transfers the license to an entity that is not eligible for designated entity. *See* 47 C.F.R. § 1.2111(b).

B. THE 2006 DESIGNATED ENTITY ORDER AND RESULTING LITIGATION

The FCC has recalibrated its designated entity rules multiple times over the years, on the basis of its experience in conducting auctions and to combat fraud and abuse of the program. Most relevant here, in April 2006 – in an effort to prevent fraud and abuse in the designated entity program – the Commission adopted two new eligibility restrictions designed to ensure that every recipient of designated entity benefits uses its licenses to provide telecommunications services directly to the public. *Second Report and Order and Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (*DE Second Report and Order*). One restriction – the 25% Attribution Rule – provided that "if a DE leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee's or purchaser's revenues to its own to determine its continued eligibility for DE credits." *Council Tree III*, 619 F.3d at 251 (citing 47 C.F.R. § 1.2110(b)(1)(i) and (b)(3)(iv)(B)). The other restriction – the 50% Impermissible Relationship Rule – disqualified license applicants or licensees for designated entity benefits "if they lease[d] or [resold] (including at wholesale) more than

50% of their spectrum capacity" on an aggregate basis. *Id.* at 253 (citing 47 C.F.R. § 1.2110(b)(3)(iv)(A)).

In the 2006 Order the Commission also strengthened its unjust enrichment rule by extending to ten years (rather than five years) the repayment period. Under the Ten-Year Repayment Schedule, a designated entity that transferred a license to a non-designated entity or otherwise lost eligibility for designated entity benefits at any time during the first ten years of its license would have to repay some or all of the value of its bidding credits. *See Council Tree III*, 619 F.3d at 240-41.

The FCC conducted two major spectrum license auctions while the designated entity rules contained in the 2006 Order – including the 25% Attribution Rule, the 50% Impermissible Relationship Rule, and the Ten-Year Repayment Schedule – were in effect:

In 2006, the Commission held Auction 66. That auction yielded "nearly $14 billion in winning bids." *Council Tree III*, 619 F.3d at 248. Designated entities accounted for "57 of the 104 winning bidders," "winning 20% of the individual licenses auctioned." *Id.* Although non-designated entities won a substantial majority of the most expensive licenses, two designated entities were among the top ten winners in terms of dollar amount. *Id.*

Auction 73, conducted in early 2008, involved reallocation of the 700 MHz spectrum that television broadcasters had relinquished in converting from analog to digital broadcast format. Auction 73 "generated about $19 billion in winning bids."

Council Tree III, 619 F.3d at 248. Designated entities in Auction 73 comprised 119 of 214 qualified bidders and 56 of the 101 winners, and won 35% of the individual licenses. *Id.*

Council Tree challenged the 2006 rule revisions and subsequent Commission designated entity orders at virtually every turn.

Council Tree I In June 2006, Council Tree and others challenged the 2006 Order in this Court. Council Tree also asked this Court to stay an upcoming auction using those new rules pending judicial review. The Court denied petitioners' stay request, concluding that "[t]he public interest … militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date." *Council Tree Communications, Inc. v. FCC*, No. 06-2943, Order at 6 (3d Cir., June 29, 2006). After briefing on the merits, the Court, in September 2007, dismissed the petition for review as "incurably premature" because Council Tree had a petition for reconsideration pending before the Commission and because the petition for review was filed before the 2006 Order was published in the Federal Register. *Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 287-91 (3d Cir. 2007).

Council Tree II In 2007, Council Tree attempted to obtain review of the application of the 2006 rules to Auction 73 by challenging – this time in the D.C. Circuit – a Commission order that had adopted additional service-specific rules (unrelated to the designated entity rules) to govern the licenses that would be made available at Auction 73.

In an unpublished judgment, the D.C. Circuit dismissed Council Tree's challenge as untimely. *Council Tree Communications, Inc. v. FCC*, 324 F. App'x 3, 4-5 (D.C. Cir. 2007). Council Tree sought rehearing or rehearing *en banc*, which was denied.

Council Tree III In 2008, Council Tree filed a new petition for review in this Court. It contended that the 2006 designated entity rules adopted in the *DE Second Report & Order*, as modified by the Commission on reconsideration, violated the Communications Act and APA. Petitioners asked that the rules be vacated, and also urged the court to unwind Auctions 66 and 73 and to order that those auctions be conducted again without the offending designated entity rules.

This Court granted the petition in part and denied it in part. *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 248-59 (3d Cir. 2010). Most important for present purposes, the Court rejected the only substantive challenge to the revised designated entity rules that the Court reached – a challenge to the 25% Attribution Rule. *Id*. at 251-253. Council Tree argued that the rule was arbitrary and capricious because "the FCC made no findings on the impact it would have on the ability of DEs to procure financing." *Id.* at 251. The Court held that the FCC appropriately "engaged in a line-drawing exercise in an attempt to prevent unjust enrichment without unduly impairing DEs' capital access." *Id.* at 251-252.

The Court also rejected a "subsidiary argument" that Council Tree made – that "the new rules present such obstacles to small businesses' participation in FCC

auctions that they violate 47 U.S.C. § 309(j)(3)(B)'s requirement that the Commission 'seek to promote' the objective of 'economic opportunity and competition … by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies.'" *Id.* at 249 n.7 (quoting 47 U.S.C. § 309(j)(3)(B)) (alterations in original). The Court noted that the statute includes other competing requirements: It "also requires the FCC to promote the development and deployment of new technologies and services, recover a portion of the value of the spectrum and prevent unjust enrichment, and ensure efficient and intensive use of the spectrum. *Id.* (citations to other subsections of 47 U.S.C. § 309(j)(3) omitted). The Court also noted that there was "general agreement that the DE program can be abused," and flagged the fact that there had been "continuing participation by DEs in auctions held under the new rules." *Id.* Thus, the Court held, "we cannot conclude that the FCC has failed to promote small-business participation at all." *Id.*

The Court did, however, strike down two of the three new rules in the 2006 Order on the ground that the Commission had provided inadequate notice of those rule changes under the APA. *Council Tree III*, 619 F.3d at 253-57. In particular, it held that there had been inadequate notice of the Impermissible Relationship and Ten-year Repayment rules. *Id.* at 253-56.

Having held that there was an APA violation with respect to two of the three new rules, the Court was confronted with the question of remedy. The Court vacated the two rules rather than merely remanding to the agency. *Id.* at 258. But the Court expressly declined Council Tree's request that the Court "rescind Auctions 66 and 73," which had been conducted pursuant to the now-vacated rules. *Council Tree III*, 619 F.3d at 257. The Court reasoned that rescission of those auctions "would have broad negative implications for the public interest," concluding that "it would be imprudent and unfair to order rescission of the auction results." *Id.* at 257-58. Instead, the Court decided to leave the auction results undisturbed. *Id.*

Council Tree IV In 2012, Council Tree sought review in the Tenth Circuit of two Commission orders that granted – and dismissed reconsideration of – a narrow waiver of one designated entity eligibility rule for a single license in Auction 73 that was never ultimately awarded.[4] The Tenth Circuit rejected Council Tree's challenge, holding that the *Waiver Order* was not a reviewable order and that the Commission's dismissals of Council Tree's reconsideration petition and the supplement to that petition were reasonable. *Council Tree Communications, Inc. v . FCC*, 739 F.3d 544, 551-58 (10th Cir. 2014),

[4] *See Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules*, 22 FCC Rcd 20354 (2007), *pet. for recon. dismissed*, 27 FCC Rcd 908 (2012).

II. THE ORDER ON REVIEW

In 2014, the FCC began a rulemaking proceeding to revise its "competitive bidding rules for the first time in years." *In the Matter of Updating Part 1 Competitive Bidding Rules, et al.*, 29 FCC Rcd 12426, 12427 ¶1 (2014) ("*NPRM*") (JA --). The Commission explained that it was "particularly important" to update these rules in light of the then-upcoming (and now underway) Broadcast Incentive Auction, which "holds historic potential for interested applicants to acquire licenses for" certain scarce low-band radio spectrum.[5] *Id.* In particular, the Commission proposed to "revisit the Commission's small business eligibility rules and evaluate whether to rebalance our competing goals in order to provide small businesses additional opportunities to gain access to new sources of capital necessary for participation in the provision of spectrum based services in today's marketplace, while guarding against unjust enrichment of ineligible entities." *Id.* ¶20 (JA --). The Commission proposed a number of new or revised rules in this area. In particular, the *NPRM* focused on bidding credits, proposing rule modifications that would, among other things, address "changes in the marketplace" and also "advance the

[5] This auction, which began in March 2016, was authorized by Congress to encourage television broadcasters "to relinquish … some or all of [their] licensed spectrum usage rights" and to reallocate a portion of the broadcast television spectrum for other uses, such as mobile broadband service. 47 U.S.C. §§ 309(j)(8)(G)(i), 1452(a)(1). *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Tit. VI, 126 Stat. 156, 201-55; *National Ass'n of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (denying review of challenges to FCC rules implementing incentive auction).

statutory directive" that designated entities "are given the opportunity to participate in the provision of spectrum-base services." *Id.*; *see generally id.* ¶¶50-77 (JA --).

In April 2015, the Commission sought additional comments on how it could meet its "statutory obligation to ensure that small business, rural telephone companies, and businesses owned by members of minority groups and women … have an opportunity to participate in the provision of spectrum based services, while at the same time ensuring that there are adequate safeguards to protect against unjust enrichment." Public Notice, *Request for Further Comment on Issues Related to Competitive Bidding Proceeding*, 30 FCC Rcd 4153 ¶1 (2015) (*Further Notice*) (JA --).

In addition to other specific matters, the *Further Notice* sought comments on a proposal made by several commenters in response to the *NPRM* that it "[l]imit the total dollar amount of DE benefits that any DE (or group of affiliated DEs) may claim during any given auction … to 'ensure that DEs cannot acquire spectrum in a manner that is wildly disproportionate to the concept of a small business.'" *Id.* ¶10 (JA --).

In July 2015, the Commission adopted the *Report and Order* that is now before the Court in this case. *In the Matter of Updating Part I Competitive Bidding Rules, et al.*, 30 FCC Rcd 7493 (2015) (*Order*) (JA --) . The Commission explained that the *Order* "modernizes and reforms the Commission's … competitive bidding rules to reflect profound changes in the wireless industry over the last dec-

ade." *Id.* ¶1 (JA --). These reforms "reflect that the wireless market is vastly different than when our rules were first adopted nearly two decades ago – and since they were last comprehensively revised in 2006." *Id.*

In addition, the *Order* provided greater flexibility to smaller companies and rural service providers to build wireless businesses that can spur additional investment in, and bring greater choice to, consumers. Among other things, these reforms facilitate greater leasing of spectrum by designated entities, increase the revenue thresholds by which entities can qualify for small business bidding credits to reflect inflation, offer for the first time a 15 percent credit to eligible rural service providers to increase competition, and restrict joint bidding to promote a competitive auction environment for smaller entities and others. *See generally Order* ¶¶18-39, 69-108, 180-202 (JA --).

Council Tree challenges here only one aspect of those new and revised rules – the adoption of a bidding credit cap that requires the Commission to set a monetary limit on the amount of bidding credits that a designated entity can receive in any given auction.[6] The Commission explained that even with the cap, bidding credits provided pursuant to the designated entity program would continue to assist designated entities' participation in auctions, "as well as provide some level of as-

[6] Council Tree also challenges the specific caps adopted by the Commission for the purpose of the Broadcast Incentive Auction. *See Order* ¶74 (JA --).

surance that bidding activity by small businesses and rural service providers is consistent with their relative business size and plans." *Order* ¶111 (JA --). Imposing such a cap on bidding credits, the Commission concluded, would provide an "important additional safeguard – or backstop – that will prevent misconduct in a manner that is simple and straightforward to implement [and that] will not impose an artificial restriction on the amount DEs are likely to bid." *Id.* ¶112 (JA --).

Rather than set a flat cap on bidding credits in all auctions, the Commission adopted "a process for establishing a reasonable monetary limit or cap on the total amount of bidding credits that an eligible small business or rural service provider may be awarded in any particular auction." *Order* ¶114 (JA --). The limit, the Commission stated, would be adopted on an "auction-by-auction basis, based on an evaluation of the expected capital requirements presented by the particular service being auctioned, and the inventory or licenses to be auctioned." The Commission adopted a baseline minimum bidding credit cap of $25 million, noting that that level "would have allowed the vast majority of small businesses to take full advantage of the Commission's bidding credit program in three recent major auctions. *Id.* ¶115. It pointed out that in those auctions a $25 million bidding credit cap would have permitted 95%, 98% and 73%, respectively, "of small businesses … to realize the full value of their bidding credit based on their gross winning bid amount." *Id.* n.367 (JA --).

For the Broadcast Incentive Auction, the Commission adopted a bidding credit cap of $150 million. *Id.* ¶¶122-126 (JA --). The Commission concluded that this significant upward adjustment from the $25 million baseline was "warranted in light of the significant value of the 600 MHz spectrum to be auctioned and associated capital requirements," finding that the $150 million cap "will ensure that smaller businesses are not disadvantaged vis-à-vis larger bidders and have the opportunity to compete in a meaningful way." *Id.* ¶123 (JA --).[7]

The Commission disagreed with complaints of some commenters that adoption of a bidding credit cap would significantly limit designated entities' ability to obtain spectrum in more than one market and could effectively end the designated entity program entirely. It noted that the caps would be adjusted to the needs of each auction (as the cap was adjusted for the Broadcast Incentive Auction) and that the rule changes "will not foreclose the ability for designated entities to participate in auctions when their auction bids fall above the cap; rather, such entities may still receive a bidding credit discount of up to the designated cap for that auction and then pay the excess above that amount." *Order* ¶118 (JA --).

The Commission similarly rejected arguments that the bidding credit cap was inconsistent with the statute's objectives, including promoting competition and

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[7] The Commission adopted a different $10 million cap that applies in the Incentive Auction in small markets. The purpose of that cap was to "create parity in the Incentive Auction among small businesses and eligible rural service providers competing against each other in smaller markets …." *Order* ¶¶127-28 (JA --).

avoiding license concentration. The Commission explained that it had "consistently determined that section 309(j) does not charge the Commission with providing entities with generalized economic assistance or a path to success, but rather with the responsibility and the discretion to provide opportunities for small businesses while preventing the unjust enrichment of ineligible entities." *Order* ¶119 (JA --). The Commission found that it would achieve its "statutory goals of benefitting DEs and at the same time preventing unjust enrichment" by "establishing parameters significant enough to assist eligible entities to have the opportunity to compete at auction, but reasonable enough to ensure that ineligible entities are not encouraged to undercut our rules." *Id.* ¶120 (JA --).

Council Tree then filed its petition for review in this Court challenging the adoption of the bidding credit cap.

SUMMARY OF ARGUMENT

The FCC's statutory authority to conduct spectrum auctions in Section 309(j) of the Communications Act requires the agency to balance a variety of goals, including, but not limited to, promoting economic opportunity and competition and avoiding excessive concentration of licenses, as well as giving small businesses an opportunity to participate in the provision of spectrum based services. The rules at issue in this case seek to promote auction participation by designated entities while limiting the potential and incentives for abuse. They reflect the

agency's reasonable judgment on how best to balance the statutory goals and are well within the Commission's statutory discretion. In *Council Tree III* this Court rejected a similar challenge by the petitioner here to the Commission's bidding credit rules, holding that the rules were lawful because the Court could not "conclude that the FCC has failed to promote small business participation at all." 619 F.3d at 249 n.7. The Commission's action here also is fully consistent with the statute.

The Commission also reasonably considered the relevant factors in adopting the bidding credit cap. The Commission found, based on an analysis of past auctions, that the cap would have little if any effect on real small businesses but would limit the potential and incentives for abuse of bidding credits by entities not eligible for bidding credits. The Commission concluded that limiting entities' ability to "game the system" by adopting a limited cap on bidding credits furthers the statute's goal of preventing "unjust enrichment."

Council Tree argues that the Commission's caps are unreasonable because they "*necessarily* work against the statutory mandates of promoting competition and avoiding license concentration." Br. 42. Not so. The argument rests on the unsound assumption that any Commission rule adopted to carry out the objectives of Section 309(j) must fulfill every statutory objective. In any event, the Commission explained that the caps would actually "help the very entities we seek to benefit, as well as provide some level of assurance that bidding activity by small businesses

and rural service providers is consistent with their relative business size and plans." *Order* ¶111 (JA --)

Nor is there any merit to Council Tree's argument that the bidding credit cap would harm small businesses. The cap would allow small businesses to receive up to at least a $25 million discount on bids in any future spectrum auction. And in the ongoing Broadcast Incentive Auction, designated entities can receive discounts of up to $150 million on their bids. For a designated entity with annual income under $55 million that receives a 15% bidding credit, the bidder's discount would not even be affected by the bidding credit cap unless its bids in the auction exceed $1 billion.[8] No reasonable conception of a *small business* bidding credit could conclude that such a limitation is unreasonable, when enacted to ensure that those credits assist real small businesses but not others intent on gaming the system.

Council Tree also challenges the levels of the bidding credit caps adopted, both in general and with respect to the specific caps applicable to the Broadcast Incentive Auction. This argument was not raised before the Commission and thus may not be raised on review. 47 U.S.C. § 405(a); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 454 (3d Cir. 2011). In any event, the record supported the Commission's conclusion that the caps adopted were reasonable and would permit

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[8] Designated entities with annual income below $55 million receive a 15% discount. For small businesses with annual income below $20 million, the credit is 25%, and thus the cap starts reducing the bidding credit if the designated entities' bids exceed $600 million.

nearly all eligible small business entities to realize the full value of the applicable bidding credit. And the Commission reasonably noted that its duty under Section 309(j) is to "provide opportunities for small businesses," not to provide "generalized economic assistance or a path to success." *Order* ¶119 (JA --).

Council Tree argues that, if the Court grants the Petition for Review, the Court should remand to the Commission with instructions to vacate the results of the Broadcast Incentive Auction. Even if the Court were to conclude that the bidding credit caps were not lawfully adopted, setting aside that auction in addition to vacating the rule would be unwarranted. Preparatory work for that auction began almost five years ago, and the auction has been ongoing since March 2016. The Commission and numerous participants have invested enormous resources in its conduct. And Council Tree never asked the Commission or a court to stay the auction. In similar circumstance, the Court in *Council Tree III* rejected a parallel request by Council Tree to set aside the results of two prior auctions. The Court should follow the same course here.

STANDARD OF REVIEW

Review of challenges to the FCC's interpretation of the Communications Act is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed

intent of Congress." *Id.* at 842-43. But if the statute is silent or ambiguous with respect to the specific issue, "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Council Tree also challenges the reasonableness of the FCC's decision to modify its designated entity rules. The Court must affirm that decision unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Council Tree III*, 619 F.3d at 250-57. This "deferential standard" of review "presume[s] the validity of agency action." *SBC, Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005). The agency "need only set forth the basis of its administrative action 'with such clarity as to be understandable'; it need not provide a detailed statement of its reasoning and conclusions." *Kamara v. Attorney General*, 420 F.3d 202, 212 (3d Cir. 2005), quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Administrative decisions "of less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned." *South Trenton Residents Against 29 v. FHA*, 175 F.3d 658, 666 (3d Cir. 1999), quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). Moreover, judicial deference to the FCC's "expert policy judgment" is especially appropriate in cases like this one, where the "'subject mat-

ter … is technical, complex, and dynamic.'" *Brand X*, 545 U.S. at 1002-03, quoting *National Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002), and where the agency must make predictive judgments about market behavior within the industry it oversees. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

ARGUMENT

I. THE BIDDING CREDIT CAP RULE IS CONSISTENT WITH THE COMMUNICATIONS ACT AND REASONABLE.

A. THE RULE IS CONSISTENT WITH THE STATUTE.

Underlying much of Council Tree's brief is the never-quite-explicit argument that the Commission's bidding credit cap rule is inconsistent with Section 309(j) of the Communications Act. Perhaps the reason that Council Tree seeks to hide the fact the it is essentially making this statutory challenge is that the argument is entirely baseless. But because it colors everything else in the case, we begin by demonstrating that the bidding credit cap rule is fully consistent with the auction provisions of the Communications Act.

1. Section 309(j)(3) of the Act requires the FCC to balance a long list of competing statutory goals as it establishes rules for a system of competitive bidding for issuance of spectrum licenses. *Fresno Mobile Radio,* 165 F.3d at 971; *Melcher v. FCC*, 134 F.3d 1143, 1153-55 (D.C. Cir. 1998). *See* page 4, *supra.*

To be sure, one of the goals set out in Section 309(j) is that the Commission must "seek to promote … economic opportunity and competition … by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies," and to "ensure that small businesses [and] rural telephone companies … are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(3)(B), (j)(4)(D).

But the statute expressly leaves to the Commission the choice of specific "competitive bidding methodology." 47 U.S.C. § 309(j)(3). And the Commission's statutory objectives also include "development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays," *id.* § 309(j)(3)(A); "recovery for the public of a portion of the value of the public spectrum resource," while avoiding "unjust enrichment" of winning bidders as a result of the auction's design, *id.* § 309(j)(3)(C); and ensuring the "efficient and intensive use of the electromagnetic spectrum," *id.* § 309(j)(3)(D). The Commission also must impose "performance requirements" on successful bidders, *id.* § 309(j)(4)(B), and adopt such "antitrafficking restrictions … as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses." *Id.* § 309(j)(4)(E).

The Commission has periodically modified and refined is designated entity rules over the years to balance the statute's goals in light of its experiences in successive auctions and changes in the wireless marketplace. *See generally Council Tree III*, 619 F.3d at 238-48; *Council Tree IV*, 739 F.3d at 547-50. The amended rules in this case – which seek to promote auction participation by designated entities while limiting the potential and incentives for abuses – reflect the Commission's reasonable judgments on how best to balance the statutory goals in light of past experience, the record before it, and the urgency of proceeding with the Broadcast Incentive Auction. *See Order* ¶119 (JA --). The rules are well within the Commission's statutory discretion. Council Tree may prefer that the Commission would have struck a different balance that would provide it more generous bidding credit benefits, but that does not make the Commission rules legally infirm.

2. Although couched in terms of a failure-to-analyze argument based on *Motor Vehicle Manufacturers' Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), *see* Br. 31, the thrust of much of Council Tree's argument is really one of statutory interpretation: their contention is that the Communications Act *mandates* that the Commission give consideration to the goals of "promoting economic opportunity and competition" and "avoiding excessive concentration of licenses," 47 U.S.C. § 309(j)(3)(B), but that the Commission failed to do so. *See, e.g.*, Br. at 31-41.

For starters, this argument is incorrect as a factual matter. Council Tree's focus on the bidding credit cap ignores other action taken in the *Order* to promote economic opportunity and competition, which will help address the issue of concentration of licenses. For example, as we have noted above, the Commission adopted rule changes that facilitate greater leasing of spectrum by designated entities, increase the revenue thresholds by which entities can qualify for small business bidding credits to reflect inflation, extend for the first time a 15 percent credit to rural service providers to increase competition, and restrict joint bidding to promote a competitive auction environment for smaller entities and others. *See generally Order* ¶¶18-39, 69-108, 180-202 (JA --). The bidding credit cap is only one part of the mix of Commission policies to address the statutory goals.[9]

The argument is also based on the unstated – but false and entirely unsupported – premise that the appropriate question is whether this specific modification of the bidding credit rule in and of itself directly advances these select statutory goals. But that is not and cannot be the rule, or the rule would operate as a one-way ratchet. Rather, the appropriate question is whether the bidding credit program after this rule change advances the statutory goals versus a world without the bidding

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[9] *See also Policies Regarding Mobile Spectrum Holdings*, 29 FCC Rcd 6133, 6193 ¶146 (2014) (discussing adoption of program pursuant to 47 U.S.C. § 309(j)(17) that reserves some spectrum available in the Broadcast Incentive Auction for certain bidders "to ensure against excessive concentration in holdings of low-band spectrum); *see generally id.* at 6193-6219.

credit program; and there is no doubt that a bidding program that affords small businesses a bidding credit and caps the available credits at no less than $25 million – or in the case of the Broadcast Incentive Auction, up to a $150 million credit – increases economic opportunity and competition, in particular by increasing the number of small businesses that can successfully buy licenses at auction. *See Order* ¶¶4-5, 118 (JA --).

In any event, the argument is also legally baseless. Council Tree does not argue that the bidding credit rule with the cap does nothing to advance the participation of small businesses in auctions. But in *Council Tree III*, this Court held that where the Court could not "conclude that the FCC has failed to promote small business participation *at all*" in modifying designated entity rules, there was no basis for Council Tree's claim that the Commission had violated Section 309(j)(3)(B)'s requirement that it "'seek to promote' the objective of 'economic opportunity and competition … by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies.'" 619 F.3d at 249 n.7 (emphasis added).

Finally, even assuming counterfactually that the capped bidding credit rule did *nothing* to advance the statutory goal of increasing small-business participation in the wireless industry, the rule would still be statutorily allowable. It is well established that in balancing a lengthy set of statutory goals the Commission need

not give effect to every goal. "When an agency must balance a number of potentially conflicting objectives, … judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular." *Fresno Mobile*, 165 F.3d at 971. Indeed, the Commission specifically noted that it "is vested with broad discretion when balancing various statutory objectives." *Order* ¶119. The Court need not go so far as to find that the Commission could ignore this statutory goal entirely, though, as this case is controlled by the Court's conclusion in *Council Tree III* that any advancement of small business participation suffices for purposes of section 309(j)(3)(B).

3. Council Tree contends that Congress intended in Section 309(j) that the Commission implement the statute in a manner that will ensure that small businesses can compete in the largest markets against the largest competitors. *See, e.g.,* Br. at 27-28. Council Tree is mistaken. In the first place, as noted above, this Court in *Council Tree III* has already found that the language of the statute does not impose any such requirement on the FCC – if the rules advance small business participation "at all," they are valid. 619 F.3d at 249 n.7. Secondly, it was consistent with the statutory language for the Commission to construe the statute to establish broad discretion for it "to provide opportunities for small businesses" but not "gen-

eralized economic assistance or a path to success," particularly in the largest markets and against the largest competitors. *See Order* ¶119 (JA --).[10] The statutory language simply does not compel the result that Council Tree desires.

Unable to find statutory language to support its claim, Council Tree relies on legislative history of Section 309(j) to argue that "Congress intended the auctions to foster the creation of 'new companies or start-ups' that could take on 'incumbents' with their 'deep pockets'" and that a bidding credit cap is inconsistent with this intent. Br. 46. But under *Chevron* step two, the Commission's reasonable determination how to implement the ambiguous provisions of Section 309(j) is entitled to substantial deference on review. Moreover, Council Tree is relying on the policy views of legislators and Congressional committees. There is no reason to believe, in the absence of specific statutory language confining the agency's discretion, that Congress intended to bind the Commission to a single, immutable view of how to carry out the statute's objectives permanently. *See Order* ¶¶2, 3 (JA --) (noting the "vastly different" wireless marketplace from when the Commission

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[10] Council Tree's claim that the Commission has previously recognized a need for designated entities to have essentially unlimited bidding credits in order to compete with "deep-pocketed rivals" (Br. at 11) rests on extracts from past agency orders that were not discussing the appropriateness of adopting a bidding credit cap – and ignores the Commission's finding in this proceeding that the "wireless market is vastly different than when our [DE] rules were adopted first nearly two decades ago." *Order* ¶2 (JA --). *See* Br. 11, quoting *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, *Fifth Report & Order*, 9 FCC Rcd 5532 (1994).

first adopted designated entity rules following the enactment of Section 309(j) more than 20 years ago); *American Trucking Ass'ns, Inc v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967) ("[Agencies] are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."). The Commission's reasonable assessment that adoption of a bidding credit cap in today's more mature wireless market environment was consistent with the statute and well within the agency's discretion.

B. THE RULE REASONABLY IMPLEMENTS THE STATUTE'S AUCTION PROVISIONS.

Council Tree's APA arguments fare no better than its implicit statutory argument. The Commission reasonably considered the relevant factors and evidence in amending its bidding credit rule, and its decision to impose caps on designated entity bidding credits was neither procedurally nor substantively arbitrary or capricious.

1. The Commission's Order Was Based On A Reasonable Analysis.

Council Tree claims that the Commission violated the APA by failing "'to consider an important aspect of the problem' or 'articulate a satisfactory explanation for its action,'" because it did not provide a detailed analysis of how the bidding credit cap rule affects two specific statutory objectives set out in Section 309(j), out of the lengthy and at times conflicting sets of statutory objectives. Br. at 31, quoting *State Farm*, 463 U.S. at 43, 52. Contrary to Council Tree's claims, the

Commission fulfilled its APA responsibilities; it "examined the relevant data and articulated a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004), quoting *State Farm*, 463 U.S. at 43.

Council Tree's argument ignores the fact that the Commission capped bidding credits largely to advance *other*, statutorily delineated, objectives. It is self-evident that a cap—*any* cap—on bidding credits will in some fashion decrease the ability of small businesses to compete at auction. So too would be a decision to limit the percentage of the credit to, say, 25%, rather than 50%, 75%, or more. The point is that the Commission created the caps on bidding credits because it concluded that larger entities were gaming the system by structuring transactions to receive bidding credits. *Order* ¶112 (JA --) (citing comments). That is itself a statutory goal of the Commission's auction program, and one this rule could appropriately be enacted to advance.

In any event, the Commission determined that the bidding cap *would* "help the very entities that we seek to benefit"—that is, real small businesses. *Order* ¶111 (JA --) (citing AT&T comments). It would also help prevent larger entities from gaming the bidding credit program to their own advantage, rather than to advance the interests of real small businesses. *Id.* ¶112 (JA --).

Council Tree also ignores the fact that the Commission did not adopt the challenged rule in isolation, but instead did so in an order that also adopted other

rules to "provide greater flexibility for small businesses to gain an on-ramp into the wireless industry by leveraging leasing and other spectrum-use agreements to gain access to capital and operational experience." *Order* ¶4 (JA --); *see also Order* ¶¶18-39, 69-108, 180-202 (JA --) (discussing reforms to facilitate greater spectrum leasing by designated entities, increasing revenue thresholds by which entities can qualify as small businesses, extending a bidding credit to rural service providers to increase competition, and limiting joint bidding to promote a competitive auction environment for smaller entities). To say that the Commission failed entirely to consider whether its *Order* advances the interests of small businesses blinks reality.

2. The Commission's Order Was Not Substantively Arbitrary Or Capricious.

Council Tree's substantive APA challenges to the bidding credit cap fare no better than their procedural challenge.

a. There Is No Basis For Council Tree's Claim That the Cap Will Cause "Predictable Harm" To Competition And License Concentration.

Council Tree argues that the bidding credit cap is arbitrary and capricious because the caps "*necessarily* work against the statutory mandates of promoting competition and avoiding license concentration." Br. 42. This argument is baseless.

For starters, this argument rests on the unsound assumption that any Commission rule adopted to carry out the objectives of Section 309(j) must fulfill every statutory objective. As we have noted above, that reading of the Commission's obligation under the statute is incorrect. *See Fresno Mobile*, 165 F.3d at 971. And this Court has already held that so long as the Commission's rules promote small business participation *at all*, they are plainly consistent with the Commission's statutory mandate. *Council Tree III*, 619 F.3d at 249 n.7.

In any event, in explaining why it adopted a bidding credit cap, the Commission pointed out that a properly designed cap would actually "help the very entities that we seek to benefit, as well as provide some level of assurance that bidding activity by small businesses and rural service providers is consistent with their relative business size and plans." *Order* ¶111 (JA --).[11] The cap itself thus advances these statutory goals. The Commission also noted that this approach was consistent with that of other agencies, including the Small Business Administration, which "limits the total dollar value of sole-source contracts that an individual participant in its 8(a) business development program may receive." *Id.*; *see also id.* n.360 (JA --) (discussing SBA 8(a) program).

[11] Citing [AT&T PN Comm. at 5; Blooston PN Comm. at 12-13] (JA --).

Council Tree dismisses the comparison with the SBA program on the ground that the statutory basis for that program does not contain Section 309(j)'s competition goal. Br. at 47 n.94. But there is no dispute that the bidding credit program promotes competition. And even if the *cap* on bidding credits could reduce to some extent the amount by which the bidding credits promote competition, the Commission's analysis demonstrated that the effect would be negligible because the number of designated entities that could be expected to face any restrictions arising from the adoption of the cap would be minimal. *See Order* n.367 (JA --) (describing minimal impact a $25 million bidding credit cap would have had in three recent auctions).

Taking into account the record in the proceeding and the changes it was making in other rules "to increase a DE's flexibility" the Commission adopted a process for "implementing a bidding credit cap for all future auctions on an auction-by-auction basis, based on an evaluation of the expected capital requirements presented by the particular service being auctioned, and the inventory of licenses to be auctioned." *Order* ¶¶113, 114 (JA --). On the basis of data from recent auctions, the Commission established a minimum cap of $25 million for each eligible small business. It observed that this would have "allowed the vast majority of small businesses [in three recent auctions] to take full advantage of the Commission's bidding credit program." *Id.* ¶115 (JA --). Specifically, the Commission explained that

from 73% small business bidders in one auction to 95% in another would have realized "the full value of their bidding credit based on their gross winning bid amounts" if the $25 million cap had been in effect. *Id.* n.367 (JA --).[12]

Seeking to rebut the Commission's determination that the bidding credit cap would have a minimal effect on real small business participation in auctions, Council Tree claims that a bidding credit cap "would have precluded DE success stories the Commission elsewhere touted in its *Order*." Br. 39, citing *Order* n.5 (JA --). Council Tree offers no factual basis for that speculative assertion. More importantly, it ignores what the Commission acknowledged – "that the wireless market is vastly different than when our [designated entity] rules were first adopted nearly two decades ago." *Order* ¶2 (JA --); *see also id.* ¶3 ("When the DE rules were first adopted, the wireless industry was in its infancy. The rules governing a nascent industry, and even rules adopted ten years ago, could not have envisioned the changes that have occurred in the industry."). Regulatory agencies have an obligation "to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present

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[12] The Commission adopted a cap of $150 million for bidding credits in the Broadcast Incentive Auction. *See Order* ¶122 (JA --). As the Commission observed in a separate proceeding implementing that auction, a "significant number of licenses offered in the [Broadcast Incentive] auction will be for small geographic areas and will provide small businesses with ample opportunities to win licenses" with provided bidding credits. *In the Matter of Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6763-64 (2014).

and the future within the inflexible limits of yesterday." *American Trucking,* 387 U.S. at 416; *see also National Small Shipments Traffic Conference, Inc. v. United States*, 887 F.2d 443, 447 (3d Cir. 1989). Amici's contention that the bidding credit cap will "prevent the replication of prior DE successes" (Amici Br. 17) is similarly flawed.

The Commission properly disagreed with commenters that "adoption of a cap 'would essentially end the DE program' and could significantly limit a DE's ability to obtain spectrum in more than one market," noting, among other things that the cap "will not foreclose the ability for designated entities to participate in auctions when their auction bids fall above the cap; rather such entities may still receive a bidding credit discount of up to the designated cap for that auction and then pay the excess above that amount." *Order* ¶118 (JA --). In addition, to the extent that commenters had argued that bidders who are not designated entities would outbid the amount at which the designated entity can receive the maximum capped amount simply to deprive designated entities of a license, the Commission found no basis for that scenario. If it occurred, however, the Commission observed that it would happen only if bidders who are not designated entities "believe the licenses' value exceeds the cap – in which case doing so would promote section 309(j)'s goal of efficient and intensive use of the spectrum." *Id.*; *see* 47 U.S.C. § 309(j)(3)(D). The Commission also pointed out the designated entity bidders

were not precluded from continuing to bid in an auction even after they had reached the bidding credit cap. *Order* ¶118 (JA --).

Thus, there is no basis for Council Tree's claim (Br. 41-43) that the Commission was required to engage in a cost-benefit analysis prior to adopting the caps, or that the adoption of the cap would cause "predictable harm to competition and license concentration" that renders the Commission's action arbitrary and capricious. Council Tree offers no explanation why its view of how far the rules must go to promote competition supplants the Commission's, and ignores other statutory goals such as the "efficient and intensive use of the electromagnetic spectrum, 47 U.S.C. § 309(j)(3)(D), that may conflict with designated entities' use of bidding credits. Council Tree similarly ignores the agency's other programs that promote competition as a result of the design of its spectrum auctions. *See* p. 26 and n. 9 above.

b. The Commission Reasonably Concluded That A Cap Would Help Ensure That Designated Entities' Bidding Would Be Consistent With Them Being A Small Business.

Council Tree claims that the bidding credit cap is arbitrary and capricious because the Commission has adopted a "'keep DEs small' policy." Br. 48; *see* also Br. 22, 44 (asserting that FCC adopted cap for purpose of "suppress[ing] DE bidding and auction success"). The Commission has done no such thing, and the bidding credit cap rule has no such purpose. Rather, the cap is designed to help ensure

that, *at the time it receives a bidding credit*, the entity receiving a bidding credit is in fact an eligible small business, not merely a pawn for a larger entity.

Nor does the size of the bidding credit cap provide any support for this argument. The fact that the cap would not be reached by an eligible small business utilizing a 15% bidding credit in the Broadcast Incentive Auction until it reached a bid of $1 billion alone disproves the claim. Any entity that has or can obtain access to $1 billion to buy a license – even before raising the capital to build out and operate that license – is far removed from any normal understanding of what a "small" business looks like. But the Commission determined that this size bidding credit was nonetheless warranted given the agency's desire to ensure that eligible small businesses would have an opportunity to participate in this unique auction. It was rational and consistent with Section 309(j) for the Commission to rely on the fact that the purpose of the bidding credit as a tool to implement the goals of Section 309(j) was to provide "small businesses" an "opportunity to participate" as a basis for concluding that the cap was an appropriate tool for it to employ as part of its designated entity and other programs to implement Section 309(j). *Order* ¶111 (JA --).

It is noteworthy that the Commission's decision was unanimous with respect to the desirability of adopting a cap on bidding credits. Two Commissioners dissented from the order in part, but their dissent was based on the belief that the Commission should have adopted a *lower* cap for the Broadcast Incentive Auction.

See Dissenting Statement of Commissioner Pai, 30 FCC Rcd at 7639 (JA --); Dissenting Statement of Commissioner O'Rielly. *Id.* at 7647 (JA --). Commissioner Pai, in particular, indicated his view that the $150 million cap that the Commission had adopted for the Broadcast Incentive Auction was unwise because it would encourage speculators rather than eligible small businesses seeking opportunities to participate in providing wireless spectrum services.[13]

Council Tree correctly notes (Br. at nn.35, 51) that the SBA's Office of Advocacy "expressed concerns that placing a cap on the total credit available to a DE is likely to undermine" the ability of designated entities to bring competition to the largest bidders. *See* [SBA Ofc Adv. Letter of June 8, 2015 at 3] (JA --). However, in that same letter the SBA Office of Advocacy opposed proposals made by some commenters to "expand the universe of businesses eligible for bidding credits to include certain large businesses" on the ground that "giving those businesses an

[13] Commissioner Pai pointed out that under the cap adopted by the Commission a small business entitled to a 25% bidding credit (*see Order* ¶74 (JA --)) would be "bidding up to $600 million in order to receive the maximum bidding credit. A 'small business' spending that massive a multiple of its revenues at a single auction is not really a small business, any more than a family earning $20,000 per year but spending $600,000 in one go is financially responsible." *Order*, 30 FCC Rcd at 7644 (JA --). He went on to note that "members of Congress have weighed in on this point, stating that 'real small businesses who are building mobile broadband to serve their communities do not have deep pockets, and placing too high a cap on bidding credits is only likely to encourage speculators and others more interested in profiting from this government program rather than deploying new broadband infrastructure and creating real competition.'" *Id.*

additional advantage over small entities will make it more difficult for small businesses to attract capital." *Id.* The Commission's conclusion that a bidding credit cap will help "'ensure that the amounts DEs are bidding are consistent with the smaller size and revenues of a small business,'" *Order* ¶111 (JA --), is fully consistent with the statutory objective of "ensur[ing] that small businesses … are given the opportunity to participate in the provision of spectrum-based services," 47 U.S.C. § 309(j)(4)(D), as well as with the SBA Advocacy Office's concern that bidding credits not be expanded to large businesses.

Finally, a theme that runs through Council Tree's brief is that the Commission improperly focused on the amount and value of spectrum that would be available to designated entities with a bidding credit cap in place. *See, e.g.*, Br. 29-30; 37-40. But the Commission explained its view that Section 309(j) charges the Commission with providing opportunities for eligible entities to participate in spectrum auctions, not generalized economic assistance or guarantees of success when participating in an auction. *See Order* ¶119 (JA --). It was entirely reasonable for the Commission to focus on the numbers of designated entities who would be affected by a bidding credit cap rather than on the value of the spectrum involved. *See Order* ¶115 and n.367 (JA --).[14]

[14]The same response applies to the amici's argument that the bidding credit cap "will prevent the replication of prior DE successes," relying on an extra-record

That the Commission's view of the statute may limit Council Tree's success in bidding in the largest markets by capping the bidding credit it could receive at up to $150 million fails to demonstrate that the Commission's determination was unreasonable. "The FCC need not demonstrate that it has made the *only* acceptable decision, but rather that it has based its decision on a reasoned analysis supported by the evidence before the Commission." *Association of Public-Safety Communications Officials Int'l, Inc. v. FCC*, 76 F.3d 395, 398 (D.C. Cir. 1996). That a petitioner might have chosen another policy if it had been the decisionmaker does not provide a basis to reject the agency's choice. *National Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 183 (D.C. Cir. 1990) ("As long as the agency's regulations are not arbitrary and capricious, the fact that alternative regulatory mechanisms exist – even attractive or viable ones – does not mean that the agency's first choice is unlawful."). Here, the Commission determined that capping bidding credits was consistent with statutory goals—including the goal of encouraging small-business participation in auctions. There is no evidence that the Commission's goal was to keep small businesses small or to preclude them from participating in the Commission's spectrum auctions.

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analysis of the *value* of spectrum acquired by designated entity bidders in previous auctions. *See* Amici Br. 17. Moreover, the Commission found that even if the bidding credit cap had applied in three recent auctions it still would have permitted the "vast majority of small businesses to take full advantage of the Commission's bidding credit program." *Order* ¶115 (JA --).

c. The Commission Reasonably Found That The Cap Would Help Discourage Gaming Of The Auction's Rules.

The Commission reasonably determined that "implementation of a bidding credit cap may discourage entities that seek to game the Commission's rules at tax-payer expense…. [A]s the cost of spectrum continues to grow, the incentives for structuring transactions to obtain bidding discounts increases significantly." *Order* ¶112 (JA --). The Commission reasoned that "by imposing a bright-line cap on the overall amount of bidding credits we will award to a *bona fide* small business or eligible rural service provider, we will provide an important additional safeguard – or backstop – that will prevent misconduct in a manner that is simple and straightforward [and] will not impose an artificial restriction on the amount DEs are likely to bid." *Id.* This approach, the Commission reasonably found, "'does not frustrate the purposes of section 309(j) but instead assists in protecting the integrity of the DE program and the auction itself.'" *Id.*, quoting [Tristar PN Comm. 5] (JA --).

Council Tree claims that there was no basis for the Commission to find that "caps were necessary" to discourage gaming the rules. Br. 49. But the Commission did not find that the rules were "necessary," nor did it have any obligation to do so. The Commission found that a bidding credit cap would be *useful* – "assists in" – protecting the integrity of the designated entity program. *Order* ¶112 (JA --) ; *see also id.* (bidding credit cap "may discourage" gaming). The Commission pointed to several commenters' submissions discussing why gaming was a worry, and noted

specifically that this concern "increases significantly" "as the cost of spectrum continues to grow." *Id.* No more was required.

Council Tree castigates the Commission for failing to cite specific "instances of DE's 'gaming the rules.'" Br. 49. But as the D.C. Circuit has observed, "[t]he APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation. Moreover, agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. An agency need not suffer the flood before building the levee." *Stillwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). The Commission has done that here – it provided a reasoned explanation of the adoption of the cap and it explained the prophylactic nature of the rule – to provide a "simple and straightforward … backstop" that will "prevent misconduct" without imposing unnecessary restrictions on bidding by designated entities. *See Order* ¶12 (JA --). A prophylactic rule represents "a judgment that the probability of abuse … is significant enough that it is more efficient to prevent the opportunity for abuse from arising than it is to try to detect actual incidents of abuse." *Biloxi Reg'l Med. Ctr. v. Bowen*, 835 F.2d 345, 350 (D.C. Cir. 1987). Such regulations need not be promulgated "with exacting precision." *Id.*

d. The Commission Reasonably Found That The Cap Would Help Prevent Unjust Enrichment.

The Commission noted in its *Order* that adoption of the bidding credit caps would advance the statutory goal of "avoidance of unjust enrichment through the methods employed to award" licenses at auction. 47 U.S.C. § 309(j)(3)(C); *see Order* ¶¶ 109, 121. Council Tree contends that the Commission's reference to the statute's requirement that the Commission prevent unjust enrichment amounted to an unacknowledged, and presumably unlawful, change of the agency's interpretation of the unjust enrichment provision of the statute. Br. 53-54. This argument has no merit.

Council Tree argues that the unjust enrichment provision is limited to preventing "'auction winners from acquiring licenses for less than true market value at auction and then transferring them for a large profit prior to providing service.'" Br. 53. But Council Tree cites to no instance in which the Commission's previous discussion of the unjust enrichment provision of the statute has indicated that the agency thought it was *limited* only to matters such as assignments and transfers of control. Certainly the statute's broad language contains no such limitation. And the problem in that instance is in the end precisely the same as the one that the Commission addressed here: entities that are not entitled to receive a bidding credit obtaining a license for "less than true market value" because of the bidding credit. The Commission's conclusion that the bidding credit cap would thus assist it in

carrying out the statutory objective of preventing unjust enrichment was reasonable and does not conflict with any prior Commission determination. It is entitled to deference on review. *See Core Communications, Inc. v. Verizon Penn., Inc.*, 493 F.3d 333, 343 (3d Cir. 2007).

e. Council Tree's Challenge To The Amount Of The Bidding Credit Cap Is Not Properly Before The Court And Is In Any Event Baseless.

To the extent that Council Tree challenges the specific amounts of the bidding credit cap adopted by the Commission, *i.e.*, the $25 million baseline cap amount or the $150 million and $10 million caps for the Broadcast Incentive Auction, it did not raise those arguments before the Commission in a petition for reconsideration and is precluded from raising them now on review. 47 U.S.C. § 405(a); *Prometheus Radio Project*, 652 F.3d at 454; *see* Br. 38, 56-59.

In all events, Council Tree's claim about the hypothetical impact of the bidding credit cap on the recent AWS-3 auction (Auction 97), which raised $41 billion and ended before the cap was adopted, is misleading. Br. 38. It relies on an assumption that the $25 million baseline cap would have applied in that auction (although there is no basis to claim that amount would have applied) and contends that the winning bid for a single license in the largest cities would have exceeded the cap, *i.e.*, that the winning bid exceeded $100 million. The Commission explained that it will base the bidding credit cap in future auctions, as it did in the

Broadcast Incentive Auction, on an assessment of "the expected capital requirements presented by the particular service being auctioned, and the inventory of licenses to be auctioned." *Order* ¶114 (JA --). If an auction similar to the AWS-3 auction is conducted in the future, there is no basis for Council Tree's implicit claim that the Commission would impose the $25 million baseline bidding credit cap. Moreover, the Commission pointed out that even applying the $25 million cap to the results of that auction, and considering the auction results as a whole rather than focusing on the largest cities, "73.3 percent of small businesses in [that] auction [would have] realize[d] the full value of their bidding credit …." *Order* n.367 (JA --). As the Commission further explained, it views its charge under Section 309(j) not to be to provide "generalized economic assistance or a path to success" but rather "to provide opportunities for small businesses." *Id.* ¶119 (JA --). Even the AWS-3 auction, which produced the most revenue in the history of FCC auctions, still provided significant opportunities for eligible small businesses, contrary to Council Tree's suggestions.

Council Tree cites the *Order* for the proposition that bidding credit caps would have "limited the success of more than a quarter of the DEs who participated in [Auction 97]." Br. at 40 n.82. Council Tree ignores the fact that, as noted by the Commission, the percentage of winning small businesses "dropped in Auction 97 due in large part to the winning bid amounts of two particular entities

claiming small business bidding credits." *Order* ¶115 n.367. Subsequently, on August 18, 2015, the Commission held that the attributable income of those two entities rendered them ineligible for designated entity bidding credits. *See Northstar Wireless, LLC, et al.*, 30 FCC Rcd 8887 (2015) (finding two winning bidders ineligible for more than $3 billion in bidding credits), *appeal pending, SNR Wireless License Co., LLC v. FCC*, Nos. 15-1330, *et al.* (D.C. Cir., argued Sept. 25, 2016). Assuming for the sake of argument that the Commission adopted the minimum bidding credit cap for Auction 97, only two of the remaining thirteen winning designated entities would not have "realize[d] the full value of their bidding credit based on their gross winning bid amounts." *Order* ¶115 n.367.

Council Tree's claim that the Commission "plucked the $25 million and $150 million figures out of thin air" (Br. 59) is baseless. The Commission provided ample explanation for its judgment as to the particular numbers it chose based on its experience with past auctions and its assessment of "expected capital requirements" and "inventory of licenses to be auctioned" in future auctions. *See Order* ¶¶114-115, 122-126, n.367 (JA --). Moreover, a number of comments submitted in the record below supported a bidding cap and proposed specific amounts. *See, e.g.*, [AT&T NPRM Comm. at 4, 17] (JA --) ("bidding credits should be more aligned with the size of small businesses themselves;" cap "would provide appropriate symmetry between the scale of DEs and the benefits that they may claim"; recommending $35 million cap); [CCA Comm. at 15, Reply Comm. at 9] (JA --) ; [Tristar

Comm. 5] (JA --) ("assists in protecting the integrity of the DE program and the auction itself"; recommending $35 million cap).

Council Tree ignores the "far less than perfect precision in agency line drawing" that courts demand. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007); *see also WJG Telephone Co. v. FCC*, 675 F.2d 386, 388–89 (D.C. Cir. 1982) (citations omitted) ("When a line has to be drawn, however, the Commission is authorized to make a 'rational legislative-type judgment.' If the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the standard of review."). The Commission's explanation for the $25 million and $150 million figures, assuming the issue is properly before the Court, more than met this standard.

II. NEITHER VACATUR OF THE BIDDING CREDIT CAP RULE NOR SETTING ASIDE THE BROADCAST INCENTIVE AUCTION RESULTS IS WARRANTED.

Council Tree contends that the bidding credit cap rule should be vacated because it was "enacted in violation of the APA" and that the Court should "remand with instruction to provide petitioner appropriate relief, which may include auction vacatur." Br. 60, 61. As discussed above, the rule was lawfully adopted, and the issue of remedy is therefore irrelevant. Even if the Court should disagree with that conclusion, however, setting aside the results of the Broadcast Incentive Auction *in*

addition to vacating the rule enacting the bidding credit caps would be unwarranted and highly disruptive. In the event the Court were to conclude that the rule in dispute here was adopted in violation of the APA, the remedy would, at most, be to vacate the rule itself, [15] not also to nullify an auction for which planning began in 2012, that formally began in March 2016 and that may be completed by the time this case is resolved.[16]

The Court addressed this issue in *Council Tree III*, where Council Tree also asked the Court not only to vacate the rules in question but also to exercise its equitable authority to set aside two completed auctions. *See* 619 F.3d at 257. The Court properly declined to take that additional step. The Court explained that doing so "would involve unwinding transactions worth more than $30 billion, upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupting existing or planned wireless service for untold

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[15] Indeed, in the event the Court were to conclude that adoption of the rule violated the APA, we believe that an appropriate remedy would be a remand to the Commission without even vacating the rule. *See, e.g.*, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("inadequately supported rule … need not necessarily be vacated").

[16] The auction began on March 29, 2016. *See Application Procedures for Broadcast Incentive Auction*, 30 FCC Rcd 11034 (2015). Reverse auction bidding in Stage 3 of the auction began on November 1, 2016. Public Notice, *Clearing Target of 108 Megahertz Set For Stage 3 of the Broadcast Television Spectrum Incentive Auction*, DA 16-1213 (Oct. 25, 2016); *see* FCC Public Reporting System, available at https://auctiondata.fcc.gov/public/projects/1000.

numbers of customers." *Id.* The Court also noted "the possibility of such large-scale disruption in wireless communications would have broad negative implications for the public interest in general." *Id.*[17] The Court's public interest analysis was correct in that case, and should apply equally here.

Council Tree contends that the Court's reasons for refusing to vacate the auctions in *Council Tree III* are inapplicable here because one of the auctions at issue in that case had been completed four years before the Court's decision, whereas in this case "the Court will likely issue its decision on the heels of the auction." Br. 63. The mere difference in timing, however, does not support Council Tree's argument. The same considerations that led the Court to refuse to set aside that auction would dictate the same result in this case.

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[17] Council Tree unsuccessfully sought certiorari in *Council Tree III*, raising the question whether "a reviewing court has the discretion under Section 706 of the APA to decline to set aside, or provide any remedy for, unlawful agency action." *Council Tree Investors, Inc. v. FCC*, No. 10-834 (S.Ct., filed Dec. 22, 2010), Pet. for Cert. at i. Council Tree described this question as "an unsettled issue of profound and recurring importance within the field of administrative law." *Id.* at 15. However, as the Commission pointed out in its opposition to the petition, "petitioners identify no court of appeals decision that has accepted the argument they now advance – *i.e.*, that the APA requires a court that finds procedural error in the promulgation of agency rules to 'set aside' not only the rules themselves, but also the outcome of entirely separate proceedings, with their own orders and agency docket numbers and in which the court found no legal error." FCC Opp. at 17. The same is true of Council Tree's repetition of those arguments here. *See* Br. at 60-61, n.114. The Supreme Court denied the petition for certiorari. *See* 563 U.S. 903 (2011).

Indeed, the unique attributes of the Broadcast Incentive Auction counsel even more strongly against Council Tree's proposed remedy. The Broadcast Incentive Auction that Council Tree seeks to have the Court set aside was explicitly authorized by Congress to provide needed additional spectrum for wireless communications, and is required to be completed prior to September 30, 2022.[18] Planning for the auction took place over nearly four years before the auction began on March 29, 2016. This auction is a unique and enormously complex undertaking that involves "three interdependent initiatives." *NAB v. FCC*, 789 F.3d at 168-70. The first element is "a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights." 47 U.S.C. § 1452(a)(1). The second involves reorganizing – or "repacking" – the broadcast television spectrum to relocate broadcasters out of a portion of the UHF spectrum and make it available for new uses. *Id.* § 1452(b). The third is a "forward auction"

[18] 47 U.S.C. §§ 309(j)(8)(G)(i), 1452(a)(1); *see NAB v. FCC*, 789 F.3d at 170-71 (denying petition for review of rules implementing incentive auction and discussing background).

to assign licenses for use of the recovered spectrum. *Id.* § 1452(c)(1). An additional complex step, on which work has already begun, involves moving television broadcasters that remain after the auction into the "repacked" spectrum.[19]

The FCC and the television broadcast and wireless communications industry segments involved have made extensive business plans and investments in preparation for and in the conduct of the Broadcast Incentive Auction. Setting aside the Broadcast Incentive Auction would result in a waste of those massive efforts and investments, impose substantial additional costs, and further delay the provision of badly needed additional spectrum for wireless communications services. These are precisely the same factors that motivated the Court in *Council Tree III* to reject Council Tree's call there for it to set aside auction results.[20]

It is also noteworthy that Council Tree took no steps beyond this petition for review to advance its views, prior to the Broadcast Incentive Auction, that the auction should not proceed while its challenge to the bidding credit cap was underway.

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[19] *See* Public Notice, *Incentive Auction Task Force and Media Bureau Seek Comment on Post-Incentive Auction Transition Scheduling Plan*, DA 16-1095 (MB Sept. 30, 2016); *see also* http://www.broadcastingcable.com/news/washington/fcc-unveils-phased-post-spectrum-auction-repack-plan/160032 (Nov. 4, 2016).

[20] Council Tree's contention (Br. n.114) that the Court has no discretion to "leave in place the results of an auction conducted under APA-invalidated rules" and must set aside a completed auction if it finds any auction rule to have been adopted unlawfully is plainly not the law of this circuit, as evidenced by the Court's decision in *Council Tree III*.

It did not seek reconsideration by the Commission of its *Order* adopting the bidding credit cap rule. It did not seek a stay by the Commission or by this Court of the implementation of that rule. And it did not seek, by way of a stay or otherwise, to delay the start of the Broadcast Incentive Auction. Council Tree's inaction on multiple fronts further weighs against its claim that the Court should direct the Commission to set aside the auction if the Court concludes that the bidding credit cap rule was adopted in violation of the APA.

Thus, in the event the Court were to conclude that the bidding credit cap here violated the APA, the Court should reject Council Tree's argument to set aside the results of the Broadcast Incentive Auction.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of F.R.A.P. Rule 32(a)(7)(B) because it contains **13,051** words, excluding the parts of the brief exempted by F.R.A.P. Rule 32(a)(7)(B)(iii).

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/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

November 10, 2016

Statutory Addendum

47 U.S.C. § 309

§ 309(j) Application for license [excerpts]

…

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed-

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods

employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

…

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), (E), (F), and (G), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this

subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraphs (D)(ii), (E)(ii), (F), and (G);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be deposited in the general fund of the Treasury, where such amount shall be dedicated for the sole purpose of deficit reduction.

(D) Proceeds from reallocated Federal spectrum

(i) In general

Except as provided in clause (ii), cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(ii) Certain other proceeds

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), in the case of proceeds (including deposits and upfront payments from successful bidders) attributable to the auction of eligible frequencies described in paragraph (2) of section 923(g) of this title that are required to be auctioned by section 1451(b)(1)(B) of this title, such portion of such proceeds as is necessary to cover the relocation or sharing costs (as defined in paragraph (3) of such section 113(g)) of Federal entities relocated from such eligible frequencies shall be deposited in the Spectrum Relocation Fund. The remainder of such proceeds shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(E) Transfer of receipts

(i) Establishment of Fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term "recovered analog spectrum" has the meaning provided in paragraph (15)(C)(vi).

(F) Certain proceeds designated for Public Safety Trust Fund

Notwithstanding subparagraph (A) and except as provided in subparagraphs (B) and (D)(ii), the proceeds (including deposits and upfront payments from successful bidders) from the use of a system of competitive bidding under this subsection pursuant to section 1451(b)(1)(B) of this title shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(G) Incentive auctions

(i) In general

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the Commission may encourage a licensee to relinquish voluntarily some or all of its

licensed spectrum usage rights in order to permit the assignment of new initial licenses subject to flexible-use service rules by sharing with such licensee a portion, based on the value of the relinquished rights as determined in the reverse auction required by clause (ii)(I), of the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection.

(ii) Limitations

The Commission may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a share of auction proceeds under clause (i) unless--

(I) the Commission conducts a reverse auction to determine the amount of compensation that licensees would accept in return for voluntarily relinquishing spectrum usage rights; and

(II) at least two competing licensees participate in the reverse auction.

(iii) Treatment of revenues

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the proceeds (including deposits and upfront payments from successful bidders) from any auction, prior to the end of fiscal year 2022, of spectrum usage rights made available under clause (i) that are not shared with licensees under such clause shall be deposited as follows:

(I) $1,750,000,000 of the proceeds from the incentive auction of broadcast television spectrum required by section 1452 of this title shall be deposited in the TV Broadcaster Relocation Fund established by subsection (d)(1) of such section.

(II) All other proceeds shall be deposited--

(aa) prior to the end of fiscal year 2022, in the Public Safety Trust Fund established by section 1457(a)(1) of this title; and

(bb) after the end of fiscal year 2022, in the general fund of the Treasury, where such proceeds shall be dedicated for the sole purpose of deficit reduction.

(iv) Congressional notification

At least 3 months before any incentive auction conducted under this subparagraph, the Chairman of the Commission, in consultation with the Director of the Office of Management and Budget, shall notify the appropriate committees of Congress of the methodology for calculating the amounts that will be shared with licensees under clause (i).

(v) Definition

In this subparagraph, the term "appropriate committees of Congress" means--

(I) the Committee on Commerce, Science, and Transportation of the Senate;

(II) the Committee on Appropriations of the Senate;

(III) the Committee on Energy and Commerce of the House of Representatives; and

(IV) the Committee on Appropriations of the House of Representatives.

…

(17) Certain conditions on auction participation prohibited

(A) In general

Notwithstanding any other provision of law, the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person--

(i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and

(ii) either--

(I) meets the technical, financial, character, and citizenship qualifications that the Commission may require under section 303(l)(1), 308(b), or 310 of this title to hold a license; or

(II) would meet such license qualifications by means approved by the Commission prior to the grant of the license.

(B) Clarification of authority

Nothing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.

47 U.S.C. § 405(a)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall

excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. §1.2110 Designated entities [excerpts]

(a) Designated entities are small businesses (including businesses owned by members of minority groups and/or women), rural telephone companies, and eligible rural service providers.

(b) *Eligibility for small business and entrepreneur provisions*— (1) *Size attribution.* (i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests 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, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to §24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests 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 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, and the affiliates of its controlling interests.

(2) *Aggregation of affiliate interests.* Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in §1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1 to paragraph (b)(2): ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A&B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.
Example 2 to paragraph (b)(2): ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) *Standard for evaluating eligibility for small business benefits.* To be eligible for small business benefits:

(i) An applicant must meet the applicable small business size standard in paragraphs (b)(1) and (2) of this section, and

(ii) Must retain *de jure* and *de facto* control over the spectrum associated with the license(s) for which it seeks small business benefits. An applicant or licensee may lose eligibility for size-based benefits for one or more licenses without losing general eligibility for size-based benefits so long as it retains *de jure* and *de facto* control of its overall business.

(4) *Exceptions*—(i) *Consortium.* Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for size-based bidding credits and/or closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for rural service provider bidding credits pursuant to paragraph (f)(4) of this section, the subscribers of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of §1.2107(g) of this chapter as a condition of license grant.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(iii) *Rural telephone cooperatives.* (A)(*1*) An applicant will be exempt from §1.2110(c)(2)(ii)(F) for the purpose of attribution in §1.2110(b)(1), if the applicant or a controlling interest in the applicant, as the case may be, meets all of the following conditions:

(*i*) The applicant (or the controlling interest) is organized as a cooperative pursuant to state law;

(*ii*) The applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act; and

(*iii*) The applicant (or the controlling interest) demonstrates either that it is eligible for tax-exempt status under the Internal Revenue Code or that it adheres to the cooperative principles articulated in *Puget Sound Plywood, Inc.* v. *Commissioner of Internal Revenue*, 44 T.C. 305 (1965).

(*2*) If the condition in paragraph (b)(3)(iii)(A)(*1*)(*i*) above cannot be met because the relevant jurisdiction has not enacted an organic statute that specifies requirements for organization as a cooperative, the applicant must show that it is validly organized and its articles of incorporation, by-laws, and/or other relevant organic documents provide that it operates pursuant to cooperative principles.

(B) However, if the applicant is not an eligible rural telephone cooperative under paragraph (a) of this section, and the applicant has a controlling interest other than the applicant's officers and directors or an eligible rural telephone cooperative's officers and directors, paragraph (a) of this section applies with respect to the applicant's officers and directors and such controlling interest's officers and directors only when such controlling interest is either:

(*1*) An eligible rural telephone cooperative under paragraph (a) of this section or

(*2*) controlled by an eligible rural telephone cooperative under paragraph (a) of this section.

(c) *Definitions*—(1) *Small businesses.* The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

…

(f) *Bidding credits.* (1) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) *Small business bidding credits.*—(i) *Size of bidding credits.* A winning bidder that qualifies as a small business, and has not claimed a rural service provider bidding credit pursuant to paragraph (f)(4) of this section, may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(A) Businesses with average gross revenues for the preceding 3 years not exceeding $4 million are eligible for bidding credits of 35 percent;

(B) Businesses with average gross revenues for the preceding 3 years not exceeding $20 million are eligible for bidding credits of 25 percent; and

(C) Businesses with average gross revenues for the preceding 3 years not exceeding $55 million are eligible for bidding credits of 15 percent.

(ii) *Cap on winning bid discount.* A maximum total discount that a winning bidder that is eligible for a small business bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a small business bidding credit may receive in any particular auction will be no less than $25 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a small business may receive for certain license areas.

(3) *Bidding credit for serving qualifying tribal land.* A winning bidder for a market will be eligible to receive a bidding credit for serving a qualifying tribal land within that market, provided that it complies with §1.2107(e). The following definition, terms, and conditions shall apply for the purposes of this section and §1.2107(e):

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.

(ii) *Certification.* (A) Within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and attach a certification from the tribal government stating the following:

(*1*) The tribal government authorizes the winning bidder to site facilities and provide service on its tribal land;

(*2*) The tribal area to be served by the winning bidder constitutes qualifying tribal land; and

(*3*) The tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction requirements set forth in paragraph (f)(3)(vii) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay any outstanding balance on its winning bid amount.

(iii) *Bidding credit formula.* Subject to the applicable bidding credit limit set forth in §1.2110(f)(3)(iv), the bidding credit shall equal five hundred thousand (500,000) dollars for the first two hundred (200) square miles (518 square kilometers) of qualifying tribal land, and twenty-five hundred (2500) dollars for each additional square mile (2.590 square kilometers) of qualifying tribal land above two hundred (200) square miles (518 square kilometers).

(iv) *Bidding credit limit.* If the high bid is equal to or less than one million (1,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed fifty (50) percent of the high bid. If the high bid is greater than one million (1,000,000) dollars, but equal to or less than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed five hundred thousand (500,000) dollars. If the high bid is greater than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed thirty-five (35) percent of the high bid.

(v) *Bidding credit limit in auctions subject to specified reserve price(s).* In any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2) with reserve price(s) and in any auction with reserve price(s) in which the Commission specifies that this provision shall apply, the aggregate amount available to be awarded as bidding credits for serving qualifying tribal land with respect to all licenses subject to a reserve price shall not exceed the amount by which winning bids for those licenses net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the applicable reserve price. If the total amount that might be awarded as tribal land bidding credits based on applications for all licenses subject to the reserve price exceeds the aggregate amount available to be awarded, the Commission will award eligible applicants a pro rata tribal land bidding credit. The Commission may determine at any time that the total amount that might be awarded as tribal land bidding credits is less than the aggregate amount available to be awarded and grant full tribal land bidding credits to relevant applicants, including any that previously received pro rata tribal land bidding credits. To determine the amount of an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified excepting this limitation ((f)(3)(v)) of this section. When determining the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified,

the Commission shall assume that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license excepting this limitation ((f)(3)(v)) of this section. After all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved, the Commission will recalculate the pro rata credit. For these purposes, final determination of a credit occurs only after any review or reconsideration of the award of such credit has been concluded and no opportunity remains for further review or reconsideration. To recalculate an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate amount of tribal land bidding credits for which all applicants for such licenses would have qualified excepting this limitation ((f)(3)(v)) of this section.

(vi) *Application of credit.* A pending request for a bidding credit for serving qualifying tribal land has no effect on a bidder's obligations to make any auction payments, including down and final payments on winning bids, prior to award of the bidding credit by the Commission. Tribal land bidding credits will be calculated and awarded prior to license grant. If the Commission grants an applicant a pro rata tribal land bidding credit prior to license grant, as provided by paragraph (f)(3)(v) of this section, the Commission shall recalculate the applicant's pro rata tribal land bidding credit after all applications seeking tribal land biddings for licenses subject to the same reserve price have been finally resolved. If a recalculated tribal land bidding credit is larger than the previously awarded pro rata tribal land bidding credit, the Commission will award the difference.

(vii) *Post-construction certification.* Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(viii) *Performance penalties.* If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vii) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without specific Commission action. Repayment of bidding credit amounts pursuant to this provision shall not affect the calculation of amounts available to be awarded as tribal land bidding credits pursuant to (f)(3)(v) of this section.

(4) *Rural service provider bidding credit*—(i) *Eligibility.* A winning bidder that qualifies as a rural service provider and has not claimed a small business bidding credit pursuant to paragraph (f)(2) of this section will be eligible to receive a 15 percent bidding credit. For the purposes of this paragraph, a rural service provider means a service provider that—

(A) Is in the business of providing commercial communications services and together with its controlling interests, affiliates, and the affiliates of its controlling interests as those terms are defined in paragraphs (c)(2) and (c)(5) of this section, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers as of the date of the short-form filing deadline; and

(B) Serves predominantly rural areas, defined as counties with a population density of 100 or fewer persons per square mile.

(C) *Size attribution. (1)* The combined wireless, wireline, broadband, and cable subscribers of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests 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 the rural service provider bidding credit.

(2) Exception. For rural partnerships providing service as of July 16, 2015, the Commission will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the individual members of the rural partnership individually have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers, and for those types of rural partnerships, the subscribers will not be aggregated.

(ii) *Cap on winning bid discount.* A maximum total discount that a winning bidder that is eligible for a rural service provider bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a rural service provider bidding credit may receive in any particular auction will be no less than $10 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a rural service provider may receive for certain license areas.

47 C.F.R. §1.2111 [excerpts]
Assignment or transfer of control: unjust enrichment

...

(b) *Unjust enrichment payment: bidding credits.*

(b) *Unjust enrichment payment: bidding credits.* (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 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), 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 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) A 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.

(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).

47 C.F.R. §27.1301 Designated entities in the 600 MHz band

(a) *Small business.* (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $55 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $20 million for the preceding three (3) years.

(b) *Eligible rural service provider.* For purposes of this section, an eligible rural service provider is an entity that meets the criteria specified in §1.2110(f)(4) of this chapter.

(c) *Bidding credits.* (1) A winning bidder that qualifies as a small business as defined in this section or a consortium of small businesses may use the bidding credit specified in §1.2110(f)(2)(i)(C) of this chapter. A winning bidder that qualifies as a very small business as defined in this section or a consortium of very small businesses may use the bidding credit specified in §1.2110(f)(2)(i)(B) of this chapter.

(2) An entity that qualifies as eligible rural service provider or a consortium of rural service providers may use the bidding credit specified in §1.2110(f)(4) of this chapter.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Council Tree Investors, Inc. Petitioner,	)	
v.	)	No. 15-3754
Federal Communications Commission and The United States of America, Respondents.	)	

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on November 10, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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