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

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

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

On January 27, 2006, my colleagues and I adopted an FNPRM in which we tentatively concluded that we should modify our Part 1 rules to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a "material relationship" with a "large in-region incumbent wireless service provider." This position was supported by a large and diverse group of commenters ranging from DEs[1] to Tier II carriers,[2] the minority community[3] to rural telephone companies,[4] and even members of Congress[5] and the Department of Justice.[6]

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

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

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

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

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

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

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

During the past month, there has been considerable discussion about an alternative proposal to our original tentative conclusion – a limitation on investment in DEs by all providers of communications services over a given revenue threshold. While we do not vote on that proposal here, many commenters argued that this approach would not have tightened the DE program, but rather that the approach would have killed it. I certainly had concerns that the proposal, as structured, would have cast a wide net over the DE program – limiting funding to the DE community from almost all FCC-regulated companies, manufacturers, and service providers, whether circuit or IP-based. Not surprisingly, the proposal to adopt a low revenue threshold was loudly opposed by a number of significant voices including members of Congress,[7] two subcommittees of the FCC's own Advisory Committee on Diversity for Communications in the Digital Age,[8] current and former DEs,[9] and a quintet of Native Alaskan Corporation CEOs.[10] Some argue that so-called DE reform was really a disguise to eliminate an avenue of competition to incumbent wireless companies.[11]

Notwithstanding the flaws in this proposal, I have been willing to consider a variety of alternatives to our tentative conclusion that would have responded to complaints by large wireless carriers that they were being unfairly singled out or that we were ignoring our precedent of conducting market by market analyses in looking at spectrum issues. Moreover, if the wireless loophole was adequately addressed in a final decision, I was willing to consider a revenue-based restriction that affected all FCC regulatees provided that a revenue threshold was based on the record, not one that could indiscriminately shut down the DE program. But inexplicably, no deal could be struck. Ultimately, it was easier for the

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

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

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

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

[11] Ex Parte of Carroll Wireless et al.

majority to make a few minor changes to the DE program than close the loophole that is recognized by almost everyone but this Commission.

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

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