

**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)	
)	
)	
)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: January 27, 2006

Released: February 3, 2006

Comment Date: (14 days after publication in the Federal Register)

Reply Comment Date: (21 days after publication in the Federal Register)

By the Commission: Chairman Martin and Commissioners Copps and Adelstein issuing separate statements.

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APPENDIX – Initial Regulatory Flexibility Analysis

I. INTRODUCTION

1. In this Further Notice of Proposed Rule Making (“*Further Notice*”), we consider whether we should modify our general competitive bidding rules¹ (“Part 1” rules) governing benefits reserved for designated entities (i.e., small businesses, rural telephone companies, and businesses owned by women and minorities).² Specifically, we seek comment on the elements of a proposal raised by Council Tree Communications, Inc. (“Council Tree”) that seeks to prohibit the award of bidding credits or other small business benefits³ to entities that have what Council Tree refers to as a “material relationship”⁴ with a “large in-region incumbent wireless service provider.”⁵ Council Tree maintains that such a prohibition should apply to “otherwise

¹ See 47 C.F.R. § 1.2101 *et. seq.*

² See 47 C.F.R. § 1.2110. The Commission establishes special 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, ¶ 48 (2000) (*Part 1 Fifth Report and Order*), citing *Adarand Constructors, Inc. v. Peña*, 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, 457-8 ¶ 100, 462-3 ¶ 111 (1994) (*Competitive Bidding Fifth MO&O*); Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, ¶¶ 51-52 (2000); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), 17 FCC Rcd 1022, ¶ 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 also*, 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 (2003). See 47 C.F.R. § 1.2110(b)(3)(iii).

³ In certain instances, the Commission has set aside blocks of spectrum reserved in “closed bidding” for “entrepreneurs” that meet a specified financial threshold. In order to be eligible to bid on such spectrum, an applicant, including attributable investors and affiliates, must have had gross revenues of less than \$125 million in each of the last two years and must have less than \$500 million in total assets. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-82 ¶ 115 (1994). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420-21 ¶¶ 28-30 (1994); Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000) (“*C/F Block Sixth Report and Order*”).

⁴ 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*).

⁵ *Id.*

qualified designated entities.”⁶ In examining this proposal, we reach a tentative conclusion 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,” and we seek comment on how we should define the elements of such a restriction. Moreover, as discussed further below, we seek comment on whether we should restrict the award of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with a large entity that has a significant interest in communications services. We intend to complete this proceeding in time so that any modifications to our rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services (“AWS”), which currently is scheduled to begin June 29, 2006.⁷ In light of our upcoming auction schedule, we seek comment on a proposal to require designated entity auction applicants to certify their qualifications subject to the changed rules by amending any auction applications that are pending on the effective date of any rule changes adopted in this proceeding.

II. BACKGROUND

2. In the Commission’s *Declaratory Ruling and Notice of Proposed Rulemaking* to implement rules and procedures needed to comply with the Commercial Spectrum Enhancement Act (“CSEA”),⁸ the Commission proposed a number of changes to its Part 1 competitive bidding rules that were necessary, apart from CSEA, to bring them in line with the current requirements of its auctions program. With today’s *Further Notice*, we consider further updates to our Part 1 competitive bidding rules and procedures.

3. The questions and tentative conclusion we pose here arise out of a proposal made by Council Tree in an *ex parte* filing that in part supplemented its petition for reconsideration of the Commission’s order establishing service rules for Advanced Wireless Services (“AWS”) in the 1710-1755 and 2110-2155 MHz bands.⁹ In the *AWS-1 Service Rules Order*, the Commission adopted rules designed to ensure that designated entities are given the opportunity to participate in an auction of AWS spectrum.¹⁰ By establishing a range of geographic licensing areas including relatively small areas, such as Metropolitan Statistical Areas (MSAs) and Rural

⁶ Council Tree *ex parte* at 14.

⁷ Proposals herein arose in connection with service rules for AWS in the 1710-1755 and 2110-2155 MHz bands. See, *infra*, ¶ 3. An auction for licenses in those bands is currently scheduled to begin June 29, 2006. Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures, *Public Notice*, DA 06-238 (rel. Jan. 31, 2006). Similarly, an auction for licenses in the 800 MHz Air-Ground Radiotelephone Service is currently scheduled to begin May 10, 2006. Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006, Comment Sought on Reserve Prices of Minimum Opening Bids and Other Procedures, *Public Notice*, DA 06-3 (rel. January 10, 2006), 71 FR 3513 (January 23, 2006).

⁸ Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Declaratory Ruling and Notice of Proposed Rulemaking*, 20 FCC Rcd 11268 (2005), released June 14, 2005.

⁹ Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, 18 FCC Rcd 25162 (2003) (*AWS-1 Service Rules Order*).

¹⁰ *AWS-1 Service Rules Order*, 18 FCC Rcd 25162 (2003).

Service Areas (RSAs), and a range of spectrum block sizes, the Commission believed that it would encourage participation by smaller and rural entities. Accordingly, it concluded that adopting set-asides or eligibility restrictions would not be necessary.¹¹ The Commission also adopted two small business size standards and associated bidding credits for small businesses, concluding that small business size standards and bidding credit levels that matched those offered in auctions of broadband Personal Communications Service (PCS) licenses were appropriate because broadband PCS presented service opportunities, capital requirements, and entry issues comparable to those presented by AWS.¹²

4. Council Tree's petition for reconsideration of the *AWS-1 Service Rules Order*, urged the Commission to reconsider its position with respect to set-asides for designated entities or, in the alternative, to add a third small business size standard and offer qualifying entities a 35 percent bidding credit.¹³ Council Tree's *ex parte* filing sought to supplement its petition for reconsideration and proposed, among other things, that the Commission prohibit the award of bidding credits or other small business benefits to entities that would "otherwise qualify" for eligibility but have what it refers to as a "material relationship" with a "large in-region incumbent wireless service provider."¹⁴ Council Tree's proposal also suggested standards by which it sought to define both "material relationship" and "large in-region incumbent wireless service provider."¹⁵ In its *ex parte* filing, Council Tree urged the Commission to add a third small business size standard to its AWS-1 service rules and offer such entities a 35 percent bidding credit, effectively reiterating the alternative proposal contained in its petition for reconsideration. It also proposed that the Commission should provide an additional 10 percent bidding credit (increasing the maximum 35 percent credit to 45 percent) for those designated entities that provide service to underserved segments of the population, namely lower income customers and members of minority groups. Council Tree further proposed that individuals with a net worth exceeding \$3 million (excluding the value of their primary residence) should not be permitted to have an actual controlling interest in a designated entity.¹⁶

5. In its *Order on Reconsideration*, the Commission rejected Council Tree's Petition and the *ex parte* proposals it made in the AWS proceeding.¹⁷ The Commission concluded,

¹¹ *AWS-1 Service Rules Order*, 18 FCC Rcd at 25189 ¶ 68.

¹² *AWS-1 Service Rules Order*, 18 FCC Rcd at 25220 ¶ 149. The Commission defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. It provided small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent. The small business size standards and associated bidding credits for licenses in the 1710-1755 MHz and 2110-2155 MHz bands are the same as those the Commission adopted for broadband PCS.

¹³ Council Tree Petition for Reconsideration (filed Mar. 8, 2004) (Council Tree Petition) at 4.

¹⁴ Council Tree *ex parte* at 1, 13-16. By this *ex parte* filing, Council Tree also seeks to supplement its February 8, 2005 reply comments in WT Docket No. 04-356 as well as its March 8, 2004 petition for rulemaking in WT Docket No. 97-82 (RM-10956).

¹⁵ Council Tree *ex parte* at 13.

¹⁶ Council Tree *ex parte* at 2-3.

¹⁷ Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, WT Docket No. 02-353, 20 FCC Rcd 14058, ¶¶ 37-41 (2005). In particular, with respect to the additional 10

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however, that Council Tree's suggestion to restrict the award of bidding credits or other small business benefits where an entity "otherwise qualified" for eligibility but has a "material relationship" with a "large in-region incumbent wireless service provider" warranted further study.¹⁸ It is this conclusion that forms the basis for this *Further Notice* today. In examining our current rules, we tentatively conclude that we should modify our requirements regarding designated entity eligibility 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." As noted below, we seek comment on the specific elements of Council Tree's proposal. Additionally, we seek comment on whether we should restrict the availability of designated entity benefits where an otherwise qualified designated entity has a "material relationship" with a large entity that has a significant interest in the provision of communication services, e.g., voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers (hereinafter collectively referred to as "entity(ies) with significant interests in communications services").

III. DISCUSSION

6. Since the inception of the auctions program, the Commission has sought to facilitate the participation of small businesses in the competitive bidding process. In the *Competitive Bidding Second Report and Order*, the Commission established various incentives, such as bidding credits and spectrum set-asides, to encourage designated entities to participate in future auctions and in the provision of service.¹⁹ The Commission also has made substantial efforts to ensure that only legitimate small businesses reap the benefits of the Commission's designated entity program. Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules.²⁰ To that end, in determining whether to award designated entity benefits, the Commission adopted a strict eligibility standard that focused on whether the applicant maintained control of the corporate entity.²¹ The

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percent bidding credit and the individual net worth proposals, the Commission found that, in light of other Commission decisions and rules, Council Tree had failed to present any evidence to justify adoption of either proposal. *Order on Reconsideration* at ¶¶ 37-40. Council Tree made the same net worth proposal in an earlier petition for rulemaking filed on March 9, 2004 in WT Docket No. 97-82. Because the *Order on Reconsideration* rejected the net worth test also proposed by Council Tree in its petition for rulemaking, this action effectively disposed of Council Tree's petition for rulemaking. With respect to Council Tree's proposal regarding entities having "material relationships" with "large in-region incumbent wireless service providers," the Commission noted that the record on this issue was undeveloped. *Order on Reconsideration* ¶ 41.

¹⁸ *Order on Reconsideration* at ¶ 41.

¹⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*).

²⁰ See, e.g., *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 (1994); *Part I Fifth Report and Order*, 15 FCC Rcd 15293 (2000); Application of ClearComm, L.P., *Memorandum Opinion and Order*, 16 FCC Rcd 18627 (2001).

²¹ *Competitive Bidding Second Report and Order* at 2396, ¶ 277.

Commission's objective in employing such a standard was "to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings."²²

7. The Commission intends its small business provisions to be available only to bona fide small businesses. In this *Further Notice*, we tentatively conclude that modifications to our designated entity rules are warranted. In determining whether additional safeguards are necessary to ensure that bidding credits and other benefits are awarded to the appropriate entities, we recognize that we must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding have sufficient capital and flexibility to structure their businesses to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public.²³

8. In its *ex parte* filing, Council Tree proposes that the Commission prohibit the availability of bidding credits or other small business benefits where an "otherwise qualified" entity seeking such eligibility has what Council Tree refers to as a "material relationship" with a "large, in-region, incumbent wireless service provider." Council Tree asserts that if the Commission does not limit the availability of bidding credits and other designated entity benefits in such instances, spectrum rights will be concentrated in the hands of large, incumbent wireless service providers.²⁴ Council Tree states that "following the consummation of announced mergers, the top-5 wireless carriers today will control 89 percent of United States wireless service subscribers, up from just 50 percent in 1995."²⁵ It further asserts that in Auction 58, the Commission's recent broadband PCS auction, the five largest wireless carriers won \$367 million of licenses, or 18 percent of the auction total. Council Tree maintains that "these same carriers also partnered with designated entities in Auction 58 to win an additional \$1.03 billion of licenses, representing another 51 percent of the auction total."²⁶ Council Tree concludes that the large carriers structured their relationships with designated entities as a means to realize for themselves the benefits and opportunities that the Commission had intended for small businesses.²⁷

²² *Competitive Bidding Second Report and Order* at 2397, ¶ 278.

²³ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532 at ¶159 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 at ¶¶ 5, 62 (1994); *Part 1 Fifth Report and Order* at ¶¶ 64-65 (2000).

²⁴ Council Tree *ex parte* at 2, 13-15.

²⁵ Council Tree *ex parte* at 6. According to Council Tree, the five largest wireless carriers are Verizon Wireless, Cingular Wireless, Sprint PCS/Nextel, T-Mobile and ALLTEL. Letter and Attachment 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 30, 2005), Attachment at 4.

²⁶ Council Tree *ex parte* at 6.

²⁷ Council Tree *ex parte* at 6.

9. CTIA – The Wireless Association (“CTIA”) opposes Council Tree’s *ex parte* asserting, among other things, that Council Tree’s proposed constraint on relationships between large wireless carriers and those seeking eligibility for small business and entrepreneur provisions is contrary to the Commission’s goal of providing legitimate small businesses maximum flexibility in attracting passive financing.²⁸ CTIA further states that such a limitation on a small business’ ability to raise capital would undermine the Commission’s intention of promoting small business participation in the highly competitive telecommunications marketplace.²⁹

10. In our continued effort to preserve for small businesses and entrepreneurs the benefits reserved for designated entities, we seek comment generally on whether the Commission’s existing rules should be modified as suggested by our tentative conclusion and Council Tree’s proposal to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities. We also seek comment below on the particular elements of Council Tree’s proposal. Additionally, we seek comment on whether we should restrict the availability of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with an “entity with significant interests in communications services.”

11. Our existing Part 1 rules include generally applicable provisions regarding the attribution of gross revenues of an entity and its controlling interests and affiliates to determine whether that entity meets service-specific eligibility standards for designated entity benefits, such as bidding credits.³⁰ Council Tree proposes that even where an entity qualifies for designated entity benefits under our existing rules, such benefits should not be available to that entity if it has a “material relationship” with a “large, in-region, incumbent wireless provider.” We tentatively conclude that we should modify our rules to restrict the award of designated entity benefits where such a relationship exists. We seek comment on Council Tree’s proposal for defining “material relationship” and on the two elements Council Tree proposes to use in defining a “large, in-region, incumbent wireless service provider” – the geographic overlap between the incumbent and the designated entity applicant, as well as the incumbent’s wireless gross revenues.³¹ We also seek comment on the factual assertions upon which Council Tree’s

²⁸ Letter from Diane Cornell, Vice President, Regulatory Policy, CTIA – The Wireless Association to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 02-353 (June 30, 2005)(CTIA Opposition).

²⁹ CTIA Opposition at 4.

³⁰ 47 C.F.R. § 1.2110(b)(1)(i).

³¹ Council Tree *ex parte* at 2, 13-16. Council Tree suggests that the Commission exclude from its proposed restriction those in-region CMRS and AWS licensees that have average gross wireless revenues for the preceding three years that do not exceed \$5 billion. It states that this exception (effectively for *smaller* in-region incumbents) will help true new entrants to attract capital and draw on the experience of existing firms and managers as a way to increase their odds of success without exacerbating the ownership concentration problems associated with turning to large incumbent providers in their existing regions for support. It also states that the eligibility rules that it proposes should not operate as a license eligibility limitation. As such, it asserts that a large incumbent CMRS or AWS provider would itself not be prevented under the plan from acquiring any AWS license through competitive bidding, and the incumbent could invest at a material level in, or enter material operating arrangements with, any new entrant applying for AWS licenses that have no significant overlap with the incumbent’s existing CMRS or AWS license

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proposals are based and the impact, if any, that the adoption of the proposed restriction would have on the ability of small businesses to provide spectrum-based services. In addition, we seek comment on whether we should extend any rule modifications we adopt to restrict the availability of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with an “entity with significant interests in communications services.”

12. *Material Relationship.* As noted above, the Commission currently applies a gross revenues test as its general standard for measuring the size of an entity for the purposes of awarding small business benefits, in part because such a standard provides “an accurate, equitable, and easily ascertainable measure of business size.”³² Under this standard, we attribute to an applicant the gross revenues of its “controlling interests” and its “affiliates” in assessing whether the applicant is qualified to take advantage of our small business provisions, such as bidding credits.³³ A “controlling interest” includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control and under a totality of the circumstances analysis.³⁴ Council Tree suggests, however, that the Commission’s current rules do not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses.

13. According to Council Tree, the Commission should determine that a “material relationship” exists if a “large, in-region, incumbent wireless service provider” has provided a material portion of the total capitalization of the applicant (*i.e.*, equity plus debt),³⁵ or has any

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service areas. The large incumbent simply could not utilize the AWS auction bidding credit itself or invest at a material level in, or enter material operating arrangements with, an AWS auction applicant “in region.”

³² Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 388-89, ¶ 19 (1997) (*Part 1 Third Report and Order*).

³³ See 47 C.F.R. § 1.2110(b)(1).

³⁴ For purposes of calculating equity held in an applicant or licensee, the controlling interest standard treats certain ownership agreements, such as warrants, stock options, convertible debentures, and agreements to merge, as already having been “fully diluted,” *i.e.*, fully exercised. 47 C.F.R. § 1.2110(c)(2)(ii)(A). *De jure* control is typically evidenced by the holding of 50.1 percent or more of the voting stock of a corporation or, in the case of a partnership, general partnership interests. This *de jure* control standard is also applicable to limited liability companies and limited partnerships. *De facto* control is determined on a case-by-case basis and includes the criteria set forth in *Ellis Thompson*. See *Ellis Thompson Corporation*, 9 FCC Rcd 7138, 7138-7139 ¶ 9 (1994) (*Ellis Thompson*), in which the Commission identified the following factors used to determine control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; (5) control of financial obligations; and (6) receipt of monies and profits. See also *Intermountain Microwave*, 12 FCC 2d 559, 560 (1963), and *Application of Baker Creek Communications, L.P.*, for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (1998).

³⁵ Council Tree asserts that this approach is similar to that employed by the Commission in providing new entrant bidding credits to applicants for construction permits in the broadcast services. Council Tree *ex parte* at 14. In determining an applicant’s eligibility for a new entrant bidding credit, the Commission attributes the mass media interests of any individual or entity who holds a significant equity interest and/or debt interest in an auction

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material operational arrangement with the applicant (such as management, joint marketing, trademark, or other arrangements) or other material financial arrangement relating to the overlap markets. In the event that there is such a “material relationship,” Council Tree advocates that designated entity benefits should be withheld even if the entity would otherwise qualify for designated entity eligibility under our existing rules. As noted above, we tentatively conclude that a relationship between a “large, in-region incumbent wireless service provider” and an otherwise qualified designated entity applicant should trigger a restriction on the availability of designated entity benefits. We therefore seek comment on the specific nature of the relationship that should trigger such a restriction. Additionally, we seek comment on whether other “material” relationships, such as those between an otherwise qualified designated entity and an “entity with significant interests in communications services,” should trigger a restriction on the award of designated entity benefits.

14. With respect to determining what may constitute a “material financial” or “material operational” relationship, we also seek comment on whether our existing “controlling interest standard” and affiliation rules appropriately measure and take into consideration the existence of those factors raised by Council Tree.³⁶ For instance, Council Tree proposes that the material operational arrangements that should trigger any proposed restriction should include management, joint marketing, and trademark arrangements.³⁷ Insofar as the Commission already attributes the gross revenues of those that have management or marketing agreements with an applicant where such agreements grant authority over key aspects of the applicant’s business, we seek comment on whether a different standard should be used where the relationship in question is with a “large, in-region incumbent wireless service provider” or with an “entity with significant interests in communications services.” If so, how should that standard differ from the factors that the Commission currently considers for determining indicia of control? If commenters believe that the Commission’s rules do not already address these types of arrangements, they should specify how we should define these arrangements.

15. We also seek comment on whether a prohibition based on certain relationships, such as the one proposed by Council Tree, would be too harsh or limit a designated entity’s ability to gain access to capital or industry expertise. We seek comment on whether there may be instances where the existence of either a “material financial agreement” or a “material

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applicant claiming new entrant status. See 47 C.F.R. § 73.5008(c). Council Tree notes that, in the broadcast context, the Commission explained that “[a]ttributing the interests, whether debt or equity, of substantial investors is justified to insure that only true new entrants qualify for the bidding credit because holders of otherwise nonattributable nonvoting interests may well have ‘a realistic potential’ to influence bidders claiming new entrant status.” Council Tree *ex parte* at 14.

³⁶ 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 (2000) (*Part I Fifth Report and Order*). A “controlling interest” includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control. Under the Commission’s attribution rules, all parties that control an applicant and their affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant’s eligibility for small business status.

³⁷ Council Tree *ex parte* at 15.

operational agreement,” in and of itself, may be appropriate between a designated entity and a “large incumbent wireless service provider” or an “entity with significant interests in communications services,” and may not raise issues of undue control. Should the Commission allow designated entities to obtain a bidding credit if they have only a “material financial agreement” or only a “material operational agreement” with a “large incumbent wireless service provider,” or an “entity with significant interests in communications services,” but not both? What factors should we consider in determining whether either type of agreement may be permissible? Would this approach be sufficient to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities? Commenters should address the appropriate level of financial or operational participation of a “large incumbent wireless service provider” or an “entity with significant interests in communications services” that should trigger any proposed prohibition of the award of designated entity benefits to entities that are otherwise qualified. As a general matter, should the definition of “material relationship” differ if we adopt our tentative conclusion or if we expand the restriction to include relationships with “entities with significant interests in communications services?”

16. In its Secondary Markets proceeding, the Commission 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.³⁸ 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. We also seek comment on whether other arrangements should be taken into account. If so, what arrangements should we consider?

17. *Wireless Gross Revenues.* Council Tree suggests that “large, in-region, incumbent wireless providers” should be defined, in part, as those having what Council Tree refers to as “average gross wireless revenues”³⁹ for the preceding three years exceeding \$5 billion. We seek comment on this proposed benchmark and whether it is a useful element for consideration if we adopt our tentative conclusion to modify our Part 1 rules to include additional restrictions on the availability of designated entity benefits. Is \$5 billion an appropriate level at which to set the benchmark to define “large, in-region incumbent wireless provider?” In contemplating this proposal, we also seek comment on whether we should evaluate the service provider’s “gross wireless revenues” as suggested by Council Tree or

³⁸ Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17541-17542 ¶ 77 (2004). The Commission concluded that a spectrum manager lease between a designated entity licensee and a non-designated entity lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible. *Id.* On the other hand, a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee’s spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. *Id.*

³⁹ Council Tree’s proposal does not include a definition of “average gross wireless revenues.”

instead if we should generally consider “gross revenues” as defined in Section 1.2110 (n) of the Commission’s rules.⁴⁰ Should we consider an alternative benchmark? What would be the appropriate benchmark if we extend the restriction on designated entity benefits to designated entities that have material relationships with “entities with significant interests in communications services?” Commenters supporting an alternative benchmark should provide specific data to support any such alternative. What standard should we use to attribute revenues, wireless or otherwise, to the incumbent wireless provider or to an “entity with significant interests in communications services”, if any? Should we use the same “controlling interest” standard and affiliation rules currently used to attribute to an applicant the gross revenues of its investors and affiliates in determining whether the applicant qualifies for small business benefits?

18. *Significant Geographic Overlap.* In addition to a gross revenues benchmark, Council Tree proposes that the Commission define a “large, in-region, incumbent wireless service provider” as an entity (including all parties under common control) that is, or has an attributable interest in, a CMRS or AWS licensee whose licensed service area has significant overlap in the geographic area to be licensed to the designated entity applicant.⁴¹ As a general matter, we seek comment on whether geographic overlap should be an element in establishing any additional restriction on the availability of designated entity benefits. Council Tree proposes that for purposes of determining significant geographic overlap in defining an in-region incumbent wireless service provider, the Commission should apply the standard set forth in Section 20.6 (c) of the Commission’s rules.⁴² Although the CMRS spectrum aggregation limit sunset on January 1, 2003,⁴³ Section 20.6 defined significant overlap of geographic service areas for the purpose of that limit, and provides that significant overlap occurs when there is an overlap of at least 10 percent of the population within the impacted service areas.⁴⁴ We further seek comment on whether we should apply the standard set forth in Section 20.6 (c) of the Commission’s rules as proposed by Council Tree. If so, what factors should the Commission consider in applying this standard to all wireless services? Should we apply a different, or any, geographic standard if we extend the restriction on designated entity benefits to designated entities that have material relationships with “entities with significant interests in communications services?” If the Commission determines that a significant geographic overlap does exist, how should the Commission implement such a restriction? Should an incumbent be allowed to divest its interest in the subject service area to allow a designated entity applicant to maintain eligibility for a bidding credit? If so, within what time period should we require the divestiture? We seek comment on whether the application of the standard set forth in Section

⁴⁰ 47 C.F.R. § 1.2110(n).

⁴¹ Council Tree suggests that the Commission employ (in part) the wireless service overlap and CMRS ownership attribution standards established as part of the Commission’s CMRS spectrum aggregation limit. Council Tree acknowledges that the CMRS spectrum aggregation limit has sunset but suggests that this standard should be followed. Council Tree *ex parte* at 14.

⁴² Council Tree *ex parte* at 13.

⁴³ See 47 C.F.R. § 20.6(f).

⁴⁴ 47 C.F.R. § 20.6 (c).

20.6 (c) of the Commission's rules or any other geographic overlap restriction would place an undue administrative burden on the Commission, making it difficult to monitor an applicant's compliance with any adopted geographic overlap restriction. Should the Commission consider adopting any other geographic overlap standards? In addressing these issues, commenters should state with specificity what factors the Commission should consider and what mechanisms it should adopt to ensure an applicant's continued compliance with any geographic overlap restriction.

19. *Entities with Significant Interests in Communications Services.* As noted above, we seek comment on whether we should prohibit the award of designated entity benefits where an otherwise qualified designated entity applicant has a "material relationship" with an "entity with significant interests in communications services." If we extend the restriction in this manner, should we define "entities with significant interests in communications services" to include a broad category of businesses such as voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers? We seek comment on whether all of these entities should be included as part of our definition of "entities with significant interests in communications services." Should we consider excluding some of these entities from our proposed definition? If so, which entities should we exclude and why? Are there additional entities that we should consider including as part of our proposed definition? If so, which entities should we include, and why? Moreover, we seek comment on how we should specifically define "significant interests in communications services?" Does our consideration of the category "communications services" provide additional safeguards to ensure the award of our designated entity benefits only to legitimate small businesses or does it create too many obstacles for designated entities to obtain access to capital?

20. *Unjust Enrichment.* 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.⁴⁵ Council Tree suggests that the Commission should also impose a reimbursement obligation on a licensee that, in the first five years of its license term, acquires a license with a bidding credit and subsequently 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.⁴⁶ Council Tree asserts that such a requirement is necessary to fulfill the Commission's statutory obligation to prevent unjust enrichment⁴⁷ and to ensure that the new eligibility requirement for bidding credits has the intended effect of helping eligible small businesses to acquire spectrum licenses.⁴⁸ Council Tree also proposes, however, that an unjust enrichment payment should not be required in the case of "natural growth" of the revenues attributed to an incumbent carrier above the

⁴⁵ 47 C.F.R. §1.2111(d).

⁴⁶ Council Tree *ex parte* at 15-16.

⁴⁷ See 47 U.S. C. § 309(j)(4)(E). See also, 47 C.F.R. § 1.2111(d).

⁴⁸ Council Tree *ex parte* at 15.

established benchmark.⁴⁹ Instead, it suggests that the reimbursement obligation should apply only where the licensee takes on new investment, or enters into any operational agreement, that would have disqualified the licensee for the bidding credit at the time of the licensee's initial application.⁵⁰ We seek comment on whether, if we adopt a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules such as those proposed by Council Tree, or in some other manner. Should any reimbursement obligation we adopt apply where the licensee takes on new investment, or also where it enters into any new "material financial relationship" or "material operational relationship" that would have rendered the licensee ineligible for a bidding credit? If we 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, over what portion of the license term should such unjust enrichment provisions apply?

21. *Pending Auction Provisions.* As stated at the outset, we intend any changes adopted in this proceeding to apply to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006.⁵¹ In light of the current auction schedule, any changes that we adopt in this proceeding may become effective after the deadline for filing applications to participate in that auction.⁵² Under Commission rules, applicants asserting designated entity status in a Commission auction are required to declare, under penalty of perjury, that they are qualified as a designated entity under section 1.2110 of the Commission's rules.⁵³ In the event that any designated entity applicants have filed an application to participate in an auction prior to the effective date of any designated entity rule changes adopted in this proceeding, we propose to require such applicants to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to section 1.2110 of the Commission's rules effective as of the date of the statement.⁵⁴ In the event applicants fail to file such a statement pursuant to procedures announced by public notice, they will be ineligible to qualify as a designated entity, *e.g.*, receive

⁴⁹ Council Tree *ex parte* at 15-16. See Applications of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. et al, *Memorandum Opinion and Order*, 16 FCC Rcd 3716 (2000).

⁵⁰ Council Tree *ex parte* at 16.

⁵¹ Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures, *Public Notice*, DA 06-238 (rel. Jan. 31, 2006).

⁵² Similarly, an auction for licenses in the 800 MHz Air-Ground Radiotelephone Service is currently scheduled to begin May 10, 2006. Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006, Comment Sought on Reserve Prices of Minimum Opening Bids and Other Procedures, *Public Notice*, DA 06-3 (rel. January 10, 2006), 71 FR 3513 (January 23, 2006). In light of the current auction schedule, any provisions that we may adopt regarding pending auctions may apply in that auction as well.

⁵³ See 47 C.F.R. See 1.2105(a)(2)(iv).

⁵⁴ *Cf.* 47 C.F.R. 1.2105(a)(2)(iv) (parallel statement currently required as of the date of filing the short-form application). Pursuant to its delegated authority to conduct auctions, the Wireless Telecommunications Bureau will establish any detailed procedures necessary for making required amendments and announce such procedures by public notice. See 47 C.F.R. §§ 0.131, 0.331.

small business bidding credits, either generally or with respect to specific licenses.⁵⁵ We seek comment on this proposal.

IV. CONCLUSION

22. For the reasons stated above, we seek comment on our competitive bidding rules, on the elements of the specific proposal raised by Council Tree, and on our tentative conclusion to modify our Part 1 rules to prohibit the award of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with a “large, in-region wireless service provider.”

V. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose Proceeding

23. For purposes of this permit-but-disclose notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted, except during the sunshine Agenda period, provided that the presentations are disclosed pursuant to the Commission’s rules.⁵⁶

B. Paperwork Reduction Act

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

C. Initial Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact

⁵⁵ While prior certifications may be a prerequisite to eligibility, applicants still must demonstrate compliance with all applicable Commission rules, including eligibility for any bidding credits, at the time the Commission is ready to grant a license, regardless of previously applicable rules. *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Report and Order*, FCC 06-4 (rel. Jan. 24, 2006), at ¶ 45 n.84; *see also* *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002) (affirming Commission application of installment payment rules that were revised after initial grant of license).

⁵⁶ *See generally* *id.* §§ 1.1202, 1.1203, 1.1206(a).

on small entities of the proposals suggested in the *Further Notice of Proposed Rulemaking*. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to the *Further Notice*, and must have a separate and distinct heading designating them as responses to the IRFA.

D. Comment Filing Procedures

26. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments on or before **14 days after publication in the Federal Register** and may file reply comments on or before **21 days after publication in the Federal Register**. **All filings related to this Further Notice of Proposed Rule Making should refer to WT Docket No. 05-211.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

27. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

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

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

E. Accessible Formats

29. To request copies of this *Further Notice of Proposed Rule Making* in accessible formats (Braille, large print, electronic files, audio format) for people with disabilities, send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 or (202) 418-7365 (TTY).

F. Further Information

30. For further information concerning this *Further Notice of Proposed Rule Making*, contact Brian Carter, Auctions and Spectrum Access Division, (202) 418-0660, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554.

G. Ordering Clauses

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),⁵⁷ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rule Making (“*Further Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in this *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁵⁸ In addition, the *Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.⁵⁹

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

The *Further Notice* tentatively concludes that the Commission should modify its general competitive bidding rules governing benefits reserved for designated entities (i.e., small businesses, rural telephone companies, and businesses owned by women and minorities).⁶⁰ Specifically, the Commission seeks comment on the specific elements of a proposal raised by Council Tree Communications, Inc. (“Council Tree”) that seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a “material relationship” with a “large in-region incumbent wireless service provider.”⁶¹

⁵⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁵⁸ See 5 U.S.C. § 603(a).

⁵⁹ See *id.*

⁶⁰ See 47 C.F.R. § 1.2110. The Commission establishes the definition of a small business 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, (2000) (*Part 1 Fifth Report and Order*) ¶ 48, citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). 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 also*, 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 (2003). See 47 C.F.R. § 1.2110(b)(3)(iii)(whereby the gross revenues of the affiliates of a rural telephone cooperative’s officers and directors are not attributed to the applicant).

⁶¹ 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*).

Additionally, the Commission seeks comment on whether there are other entities that might have a significant interest in the provision of communication services, *e.g.*, voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers (hereinafter collectively referred to as “entity(ies) with significant interests in communications services,”) whose relationship with an otherwise qualified designated entity applicant should trigger a restriction on the availability of designated entity benefits.

Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules.⁶² To that end, in determining whether to award designated entity benefits, the Commission adopted a strict eligibility standard that focused on whether the applicant maintained control of the corporate entity.⁶³ The Commission’s objective in employing such a standard was “to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings.”⁶⁴ The Commission intends its small business provisions to be available only to bona fide small businesses.

By its *Further Notice*, the Commission tentatively concludes that modifications to its designated entity rules are warranted. In determining what additional safeguards are necessary to ensure that bidding credits and other benefits are awarded to the appropriate entities, the Commission recognizes that it must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding, have sufficient capital to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public.⁶⁵ In its continued effort to reserve for small businesses and entrepreneurs the designated entity benefits that the Commission offers, the *Further Notice* seeks comment on the elements of Council Tree’s proposal and the Commission’s tentative conclusion that its existing rules should be modified.

B. Legal Basis

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

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

⁶² See, *e.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 (1994); *Part 1 Fifth Report and Order*, 15 FCC Rcd 15293 (2000); *Application of ClearComm, L.P., Memorandum Opinion and Order*, 16 FCC Rcd 18627 (2001).

⁶³ *Competitive Bidding Second Report and Order* at 2396, ¶ 277.

⁶⁴ *Competitive Bidding Second Report and Order* at 2397, ¶ 278.

⁶⁵ See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532 at ¶159 (1994); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 at ¶¶ 5, 62 (1994); *Part 1 Fifth Report and Order* at ¶¶ 64-65 (2000).

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁶⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small organization,” “small business,” and “small governmental jurisdiction.”⁶⁷ The term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁶⁹ Nationwide, as of 2002, there were approximately 1.6 million small organizations.⁷⁰ The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”⁷¹ As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.⁷² This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.⁷³

Any proposed changes or additions to the Commission’s Part 1 rules that may be made as a result of the *Further Notice* would be of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. Accordingly, this IRFA provides a general analysis of the impact of the proposals on small businesses rather than a service by service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1,973 out of a total of 3,303 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the

⁶⁶ 5 U.S.C. § 603(b)(3).

⁶⁷ *Id.* § 601(6).

⁶⁸ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.* § 601(3).

⁶⁹ *Id.* § 601(4).

⁷⁰ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

⁷¹ 5 U.S.C. § 601(5).

⁷² U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, Section 9, pages 299-300, Tables 490 and 492.

⁷³ See SBA, *Programs and Services*, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

Commission for specific services.⁷⁴ In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

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

In the event that the Commission changes its designated entity rules in this proceeding, designated entity applicants that have filed applications to participate in an auction before the effective date of any changes may be required to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to the Commission's rules effective as of the date of the statement.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.⁷⁵

The *Further Notice* tentatively concludes that the Commission should modify its general competitive bidding rules regarding designated entity eligibility. It seeks comment on the specific elements described in a proposal raised by Council Tree Communications, Inc., which seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a "material relationship" with a "large in-region incumbent wireless service provider." The *Further Notice* also seeks comment on whether such a restriction should apply to "entities with significant interests in communications services." The *Further Notice* seeks guidance from the industry on how it should define the elements of any restrictions it might adopt regarding the award of designated entity benefits. Small entity comments are specifically requested.

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

None.

⁷⁴ In auctions for licenses for certain services, including auctions of broadcast construction permits, sized-based bidding preferences have not been available.

⁷⁵See 5 U.S.C. § 603.

**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*, Further Notice of Proposed Rulemaking (WT Docket No. 05-211)

The Commission agreed to initiate this examination to determine whether we should change the designated entity program. That program was intended to promote small businesses by providing them with bidding credits. During our reconsideration of the AWS-1 service rules, Council Tree Communications expressed concern that these bidding credits were being used by carriers with billions of dollars in revenues, who partner with small businesses in order to gain access to the bidding credits. Today, we initiate a review of the program to consider changing these kinds of practices. We also make clear our intention that any changes we make to the program will apply to the AWS auction scheduled for this summer.

We tentatively conclude that we should reform our program by preventing large incumbent wireless carriers from gaining access to bidding credits through partnering with designated entities. While I think that is a good step, I believe we should consider going further, applying the same rule to all large communications service providers. Why single out large wireless carriers alone for this kind of treatment and allow large wireline carriers, cable companies, satellite providers, and other communications companies to continue to participate in a program for small businesses? A more fair and reasonable way to reform the program would limit all large communications companies from such small business discounts. I remain hopeful that we will be able to adopt such a consistent approach in our final rules.

**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 (Further Notice of Proposed Rulemaking, WT Docket No. 05-211).

Today, we initiate an examination of a troubling loophole in the designated entity program. The DE program was intended to create opportunities for smaller carriers to obtain the spectrum resources needed to bring new services to consumers – and has proven to be particularly useful for rural areas. In the upcoming AWS auction, carriers that qualify as small companies under the DE program can receive up to a 25 percent auction discount. We need to act quickly to close any loopholes to ensure that American taxpayers do not lose millions of dollars in AWS auction revenues.

I strongly support the DE program. It helps foster new competition and promote entry by small businesses – which is all the more critical in this era of increasing market consolidation. Because of the importance of the DE program, we must vigilantly guard against its misuse. In recent auctions, some entities have put themselves forward as small companies in order to qualify for auction discounts. They do this having already entered into agreements to lease the spectrum rights they win to industry giants that do not qualify for a discount themselves. This loophole could result in millions of dollars less in auction revenues without serving the underlying purposes of the DE program. We tentatively conclude today that we should close this loophole to ensure the integrity of the program.

I have said before that I am committed to sticking to our schedule for the AWS auction. When we revised the band plan for the AWS spectrum last August, I called for the examination we initiate today. I am pleased that we now signal our intention to complete this examination in advance of the AWS auction. The AWS auction will be one of our largest in years. We need not delay this auction – which holds great promise for bringing new wireless services to American consumers. At the same time we must protect taxpayer money. It is our obligation to achieve both of these objectives – which we still can do if we move quickly.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

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

I strongly support this Further Notice and its tentative conclusion that the Commission should limit the ability of designated entities (DEs) who have a material relationship with the nation's largest wireless carriers from having access to bidding credits in future auctions. But I am very disappointed that it has taken so long for this item to be adopted. The Commission committed to launch this proceeding at our August 2005 Open Meeting, yet it took over five months to prepare this relatively brief notice of proposed rule making.

The upcoming Advanced Wireless Services (AWS) auction will be a landmark event for the Commission. It represents the first auction in almost 10 years of a nationwide footprint of spectrum ideal for mobile wireless services. There is a great deal at stake both for carriers interested in creating new services or expanding old ones and for the Government, which has authorized the relocation of federal users to make room for these commercial services. This also is the first auction subject to the Commercial Spectrum Enhancement Act, which requires that auction proceeds must be sufficient (at least 110 percent) of estimated relocation costs of eligible federal entities.

I have repeatedly stated my commitment to try to avoid unnecessary delays to the AWS auction. I also believe we should do whatever we can to conclude this proceeding as quickly as possible. Of course, we have lost a great deal of time since the Commission first committed to launch this proceeding. I am frustrated that the lack of timely action may unnecessarily create challenges and some uncertainty as interested parties both respond to this item and prepare for the upcoming auction. I cannot emphasize enough that this timing was not of my choosing. We should have initiated this proceeding three months ago and allowed interested parties a more rational amount of time to comment on our proposals. Unfortunately, that didn't happen and now commenters and indeed our own Commission staff are forced to work within an incredibly aggressive schedule to try to finalize this proceeding sufficiently in advance of the June 29, 2006, AWS auction date.

Whatever the status of this proceeding at the time of the AWS auction, I want to put all interested parties on notice that I will personally review any agreements through which one of our nation's largest wireless companies partners with a DE that is seeking to use bidding credits in the AWS auction. I am not interested in excluding companies from participating in the auction, but I am concerned when large wireless carriers gain indirect access to bidding credits. I will rigorously enforce whatever rules and policies are on the books at that time.

The issue of DEs partnering with the largest wireless carriers is particularly important given the dramatic scope of consolidation in the wireless industry over the last 18 months and the ever-increasing market share of the largest carriers. It has been reported to us that in 1998 the five largest wireless carriers controlled 48% of the market; in 2005, the top five carriers

controlled almost 90% of the market. Also, the AWS auction could raise \$15 billion dollars by some estimates for the federal Government at a time our budget is under ever increasing pressure. Do we really want the nation's largest wireless carriers partnering with DEs to get a 25% discount so that auction revenues to the U.S. Treasury could potentially be reduced by billions of dollars? How is the public interest served in that outcome?

Finally, with respect to the specific proposals in the Further Notice, I want to let commenters know that I do not necessarily support the decision to expand the original scope of inquiry from large wireless carriers partnering with DEs to the broader "entities with significant interests in communications services" as that term is defined in the Further Notice. At a time of significant consolidation in the wireless industry, the DE program indeed may be an appropriate opportunity for smaller wireless providers, with the backing of non-wireless companies, to build new networks to compete with large wireless incumbents. While I look forward to reviewing all of the comments on the Further Notice with great interest, I will be particularly interested in pleadings that address this specific aspect of the item.