

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

In the Matter of)	
)	
Grain Management, LLC's Request for)	
Clarification or Waiver of Section)	
1.2110(b)(3)(iv)(A) of the Commission's Rules)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Amendment of the Commission's Rules with)	GN Docket No. 13-185
Regard to Commercial Operations in the 1695-)	
1710 MHz, 1755-1780 MHz, and 2155-2180 MHz)	
Bands)	

ORDER

Adopted: July 21, 2014

Released: July 23, 2014

By the Commission: Commissioners Pai and O'Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. In this Order, we grant a request by Grain Management, LLC (Grain), and waive the bright-line application of one of our attribution rules that would otherwise prevent Grain, and any other similarly situated entity, from qualifying to participate at auction as a designated entity (DE).¹ While the attributable material relationship (AMR) rule establishes a bright-line trigger for the attribution of a lessee's gross revenues to a DE applicant that has leased more than 25 percent of the capacity of any one of its licenses, we conclude that the underlying purposes of this provision would not be served by applying such a *per se* rule in these circumstances, and that grant of a limited waiver would serve the public interest in ensuring the appropriate application of the Commission's DE policies and promoting its goal of disseminating licenses among a wide variety of applicants. Accordingly, we waive the bright-line provision of the AMR rule that would otherwise trigger the automatic attribution of the lessee's gross revenues to a DE applicant, where the leased licenses were not subject to DE benefits and, at the time the leases became effective, the DE applicant held no other licenses subject to DE benefits. Instead, as discussed below, to the extent this waiver allows Grain and any other similarly situated parties to certify that they are qualified to claim DE benefits in any upcoming auction, they will be required to demonstrate at the long-form application stage that the specific facts and circumstances of their spectrum lease agreements do not require attribution of the lessees' gross revenues in their respective cases.

¹ Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule, filed March 4, 2014 ("Grain Waiver Request").

II. BACKGROUND

2. As a general matter, to determine which applicants are small businesses eligible for DE benefits,² the Commission looks to the average gross revenues attributable to the applicant over the previous three years. The attribution rules include a controlling interest standard, under which the Commission attributes to an applicant the gross revenues of itself, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests.³ 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.⁴ The attribution rules also include the AMR provision, which establishes a bright line trigger to attribute to the applicant the gross revenues of any entity with which it has an agreement for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under wholesale agreements) of more than 25 percent of the spectrum capacity of "any one of the applicant's or licensee's licenses."⁵

3. As explained in its Request, Grain Management is a private equity and telecommunications infrastructure firm.⁶ Grain Management manages Grain Capital II, LLC, which in turn wholly owns Grain Spectrum, LLC (Grain I) and Grain Spectrum II, LLC (Grain II) (collectively Grain).⁷ In February 2013, Grain filed applications seeking the Commission's consent to the assignment and lease of lower 700 MHz Band B Block and full and partitioned Advanced Wireless Services (AWS-1) licenses from AT&T, Inc. (AT&T) and Celco Partnership d/b/a Verizon Wireless (Verizon Wireless) to Grain, which Grain then leased back to AT&T and Verizon Wireless under long-term *de facto* transfer

² Section 309(j)(4)(D) of the Communications Act of 1934, as amended, directs the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women [designated entities] are given the opportunity to participate in the provision of spectrum-based services. . . ." 47 U.S.C. § 309(j)(4)(D). The Commission's primary method of promoting the participation of designated entities in competitive bidding, and providing such entities with the opportunity to participate in the provision of spectrum based services, has been to award bidding credits – percentage discounts on winning bid amounts – to eligible small business applicants. See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391-92 ¶¶ 241-44 (1994) ("*Competitive Bidding Second Report and Order*").

³ See 47 C.F.R. § 1.2110(b).

⁴ 47 C.F.R. § 1.2110(c)(2). See also Application of Ellis Thompson Corporation, *Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd 7138, 7138-39 ¶ 9 (1994), 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 (and citing the Commission's decision in *Intermountain Microwave*, Applications for Microwave Transfers to Teleprompter Approved with Warning, *Public Notice*, 12 FCC 2d 559 (1963) ("*Intermountain Microwave*"). Under the controlling interest standard, the officers and directors of any applicant are also considered to have a controlling interest in the applicant. 47 C.F.R. § 1.2110(c)(2)(ii)(F). See also 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, 15325-26 ¶¶ 65-66 (2000) ("*Order on Reconsideration of the Part 1 Third Report and Order*," "*Part 1 Fifth Report and Order*," and "*Part 1 Fourth Further Notice*"), modified by Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Erratum*, 15 FCC Rcd 21520 (2000).

⁵ 47 C.F.R. § 1.2110(b)(3)(iv) (emphasis added).

⁶ Grain Waiver Request at 9.

⁷ *Id.* at 9-10.

spectrum leases.⁸ After reviewing the public interest effects, the Wireless Telecommunications Bureau (Bureau) approved the transaction.⁹

4. Grain subsequently filed the instant request seeking either a clarification that the AMR provision of the Commission's attribution rules used for determining an applicant's eligibility for DE benefits does not apply to Grain's existing leasing arrangements, or seeking a waiver of the AMR rule related to its leases with AT&T and Verizon, which pertain to licenses acquired on the secondary market without DE benefits.¹⁰ Grain contends that the AMR rule is "overly broad" and that applying the rule as drafted has the potential to deny DE benefits to entities that Congress intended should receive them.¹¹ Grain argues in favor of an AMR rule "clarification," maintaining that the Commission did not explain why the AMR rule should apply to every license held by an entity, and that the rationale of the rule was not intended to apply to licenses that were acquired without DE benefits.¹² Alternatively, Grain contends that if the Commission does not clarify the rule as requested, it should waive application of the AMR rule to the foregoing transaction. Specifically, Grain seeks relief from the application of the AMR rule to the spectrum licenses it acquired in the secondary market without DE benefits, which it subsequently fully leased through long term *de facto* transfer leases to AT&T and Verizon Wireless.¹³ To date, the Commission has never determined Grain's eligibility for DE benefits.

5. On March 27, 2014, the Bureau released a Public Notice seeking comment on Grain's request.¹⁴ Minority Media & Telecom Council (MMTC)¹⁵ and Council Tree Investors, Inc. (Council Tree) filed comments.¹⁶ MMTC argues for elimination of the AMR rule, and support of Grain's requested clarification in the interim. It also contends that any waiver should either extend to all DEs "or at least [be] reviewed on a case by case basis."¹⁷ Council Tree similarly argues that "the AMR [rule] be eliminated all together and not just waived in the instance highlighted in the Grain Request."¹⁸

6. Grain¹⁹ and Council Tree²⁰ also submitted reply comments. Council Tree's reply repeats its earlier argument. Grain's reply reiterates its support for clarification of the AMR rule "so as to benefit

⁸ See *In re Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC and Grain Spectrum II, LLC for Consent to Assign and Lease AWS-1 and Lower 700 MHz Licenses*, WT Dkt. No. 13-56, *Memorandum Opinion and Order*, 28 FCC Rcd 12878, 12881 ¶¶ 6-8 (WTB 2013) ("*AT&T/Verizon Wireless/Grain Order*").

⁹ *Id.* at 12879 ¶ 1 (noting a condition placed on Verizon's build-out of AWS-1 licenses and spectrum that does not affect the waiver request here).

¹⁰ Grain Waiver Request at 1-2, 13.

¹¹ *Id.* at 2.

¹² *Id.* at 4-6. Grain further argues that its requested clarification poses no danger of the unjust enrichment of non-DE entities. *Id.* at 9.

¹³ Grain Waiver Request at 1-2, 13.

¹⁴ Wireless Telecommunications Bureau Seeks Comment on Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule, WT Docket No. 05-211, GN Docket No. 12-268, GN Docket No. 13-185 (rel. March 27, 2014) ("*Public Notice*").

¹⁵ See MMTC Comments, WT Docket No. 05-211, WT Docket No. 13-135, GN Docket No. 13-185, GN Docket No. 12-268, *et. al.* (filed April 25, 2014).

¹⁶ See Council Tree Comments, WT Docket. No. 05-211, GN Docket No. 12-268, GN Docket No. 13-185 (filed March 18, 2014).

¹⁷ MMTC Comments at 1-2.

¹⁸ Council Tree Comments at 1.

¹⁹ See Grain Reply Comments, WT Docket. No. 05-211, GN Docket No. 12-268, GN Docket No. 13-185 (filed May 9, 2014).

both Grain and other ‘similarly-situated companies.’”²¹ It also urges alternatively a grant of its waiver request with respect to application of the AMR rule to “transactions, such as the secondary market, arm’s-length leasing arrangement involving AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, and Grain . . . , that do not involve entities with joint or common ownership or control.”²²

7. Grain acknowledges that, absent the relief it now seeks, the plain language of the rule could render it ineligible in the future to receive small business DE benefits because the application of the AMR rule would require Grain to attribute to itself the gross revenues of AT&T and Verizon Wireless, current lessees of 100 percent of the spectrum associated with four licenses held by Grain.²³

III. DISCUSSION

8. Because the clarification that Grain requests contradicts the plain language of the rule, we do not view this case as one of clarification, and therefore limit our consideration to whether Grain has met the standard for waiver.

9. Under section 1.925 of the Commission’s rules, to receive a waiver, Grain must demonstrate that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest, or (2) in view of the unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative to seeking a waiver of the rule.²⁴ As explained below, we conclude that a waiver of the bright-line provision of the AMR rule is appropriate under the circumstances Grain presents because the underlying purpose of that provision would not be served by its application to these, or similar, facts, and that such a limited waiver would serve the public interest.

10. When the Commission adopted the AMR rule in 2006, it sought to prevent unjust enrichment to ineligible entities and to ensure that DEs have opportunities to become independent facilities-based service providers.²⁵ Thus, the AMR rule, in contrast to the other provisions of our DE eligibility rules, established a bright-line for triggering the attribution of revenues where a lease is for more than 25 percent of the spectrum capacity of a license. The Commission was concerned about “the potential to significantly influence” the DE applicant. It also noted “the potential” for the relationship to impede a DE’s “ability to become a facilities-based provider,” and sought to avoid a relationship that is “ripe for abuse.”²⁶

11. Under the circumstances presented here, however, we are unable to conclude that the underlying purpose of the bright-line provision of the AMR rule would be served by its application to

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²⁰ See Council Tree Reply Comments, WT Docket No. 05-211, GN Docket No. 12-268, GN Docket No. 13-185 (filed May 9, 2014).

²¹ Grain Reply Comments at 2 n.4, quoting Grain Waiver Request at 12.

²² Grain Reply Comments at 3.

²³ Grain Waiver Request at 2, 9.

²⁴ See 47 C.F.R. §§ 1.925(b)(3)(i)-(ii).

²⁵ See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753, 4762 ¶ 21 (2006) (“CSEA/Part 1 Second Report and Order”), modified by erratum, 21 FCC Rcd 6622 (2006), clarified by Order on Reconsideration, 21 FCC Rcd 6703 (2006) (“CSEA/Part 1 Order on Reconsideration of Second Report and Order”), *aff’d in pertinent part sub nom. Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), rules amended and petitions for reconsideration dismissed, *Implementation of the Commercial Spectrum Enhancement Act & Modernization of the Commission’s Competitive Bidding Rules & Procedures*, 27 FCC Rcd 908 (2012).

²⁶ CSEA/Part 1 Second Report and Order, 21 FCC Rcd 4753, 4762 ¶¶ 22-23.

leased licenses that were not subject to DE benefits and, at the time the leases became effective, the DE applicant held no other licenses subject to DE benefits. In the *CSEA/Part 1 Second Report and Order*, the Commission sought to “recapture designated entity benefits” when ineligible entities “control . . . or exert impermissible influence over” DEs.²⁷ Building on its *Secondary Markets Second Report and Order*,²⁸ the Commission focused in particular on agreements such as spectrum leases that involve use of “the designated entity’s spectrum capacity.”²⁹ The concern addressed by the Commission was thus with respect to each license for which “a designated entity licensee . . . has been awarded and retained designated entity benefits.”³⁰

12. The Bureau has determined that Grain’s transaction with AT&T and Verizon Wireless would result in public interest benefits, “including by promoting spectrum license opportunities for entrepreneurs and other small businesses.”³¹ That transaction does not involve spectrum leases for any license for which the Commission has awarded DE benefits. Thus, as to those three Lower 700 MHz B Block licenses and one AWS C Block license,³² Grain’s spectrum leases do not implicate any of the foregoing Commission policies underlying the AMR rule.

13. Of course, the AMR rule is also designed to address the operations of any DE licenses that Grain does not now hold but may subsequently acquire. Grain contends that its spectrum leases with respect to its existing North Carolina and Texas licenses would “carr[y] no risk of a non-DE unduly influencing the DE’s activities or decision-making.”³³ At this point, we need not decide the merits of this argument, or the impact if any of these existing leases on the operation of any other licenses Grain may acquire with DE benefits. In these limited circumstances, we need only decide that the purposes of the AMR rule would not be served by applying a presumption of undue influence (or unjust enrichment) with respect to such future licensed facilities or of inability to provide facilities-based service, based solely on the existence of spectrum leases for wholly different licenses previously acquired and not subject to DE benefits, by a licensee holding no other licenses subject to such benefits. Applying the bright-line test for leases of existing licenses such as these is not necessary to preserve the Commission’s ability to determine whether the leases in question would be inconsistent with the foregoing policies underlying the rule with respect to any such future licenses.³⁴

14. Here, Grain represents that the transactions and the terms of the leasing agreements at issue did not confer any undue influence to the lessees and did not form any entity, LLC, joint venture, or

²⁷ *CSEA/Part 1 Second Report and Order*, 21 FCC Rcd at 4755 ¶ 4.

²⁸ 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, 17536-44 ¶¶ 67-82 (2004) (“*Secondary Markets Second Report and Order*”).

²⁹ *CSEA/Part 1 Second Report and Order*, 21 FCC Rcd at 4762 ¶ 23. See also *CSEA/Part 1 Order on Reconsideration of Second Report and Order*, 21 FCC Rcd at 6712 ¶ 20.

³⁰ *CSEA/Part 1 Second Report and Order*, 21 FCC Rcd at 4764 ¶ 27.

³¹ *AT&T/Verizon Wireless Grain Order*, 28 FCC Rcd at 12905 ¶ 66.

³² Pursuant to the foregoing transaction, Grain holds Lower 700 MHz B Block licenses for Greensboro-Winston-Salem-High Point, NC (WQJQ728); Charlotte-Gastonia, NC (WQJQ729); and Raleigh-Durham, NC (WQJQ731), and an AWS C Block license for Dallas-Fort Worth TX-AR-OK (WQGA729). See WT Docket No. 13-56, FCC Form 603 Ex. 1, at 21. For ease of reference, we refer to these as Grain’s existing North Carolina and Texas licenses.

³³ Grain Waiver Request at 2-3.

³⁴ For the same reasons, the *Secondary Markets* policy, which prior to the adoption of the AMR rule indicated that a designated entity licensee could not lease all of its spectrum capacity while retaining DE benefits, is similarly inapplicable to the circumstances presented here. See *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17541-42 ¶¶ 76-77.

other joint business relationship between Grain and AT&T or Verizon Wireless.³⁵ Given that we are waiving only the bright-line application of the AMR rule, which requires the automatic attribution of the lessee's gross revenues, we emphasize that we fully preserve the Bureau's ability to assess whether the terms of the agreements or any other aspect of the relationship between these, or similarly situated, parties require attribution of the gross revenues of the lessees under section 1.2110 in the event that the lessors become winning bidders claiming DE benefits. At the long-form application stage, Grain and any other such similarly situated parties will be required to demonstrate that the specific facts and circumstances of their spectrum lease agreements do not require attribution of the lessees' gross revenues in their respective cases.³⁶ Thus, we need not apply the bright-line provision of the AMR rule to serve its underlying purpose in these circumstances. Further, we conclude that applying the bright-line AMR test here would undermine the broader policy objectives of our DE rules because applying it here would automatically foreclose an applicant that is not currently subject to our DE rules on any of its licenses from the opportunity to demonstrate its eligibility for DE benefits associated with later-acquired licenses. Waiver of such application here would also promote the Commission's public interest goal of disseminating licenses among a wide variety of applicants.³⁷

15. We emphasize that this decision waives only the bright-line threshold established in the AMR rule, which automatically triggers the attribution of the lessee's gross revenues to a DE applicant, where the leased licenses were not subject to DE benefits and, at the time the leases became effective, the DE applicant held no other licenses subject to DE benefits. Our decision to grant this waiver does not abrogate our policy goal to ensure that DE benefits are awarded only to bona fide DEs. Pursuant to section 1.2110 of the Commission's rules, the Bureau will assess in the context of any future long-form application for DE benefits whether there are facts that require the attribution of revenues of entities that are able to exercise undue influence, control, or affiliation with, the DE applicant.³⁸ The applicant's certifications regarding the required attribution of the revenues of its interest holders will be evaluated, as is the process for all DE applicants.³⁹

³⁵ Grain Waiver Request at 11.

³⁶ See *CSEA/Part 1 Second Report and Order*, 21 FCC Rcd at 4769 ¶ 44.

³⁷ See 47 U.S.C. § 309(j)(3)(B).

³⁸ As one example, we note that if the Bureau reviewed a leasing agreement in connection with Grain's existing North Carolina or Texas licenses in connection with a future long-form application on which Grain claimed DE status and found term(s) in the agreement that affected Grain (or its affiliate) with respect to how it could operate or make decisions with respect to licenses for which it claimed DE status, the Bureau could determine that there was undue influence or affiliation through contractual relationships that would require the attribution of the lessee's gross revenues to the DE applicant. See, e.g., 47 C.F.R. § 1.2110(c)(5)(ix).

³⁹ 47 C.F.R. § 1.2110 (designated entities). In ignoring this point, the dissenting statements thus address a decision that the Commission has not made, which will be made at the long-form application stage in accordance with established Commission policy, as to whether the actual terms of these leases in connection with Grain's existing North Carolina or Texas licenses are consistent with the foregoing policies reflected in the DE rules as they may apply with respect to any future licenses that Grain may acquire for the first time with DE benefits. See also note 38 *supra*. Nor is there any inconsistency with a waiver of the bright-line application of the AMR rule and the opportunity under Section 1.3 of the Commission's rules to seek a waiver of any other rule. 2014 Quadrennial Regulatory Review, *Further Notice of Proposed Rulemaking and Report and Order*, FCC 14-28 (rel. Apr. 15, 2014), at ¶ 364 (undertaking prompt review of requests for waiver of JSA attribution rule). We note, however, that the established effect of the spectrum leases for Grain's existing North Carolina and Texas licenses for purposes of our wireless spectrum screen is no different from the effect of certain joint sales agreements between two radio or television stations in the same market. Absent such a waiver, both are attributable to the lessee or brokering station, respectively. Compare Policies Regarding Mobile Spectrum Holdings, *Report and Order*, FCC 14-63 (rel. June 2, 2014), at ¶¶ 294-302 and App. B § 20.22(b) (codifying attribution policies), with 47 C.F.R. § 73.3555 note 2(k). Thus, we need not address the different policies underlying these two rules.

16. As noted above, Council Tree filed comments seeking to have the Commission eliminate the AMR rule altogether, claiming that “the merit of the Grain Request goes to the defects of the AMR as a whole for all DEs, and not to an exception favoring one party.”⁴⁰ We have considered Council Tree’s assertions, but conclude Council Tree’s comments exceed the scope of Grain’s limited request for waiver. We also reject the notion that the waiver we grant today benefits only Grain; rather, this relief would apply to any entity where its leased licenses were not subject to DE benefits and, at the time the leases became effective, the DE applicant held no other licenses subject to DE benefits. Further, as noted in the recent Incentive Auction Report and Order, the Commission has committed to initiate a separate proceeding to examine the DE program generally.⁴¹ Because that proceeding will provide us an opportunity to elicit and thoroughly consider broader policy implications of the AMR rule, we need not address those issues at this time.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 5(c), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 155(c), 303(r), and sections 1.3 and 1.925 of the Commission’s rules, 47 C.F.R. §§ 1.3 and 1.925, application of 47 C.F.R. § 1.2110(b)(3)(iv)(A) is waived for Grain Management, LLC, and any other similarly situated entities, to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ See Council Tree Comments at 3 (filed on March 18, 2014).

⁴¹ Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, FCC 14-50, at 14 ¶ 31 (rel. June 2, 2014).

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185.*

When Congress first granted the Commission auction authority, it wanted to ensure that small businesses could participate in the provision of spectrum-based services.¹ To implement this congressional directive, the Commission adopted the designated entity (DE) program, which seeks to promote opportunities for small businesses to provide facilities-based services to the public. As part of the DE program, the Commission adopted a rule—the attributable material relationship (AMR) rule—that kicks in whenever an applicant for DE benefits leases more than 25 percent of the spectrum capacity of *any one* of its licenses to another company.² The purpose of the AMR rule is to ensure that a DE that benefits from the program “uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public” and is not unduly controlled or influenced by a third party.³

Today, the Commission jettisons this entire framework by waiving the AMR rule for the benefit of Grain Management, LLC (Grain), a private equity firm that leases *100 percent* of the spectrum capacity of *all of its licenses* to the two largest wireless carriers in the country.

This decision cannot be justified under the Commission's waiver law, since waiving the AMR rule here eviscerates—rather than promotes—the purpose of the rule. The Commission's suggestion that the rationale underlying the AMR rule does not apply when a DE applicant obtained its spectrum licenses without the benefit of bidding credits simply cannot be squared with either the text of the rule or the reasoning of the Commission decision that adopted it. In addition, the Commission's claim that Grain's leasing agreements do not support any inference of undue influence flatly contradicts its determinations in the context of joint sales agreements among broadcast television stations. Finally, today's decision will likely produce anomalous results, inject needless uncertainty into the Commission's auction process, and invite arbitrageurs to make creative end-runs around our DE rules—all of which is unnecessary given the upcoming DE rulemaking. For all these reasons, I dissent.

1. This Request Does Not Meet the Waiver Standard.

To start, the Grain petition falls far short of satisfying even the first element of the waiver standard—that the “underlying purpose of [the AMR rule] would not be served or would be frustrated by

¹ See 47 U.S.C. § 309(j)(4)(D) (stating that the Commission shall ensure that certain designated entities “are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures”); Conference Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep. 103-213, 103rd Cong., 1st Sess. 484 (1993) (same), *available at* <http://go.usa.gov/55wx>.

² See 47 C.F.R. § 1.2110(b)(3)(iv)(A). The Commission's DE program provides bidding credits to small businesses based on the gross revenues attributable to each DE applicant. The AMR rule is part of that calculus. It states that every DE applicant must include, as part of its attributable gross revenues, the revenues of any entity that leases, “on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.” *Id.*; see also *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report & Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4762–63, paras. 21–24 (2006) (*CSEA/Part I Second Report and Order*) (adopting the AMR rule and stating that the Commission intended to prevent DEs from leasing more than a certain percentage of their spectrum to other companies).

³ *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15.

application to the instant case.”⁴ The Commission reaches a contrary conclusion by boldly asserting that awarding DE benefits to a company that leases 100 percent of its spectrum to the nation’s two largest wireless providers does not even “implicate any of the . . . policies underlying the AMR rule.”⁵ This determination does not withstand even casual scrutiny and cannot be reconciled with the purpose of the rule.

Why did the Commission adopt the AMR rule? It’s pretty simple: to make sure that those who benefited from the DE program would use their licenses to provide facilities-based services directly to the public.⁶ Indeed, the Commission has consistently said that the Communications Act requires DEs to have “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.”⁷ Thus, “in accordance with the intent of Congress, every recipient of the Commission’s designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.”⁸ The whole point of the AMR rule—indeed, the entire DE framework—is to promote competition, not arbitrage; competitors, not middlemen.

Against this backdrop, the Commission’s decision today—that a company can lease every last slice of its spectrum without even *implicating* the purpose underlying the AMR rule and therefore obtain DE benefits—is as unlawful as it is absurd. The decision violates the AMR rule’s core purpose of limiting DE benefits to companies that use their spectrum to offer facilities-based service, since Grain offers no such service and its waiver petition evinces no intention whatsoever that it will do so. Indeed, this is the very case for which the AMR rule was *designed*, not one that merits its waiver.

But even if one were to ignore the AMR rule’s fundamental purpose, the waiver decision itself acknowledges another important purpose. It states that the Commission adopted the rule because it “was concerned about ‘the potential [for leasing agreements] to significantly influence’ the DE applicant.”⁹

Under the Commission’s own framing, then, it can grant Grain’s request only if there is no concern about the potential for undue influence. But how could that possibly be the case? How is the potential for leasing agreements to significantly influence a DE *not* present when those leases cover 100 percent of the DE’s spectrum? If this reason for the rule is ever at play, it is here.

⁴ See 47 C.F.R. § 1.925(b)(3)(i).

⁵ Order at para. 12.

⁶ See, e.g., *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4763, para. 26 (concluding that the material relationship rules “are necessary to ensure that the recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public”).

⁷ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration, 21 FCC Rcd 6703, 6705 n.8 (2006) (*CSEA/Part I Second Report and Order Recon*); see also *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, 17538, para. 70 (2004) (*Secondary Markets Second Report and Order*) (Section 309(j)’s “statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service.”).

⁸ *CSEA/Part I Second Report and Order Recon*, 21 FCC Rcd at 6705, para. 3 (emphasis added). Although some have argued that “[t]here is no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market—construction and operation of a facilities-based network[.]” the Commission has stated that “Section 309(j) indicates otherwise.” *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538, paras. 70–71.

⁹ Order at para. 10 (quoting *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4762–63, paras. 21–22).

While the *Order* offers no apparent response,¹⁰ this is not a point that escaped commenters' notice. As Council Tree observes, there is no reason why the AMR's purpose does not apply in Grain's case.¹¹ It states that "the analytical foundation of the AMR rule, stated simply, is the proposition that a lease of more than 25% of spectrum capacity in a given license by Party A to Party B creates 'undue influence' by Party B on Party A." "[I]f this proposition is true," Council Tree points out, "there is no reason to believe that it is untrue in the case of the Grain Request." Indeed, Council Tree recognizes that granting a waiver here would be "analytically illogical and unsupportable in the face of a continuing AMR rule."¹²

2. This Waiver Has No Foundation in Either the AMR Rule or Commission Precedent.

Next, the item engages in some revisionist history by suggesting that the Commission never intended the AMR rule to apply when a potential DE applicant, like Grain, obtained all of its existing spectrum licenses without the benefit of DE credits.¹³ This contention is belied by both the plain text of the AMR rule and the Commission's prior decisions.

The AMR rule provides that an entity has an attributable material relationship "when it has one or more arrangements with any individual entity for the lease . . . of, on a cumulative basis, more than 25 percent of the spectrum capacity of *any one of the applicant's or licensee's licenses*."¹⁴ The language thus requires the DE applicant to determine whether it exceeds the leasing threshold with respect to "any one of" its licenses. This language covers *all* of the applicant's existing spectrum holdings without any exception for licenses obtained without DE benefits. The AMR rule admits of no ambiguity here.

Moreover, the Commission's claim that the rationale for the AMR rule lacks force where a lease agreement does not involve DE spectrum is misplaced. As indicated above, the Commission adopted the rule because it "conclude[d] that certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility."¹⁵ "In this regard," it stated, "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."¹⁶

It was the lease agreement itself (where the agreement concerned more than 25 percent of the spectrum capacity) that worried the Commission and motivated it to adopt the AMR rule. It was wholly irrelevant whether the agreement involved a particular license that had been obtained using DE credits. The risk of undue influence was the same in either case.

That was certainly the view expressed by the U.S. Department of Justice in the Commission's

¹⁰ In fact, in conducting its analysis, the Commission turns the waiver standard on its head, stating at one point that "we are unable to conclude that the underlying purpose of the bright-line provision of the AMR rule would be served by its application" in this case. *Order* at para. 11. But our rules do not permit the Commission to grant a waiver based on an asserted inability to reach such a conclusion; rather, "[t]he Commission may grant a request for waiver if it is shown that . . . the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case." 47 C.F.R. § 1.925(b)(3).

¹¹ See Letter from Steve Hillard, Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, GN Docket Nos. 12-268, 13-185 (May 9, 2014) *available at* <http://go.usa.gov/5NTA>.

¹² *Id.*

¹³ *Order* at para. 11.

¹⁴ 47 C.F.R. § 1.2110(b)(3)(iv)(A) (emphasis added).

¹⁵ *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4762, para. 23.

¹⁶ *Id.*

AMR rulemaking.¹⁷ To ensure that DEs are truly independent, the DOJ stated that “the FCC should disqualify”—not merely attribute revenues, but disqualify—“a DE that has any . . . agreement with a large wireless carrier that suggests that the licenses will be used principally for the benefit of the large wireless carrier.”¹⁸ But today, we pave the way for precisely this.

Simply put, the idea embraced by the Commission today—that undue influence (if there is any) flows differently through an agreement that relates to spectrum that was originally purchased with DE credits than it does through an agreement that relates to non-DE spectrum—is untenable. If a small business pays \$1 million for a license, having obtained it with no DE benefits, and then leases 100 percent of the capacity to a large provider, the risk from an AMR perspective is no different than if the same company paid 10 percent less for that license, having obtained it through the use of DE credits, and then leased 100 percent to the same large provider. How could the use of DE benefits in an auction change the influence a lessor has over the licensee? It couldn’t, and the Commission offers no reason why it could. In the end, the Commission’s decision today does not waive the AMR rule; it rewrites it.¹⁹

This begs the question—how will the Commission apply its new approach going forward? If Grain or a similarly situated company uses bidding credits to obtain spectrum at auction, how will the Commission determine whether the pre-existing leases present a risk of undue influence? The Commission claims that it will engage in a case-by-case review. But what will that review look like? Will the Commission just rubber-stamp those agreements? Or will it engage in a thorough review of the underlying agreements and relationships? Neither option has much appeal. If it’s the former, the Commission will simply confirm that it eviscerated the AMR rule today. If it’s the latter, how will the Commission perform the inquiry? What criteria will apply? What documents and other information will it need to review? How long will this review take? Will the review jeopardize the results of the auction? Today’s decision offers no guidance.²⁰

3. This Decision Contradicts the Commission’s Recent Ban on Joint Sales Agreements Among Broadcast Television Stations.

It is striking how irreconcilable the Commission’s decision here is with its recent crackdown on the use of joint sales agreements (JSAs), under which one broadcast television licensee sells advertising

¹⁷ See Ex Parte Submission of the U.S. Department of Justice, WT Docket No. 05-211, at 5 (Mar. 17, 2006), available at <http://go.usa.gov/58fY>.

¹⁸ *Id.* at 5.

¹⁹ See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (“The court’s insistence on the agency’s observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”).

²⁰ The claim that Commission review of Grain’s leases after the conclusion of the auction would be “in accordance with established Commission policy,” *Order* at n.39, is patently inaccurate. Under the Commission’s established rules, leases such as Grain’s render a company ineligible for DE benefits so entities such as Grain are not allowed to participate in the auction as if they were DEs. Today’s decision waives that “established Commission policy” and allows Grain to receive DE treatment during the bidding process. Moreover, the Commission’s desire to conduct a post-auction, case-by-case review in this instance is quite curious given its decision only a couple of months ago to replace post-auction, case-by-case review of licenses in auctions with pre-auction, bright-line rules governing reserved and unreserved spectrum. In explaining that policy shift, the Commission reasoned that “upfront, clear determination, instead of case-by-case analysis post-auction, would provide potential bidders with greater certainty in the auction process.” *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269; Docket No. 12-268, Report and Order, FCC 14-63 at para. 139 (2014). It also maintained that *ex ante* restrictions “would provide greater certainty and efficiency in the process of licensing through competitive bidding” than a post-auction, case-by-case analysis. *Id.* at para. 140. The Commission stated that “[i]n particular, upfront, bright-line determinations would streamline the post-auction review of license applications, which should allow winning bidders to receive their licenses more quickly and proceed to deploy service using the acquired spectrum.” *Id.* All of this goes out the window in today’s decision.

time on behalf of another licensee's station.²¹ In the latter context, the agency recently instituted a flat ban in most markets, through tightened attribution rules, on one station selling more than 15 percent of advertising for another station, darkly ruing the hypothetical concern (and it was hypothetical, as no evidence of undue influence was proffered and no advertiser had ever complained) that the mere existence of the agreements gave licensees "the opportunity, ability, and incentive to exert significant influence over the brokered station" of competing licensees.²² It was said then that "[w]hen one licensee controls the cash flow of another, it controls the other. The old admonition 'follow the money' has never been more appropriate."²³ The Commission thus determined that the fact of these agreements required attribution for purposes of the agency's media ownership rules because the risk of undue influence was simply too great.²⁴

So here's a riddle: How is it that one television station in a small market selling 16 percent of another station's advertising is conclusive evidence of "undue influence" and an intolerable end-run around our rules, but an investment firm's scheme to lease every last speck of its spectrum to two of the world's Fortune 50 corporations does not even justify a presumption of "undue influence"? Whatever happened to the old admonition "follow the money"? Why follow 16 percent of the money, but not 100 percent of the money? Yet again, today's decision offers no answer. And there is none. A foolish consistency may be the hobgoblin of little minds, but a deliberate inconsistency is the ogre of arbitrariness.²⁵

²¹ See *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 29 FCC Rcd 2647 (Med. Bur. 2014) (*JSA Processing PN*); see also *2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527-45, paras. 340-72 (2014) (*2014 Quadrennial Regulatory Review*).

²² *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4527, para. 340 ("[T]he ability of a broker to control a brokered television station's advertising revenue, its principal source of income, affords the broker the opportunity, ability, and incentive to exert significant influence over the brokered station."); see also *id.* at 4533, para. 350 ("[T]elevision JSAs involving a significant portion of the brokered station's advertising time convey the incentive and potential for the broker to influence program selection and station operations."); *id.* at 4539, para. 360 ("[A] 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, including programming choices, and give them an incentive to do so."); *id.* at 4539, para. 361 ("As the amount of advertising revenue controlled by the brokering station increases, so too does its incentive and ability to influence brokered station's programming."); *id.* at 4582 (Statement of Chairman Tom Wheeler) (JSAs provide broker stations "the incentive and ability to unduly influence the operations" of brokered stations), available at <http://go.usa.gov/58Ck>.

²³ *Id.* at 4582 (Statement of Chairman Tom Wheeler).

²⁴ See *JSA Processing PN*, 29 FCC Rcd at 2648; but see Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), <http://go.usa.gov/58ax>; *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4587 (Dissenting Statement of Commissioner Ajit Pai), available at <http://go.usa.gov/58a5>; Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on Three More TV Stations Going Dark Under The FCC's New JSA Policy (June 24, 2014), <http://go.usa.gov/58xQ>; Statement of Commissioners Ajit Pai and Michael O'Rielly on the Negative Impact of the Decision to Restrict Television Stations' Use Of Joint Sales Agreements (May 29, 2014), <http://go.usa.gov/9N7V>.

²⁵ The Commission's assertion that the treatment of Grain's leases under the wireless spectrum screen is consistent with the Commission's treatment of JSAs among television stations is beside the point. *Order* at n.39. The relevant inconsistency is between the justification for today's waiver of our DE rules and the rationale for the Commission's new JSA rules. On this point, the Commission has no response.

4. This Decision is Entirely Unnecessary in Light of the Upcoming DE Rulemaking.

Not only is the Commission's decision to gut a rule through waiver legally infirm,²⁶ thus creating risk and uncertainty for our upcoming auctions, it is not a step the Commission had to take. The Commission stated in the *Incentive Auction Order* that it would "general[ly] re-examine the AMR rule" as part of a broader review of the DE program.²⁷ It reiterates this intention in its decision today.²⁸ Thus, regardless of what one thinks about the merits of today's waiver, the proper way forward would have been to consider these issues in the context of the agency's industry-wide DE rulemaking.

Notably, even parties that support Grain's request on the merits argue that a rulemaking was the appropriate forum to address it. They argue, among other things, that "[c]onsideration of this matter can only be done as part of a review of the AMR, its policy rationale, and its effects on all DEs."²⁹ The Commission's decision to take a piecemeal approach will either complicate or prejudice the agency's broader consideration of these and other DE-related issues.

* * *

We need clear, predictable, and legal rules that apply to all players and promote entry by small companies into the wireless business—not arbitrary waivers that yield no benefits other than a serendipitous profit to a preferred entity.

Because this waiver does not meet the standard set forth in our rules; because it cannot be reconciled with either the text of our AMR rule or Commission decisions expounding it; because it effectively rewrites the rule in a way that raises questions about how these issues will be handled as we approach important spectrum auctions; because it blesses a questionable scheme just months after the agency denounced as illicit far more legitimate arrangements in the media context; because the far better tactic is to consider this request in the general rulemaking, expected to commence soon; in short, because to describe this waiver request is to decide against it, I respectfully dissent.

²⁶ See, e.g., *WAIT Radio*, 418 F.2d at 1159.

²⁷ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, FCC 14-50 at para. 482 (June 2, 2014).

²⁸ *Order* at para. 16.

²⁹ Letter from Steve Hillard, Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, GN Docket Nos. 12-268, 13-185 (Mar. 18, 2013), available at <http://go.usa.gov/5NTT>.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185.*

I must respectfully dissent from this waiver order that exempts Grain Management, LLC (and other similarly situated parties) from the bright-line trigger of the attributable material relationship (AMR) rule. I do so because I am not persuaded that the standard for a waiver under section 1.925 of the Commission's rules has been met.¹ I am also concerned that today's action sets in motion an effort to undermine the designated entity rules.

Starting in the 1990s, the Commission established rules enabling independent small businesses to receive bidding credits—government subsidies provided by the American people—for use in spectrum auctions. Over the years, the rules for these “designated entities” were refined to prevent instances of abuse and to promote facilities-based communications service. Specifically, the AMR rule aims to limit a subsidy recipient's ability to merely lease spectrum to other wireless providers instead of building out its own network. The stated concern being that these lease agreements could unduly influence a designated entity's decisions, increasing the potential to operate as a shell company.

Section 1.925 allows a rule to be waived if the petitioner can demonstrate that the rule's underlying purpose would not be served, or would be unduly burdensome or contrary to the public interest.² In this case, Grain obtained spectrum licenses on the secondary market. It then immediately leased *all* of this spectrum to AT&T and Verizon, thus making their revenues attributable and rendering Grain ineligible for designated entity status.³ Despite full knowledge of the AMR rule when it entered into these business arrangements, Grain now wants a waiver so that it can pursue bidding credits in the upcoming AWS-3 spectrum auction. Unfortunately, this item provides little to no analysis as to how waiving this rule will promote facilities-based service. There is also no attempt to adequately explain how this category of leasing arrangements could not result in undue influence and how this waiver is, therefore, consistent with the underlying purpose of the AMR rule. Moreover, this rule is not overly burdensome because there is nothing that prevents Grain from participating in future spectrum auctions or transactions; they just wouldn't get a special subsidy in the process.

Going forward, I will monitor the implementation of this item closely and I will be skeptical of any attempts to water down our designated entity rules. Let's be clear: bidding credits should be awarded sparingly to bona fide small businesses after going through a stringent and comprehensive review process. Otherwise, we deprive the American people of the opportunity to rightfully maximize revenues for the use of their public resource.

In closing, as I have said previously, the full Commission should have the opportunity to vote on all issues of significance. I, therefore, thank Chairman Wheeler for circulating this item for a vote.

¹ 47 C.F.R. § 1.925.

² *Id.* § 1.925(b)(3).

³ If a designated entity has a lease agreement for “more than 25 percent of the spectrum capacity of *any one* of the applicant's or licensee's licenses,” the revenues of the lessee are attributed to the applicant. 47 C.F.R. § 1.2110(b)(3)(iv) (emphasis added).