

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of the Commercial Spectrum )  
Enhancement Act and Modernization of the ) WT Docket No. 05-211  
Commission’s Competitive Bidding Rules and )  
Procedures )

**ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER**

**Adopted: June 1, 2006**

**Released: June 2, 2006**

By the Commission: Chairman Martin and Commissioner Copps issuing separate statements;  
Commissioners Adelstein and Tate approving in part, concurring in part and issuing  
separate statements.

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**I. INTRODUCTION**

1. In this Order on Reconsideration, on our own motion, we clarify certain aspects of the *Second Report and Order* in this proceeding (“*Designated Entity Second Report and Order*”).<sup>1</sup> We also

<sup>1</sup> Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule* (continued....)

address certain procedural issues raised in filings submitted in response to the *Designated Entity Second Report and Order*.<sup>2</sup> As the record on reconsideration has not yet closed, however, we may deal with additional issues raised by interested parties at a later date.

## II. BACKGROUND

2. In the *Further Notice of Proposed Rule Making* in this docket,<sup>3</sup> we sought comment on a proposal by Council Tree that we restrict the award of designated entity benefits to designated entities that have what Council Tree only generally referred to as “material relationships” with large in-region incumbent wireless service providers.<sup>4</sup> We asked for comment on each of the elements of this proposal, including what types of “material relationships” should trigger a restriction on the availability of designated entity benefits and what types of entities other than large in-region incumbent wireless service providers should be covered.<sup>5</sup>

3. In the *Designated Entity Second Report and Order*, after reviewing the diverse comments filed in the record and taking into consideration what we have learned in administering the designated entity benefits program,<sup>6</sup> we revised our rules (“Part 1” rules)<sup>7</sup> to include certain “material relationships”

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*Making*, 21 FCC Rcd 4753 (2006) (“*Designated Entity Second Report and Order*” and “*Second Further Notice of Proposed Rule Making*”).

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

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

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

<sup>5</sup> *Further Notice*, 21 FCC Rcd at 1760 ¶ 13.

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

as factors in determining designated entity eligibility. Specifically, we adopted rules to limit the award of designated entity benefits to any applicant or licensee that has “impermissible material relationships” or an “attributable material relationship” created by certain agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity. We found that these additional eligibility restrictions were necessary to meet our statutory obligations and to ensure that, in accordance with the intent of Congress, every recipient of the Commission’s designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.<sup>8</sup> In particular, we determined that the relationships underpinning such leasing and resale agreements underscored the need for stricter regulatory parameters to ensure that benefits were reserved to provide opportunities for designated entities to become robust independent facilities-based service providers with the ability to provide new and innovative services to the public, and to prevent the unjust enrichment of unintended beneficiaries.<sup>9</sup>

4. In the *Further Notice*, we also sought comment on whether, if we adopted a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules. We asked over what portion of the license term the unjust enrichment provisions should apply if we decided to require reimbursement by licensees that, either through a change of “material relationships” or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt. In the *Designated Entity Second Report and Order*, after reviewing the filings in the record and taking into account our experience with spectrum auctions and licensing, we adopted rule modifications to strengthen our unjust enrichment rules in order to better deter entities from attempting to circumvent our designated entity eligibility requirements and to recapture designated entity benefits when ineligible entities control licenses held by designated entities or exert impermissible influence over a designated entity.<sup>10</sup> Specifically, as discussed fully below, we adopted a ten-year unjust enrichment schedule for licenses acquired with bidding credits.

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*Order, Fifth Report and Order, and Fourth Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15320-21 ¶¶ 51-52 (2000); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022, 1090-91 ¶ 176 (2002). The Commission determines eligibility for its small business provisions based on an entity’s size determined pursuant to attribution rules. 47 C.F.R. § 1.2110(b)(1)-(3). *But see* Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10180, 10191-94 ¶¶ 16-18 (2003) (establishing exemption for rural telephone cooperatives from the requirement that gross revenues of entities controlled by an applicant’s officers and directors be attributed to the applicant), *modified on reconsideration, Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005); 47 C.F.R. § 1.2110(b)(3)(iii) (exempting rural telephone cooperatives from attributing the gross revenues of its officers and directors).

<sup>7</sup> See 47 C.F.R. § 1.2101 *et. seq.*

<sup>8</sup> Section 309(j)(4)(D) directs the Commission to issue regulations to “ensure” that designated entities “are given the opportunity to participate in the provision of spectrum-based services.” 47 U.S.C. § 309(j)(4)(D). We believe that the word “participate” in this directive contemplates significant involvement in the provision of services to the public, not merely passive ownership of a license to spectrum used by others to provide service. This view is supported by the legislative history of Section 309(j), in which Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter “participation in the licensing process by those who have no intention of offering service to the public.” H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993)).

<sup>9</sup> *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 21.

<sup>10</sup> See 47 C.F.R. § 1.2111.

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

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

### III. DISCUSSION

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

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

8. In this section, we address the claim by the Joint Petitioners that adoption of our new rules contravened section 309(j)(3)(E)(ii) of the Communications Act.<sup>11</sup> Joint Petitioners specifically assert that our application of the new designated entity rules to the licenses offered in Auction No. 66 violates the section 309(j)(3)(E)(ii) directive that the Commission ensure that, after it issues bidding rules, “interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.”<sup>12</sup> We disagree.

9. As an initial matter, we reject Joint Petitioners’ basic assumption that the new designated entity rules implicate section 309(j)(3)(E)(ii) at all. While that provision instructs the Commission to promote the objective of ensuring that interested parties “after the issuance of bidding rules” have “a sufficient time to develop business plans, assess market conditions, and evaluate the availability of

<sup>11</sup> Petition for Expedited Reconsideration at 22-23.

<sup>12</sup> See 47 U.S.C. § 309(j)(3)(E)(ii).

equipment for the relevant services,” the new designated entity rules do not constitute “bidding rules” for purposes of section 309(j)(3)(E)(ii). As the Commission has explained, this provision does not require the Commission “to postpone an auction until every external factor that might influence a bidder’s business plan is resolved with absolute certainty.”<sup>13</sup> Rather, we have indicated that the provision applies to “auction-specific information” and “specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation.”<sup>14</sup> In this case, the new designated entity rules included neither auction-specific information nor specific mechanisms relating to day-to-day auction conduct. Therefore, we do not believe that they fall under the rubric of section 309(j)(3)(E)(ii).

10. Even if, however, we were to agree with the Joint Petitioners that the new designated entity rules somehow implicate section 309(j)(3)(E)(ii), we would still reject their contention that the Commission’s action here runs afoul of the statutory provision. We note that parties were on notice for many months of the Commission’s intent to apply the changes to the designated entity rules adopted in this proceeding to licenses issued in Auction No. 66.<sup>15</sup> They thus had ample warning that a change in the designated entity rules was coming and should have been prepared to react as soon as the new rules were announced. Additionally, while the Joint Petitioners complain that the then-existing short-form filing deadline for Auction No. 66 was two weeks after the release of the new designated entity rules, auction applicants are permitted, even after the short-form filing deadline, to take a variety of steps “to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services,” including adding non-controlling investors at any time before or during the auction.<sup>16</sup>

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

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

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

<sup>15</sup> See *Further Notice* at ¶ 21.

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

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

rules.<sup>18</sup> Along these lines, we note that Joint Petitioners nowhere provide any estimate of what would be a sufficient period of time for designated entities to adjust to the new rules.<sup>19</sup> Rather, they appear to argue that so long as the new rules are in place, they will be unable to participate in the auction. For example, while Bethel Native Corporation contends that it will be able to participate in Auction No. 66 if the new rules were no longer to apply to the licenses awarded in the auction, nowhere does it make a similar representation that it would be able to participate in Auction No. 66 if given a sufficient period of time to adjust to the new rules, which is not surprising given Joint Petitioners' claim that the new rules "have the practical effect of eviscerating a designated entity's access to capital."<sup>20</sup> Likewise, Council Tree claims: "[I]t will be virtually impossible as a practical matter to reconstruct or develop new business plans or financing alternatives for Designated Entities so long as the new rules are on the books. A mere postponement of the AWS auction is not sufficient under these circumstances."<sup>21</sup> As a result, it is apparent that the Joint Petitioners' real objection is to the substance of the new rules and not to questions of timing under section 309(j)(3)(E)(ii).

12. Additionally, it is important to note that section 309(j)(3) requires the Commission to balance several statutory objectives. As the Commission has previously stated, "while Section 309(j)(3)(E) directs the Commission to provide interested parties adequate time to prepare prior to an auction, the statute also requires that the Commission promote several other objectives in exercising its competitive bidding authority, including the rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum and avoidance of unjust enrichment, and efficient and intensive use of the spectrum."<sup>22</sup> Two of these other statutory objectives are of particular importance here: (1) promoting the development and rapid deployment of new technologies, products, and services for the benefit of the

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

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

<sup>20</sup> *Motion for Expedited Stay* at 4-5. As explained *infra*, the Commission strongly disagrees with this claim.

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

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

public; and (2) avoiding unjust enrichment. We believe that these objectives impose on us here an obligation to avoid unnecessary or unreasonable delays of Auction No. 66. We have evidence that potential bidders have an immediate need for the licenses that will be offered in Auction No. 66<sup>23</sup> and that delaying the auction would impair the rapid deployment of affordable wireless service to the public.<sup>24</sup> Indeed, there is evidence in the record that suggests that delaying the auction further will impede the ability of smaller entities to successfully obtain licenses in Auction No. 66,<sup>25</sup> even though Joint Petitioners claim that our new rules will deter small businesses from participating in the auction. The alternative proposed by the Joint Petitioners of holding Auction No. 66 as currently scheduled but setting aside our new designated entity rules with respect to the licenses offered in that auction,<sup>26</sup> would put us in the position of neglecting our statutory duty to avoid unjust enrichment by assuring that designated entity benefits go to those entities that use their licenses to provide facilities-based services for the benefit of the public.<sup>27</sup> The additional alternative proposed by Joint Petitioners of delaying the auction to allow further comment on the rules adopted in the *Designated Entity Second Report and Order*<sup>28</sup> would constitute unreasonable delay in light of our statutory obligation to promote the development and rapid deployment of services for the benefit of the public. For all of these reasons, we continue to believe that we have reasonably balanced the objectives set forth in section 309(j)(3) and that proceeding with the auction as scheduled would best serve the public interest.

13. Finally, it is worth noting that Council Tree, in its comments in this proceeding, previously supported the Commission's proposal to apply new designated entity rules to the licenses offered in Auction No. 66.<sup>29</sup> And, at the same time, Council Tree took the position that Auction No. 66 should not be delayed.<sup>30</sup> When Council Tree made these comments, it was well aware of the general timeframe under which the Commission was operating, both with respect to this proceeding as well as the date of the auction. Indeed, recognizing the potentially tight time window at issue, Council Tree even urged the Commission, if necessary, to make the new designated entity rules effective immediately upon publication in the Federal Register, rather than with the normal thirty-day delay, so that the new rules could apply to the licenses offered in Auction No. 66, and the auction could be held on time.<sup>31</sup> And this was despite the fact that Council Tree was advocating even broader changes to the designated entity rules than those the Commission ultimately decided to adopt. In light of this history, we believe that Council Tree's current claim that the Commission has violated section 309(j)(3)(E)(ii) by applying the new designated entity rules to the licenses offered in Auction No. 66 and delaying the auction for over one month runs afoul of what the United States Court of Appeals for the District of Columbia Circuit has

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<sup>23</sup> See, e.g., T-Mobile Reply Comments at 4.

<sup>24</sup> See, e.g., Comments of T-Mobile USA, Inc., AU Docket No. 06-3 at 2 (filed Feb. 14, 2006).

<sup>25</sup> Comments of Rural Telecommunications Group and Organization for the Promotion and Advancement of Small Telecommunications Companies at 6.

<sup>26</sup> Petition for Expedited Reconsideration at 4-8.

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

<sup>28</sup> Further Supplement at 2.

<sup>29</sup> See Council Tree Comments at viii, 61-62. Petitioner Minority Media and Telecommunications Council also espoused this view. See Comments of Minority Media and Telecommunications Council at 7-8.

<sup>30</sup> See *id.* at 61.

<sup>31</sup> See *id.* at 61.

termed the “chutzpah doctrine.”<sup>32</sup>

## B. Material Relationships

14. *Notice.* In their Supplement, Joint Petitioners argue that we violated the Administrative Procedure Act<sup>33</sup> by adopting the new material relationship rules.<sup>34</sup> They contend, first, that we failed to give sufficiently specific notice, and thus sufficient opportunity for comment, on the new restrictions on leasing and resale arrangements. Second, they argue that we made certain aspects of the rules immediately effective without the requisite statutory notice. We find both claims unconvincing.

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

16. Applying these standards, it is clear that there was ample notice of the new material relationship rules in this case. The *Further Notice* emphasized the Commission’s ongoing commitment “to prevent[ing] companies from circumventing the objectives of the designated entity eligibility rules”<sup>39</sup> and to ensuring that “its small business provisions [are] available only to bona fide small businesses.”<sup>40</sup> After discussing existing rules, we noted Council Tree’s concern that those rules did “not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses.”<sup>41</sup> We then took note of Council Tree’s specific proposal for addressing this concern, namely that designated entity benefits be withheld from any prospective licensee that has a “material relationship” with a “large, in-region incumbent wireless service provider.”<sup>42</sup> While we tentatively proposed adoption of Council Tree’s rule, we also sought comment “on whether other ‘material relationships’ . . . should trigger a restriction on the award of designated entity benefits.”<sup>43</sup>

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

<sup>33</sup> Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration at 9.

<sup>34</sup> Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration at 7-10.

<sup>35</sup> *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Further Notice* ¶ 6.

<sup>40</sup> *Id.* ¶ 7.

<sup>41</sup> *Id.* ¶ 12.

<sup>42</sup> *Id.* ¶ 13.

<sup>43</sup> *Id.*; see also *id.* ¶ 19 (asking whether “additional entities” should be added to the list of those with which a designated entity may not have a “material relationship” without losing its status). We offered as an example of such a relationship one between “an otherwise qualified designated entity and an ‘entity with significant interests in (continued...)”



Similarly, we asked whether limiting the prohibited “material relationships” to “large incumbent wireless service providers” or entities “with significant interests in communications services” would be “sufficient to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities.”<sup>44</sup>

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

18. Contrary to Council Tree’s claim that it had no notice that an arrangement such as lease or resale could constitute a “material relationship,” the *Further Notice* specifically contemplated it. We noted that in our Secondary Markets proceeding, we had concluded “that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee would cause the spectrum lessee to become an attributable affiliate of the licensee, thus rendering the licensee ineligible for designated entity benefits and making such a spectrum lease impermissible.”<sup>47</sup> We then sought comment on whether we should follow a similar approach here: “We seek comment on what, if any, standard should be used to determine whether a spectrum leasing arrangement is a ‘material relationship’ for the purpose of any additional restriction on the availability of designated entity benefits that we might adopt.”<sup>48</sup> We went on to ask “whether other arrangements should be taken into account” and “[i]f so, what arrangements should we consider?”<sup>49</sup>

19. The comments filed in response to the *Further Notice* reflected the broad scope of the questions posed there, and they ranged from those suggesting a complete overhaul of the Commission’s designated entity eligibility rules to those recommending that we maintain the status quo.<sup>50</sup> Commenting parties clearly understood that the Commission was contemplating rule changes that would extend beyond material relationships with incumbent wireless carriers. For example, Dobson Communications

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communications services.” *Id.* ¶ 13. Our use of “such as” before this example makes clear that it was not the only one contemplated. In any event, insofar as the Commission sought comment on a far broader definition of the class of entities with whom a designated entity’s material relationship might trigger the restriction of benefits, it should have been obvious to commenters that there was a possibility that an adopted restriction could apply to any relationships that the Commission deemed to be “material.”

<sup>44</sup> *Further Notice* ¶ 15.

<sup>45</sup> *Further Notice* ¶ 13.

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.*, Comments of CTIA – The Wireless Association filed February 24, 2006; Comments of Verizon Wireless filed February 24, 2006; Comments of Cook Inlet Region, Inc. filed February 24, 2006; Comments of The Minority Media and Telecommunications Council filed February 24, 2006; Comments of National Hispanic Media Coalition filed February 24, 2006.

Corporation noted that the Commission had sought comment “as to whether . . . restrictions should be placed on DEs that partner with other large companies that are not in-region wireless carriers.”<sup>51</sup> Dobson urged the Commission to do so, arguing that “[i]f it is proven true that the benefits designed for small businesses are instead being realized by large strategic investors, it surely should not matter whether that investor is an in-region incumbent wireless service provider or not.”<sup>52</sup> Council Tree, on the other hand, argued that the prohibition should remain narrowly circumscribed to only large incumbent wireless carriers.<sup>53</sup> Likewise, parties clearly understood that arrangements such as spectrum leases could constitute “material relationships” and commented on the subject.<sup>54</sup>

20. Based on a review of those comments, and given our experience in awarding designated entity benefits, we determined that we should modify our rules to achieve Congress’s objectives of preventing unjust enrichment and promoting true participation by designated entities in the provision of spectrum-based services for the benefit of the public. We concluded that “certain agreements” between designated entities and others are “by their very nature . . . generally inconsistent with Congress’s legislative intent,” regardless of what other kind of entity they involve.<sup>55</sup> Specifically, we explained that “where an agreement concerns the actual use of the designated entity’s spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity’s ability to become a facilities-based provider, as intended by Congress.”<sup>56</sup> Accordingly, we adopted rules in the *Designated Entity Second Report and Order* to limit the award of designated entity benefits to any applicant or licensee that has “impermissible material relationships” or an “attributable material relationship” created by agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity.

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

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

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<sup>51</sup> Comments of Dobson Communications Corporation at 2 (filed February 24, 2006).

<sup>52</sup> *Id.*

<sup>53</sup> Comments of Council Tree Communications, Inc. at 35-41 (filed February 24, 2006).

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

<sup>55</sup> *Designated Entity Second Report and Order* ¶ 23.

<sup>56</sup> *Designated Entity Second Report and Order* ¶ 23.

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

24. *Material Relationships.* A number of questions have been raised regarding how the Commission will evaluate impermissible and attributable material relationships for the purposes of determining eligibility for both designated entity benefits and the imposition of unjust enrichment. In the *Designated Entity Second Report and Order*, we concluded that an applicant or licensee has “impermissible material relationships” when it has agreements with one or more other entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any individual license. We decided that such “impermissible material relationships” would render the applicant or licensee (i) ineligible for the award of future designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis. We further concluded that an applicant or licensee has an “attributable material relationship” when it has one or more agreements with any individual entity, including entities and individuals attributable to that entity, for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee. We decided that such an “attributable material relationship” would be attributed to the applicant or licensee for the purposes of determining the applicant’s or licensee’s (i) eligibility for future designated entity benefits, and (ii) liability for unjust enrichment on a license-by-license basis. As stated in the *Designated Entity Second Report and Order*, the Commission’s policy is to assure that a designated entity preserves at least half of the spectrum capacity of each license for which the designated entity has been awarded and retained designated entity benefits in exchange for the provision of service as a facilities-based provider for the benefit of the public.<sup>57</sup>

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

26. We observe, as an initial matter, that there are a number of ways “spectrum capacity” could be defined. It would be difficult for the Commission to enumerate every possible means by which a licensee could lease or make its spectrum capacity available to another party to resell. By adopting “spectrum capacity” as a measurement, we sought to provide licensees with some flexibility to tailor their agreements to their business needs. We thus are reluctant to employ only a single measure of “spectrum capacity.” Nevertheless, to assist designated entities as they evaluate secondary market transactions, we clarify that if they meet the spectrum capacity thresholds on a MHz \* pops basis, the Commission will find them in compliance. The MHz \* pops basis is consistent with the Commission’s current method of apportioning unjust enrichment when licenses are partitioned and/or disaggregated and provides a

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<sup>57</sup> *Designated Entity Second Report and Order* at ¶ 27.

meaningful measure here.<sup>58</sup> However, while meeting the spectrum capacity thresholds on a MHz \* pops basis is sufficient to comply with our rules, it is not the only means of compliance. In other words, any entity meeting the thresholds on a MHz \* pops basis will be found in compliance, but entities not meeting the thresholds on a MHz \* pops basis may also be found in compliance based on other factors. The MHz \* pops measure is intended as a safe harbor; it is not meant to limit complying with the rules in other ways that we cannot fully anticipate at this time. We recognize that our decision not to enumerate all other means of compliance necessarily leaves some uncertainty, but we think that the MHz \* pops safe harbor provides sufficient certainty while allowing licensees and the Commission flexibility to conduct a more contextual analysis.

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

28. We received a number of inquiries regarding how the Commission will consider future agreements that were “agreed upon” prior to the release date of our decision. We therefore offer the following explanation. Agreements entered into by a designated entity – and, to the extent required, approved by or pending approval by the Commission – no later than April 24, 2006 that concern the lease or resale of the designated entity’s spectrum capacity after the release date of the *Designated Entity Second Report and Order* are grandfathered for the purposes of existing eligibility benefits and the imposition of unjust enrichment to the extent that the designated entity has no discretion as to the future lease or resale. For example, if a designated entity licensee had entered into an agreement on or before April 24, 2006 pursuant to which it was required to make 26 percent of its spectrum capacity available to Company B for resale purposes in 2007, that agreement would be grandfathered and therefore would not affect the licensee’s eligibility for existing designated entity benefits for that license nor would it trigger any future unjust enrichment obligations for that license. Even though Company B could not begin reselling the designated entity’s spectrum until 2007, its unequivocal right to do so had been contractually established before the release date of the *Designated Entity Second Report and Order*.<sup>59</sup>

29. If, however, the agreement allowed the designated entity to decide at some future point in time whether it would make spectrum available to Company B for resale purposes, and the designated entity did not legally commit itself to the resale until after April 24, 2006, the agreement for resale would, on the date the designated entity made the legal commitment, give rise to an attributable material relationship and also would be considered in calculating whether the designated entity had entered into impermissible material relationships.<sup>60</sup> Accordingly, the agreement might have implications for the designated entity’s ongoing eligibility for designated entity benefits for that license and unjust enrichment obligations. This result would occur even if the agreement had, prior to the release date of the *Designated Entity Second Report and Order*, already been reviewed and approved by the Commission. Thus, the applicability of grandfathering to the future lease or resale of spectrum in a pre-existing agreement depends on whether or not the provision was a “done deal” such that, prior to April 25, 2006, the decision

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<sup>58</sup> See 47 C.F.R. §1.2111(e).

<sup>59</sup> The agreement would still count toward any assessment of whether the designated entity retained a controlling interest in the license, however.

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

to lease or to allow the resale of spectrum was no longer within the discretion of the designated entity.<sup>61</sup>

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

### C. Unjust Enrichment

31. *Notice.* In their petition for expedited reconsideration of the *Designated Entity Second Report and Order*, the Joint Petitioners argue that the Commission violated the Administrative Procedure Act by giving inadequate notice and opportunity for comment prior to adopting new unjust enrichment provisions.<sup>64</sup> This claim is refuted by the plain language of the *Further Notice* and by the Joint Petitioners' own filings in response to it.

32. In the *Further Notice*, we observed that the Commission's existing rules "require the payment of unjust enrichment when an entity that acquires its license with small business benefits loses its eligibility for such benefits or transfers a license to another entity that is not eligible for the same level of benefits."<sup>65</sup> We also noted that Council Tree had proposed extending this "reimbursement obligation" to any licensee that acquires a license with the help of a bidding credit but then "makes a change in its 'material relationships' or seeks to assign or transfer control of the license to an entity that would result in its loss of eligibility for the bidding credit pursuant to any eligibility restriction that we adopt."<sup>66</sup> According to Council Tree, strengthening the unjust enrichment rules was "necessary to fulfill the Commission's statutory obligation to prevent unjust enrichment."<sup>67</sup> The *Further Notice* sought comment both on Council Tree's specific proposal and on whether we should seek to strengthen the unjust enrichment rules "in some other manner."<sup>68</sup> We also asked a series of questions about the scope of the reimbursement obligation, seeking comment on whether it should be triggered only "where the licensee takes on new investment" or also when it "enters into any new 'material financial relationship' or 'material operational relationship' that would have rendered the licensee ineligible for a bidding credit."<sup>69</sup>

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

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

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

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

<sup>65</sup> *Further Notice* at ¶ 20.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see 47 U.S.C. § 309(j)(4)(E); 47 C.F.R. § 1.2111(d).

<sup>68</sup> *Further Notice* at ¶ 20.

<sup>69</sup> *Id.*

Finally, while we noted Council Tree's proposal for a five-year reimbursement obligation, we did not even tentatively propose adopting it; instead, we asked "over what portion of the license term should . . . unjust enrichment provisions apply?"<sup>70</sup>

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

34. Indeed, the comments filed in response to the *Further Notice* demonstrate that parties did in fact understand the scope of the contemplated changes to the unjust enrichment rules. Council Tree itself squarely acknowledged that "[t]he Commission also seeks comment regarding over what portion of the license term should the unjust enrichment provisions apply."<sup>71</sup> Council Tree went on to advocate retention of a five-year time period.<sup>72</sup> On the other hand, MMTC, another of the Joint Petitioners now claiming lack of notice, urged "the Commission [to] consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years."<sup>73</sup> MMTC also suggested that the Commission consider adjusting its reimbursement obligations to require repayment of 100 percent of the value of the bidding credit.<sup>74</sup> Similarly, STX supported "stricter unjust enrichment rules so that the U.S. Treasury may be made whole in the event that a designated entity turns out to have been merely a front organized to secure bidding credits for a large incumbent wireless service provider."<sup>75</sup>

35. The changes we ultimately adopted to our unjust enrichment rules were clearly within the scope of the revisions contemplated by the *Further Notice* or, at a minimum, a logical outgrowth of them. Indeed, had we only revised the five-year unjust enrichment schedule for certain types of transactions but not for others, we would have risked creating an illogical scheme that would have created an incentive for designated entities to prioritize certain types of transactions over others. For all of these reasons, we reject the Joint Petitioner's APA notice claim.

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

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<sup>70</sup> *Id.*

<sup>71</sup> Comments of Council Tree at 58 (citing the *Further Notice* at ¶ 20).

<sup>72</sup> *Id.*

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

<sup>74</sup> *Id.*

<sup>75</sup> *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 35, referencing the Comments of STX at 2.

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

a windfall profit.<sup>77</sup>

37. We therefore modified our unjust enrichment rules to expand the unjust enrichment payment schedule from five to ten years.<sup>78</sup> Further, we required that the Commission be reimbursed for the entire bidding credit amount owed if a designated entity loses its eligibility for a bidding credit prior to the filing of the applicable construction notifications.<sup>79</sup> Specifically, we adopted the following ten-year unjust enrichment schedule for licenses acquired with bidding credits. For the first five years of the license term, if a designated entity loses its eligibility for a bidding credit for any reason,<sup>80</sup> including but not limited to, entering into an “impermissible material relationship” or an “attributable material relationship,” seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that does not qualify for bidding credits, 100 percent of the bidding credit, plus interest, is owed.<sup>81</sup> For years six and seven of the license term, 75 percent of the bidding credit, plus interest, is owed.<sup>82</sup> For years eight and nine, 50 percent of the bidding credit, plus interest, is owed, and for year ten, 25 percent of the bidding credit, plus interest, is owed.<sup>83</sup> We also imposed a requirement that the Commission must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any reason,<sup>84</sup> including but not limited to, entering into an “impermissible material relationship” or an “attributable material relationship,” seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that is not eligible for bidding credits prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the license term have been met.<sup>85</sup>

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

39. First, Joint Petitioners contend that the new unjust enrichment rules “have the practical effect of eliminating a designated entity’s access to capital by closing an accepted exit path if the business

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<sup>77</sup> See *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 36.

<sup>78</sup> See *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 37.

<sup>79</sup> See *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 38.

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

<sup>81</sup> *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 37.

<sup>82</sup> *Id.*

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

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

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

is not going well.”<sup>86</sup> This is so because, according to Joint Petitioners, “private equity and other investors frequently adhere to three to seven year investment horizons, with five being an accepted average.”<sup>87</sup> Joint Petitioner’s assertions regarding “accepted averages” do not demonstrate, however, that designated entities access to capital will be eliminated. Indeed, we are not convinced that three to seven years is a reasonable timeframe for investors to expect to recover their capital investments in facilities to provide spectrum-based services. In a recently concluded proceeding addressing the leasing of Educational Broadcast Service spectrum, a broad cross-section of commenters, including a private equity investment firm,<sup>88</sup> submitted evidence that insufficient capital would flow to businesses that want to develop that spectrum if the length of spectrum lease terms was limited to fifteen years.<sup>89</sup> These parties argued that lessees needed access to the spectrum for thirty years or more in order to provide the necessary certainty to justify capital investment in the band.<sup>90</sup> The Commission was “persuaded by the analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration” than thirty years.<sup>91</sup> Given our recent finding that access to Educational Broadcast Service spectrum for longer than fifteen years is essential to attract the capital needed to deploy facilities for spectrum based services, we are not convinced that the appropriate investment horizon for designated entity status should be only three to seven years.<sup>92</sup> Designated entity benefits are offered to ensure that small businesses have an opportunity to participate in the provision of spectrum-based services, not to ensure the short-term “exit strategies” of parties providing capital. The Commission strengthened its rules to ensure that those that receive such benefits were properly motivated to build out their spectrum and provide services for the benefit of the public by closing off the opportunity to sell licenses awarded with bidding credits for huge profits without ever having to provide actual facilities based services. The Joint Petitioners’ predictions regarding the new rules’ effect on venture capital alone are not a basis for reconsidering the rules.

40. Second, even if some sources of financing and capital would no longer be available on the same terms as before, the adoption of new rules is not arbitrary and capricious, or otherwise contrary to law. The Commission must balance the various statutory objectives of Section 309(j), and based on the record in response to the *Further Notice* and many years of experience, we found that the new unjust enrichment rules are necessary to increase the probability that designated entities will develop into facilities-based providers of service for the benefit of the public.<sup>93</sup> Again, it is neither the Commission’s

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<sup>86</sup> Petition for Expedited Reconsideration at 3-4.

<sup>87</sup> Petition for Expedited Reconsideration at 10.

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

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

<sup>90</sup> Nextel Opposition to Petition for Reconsideration in WT Docket No. 03-66 at 18-19.

<sup>91</sup> See, generally, Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Third Memorandum Opinion and Order*, FCC 06-46 (rel. April 27, 2006), ¶268 (permitting EBS licensees to enter into leases with terms of up to 30 years based on “analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration”).

<sup>92</sup> *Id.*

<sup>93</sup> See *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 36.



statutory responsibility nor its intent merely to provide small businesses with generalized economic opportunities in connection with spectrum licenses.<sup>94</sup> The Commission has not been charged with providing entities with a path to financial success, but rather with an obligation to facilitate opportunities for small businesses to provide spectrum based services to the public.<sup>95</sup> Therefore, it is our responsibility to create strong incentives for designated entities to use spectrum to provide facilities-based service to the public instead of holding their licenses and selling them for profit. We believe that our new rules create appropriate incentives in this regard while still affording designated entities the opportunity to achieve financial success by providing service to the public. It is important to remember that designated entities are provided with bidding credits in order to enable them to obtain spectrum and then provide facilities-based service to the public. To the extent that they do not do so, but instead sell their licenses to others in the marketplace at market prices, we believe that it is reasonable that they no longer be allowed to enjoy the benefit of obtaining spectrum at below-market prices.

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

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

42. We also take this opportunity to clarify and emphasize certain aspects of section 1.2114, our newly-adopted rule relating to reportable eligibility events.<sup>99</sup> As the rule expressly states, “[a] designated entity must seek Commission approval for all reportable eligibility events.”<sup>100</sup> As discussed in the *Designated Entity Second Report and Order*,<sup>101</sup> we emphasize that section 1.2114 requires prior Commission approval for a reportable eligibility event. We also clarify that a reportable eligibility event includes any event that might affect a designated entity’s ongoing eligibility, under either our material relationship or controlling interest standards,<sup>102</sup> and we correct new section 1.2114(a) accordingly. Although we affirm that we have delegated authority to the Wireless Telecommunications Bureau (“Bureau”) to implement our rule changes on reporting,<sup>103</sup> we anticipate that the Bureau’s procedures will

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<sup>94</sup> *Secondary Markets Second Report and Order* at ¶ 70.

<sup>95</sup> *See id.*

<sup>96</sup> *Designated Entity Second Report and Order*, FCC 06-52, at ¶ 41.

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

<sup>98</sup> *See* Rules Appendix.

<sup>99</sup> 47 U.S.C. § 1.2114.

<sup>100</sup> 47 C.F.R. § 1.2114(a).

<sup>101</sup> *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 46, note 115 and accompanying text.

<sup>102</sup> *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 47, note 116 and accompanying text.

<sup>103</sup> *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 48.

provide the means by which parties will apply for approval of all such arrangements. Such approval may require modifications to the terms of the parties' arrangements or unjust enrichment payments based on the impact of such arrangements on designated entity eligibility. We also take this opportunity to affirm our conclusions in the *Designated Entity Second Report and Order* with regard to the implementation of our regulations relating to the review of long-form applications and agreements to determine designated entity eligibility under the controlling interest standard. We also affirm our event-based and annual reporting requirements as well as our commitment to audit the eligibility of every designated entity that wins a license in the AWS auction at least once during the initial term.<sup>104</sup>

#### E. Regulatory Flexibility Act

43. We also disagree with the claims of the Joint Petitioners that our recently adopted rules violate the Regulatory Flexibility Act ("RFA").<sup>105</sup> Among other things, the Joint Petitioners assert that we failed to provide adequate notice in the Initial Regulatory Flexibility Analysis ("IRFA") about the scope of the proposed rules, their application to current designated entity licensees, or the ten-year unjust enrichment schedule for licenses acquired with bidding credits. We note as an initial matter that the IRFA is not subject to judicial review. Section 611 of the RFA expressly prohibits courts from considering claims of non-compliance with the initial regulatory flexibility analysis requirement of RFA section 603.<sup>106</sup> Moreover, Joint Petitioners have not articulated the legal basis for their claim that a purported lack of notice constitutes an independent violation of the RFA. In any case, we have demonstrated above that the *Further Notice* (the substance of which was incorporated by reference in the IRFA) provided ample notice of the possible rule changes at issue here.<sup>107</sup> For the same reason, any claim about the sufficiency of the Final Regulatory Flexibility Analysis ("FRFA") based on charges of inadequate notice and lack of opportunity for comment is also without merit.

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

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<sup>104</sup> See *Designated Entity Second Report and Order*, FCC 06-52, at ¶¶ 42-50.

<sup>105</sup> See Supplement of Council Tree, MMTC and Bethel Native at 3-7.

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

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

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

investments in qualified businesses.”<sup>109</sup> Consistent with previous changes we have made to our designated entity rules, the rule modifications at issue were the result of trying to maintain this balance in “the face of a rapidly evolving telecommunications industry, legislative changes, judicial decisions, and the demand of the public for greater access to wireless services.”<sup>110</sup> Moreover, as evidenced by the expansive record compiled in this docket and our decision to defer the adoption of further rules, if any, until after we had provided additional opportunity for parties to comment, we adopted only those rules that we concluded were clearly warranted to deter abuse of the Commission’s designated entity program.<sup>111</sup> Consequently, we believe that our analysis fully complied with the requirements of the RFA.<sup>112</sup>

#### IV. CONCLUSION

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

#### V. PROCEDURAL MATTERS

##### A. Paperwork Reduction Act Analysis

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

##### B. Congressional Review Act

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

##### C. Effective Date

48. This Order on Reconsideration of the Second Report and Order and the accompanying rule changes are effective upon publication in the Federal Register. We find there is good cause under section 553(d)(3) of the Administrative Procedure Act<sup>113</sup> to make the changes we implement with this Order effective upon Federal Register publication, without the usual 30-day period, because these changes (with the possible exception of those concerning the unjust enrichment rules) constitute minor points of clarification of the rules adopted in the Designated Entity Second Report and Order, which were published in the Federal Register on May 4, 2006.<sup>114</sup> As to the clarifying changes in our unjust

<sup>109</sup> *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 8.

<sup>110</sup> *Id.*

<sup>111</sup> *See Designated Entity Second Report and Order*, FCC 06-52, at ¶ 23.

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

<sup>113</sup> 5 U.S.C. §553(d).

<sup>114</sup> 71 Fed. Reg. 26,245, May 4, 2006.

enrichment rules,<sup>115</sup> these changes, at most, serve to “grant[ ] or recognize[ ] an exemption or relieve[ ] a restriction” and would therefore fall within the exception contained in section 553(d)(1).<sup>116</sup>

## VI. ORDERING CLAUSE

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>115</sup> 47 C.F.R. § 1.2111 as revised herein.

<sup>116</sup> 5 U.S.C. § 553(d)(1).

**APPENDIX****Final Rules**

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

**PART 1 – PRACTICE AND PROCEDURE**

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

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

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

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

**§ 1.2111 Assignment or transfer of control: unjust enrichment.**

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

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

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

\* \* \* \* \*

(d) \* \* \*

(2) Payment schedule.

(i) For licenses initially granted after April 25, 2006, the amount of payments made pursuant to paragraph (d)(1) of this section will be 100 percent of the value of the bidding credit prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met. If the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met, the amount of the payments will be reduced over time as follows:

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

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

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

and

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

(ii) For licenses initially granted before April 25, 2006, the amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

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

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

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

(D) 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.

(iii) 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).

\* \* \* \* \*

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

**§ 1.2114 Reporting of Eligibility Event.**

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

(1) Any spectrum lease (as defined in § 1.9003) or resale arrangement (including wholesale agreements) with one entity or on a cumulative basis that might cause a licensee to lose eligibility for installment

payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under § 1.2110 and applicable service-specific rules.

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

\* \* \* \* \*



**STATEMENT OF CHAIRMAN KEVIN J. MARTIN**

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

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

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

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

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

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

Study after study demonstrates that our nation's broadband infrastructure lags dramatically behind other industrialized nations. In order to reverse this trend, we must encourage "third pipe" technologies to provide some at least some challenge to the cable/telco broadband duopoly in our cities. In rural areas, the situation is even graver. The GAO recently announced that the Commission has not even properly *measured* the rural-urban broadband gap – a gap that no one disputes is both significant and deeply troubling. In underserved rural regions of our country, AWS spectrum can provide a desperately needed "first pipe." The upcoming auction can be an important step in making this happen.

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

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

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

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

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

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

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