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

In the Matter of	)	
	)	
Updating Part 1 Competitive Bidding Rules	)	WT Docket No. 14-170
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268
	)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver	)	RM-11395
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211

COMMENTS OF STEVEN R. BRADLEY, FORMER PRESIDENT/CEO OF INTEGRATED COMMUNICATIONS GROUP, LLC; ANITA S. GRAHAM, FORMER MANAGING PARTNER OF OPPORTUNITY CAPITAL PARTNERS; STANLEY CAMPBELL, CHAIRMAN AND CEO OF EAGLEFORCE ASSOCIATES; GILBERT H. SCOTT, Sr., PRESIDENT AND CEO OF HURSHELL ASSOCIATES; LATINOS IN INFORMATION SCIENCES AND TECHNOLOGY ASSOCIATION (LISTA); LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC); ARTHUR MOBLEY, BROADCAST OWNER/OPERATOR AND ENDOWMENT BOARD MEMBER, WALTER CRONKITE SCHOOL OF JOURNALISM, ASU; MUTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL (MMTC); NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS (NABOB); NATIONAL ASSOCIATION OF MULTICULTURAL DIGITAL ENTREPRENEURS (NAMDE); NATIONAL BLACK CAUCUS OF STATE LEGISLATORS; NATIONAL POLICY ALLIANCE; NATIONAL URBAN LEAGUE; NOBEL WOMEN; RAINBOW PUSH COALITION; AND THE U.S. BLACK CHAMBERS, INC.

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Executive Summary

Numerous public interest benefits flow from meaningful Designated Entity ("DE") participation in spectrum auctions, ranging from increased competition in a highly concentrated industry to more robust auction proceeds for the U.S. Treasury and the taxpaying public. The DE Opportunity Coalition ("Coalition"), comprised of 16 national organizations and individuals, respectfully urges the Federal Communications Commission ("the Commission") to build on the revival of the congressionally mandated DE program to ensure that these entities, comprised of small businesses, minority- and women-owned businesses and rural telcos, not only have the opportunity to participate, but also succeed in the upcoming spectrum incentive auction.

As a general proposition, the Coalition urges the Commission to take steps to realize that a viable DE program can fulfill important statutory and policy priorities, such as the wide dissemination of licenses and the avoidance of the excessive concentration of licenses. More specifically, the Coalition asks the Commission to eliminate the Attributable Material Relationship ("AMR") Rule, a counterproductive regulatory restriction that ultimately inhibits DE participation in auctions, and maintain the existing five-year unjust enrichment repayment schedule. As a reasonable safeguard, the Commission should also retain existing DE reporting requirements, and thereby maintain an effective system of checks and balances.

To encourage meaningful DE participation in future auctions, the Coalition also recommends that the Commission increase bidding credits across small business categories and extend new bidding credits to race-neutral categories of firms, supported by necessary data gathered through fact-based notice and comment. Finally, the Coalition believes that the Commission should implement other additional policy recommendations outlined herein.

As wireless increasingly becomes the new broadcasting and people of color and other vulnerable populations leverage mobile as their primary vehicle to connect to high-speed broadband and the Internet, the Coalition believes it imperative to generate more owners of commercial wireless spectrum that can, in turn, generate economic opportunities for the communities they serve. The Coalition believes that positive reform of DE program rules will help to realize these ownership opportunities and is in the public interest.

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Comments of the DE Opportunity Coalition

"*Those who cannot remember the past, are condemned to repeat it.*"[1] The DE Opportunity Coalition ("collectively, The Coalition"),[2] comprised of 16 national organizations

[1] George Santayana, Reason in Common Sense, Vol. 1 of The Life of Reason (emphasis added).

[2] Members of the DE Opportunity Coalition include: Steven R. Bradley, Former President/CEO of Integrated Communications Group, LLC – Mr. Bradley is the former President and CEO of Integrated Communications Group, LLC, a broadband PCS licensee, and is currently an investor and entrepreneur in various telecommunications and other industries; Anita S. Graham, Former Managing Partner of Opportunity Capital Partners - Ms. Graham is a former Managing Partner of Opportunity Capital Partners, a minority-owned venture capital fund (and an investor in various wireless transactions), former Chairman of the National Association of Investment Companies, and a member of the FCC Advisory Committee on Diversity for Communications in a Digital Age; Stanley Campbell, Chairman and CEO of EagleForce Associates, *see infra* n.69; Gilbert H. Scott, Sr., President and CEO of Hurshell Associates, *see infra* n.87; Latinos in Information Sciences and Technology Association (LISTA); League of United Latin American Citizens (LULAC); Arthur Mobley, Broadcast Owner/Operator and Endowment Board Member, Walter Cronkite School of Journalism, ASU; the Multicultural Media, Telecom and Internet Council (MMTC); National Association of Black Owned Broadcasters (NABOB); National Association

and individuals, respectfully urges the Federal Communications Commission ("FCC" or "the Commission") to expand the Designated Entity ("DE") program and foster meaningful diversity in the control of the people's spectrum, as intended by Congress when it enacted the DE provisions within the Communications Act, as amended. These joint Comments are in response to the Commission's Notice of Proposed Rulemaking to update its Part I Competitive Bidding Rules.[3] We urge the Commission to avoid repeating past regulatory missteps relating to the DE program. The Coalition further requests that the Commission provide more flexibility in the DE rules so that new entrants can effectively compete amid changing market conditions, gain greater access to the capital needed to obtain spectrum, and secure a foothold in the increasingly dynamic telecommunications sector.

Against the backdrop of a record-setting AWS-3 auction that far exceeded national revenue goals[4] and the Commission's preparation for the upcoming spectrum incentive auction,[5] the issue of positive DE reform is timely. The incentive auction involves the highest value

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of Multicultural Digital Entrepreneurs (NAMDE); National Black Caucus of State Legislators; National Policy Alliance; National Urban League; NOBEL Women; Rainbow PUSH Coalition; and the U.S. Black Chambers, Inc.

[3] *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014) ("*NPRM*"). *See also Updating Part 1 Competitive Bidding Rules*, Order, DA 14-1784, WT Docket No. 14-170 (rel. Dec. 8, 2014) (extending the deadline for filing initial comments to Jan. 23, 2015); *Updating Part 1 Competitive Bidding Rules*, Order, DA 15-52, WT Docket No. 14-170 (rel. Jan. 13, 2015) (extending the deadline for filing initial comments to Feb. 6, 2015); *Updating Part 1 Competitive Bidding Rules*, Order, DA 15-542, WT Docket No. 14-170 (rel. Jan. 30, 2015) (extending the deadline for filing initial comments to Feb. 20, 2015).

[4] *See* Monica Alleven, AWS-3 spectrum auction ends with record $44.9 B in bids, *FierceWirelessTech* (Jan. 29, 2015), available at http://www.fiercewireless.com/tech/story/aws-3-spectrum-auction-ends-record-449b-bids/2015-01-29 (last visited Jan. 29, 2015) ("Total provisional winning bids came in at a record $44.899 billion – far more than the FCC raised in its previous spectrum auctions.")

[5] *See, e.g.*, Phil Goldstein, CTIA's Baker: Getting more spectrum for mobile in years ahead is 'not going to be easy,' *FierceWireless.com* (Dec. 2, 2014), available at http://www.fiercewireless.com/story/ctias-baker-getting-more-spectrum-mobile-years-ahead-not-going-be-easy/2014-12-02 (last visited Feb. 19, 2015).

spectrum the United States is likely to auction in the foreseeable future, and as demonstrated by the AWS-3 auction, demand for spectrum is at a premium. The results of the AWS-3 auction illustrate the benefits of meaningful DE participation and underscore the need to expand the DE program.[6]

If the opportunities created by the spectrum incentive auction to increase diverse participation and competition are squandered, there will be long-term negative consequences for competition and innovation.[7] As growth within the wireless industry increasingly correlates with the United States' overall economic and societal growth, finding ways to help DEs fulfill their aspirations to own and operate the assets that support the wireless industry is important both to those businesses and the communities they serve.[8] The Coalition believes that we cannot afford another round of exclusionary spectrum auction results, as produced by the 700 MHz Auction.[9] The increasing demand for wireless services indicates that wireless is rapidly becoming a consumer necessity in a world of peer-to-peer communications and broadband technologies,

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[6] *See infra* at 9, Section I(b).

[7] S. Jenell Trigg and Jeneba Jalloh Ghatt, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry* (Feb. 25, 2014) ("White Paper"), available at http://mmtconline.org/wp-content/uploads/2014/02/Web-Unembargo-MMTC-WHITE-PAPER_WIRELESS-OWNERSHIP_2.24.14_FINAL-2.pdf (Feb. 19, 2015). "When the wireless industry was still in its infancy, MBEs had a unique opportunity to enter the industry on the ground floor, unlike MBEs engaged in terrestrial broadcasting. In some ways due to the creation of new communications services, the wireless industry avoided the history of discrimination present in the broadcasting industry that hampered the ability for new entrants, especially MBEs. Unfortunately, other forms of discrimination against MBEs regarding access to capital have carried through to the new industry." *Id.* at 6.

[8] *See id.* at 4.

[9] Reviewing the abysmal performance of DEs in Auction 73, it comes as no surprise that then-Commissioner Adelstein unsurprisingly remarked, "It's appalling that women and minorities were virtually shut out of this monumental auction [73]. It's an outrage that we've failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse. This gives whole new meaning to "white spaces" in the spectrum." *Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction*, FCC News Release (Mar. 20, 2008).

including the "Internet of Things," underlined by the wide availability of wireless technologies, as they have become the most affordable means of accessing the Internet.[10]

To maximize the engagement of DEs, the Coalition, therefore, makes the following recommendations to ensure timely, substantive reform, and/or effective promotion of the DE program: (1) eliminate the financial limitations imposed by the Attributable Material Relationship ("AMR") Rule;[11] (2) clarify Commission rules to allow DE lessors to fully engage in spectrum leasing under the same *de facto* control standard as non-DE lessors; and (3) maintain the current five-year unjust enrichment repayment schedule for licenses acquired with DE bidding credits. The Coalition also requests that the Commission increase bidding credits across all existing small business categories to a new maximum of at least 40 percent and extend bidding credits to new race-neutral categories of DEs, such as an Overcoming Disadvantage Preference,[12] where the Commission has properly solicited comment through public notice, in compliance with the Administrative Procedure Act. Further, the Coalition urges the Commission to adopt several recommendations to collect data and incorporate diverse participation throughout the regulatory process, as set-forth in the White Paper, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*.[13] To support our recommendations and the need to improve upon meaningful DE participation in FCC auctions, the Coalition shares

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[10] *See generally, National Telecommunications and Information Administration, Exploring the Digital Nation: Embracing the Mobile Internet* (Oct. 2014), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_embracing_the_mobile_internet_10162014.pdf (last visited Feb. 17, 2015).

[11] The AMR Rule was one of the three major DE Rules adopted by the FCC in 2006, which undercut DE participation in Auctions 66 and 73. For a fuller discussion of the AMR Rule, see Section II below.

[12] *See infra* at 34.

[13] *See supra* n. 7. *see also infra* at 32, Section IV.

three case studies based on interviews with former and current DEs introduced throughout our comments.[14]

I. THE COMMISSION SHOULD BUILD ON THE HISTORIC SUCCESS OF THE DE PROGRAM AND CURRENT MARKET OPPORTUNITIES BY ENSURING THAT ITS RULES PROMOTE REALISTIC AND MEANINGFUL OPPORTUNITIES FOR DE PARTICIPATION.

a. A Viable DE Program Fulfills Important Statutory and Policy Priorities.

The Commission's DE program was created to ensure diverse participation and competition within a competitive bidding system. When the DE program was created, Congress recognized that "[o]ne of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with 'deep pockets,' and therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new competitors or start-ups."[15] However, from the DE program's inception, the Commission has also recognized the importance of strategic alliances between DEs and larger companies, if DEs are to have any chance of competing against large incumbents.[16] Congress' concern over diversity and competition continued as the DE program matured. As a result of this concern, Congress and the Commission have both recognized that DEs must be able to do more than have an "opportunity"

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[14] Three former and current DEs were selected for interviews between January 2015 and February 2015. The interviews were conducted by both phone and in person by MMTC staff. A survey questionnaire was designed and implemented to gather the relevant data, interviews were transcribed and all respondents provided permission to MMTC and the Coalition to publish relevant findings from the data collected.

[15] H.R. Rep. No. 103-111 (May 25, 1993) at 255. Congress provided the FCC with flexibility in designing alternative payment schedules to ensure that such favoritism not occur. *Id.* However, the FCC suspended the installment payment program in 1997 and ultimately eliminated any flexibility in payment schedules in 2000. *See Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures*, 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, 15321-22 ¶¶ 54-55 (2000); *see also* White Paper at 3.

[16] *See infra* n.39.

to win licenses.[17] Unless DE auction participation yields successful results, the mandates under Section 309(j) that the FCC auction process promote competition, avoid an excessive concentration of licenses, and disseminate licenses among a wide variety of providers, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, would be substantially undermined, if not rendered altogether meaningless.

Historically, the DE program's effectiveness has been measured by auction results, which reveal whether the congressional mandate to disseminate licenses to "a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by women and minorities has been successfully met."[18] As documented by the first fourteen spectrum auctions

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[17] In 1997, Congress took steps to expand the Commission's auction authority and further expected that a required report "shall include a detailed analysis of the impact of such bidding on the ability of small businesses and new entrants *to participate effectively* in the bidding process." H.R. Conf. Rep. No. 105-217, Balanced Budget Act of 1997 (July 30, 1997) at 572 (*emphasis added*). Early on, the Commission recognized its statutory obligation to promote diversity and competition and understood that it must "take the steps that are necessary to ensure that designated entities have a *realistic opportunity* to obtain [spectrum] licenses." *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd. 5532, 5537 ¶ 9 (1994) ("*Fifth Report & Order*") (emphasis added).

[18] The FCC Report to Congress on Spectrum Auctions, Federal Communications Commission, Wireless Telecommunications Bureau, FCC 97-353 at 34 (1997) ("FCC Congressional Spectrum Report") (*citing* to the large number of licenses *won* by DEs over the first 14 auctions conducted by the FCC (484 of 608 winners (79.6 percent)). The dollar value of those licenses won by DEs was $12.3 billion, a significant 53 percent of the total value of all winning bids. *See* aggregate of final results for Auctions 1 -15. There was no Auction labeled #13.) (Auction 1) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=1, Round Results (Round Results File Format); (Auction 2) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=2, Auction Summary by License (xls), Auction Summary by Bidder (xls); (Auction 3) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=3, Round Results (Round Results File Format); (Auction 4) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=4, Final Results for All License (xls), Final Results for All Bidders (xls): (Auction 5) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=5, Final Results for All Licenses (xls), Final Results for All Bidders (xls); (Auction 6) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=6, All Markets (xls), All Bidders (xls); (Auction 7) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=7, All Markets (xls), All Bidders (xls); (Auction 8) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=8; (Auction 9) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id =9; (Auction 10) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=10, Results for All Markets (xls), Results for All Bidders (xls); (Auction 11)

prior to 2006, which witnessed significant success by DEs, the Commission's auctions "had both national and global impact."[19]

During the period 2006-2010, which started with the ill-advised implementation of a number of highly restrictive DE Rules in 2006, the DE program did not promote meaningful DE participation or realistic opportunity to win spectrum licenses compared to the program's more successful debut.[20] This was reflected in the revenue results of the two most substantial auctions conducted during that time period, Auctions 66 (2006) and 73 (2008). Just as, prior to 2006, the Commission consulted auction results to determine the success of the DE program, the Coalition submits that the Commission, as it now looks to reform the DE program, should pay particular attention to the recent history of the dollar value and depth of spectrum purchased by DEs to evaluate the effectiveness of the reform proposals before it.[21] Table 1 compares DE performance in Auctions 66, 73 and 97 (top 80 percent of licenses won, by value).

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http://wireless.fcc.gov/auctions/default.htm?id=11&job=auction_summary, Results for All Markets (xls), Results for All Bidders (xls); (Auction 12) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=12, All Markets (xls), All Bidders (xls); (Auction 14) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=14 All Markets (< a href="http://wireless.fcc.gov/auctions/14/charts/14_cht2.xls" title="All Markets">xls), All Bidders (xls); and (Auction 15) http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=15.

[19] *Id.* ("These auctions have increased competition, which in turn may have contributed to growth in wireless industry employment in U.S. Markets. As shown in the accompanying chart entitled 'Wireless Industry Employment,' the compound annual growth in wireless industry employment has increased by 35 percent between 1993-1996.").

[20] *See infra* at 16, Section II.

[21] The overall spectrum dollar value tells the real story of DE auction success or failure, because that figure takes into account not only the number of winning DEs, but the size and the dollar value of all licenses won. For example, in Auction 66, DEs represented 55 percent of the winning bidders, an estimated 70 percent of which were rural telephone companies. However, the percentage of the total value of spectrum won by DEs in that auction was only 4 percent. In Auction 73, DEs again represented 55 percent of the winning bidders (many of which were again rural telephone companies), but those DEs won a mere 2.6 percent of the total spectrum value auctioned. Phrased another way, in Auction 73 a number of DEs won small spectrum blocks of lesser value – relative spectrum scraps – while AT&T and Verizon Wireless won on their collective winning of 84.4 percent of the total spectrum value; representing the lion's share of the most valuable licenses. The overall outcome in 2008 of Auction 73's

Table 1. Comparison of Auctions 66, 73 and 97 Performance by DEs

DE Performance in Recent FCC Auctions in Top 80 Percent of License Value			
Category	Auction 66[22]	Auction 73[23]	Auction 97[24]
Top 80% Dollar Value/ Total # of licenses	$10,981 MM 40	$15,186 MM 70	$33,105 MM 117
# of Licenses Won by DEs (%)	2 (5%)[1]	0 (0%)	29 (25%)[2]
DE Dollar Value Won (%)	$353 MM (3.2%)	0 (0%)	$7,372 MM (22.27%)
New Entrants	$353 MM (3.2%)	0 (0%)	$7,372 MM (22.27%)
Rural Telecommunications Companies	0 (0%)	0 (0%)	0 (0%)

Source(s): [1] The two DEs were Denali Spectrum License, LLC ($274.1 MM Net Bids) and Barat Wireless, L.P. ($79.4 MM Net Bids). [2] The three DEs were Northstar Wireless, LLC ($4,694 MM Net Bids), SNR Wireless LicenseCo, LLC ($2,605 MM Net Bids) and 2014 AWS Spectrum Bidco Corporation ($73.9 MM Net Bids). (AWS Spectrum partnered with Terrastar.)

Table 1 demonstrates how DEs made measurable progress in Auction 97, compared to their historically poor results in Auctions 66 and 73. Licenses won by DEs in the top 80 percent of value category jumped from 2 and 0 in Auctions 66 and 73 to 29 in Auction 97; the percentage of spectrum value won in this category improved from 3.2 and 0 percent in Auctions 66 and 73 to 22.27 percent in Auction 97. Thus, these numbers illustrate that: (1) the rules governing the

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sale of beachfront spectrum conducted under the highly restrictive DE Rules adopted by the FCC just before the commencement of Auction 66 in 2006, dramatically illustrates the failure of the FCC to promote DE success. *See* Nate Anderson, Hearing Used for Finger-Pointing on 700 MHz Auction, D Block (Apr. 15, 2008), http://arstechnica.com/news.ars/post/20080415-congress-to-fcc-i-told-you-so-on-d-block.html ("[FCC Commissioner] Adelstein noted that from a consumer perspective, 'one of the greatest failings of this auction' was the lack of a real 'third pipe' for wireless broadband"); *see also* Press Release, Eshoo Introduces Free Wireless Broadband Legislation (Apr. 17, 2008).

[22] Auction 66 Data: https://apps.fcc.gov/edocs_public/attachmatch/DA-06-1882A2.pdf.

[23] Auction 73 Data: https://apps.fcc.gov/edocs_public/attachmatch/DA-08-595A2.pdf.

[24] Auction 97 Data: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0130/DA-15-131A2.pdf (data in this report was sorted from largest to smallest license by net dollar value).

DE program greatly impact meaningful participation; and (2) without imprudent regulatory restraints, DEs can raise the capital necessary to successfully compete in the Commission's spectrum auctions.

b. Auction 97 Demonstrates the DE Program Generates Surplus to US Consumers.

While more needs to be done to truly unleash robust participation for all types of DEs, especially rural telecos and smaller DEs, Auction 97's results provide some evidence of the multiple public interest benefits that flow from DE participation in spectrum auctions. These benefits include record-breaking revenue, new competition, and slowing of consolidation in wireless ownership. The results of Auction 97 also indicate the need to bolster the Commission's resolve to strengthen DE participation and competition in the upcoming incentive auction across all categories of DEs.

The results of Auction 97 also reflect numerous benefits provided to the American taxpayer, contrary to the initial reaction of some.[25] First, the presence of DEs in the bidder pool materially increased the level of overall competition for the available spectrum, driving auction prices above $40 billion net, reflective of a full market value and far in excess of pre-auction estimates.[26] The record-setting dollar amounts in Auction 97 raised billions for the following

[25] *See Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program* (Feb. 2, 2015), available at http://www.fcc.gov/document/commissioner-pai-statement-abuse-designated-entity-program (last visited Feb. 19, 2015).

[26] Pre-auction estimates suggested total bids for the spectrum would fall in a range between $10 and $25 billion. *See, e.g.*, Alina Selyukh, "Big U.S. Wireless Carriers, Dish Plan Bids in Airwaves Auction," Reuters, Oct. 1, 2014, *available at* http://www.reuters.com/article/2014/10/02/us-usa-fcc-auction-idUSKCN0HQ57T20141002 ("the auction is expected to raise at least $10 billion") (last visited Feb. 12, 2015). The auction's final results far outstripped these predictions. Thomas Gryta & Gautham Nagesh, "FCC Raises $44.9 Billion in U.S. Wireless Spectrum Sale," Wall St. Journal, Jan. 29, 2015, *available at* http://www.wsj.com/articles/fcc-raises-44-9-billion-in-u-s-wireless-spectrum-sale-1422548474 ("The aggressive bidding surprised analysts who thought it would be a quiet affair dominated by AT&T Inc. and Verizon Communications Inc., the country's biggest wireless carriers by subscribers") (last visited Feb. 12, 2015).

beneficiaries: FirstNet, the country's first interoperable national public safety network;[27] the Spectrum Relocation Fund;[28] and the U.S. Treasury, the latter of which received more than $20 billion to pay down the national debt. The success of Auction 97 was acclaimed by each of the FCC Commissioners[29] and by congressional leaders.[30] The more than $40 billion dollar net

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[27] FirstNet was established under the authority of the Middle Class Tax Relief and Job Creation Act of 2012 for the purpose of creating an interoperable public safety broadband network. A substantial portion of the Auction 97 proceeds ($7 billion) will be allocated toward building this vital network to enhance U.S. emergency communications capability. *See* Marguerite Reardon, "FCC rakes in $45 billion from wireless spectrum auction," CNET.com (Jan. 29, 2015) ("This auction easily met the $7 billion obligation to pay for FirstNet"), *available at* http://www.cnet.com/news/fcc-rakes-in-45-billion-from-wireless-spectrum-auction/ (last visited Feb. 12, 2015).

[28] The Spectrum Relocation Fund is authorized under the Commercial Spectrum Enhancement Act to fund from auction proceeds the one-time expenses incurred by government agencies to vacate spectrum bands auctioned for commercial use, which may be nearly $5 billion for the spectrum cleared for the AWS-3 auction. *See* NTIA Website at http://www.ntia.doc.gov/category/aws-3-transition (last visited Feb. 12, 2015).

[29] *See* FCC Chairman Tom Wheeler Statement on Auction 97, Jan. 29, 2015 ("Today we closed bidding Auction 97 – by far the highest-earning spectrum auction the United States has ever seen"); Statement of Commissioner Ajit Pai on the Completion of the AWS-3 Auction, Jan. 29, 2015 ("The AWS-3 auction has been a historic success, raising almost $45 billion in provisionally winning bids . . . We can already draw a few lessons from the AWS-3 auction, beyond the obvious fact there is intense demand for mid-band spectrum. The most important is that the way the FCC structures an auction matters . . . I hope we take a similar approach in future auctions."); Statement of Commissioner Mignon L. Clyburn on the Results of the AWS-3 Auction, Jan. 29, 2015 ("If you had conducted a poll of analysts before the start of the AWS-3 auction, the highest prediction given for its yield would not have exceeded $18 billion. Seventy-seven days and a record setting $44.89 billion later, Auction 97 has shown that demand for this spectrum was phenomenal."); Statement of FCC Commissioner Jessica Rosenworcel on the AWS-3 Auction, Jan. 29, 2015 ("Today's conclusion of the AWS-3 auction demonstrates the extraordinary value of the airwaves all around us. Putting spectrum like this into the marketplace not only expands the possibilities for wireless services, it strengthens the new digital economy."); Statement of Commissioner Michael O'Rielly on the Conclusion of The AWS-3 Auction, Jan. 29, 2015 ("The conclusion of today's AWS-3 auction reemphasizes that licensed spectrum is valued more highly than ever in the marketplace.").

[30] *See, e.g.*, Senate Commerce Committee Chairman John Thune Remarks Prepared for Delivery American Enterprise Institute event: "Tech Policy 2015: The Year Ahead," Jan. 28, 2015 ("Spectrum policy is one area that has the potential for bipartisan consensus and Congressional collaboration with the White House. I think everyone was surprised to see just how successful the AWS-3 auction has been. Forty-five billion dollars is a lot of money, even in Washington D.C., and it illustrates the incredible demand for wireless spectrum, which is needed to fuel the mobile revolution."), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=281c1589-7535-4b9d-8197-3a846a97e8db (last visited Feb. 12, 2015); House Energy and Commerce Committee New Release, "BOOM! Auction Raises $35 Billion and Counting," Nov. 24, 2014 ("House Energy and Commerce Committee Chairman Fred Upton (R-MI) and Communications and Technology Subcommittee Chairman Greg Walden (R-OR) today praised the Federal Communications Commission's ongoing AWS-3

total raised by the auction far exceeded amounts generated by the two preceding large spectrum auctions (66 and 73), which offered spectrum licenses that were greater in quantity (Auction 66) or greater in quality (Auction 73) than the spectrum offered in Auction 97.[31] In fact, the results of Auctions 66 and 73, where DEs were relegated to the sidelines, netted just $13.7 billion and $19 billion, respectively, or only $32.7 billion combined. In Auction 97, by contrast, some $3.6 billion in Auction 97 DE bidding credits helped ramp up competition for the spectrum, and those bidding credits were *dwarfed* by the additional bid amounts generated. In Auction 97, DEs were for the first time in many years able to provide viable bidding competition to entrenched incumbent wireless companies, and the auction's final bid totals reflect that fact. In sum, in Auction 97, DE competition substantially disrupted the oligopolistic bidding behavior in which the large wireless incumbents had engaged in Auctions 66 and 73, and the nation's taxpayers were the ultimate beneficiaries.

In addition to increased revenue, Auction 97 generated new competition in furtherance of the mandate in Section 309(j) to disseminate licenses amongst a wide variety of applicants.[32] Fifteen separate DEs won nearly 26 percent of the aggregate value of the spectrum available during the auction. This percentage of spectrum value won was sharply higher than the dismal DE results of Auction 66 (4 percent of the total spectrum value) and Auction 73 (2.6 percent

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spectrum auction . . . [as] a remarkable success – a boon for American taxpayers."), *available at* http://energycommerce.house.gov/press-release/boom-auction-raises-35-billion-and-counting#sthash.8sBEj0JE.dpuf (last visited Feb. 12, 2015).

[31] The amount of AWS spectrum sold in Auction 66 exceeded the amount of AWS spectrum sold in Auction 97 (90 MHz of paired spectrum in Auction 66 vs. 65 total MHz in Auction 97 of which only 50 MHz was paired) and the lower band spectrum sold in Auction 73 was qualitatively superior to that offered in Auction 97 – the Auction 73 spectrum was widely considered to be "beachfront" in quality because of its excellent propagation characteristics. *See* Eric Bangeman, *FCC Readies "For Sale" Sign on Beachfront 700 MHz Property*, ARS TECHNICA, Apr. 25, 2007, *available at* http://arstechnica.com/tech-policy/2007/04/fcc-readies-for-sale-sign-on-beachfront-700mhz-property/ (last visited Feb. 12, 2015).

[32] *See* 47 U.S.C. §309(j)(3)(B).

thereof). The spectrum won by DEs in Auction 97 also represents the furtherance of a separately articulated statutory provision to *avoid* excessive concentration of licenses.[33] All of the spectrum auctioned did *not* go to the large incumbent wireless providers that currently dominate the competitive landscape.[34]

Further, Auction 97's results represent a milestone in the effort to overcome detrimental 2006 rules and policies that operated to suppress minority and women participation in the

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[33] *See id.*

[34] It should be noted that, in the decades prior to Auction 97, every major incumbent wireless carrier has benefited from partnerships with DEs. *See* Walter Piecyk, *Dish Does Not Control the Bidders That Won $10 Billion Of Spectrum*, BTIG Research (Feb. 2, 2015) ("[W]e believe that there should be little, if any, justification for the FCC to do anything but issue the licenses without delay, as mandated by legislators. … [T]he fact is that the same structures have been approved in the past for both AT&T and Verizon, who have been long considered the dominant players in the market . . . and control the majority of low band spectrum. It seems odd that anyone would believe that it's OK to approve designated entity structures used by AT&T and Verizon, but deny Dish which has a long stated purpose to inject competition in the market."), available at: http://www.btigresearch.com/wp-login.php?redirect_to=http%3A%2F%2Fwww.btigresearch.com%2F2015%2F02%2F02%2Fdish-does-not-control-the-bidde&reauth=1 (last visited Feb. 10, 2015).

See, e.g., Press Release, "Alaska Native Wireless Announces Successful Completion of Federal Spectrum Auction," at 1 (dated Jan. 26, 2001) (detailing the participation in Auction 35 (PCS C and F Blocks) of Alaska Native Wireless, LLC, a joint venture including AT&T Wireless, which obtained wireless licenses covering 43 markets with a population of 71 million), *available at* http://www.prnewswire.com/news-releases/alaska-native-wireless-announces-successful-completion-of-federal-spectrum-auction-71110757.html (last visited Feb. 19, 2015); *see also* Cellco Partnership 10-K at 5 (filed Dec. 31, 2005) (detailing Verizon Wireless' alliance with Vista PCS, LLC ("Vista") to secure 37 licenses "that were available only to entities qualifying as a 'small business' under FCC rules" for approximately $332 million, covering a total population of approximately 34.4 million, in FCC Auction No. 58 (Broadband PCS)), *available at* http://edgar.sec.gov/Archives/edgar/data/1175215/000095010306000525/dp02229_10k.htm. Vista was a joint venture owned 80% by Cellco Partnership and 20% by Valley Communications, LLC. *Id.* Cellco Partnership entered into a management agreement in which it served as the manager of Vista's wireless systems, "subject to Vista's oversight and control." *Id.* The FCC approved this partnership and granted the licenses to Vista on March 8, 2006. *Id.* Other strategic alliances identical to the DISH, Northstar and SNR relationships were approved by the FCC. Walter Piecyk, *Dish Does Not Control the Bidders That Won $10 Billion Of Spectrum*, BTIG Research (Feb. 2, 2015). These include a deal between Salmon PCS and AT&T predecessor Cingular, and between Denali Spectrum and Leap. *Id.* Many FCC-sanctioned partnerships have expedited service to areas that were unserved or underserved, and at competitive prices. *See* White Paper at 11-12.

wireless industry.[35] Auction 97 began to address the glaring and unacceptable reality that minority ownership and control of spectrum languish at abysmally low levels. The two largest DE winners in Auction 97, Northstar Wireless LLC ("Northstar") and SNR Wireless LicenseCo LLC ("SNR"), are both minority-controlled enterprises – Northstar is led by Doyon Limited, an Alaskan Native Corporation,[36] and SNR is led by John Muleta, an accomplished African American businessman with over 30 years of experience in the wireless and Internet services industries.[37] These two companies each strategically aligned themselves with a non-incumbent wireless provider,[38] as well as other significant investors.

While the Commission's robust post-auction review process will verify that these structures are consistent with longstanding FCC Rules and time-tested precedent establishing DE enterprise control requirements, such alliances are emblematic of a viable business model that a new entrant can use to realistically compete in any material scale at auction with well-capitalized

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[35] "Women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%)." *Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction*, FCC News Release (Mar. 20, 2008).

[36] Doyon is one of the thirteen Alaska Native Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act. Doyon is owned by 19,000 Alaska Native shareholders and is headquartered in Fairbanks, Alaska. Doyon's mission is to enhance and promote the economic and social well-being of its shareholders and future shareholders, to strengthen its Native way of life and to protect and enhance its land and resources.

[37] Mr. Muleta, the controlling member of SNR, has a 30-year career spanning both industry and government service. He has been CEO of ATELUM LLC, a strategic consulting firm specializing in mobile and web services platforms, since December 2010. Mr. Muleta's corporate and entrepreneurial career included senior officer positions at PSINet, Navisite and co-founding M2Z Networks. His government experience included senior staff positions at the FCC during the Clinton and Bush Administrations. Mr. Muleta has an undergraduate degree in Engineering, a law degree and an MBA all from the University of Virginia ("UVA"), where he currently serves as a co-chair of the University of Virginia's Alumni Entrepreneurial Advisory Board for the UVA School of Engineering and as an Alumni Trustee of UVA's Inclusion, Diversity, Equality and Access (IDEA) Fund.

[38] Incumbents AT&T and Verizon are vastly larger companies than DISH, with respective market capitalizations as of February 18, 2015 of approximately $178.5 billion and $203.4 billion. DISH, on the other hand, with a current market cap of $35.2 billion is much closer in size to other national incumbent mobile wireless service providers T-Mobile ($25.0 billion) and Sprint ($19.7 billion).

incumbents and produce public interest benefits like those discussed herein.[39] Indeed, only qualified, strategically structured, well-capitalized DEs possess the business plan flexibility and financial wherewithal to bring true competition on a national scale to an auction landscape badly in need of it.[40] Critics of DE relationships with even *non-incumbent* businesses have not explained how, given access to capital challenges (as documented and recognized by both Congress and the Commission), DEs would otherwise be able to raise money and fulfill the statutory mandate to avoid an excessive concentration of licenses – *all* licenses, not just small

[39] When first implementing its auction authority, the Commission recognized that, "although auctions have many beneficial aspects, *they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women* by raising the cost of entry into spectrum-based services." Fifth Report & Order. 9 FCC Rcd at 5537 ¶ 10 (*emphasis added*). For this reason, the FCC has had a long-standing history of allowing and encouraging strategic partnerships between DEs and large businesses, including partnerships with the largest incumbent wireless carriers. *See, e.g.*, *id.* at 5539 ¶ 14 ("First, we will structure our attribution rules to allow those extremely large companies that may not bid on [PCS] blocks C and F to invest in entities that bid on those blocks."). And DE bidding credits were purposefully used as an incentive to foster such alliances. *Id.* at 5539 ¶ 15 ("Second, to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions, we will make bidding credits available to designated entities. . . . Under these rules, it still will be more expensive for designated entities to participate in the provision of spectrum-based services than it was before Congress granted us authority to hold auctions, because they will have to purchase licenses. But by adopting bidding credits, which are explicitly authorized by Section 309(j)(4)(D), the *Commission seeks to promote economic opportunity and to counterbalance the tendency of auctions to concentrate license ownership in the hands of several very large companies*.") There was a need to take multiple steps to address this long standing access to capital issue for certain DEs, particularly given the anticipated "exponentially greater expense likely to be incurred in acquiring broadband PCS licenses and construct[ing] the systems." *Id.* at 5590 ¶ 132 n.110 (*emphasis added*). Therefore, the FCC adopted a series of provisions that were designed to level the playing field specifically for small business, and minority- and women- owned businesses. However, the FCC later incorporated the minority- and women- owned business provisions into the race-neutral small business standard after the Supreme Court's decision in *Adarand Constructors Inc. v Peña*, 515 U.S. 200 (1995). *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136 (1994), *aff'd sub nom. Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) ("Sixth Report & Order"); *see also* White Paper at 18-19.

[40] The mobile telecommunications marketplace has become increasingly concentrated over the past decade, with the FCC finding last year that the "four nationwide service providers accounted for about 96 percent of the nation's mobile wireless service revenue in 2013, up from 91.5 percent in 2012, and that "[t]he service revenues of Verizon Wireless and AT&T accounted for about 70 percent of total service revenue" for the same period. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (Seventeenth Report)*, 29 FCC Rcd 15311, 15326 (¶ 30) (2014). In the same report, the Bureau noted that "[a]t the end of 2013, the weighted average of the [Herfindahl-Hirschman Index, which measures market concentration] (weighted by population across the 172 Economic Areas in the United States) for the mobile wireless services industry was 3,027, a small increase from 2,966 at the end of 2012, which in turn was an increase from 2,874 at the end of 2011." *Id.* at 15327 (¶ 33).

licenses. Nor have the critics shown that a large non-controlling equity investor deprives a DE of *de jure* and *de facto* control. In fact, the Commission has a well-developed regulatory record on the issue reflected in longstanding FCC precedent and case-by-case analysis. In 1994, the FCC allowed DEs to obtain non-controlling equity investments (with fixed maximum percentages) from larger companies."[41] This approach was then revisited and refined in 2000 to facilitate increased DE flexibility and financing:

> We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing. A minimum equity requirement would require any person or entity identified as a controlling interest to retain some level of equity in the applicant, thereby reducing the amount of equity the applicant could offer to non-controlling interests in exchange for financing. This policy would thus limit a small business' ability to raise capital and undermine our intention of promoting small business participation in the highly competitive telecommunications marketplace.[42]

In sum, the Auction 97 results illustrate the critical importance of viable DE participation in the FCC's upcoming Incentive Auction. The Coalition believes that this is a good start. However, more needs to be done to encourage more robust DE participation across all levels, including rural telecos and smaller DEs. DE bidding credits provide an essential competitive antidote to the many advantages the large incumbent companies enjoy in spectrum auctions. However, in addition to bidding credits, the Commission should now consider other ways to

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[41] *Fifth Report & Order*, 9 FCC Rcd at 5539 ¶ 14.

[42] *Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures*, 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 (2000). The primary factor has historically been whether the DE remains in *de jure* and *de facto* control. "[W]e do not believe that the adoption of a minimum equity requirement [for DEs] is necessary to ensure appropriate identification of an applicant's controlling interest if the principles of *de jure* and *de facto* control are applied. These principles are, in effect, broader than the minimum equity requirements because they look to actual control irrespective of the amount of equity held in an applicant." *Id*. at 15326 ¶ 66. The Commission stated further that "[w]hile we agree with commenters that lack of equity may indicate lack of *de facto* control, we are not persuaded that this factor alone is dispositive. (footnote omitted)." *Id.*

further bolster a revived DE program, such as repeal of the AMR Rule, discussed in the next section.

II. THE COMMISSION SHOULD ELIMINATE THE ATTRIBUTABLE MATERIAL RELATIONSHIP (AMR) RULE IN FAVOR OF THE TWO-PRONGED APPROACH PROPOSED IN THE NPRM.

The Coalition urges the Commission to eliminate the AMR Rule[43] in favor of the two-pronged approach set forth in the *NPRM*. The current rule does not comply with the language or congressional intent of Section 309(j)[44] and inappropriately presumes that all DEs are alike, with identical business and capital needs, thus impeding access to capital, innovation in business plans, and DE capacity to adapt to changing market conditions. Thus, the Coalition applauds the Commission's tentative conclusion to eliminate the AMR Rule in favor of a more targeted enforcement approach.[45]

a. The Current AMR Rule Does Not Further the Objectives of Section 309(j) and Should be Repealed.

The AMR Rule is the last surviving vestige of a series of major DE rule changes improvidently adopted in 2006, and it remains a counterproductive regulatory restriction that impedes new entrant and incumbent DE participation, and, therefore, the Commission's goals of

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[43] *See* Comments of the Minority Media and Telecommunications Council, GN Docket No. 13-185 (Apr. 25, 2014). "A small business is eligible for bidding credits if its gross revenues, in combination with those of its "attributable" interest holders, fall below applicable service-specific financial caps…. [in 2006, the Commission] adopted a bright line test to require a small business applicant or licensee to automatically attribute to itself the gross revenues of any entity with which it had an "attributable material relationship."…. The Commission concluded that an applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manger or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative bases, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee." *See NPRM* 29 FCC Rcd. at 12431-12433 ¶¶ 12-15.

[44] *See* 47 U.S.C. §309(j).

[45] *See NPRM* at 12437 ¶¶ 25, 28

competition, innovation, and efficient use of spectrum.[46] When implemented in 2006, the AMR Rule had an immediate detrimental impact on DEs, causing qualified new DE entrants seeking to participate in Auction 66 to lose anticipated funding.[47] Since that time, the AMR Rule has continued to pose demonstrable entry barriers for DEs;[48] a result that is contrary to the Congressional intent behind Section 309(j) and the Commission's own understanding of its authority.

The Commission has stated that its policies should help licensees, including new entrants, "*enter into arrangements best suited [to] the parties' respective needs and business models*."[49] Further, in its *Seventeenth Competition Report*,[50] the Commission recognized the importance of wireless business plans that extend beyond facilities-based providers, noting, for example, that "Mobile Virtual Network Operators (MVNO) often increase the range of services offered by the host facilities-based provider by targeting specific market segments, including segments previously not served by the hosting facilities-based provider. Hence, the relationship between

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[46] *See NPRM* at 12431 ¶ 13 (*citing Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Second Report and Order* 19 FCC Rcd 17503, 17505 ¶ 1 (2004) ("*Secondary Markets Second Report and Order*").

[47] *See* White Paper at 14.

[48] The Commission claims that a focus on the low percentage of auction value won by DEs "mistakenly focus[ed] on the success rate of small business as opposed to whether the Commission has met its statutory goal of providing DEs with 'opportunities' to participate [in] the provision of spectrum based services as the language of section 309(j) requires." *NPRM* at ¶ 24, n.68. However, this is incorrect as the Commission's obligations under Section 309(j) are not limited to merely ensuring opportunities for DEs to participate in auctions. Unless DE auction participation yields successful results, Section 309(j) mandates that Commission auction process promote competition, avoid an excessive concentration of licenses, and disseminate licenses among a wide variety of providers, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, would be substantially undermined, if not rendered altogether meaningless.

[49] *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business, Report*, 19 FCC Rcd 3034, 3081-82 ¶ 156 (2003) (*emphasis added*).

[50] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Seventeenth Report*, WT Docket No. 13-135 (Dec. 18, 2014) ("*Seventeenth Competition Report*").

an MVNO and its hosting facilities-based provider can be a mutually beneficial strategic partnership."[51] However, the AMR Rule has not furthered these policies.

As adopted in 2006, the AMR Rule proved to be a major impediment to DE participation in Auctions 66 and 73 because it restrained a DE's ability not only to raise and retain capital, but to develop a viable business plan in light of improvements in technology and the current consolidated state of the wireless industry. Specifically, the AMR Rule has made it very difficult, if not impossible as a practical matter, for a DE to lease, wholesale or resell more than 25 percent of its spectrum capacity to any individual entity, because the AMR makes the revenues of that customer attributable to the DE.[52] Under these terms, a DE cannot pursue an anchor wholesaling or reselling relationship with a larger company (including even another DE, large or small), without risking loss of its DE eligibility and other benefits, including bidding credits. The AMR Rule impedes the flexibility of DEs to foster innovation and creative solutions for serving markets, particularly underserved and unserved communities.

Consequently, the Coalition fully supports the Commission's proposed repeal of the AMR Rule, with five-year unjust enrichment and transparent reporting safeguards in place. The FCC suggested in 2006 that a major purpose of the AMR Rule (as well as the now-vacated 50 Percent or Impermissible Relationship Rule)[53] was to encourage DEs to be facilities-based providers.[54] This rationale was ostensibly based on the legislative history of Section 309(j), and

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[51] *Id.* at ¶ 15

[52] *See* 47 U.S.C. § 1.2110(b)(3)(iv)(A)(2012); *see also* 27 FCC Rcd 908 (2012).

[53] Formerly 47 U.S.C. § 1.2110(b)(3)(iv)(A)(2006) (vacated by *Council Tree Communications, Inc. v FCC*, 619 F.3d 235 (2010) (subsequent history omitted) ("50 Percent Rule").

[54] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rule Making, 21 FCC Rcd 4753, 4754-55 ¶ 3 and n.9 (2006) ("2006 Second Report and Order").

Congress' expressed concern with deterring "participation in the licensing process by those who have no intention of offering service only to the public."[55] But the Commission improperly interpreted this language as a statutory mandate to require that DEs operate *solely* as facilities-based providers, offering service on a retail basis, the most expensive form of service, especially for new entrants.[56]

The Coalition agrees with the Commission's current, more enlightened analysis – that the prior interpretation used to justify the AMR Rule was overly narrow.[57] The Commission's prior interpretation of Section of 309(j) and its legislative history is erroneous,[58] as the unjust enrichment and anti-trafficking issues identified by Congress, when it first granted the Commission competitive bidding authority, generally apply to the entire competitive bidding scheme and to *all* bidders in the auction, not just to DEs.[59] In fact, Congress addressed the

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[55] *Id.* at 4759-60 ¶ 15, n.57 (citing to H.R. Rep. No. 103-111, at 257-58 (1993) and H.R. Conf. Rep. No. 103-231, at 483 (1993)).

[56] *See* White Paper at 28.

[57] *See NPRM* at 12346 ¶ 23.

[58] Overall, Section 309(j)(4) applies to all parties involved in the competitive bidding process pursuant to Section 309(j)(3). One subsection allows for the FCC to consider alternative payment schedules and other payment options specific to DEs as set forth in the statute's plain language. 47 U.S.C. § 309(j)(4)(A) ("that promote the objectives described in *paragraph (3)(B)*)" (emphasis added). "Paragraph (3)(B)" means Section 309(j)(3)(B), which mandates that the FCC promote economic opportunity and competition, avoid excessive concentration of licenses, and disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women (the "DE Provision"). 47 U.S.C. § 309(j)(3)(B). Section 309(j)(4)(B) mandates that the FCC establish performance requirements, ensure prompt delivery of service to rural areas, and prevent stockpiling or warehousing of spectrum. 47 U.S.C. § 309(j)(4)(B). Section 309(j)(4)(E) mandates that the FCC require transfer disclosures, anti-trafficking restrictions and payment schedules to prevent unjust enrichment. 47 U.S.C. § 309(j)(4)(E). *Neither Sections (4)(B) nor (4)(E) contains the express DE Provision*. Therefore, these sections are *not* exclusive to DEs. It would have been a simple matter for Congress to add the DE Provision (as in Section 309(j)(4)(A)) and its absence is a clear indication that Congress intended the other subsections of 309(j)(4) to apply generally to all licensees and permittees.

[59] Congress noted, "at least hypothetically, a system of competitive bidding will obviate the need for anti-trafficking restrictions" but imposed anti-trafficking and unjust enrichment provisions as a precaution. *See*, H. R. Rep. No. 103-111, at 257 ("Nevertheless, the Committee anticipates that the Commission will

applicability of anti-trafficking and unjust enrichment provisions specifically to DEs in a *different* paragraph, commenting that if a "reservation of appropriate licenses for small business applicants" was provided in an attempt to "achieve a justifiable social policy . . . anti-trafficking restrictions are necessary and appropriate."[60]

Further, neither the plain language of Section 309(j) nor its legislative history supports an interpretation that "service to the public" means service "*directly* to the public," requiring that a DE provide solely facilities-based retail service, and not leasing, wholesaling or reselling services. Moreover, the Commission itself has not consistently enforced the "direct to the public" requirement, finding, for example, that a full waiver of the 50 Percent Rule (now vacated) for Frontline Wireless prior to Auction 73 was in the public interest.[61] And the

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monitor trafficking in licenses issued pursuant to the provisions of 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment.").

[60]*See* H.R. Rep. No. 103-111, at 257. The words "direct" or "directly" are not included in the statute or the legislative history. And the concept of "service to the public" applies to all participants in an auction – not just DEs. In further support of the Coalition's correct reading of Congressional intent, the House stated generally that "[i]n order to assure that the goal of *prompt delivery of services to the public* is not frustrated by the Commission's employment of competitive bidding, the Commission's regulations must include performance requirements, and penalties for failure to meet these requirements, to prevent warehousing of frequencies." *Id*. at 256 (emphasis added).

[61] *See Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules for the Upper 700 MHz Band D Block*, Order, 22 FCC Rcd 20354 (2007) Frontline sought repeal of the 50 Percent Rule because it planned to purchase spectrum in Auction 73's D Block and be a 100% wholesale wireless provider. *See* Petition for Reconsideration of Frontline Wireless, LLC, WT Docket No. 06-150 et al. (Oct. 23, 2007) at 5 ("Wholesaling is also the only model a new nationwide wireless network operator could realistically afford to adopt, given the massive costs associated with providing retail service – consider Verizon's 2,300 retail outlets and its $1.9 billion annual advertising budget."). However, the FCC's Waiver Order was issued too late for Frontline to raise the necessary capital. Auction 73's D Block went unsold and to date, there is no national public safety network. *See* Jeffrey Silva, D-*Block Dustup Casts Questions on Martin, Frontline, Cyren Call*, RCR Wireless MNews (Mar. 20, 2008), available at **http://www.rcrwireless.com/20080320/policy/d-block-dustup-casts-questions-on-martin-frontline-cyren-call** (last visited Feb. 19, 2015).

Commission has found on numerous occasions that leasing agreements also are an efficient use of the spectrum and that such relationships would provide service to the public.[62]

Therefore, if the AMR Rule is not repealed, DEs would unreasonably be treated differently than other auction participants that are subject to the same anti-trafficking and unjust enrichment statutory provisions. The AMR Rule would continue to function as a market entry barrier, creating an unequal playing field for DEs and failing to enhance competition amongst providers of commercial mobile services, in contravention of Section 332 of the Act.[63]

Finally, the Commission has never developed an adequate record of the benefits or detriments of different leasing, wholesaling, and reselling relationships as they relate to DE control, access to capital, or the FCC's stated objectives under Section 309(j) to promote competition and to avoid an excessive concentration of licenses. The Coalition encourages the Commission to do so.

For example, the Commission failed to engage in adequate fact finding concerning the distinctions between various types of leasing, reselling, and wholesaling prior to adopting its ill-advised 2006 DE Rules. Yet, wholesaling differs widely from leasing because it typically involves the construction and ownership of new network facilities by DEs, and the sale to third parties of the right to use a DE's network capacity on those facilities (e.g., to small or mid-size carriers that need network capacity to compete with the largest incumbents, or other non-incumbent companies of any size that wish to provide retail wireless services).

b. <u>The AMR Rule Assumes that DEs Are Identical Entities with the Same Business Needs.</u>

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[62] *See, e.g.*, *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

[63] 47 U.S.C. § 332(c)(1)(C).

As discussed above, the Coalition urges the Commission to modify Section 1.9020 of its Rules to ensure that DE lessors "may fully engage in spectrum manager leasing under the same *de facto* control standard as non-DE lessors."[64] It is abundantly clear that the various categories of DEs (small businesses, rural telephone companies, minority-owned businesses, and women-owned businesses),[65] as well as the individual businesses that fall within each category, do not automatically have the same business needs. Like any individual business, different types of DEs have unique business plans, capital requirements, auction strategies and objectives. For example, rural telcos, with existing subscription revenue, might be less dependent on private or venture capital than a new entrant would be. Even so, DEs naturally wish to expand and grow their businesses and services, and therefore seek the flexibility to enter into strategic partnerships with other entities of all sizes and objectives.

Moreover, DEs should not be excluded from any area of commerce, including 'beneficial strategic partnerships,' especially given that DEs, and minority and women-owned business entities ("MWBE") in particular, have had difficulty gaining access to capital under the current regulatory regime.[66]

The AMR Rule is also contrary to the Commission's secondary market policies.[67] The rule has not only hampered the ability of new entrants to participate in Auction 66 and 73, but it

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[64] *See NPRM* at ¶ 8.

[65] 47 U.S.C. §309(j)(3)(B).

[66] *See* White Paper at 21.

[67] In the *Secondary Markets* proceeding, the Commission affirmed its existing rules for spectrum leasing agreements with DEs and concluded that the "leasing by a designated entity licensee of '*substantially all* of the spectrum capacity of the licensee' would cause attribution likely leading to a loss of eligibility." *2006 Second Report and Order*, 21 FCC Rcd. at 4762 ¶ 24 (citing *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17503, 17538, 17541 & 17544) (*emphasis added*). In the *Second Report and Order*, the Commission cites with favor that prior conclusion, but just one paragraph later the Commission concludes that a mere 25 percent spectrum capacity threshold figure will constitute an "attributable material relationship." *Id.* at 4763 ¶ 25. By any measure, 25 percent of spectrum capacity

also prevented incumbent DEs from increasing their spectrum holdings and growing. Several DEs, including Wirefree Partners, III, did not participate in auctions after 2006 due to the impact of the Commission's DE rule changes on access to capital and growth opportunities.[68] The Coalition submits this as an additional reason for repealing the AMR Rule.

In preparing for this filing, the Coalition met with three DEs to discuss how the Commission's rules impact actual businesses. The overarching feedback we received from these meetings was frustration, specifically over how the DE rules, and the AMR Rule in particular, prevent DEs from participating in every level of commerce.

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does not amount to "substantially all" spectrum capacity, yet the Commission is silent on how the two concepts are compatible. Council Tree Communications, Inc., Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial review and Petition for Expedited Reconsideration, WT Docket No. 05-211 and AU Docket No. 06-30 (filed May 17, 2006) at 10-11.

[68] *See* Comments of Wirefree Partners III, LLC, WT Docket No. 05-211 (filed Sept. 20, 2006) at 6. *See also* Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP Petition for Partial Reconsideration and/or Clarification, WT Docket No. 05-211 (June 2, 2006) at 5-6. Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP Petition for Partial Reconsideration and/or Clarification, WT Docket No. 05-211 (June 2, 2006) at 5-6 ("It is respectfully submitted that the 'material relationship' restrictions suffer from most of the same infirmities as the expanded unjust enrichment penalty: … the new rules work an undue hardship on rural telephone companies and small businesses, without adequate justification in the record …. [T]he Commission concluded that spectrum lease and resale arrangements 'by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent.'(footnote omitted). It is respectfully submitted that this conclusion is unsupported, as there is no evidence in the record that the current *de facto* control standards are inadequate for policing sham relationships; and while Congress evidenced an intent that the Commission should deter abuses of the bid credit mechanism, it did not mandate a bright line decree that all spectrum leases and resale arrangements are shams in which the other party has assumed control of the applicant or licensee. The assumption that such relationships are *per se* abuses of the bid credit rules is rather startling, considering that the Commission adopted the spectrum leasing rules less than three years ago, following a lengthy rule making and development of an extensive record showing that the public interest was served by allowing rural telephone companies and small businesses to utilize spectrum leasing."); National Telecommunications Cooperative Association Comments in Support of Petitions for Reconsideration, WT Docket No. 05-211 (July 14, 2006) at 3. ("NTCA agrees with the Blooston Petition that the material relationship provisions should be rescinded. Rural telephone carriers should be permitted to utilize spectrum leasing and resale arrangements to their full extent to bring advanced wireless services to rural America. As the Blooston Petition points out, the Commission just recently found that the public interest was serviced by allowing rural telephone companies and small businesses to utilize spectrum leasing.").

One of the DE respondents was EagleForce, a certified small, minority, and veteran owned business run by Chairman and CEO, Stanley Campbell.[69] Mr. Campbell has an impressive resume that spans time as a Navy pilot and patent holder in the areas of business, intelligence, security, and health care. His health care and intelligence technology, in particular, are transforming how industry functions. But despite these accomplishments, Mr. Campbell has been unable to effectively compete in FCC auctions, and win ownership and control of the spectrum that his innovative and information sensitive technology relies upon.[70] In the interview, he shared that "this inability to own the infrastructure on which his patents operate makes it very difficult to raise capital and attract partners, thus limiting business development."[71]

Mr. Campbell was part of a coalition of bidders negatively affected by the DE 2006 rule changes, which, he explained, created a host of problems. When asked if DEs should have to be facilities based-providers, Mr. Campbell raised a strong point about the limitations of the model. "We expect new entrant DEs to survive in this capital-intensive industry," shared Mr. Campbell. Leasing and wholesaling may very well be "how we pay the bills for the first five years in this business while the company learns the industry and builds a reputation."[72] Ultimately, he stressed that DEs "should at least be able to participate in every level of commerce."[73] "Right now, DEs already have an uphill battle, just to get in the game," he reiterated.

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[69] Interview with Stanley Campbell, Chairman and CEO, EagleForce, in Herndon, VA (Jan. 30, 2015) ("Stanley Campbell Interview"). More information about Mr. Campbell and the EagleForce team is available at http://www.theeagleforce.net/managementTeam.html (last visited Feb. 11, 2015).

[70] Stanley Campbell Interview.

[71] *See id.*

[72] *Id.*

[73] *Id.*

Mr. Campbell's sentiments echo our primary reasons for eliminating the AMR Rule; it inhibits a DE's ability to create a flexible business plan that responds to marketplace changes and, as a result, unreasonably impedes access to capital.[74]

In summary, the AMR Rule needs to be repealed. It makes it more difficult for DEs to secure capital, grow their businesses, or expand spectrum holdings at auction. Additionally, it restricts new entrant DEs that do not have a ready-made subscriber base (i.e., steady incoming revenue) from securing financial support from an anchor tenant through a lease, resale, or wholesale arrangement.[75] Given a level playing field, an AMR Rule elimination will give DEs the ability to participate and thrive in the communications market[76] by pursuing business models that fall outside of the provision of only facilities-based services. As Mr. Campbell shared in the interview, "DEs should not have to fit a square peg in a round hole when it comes to their business models. We need some flexibility to keep up with the innovation." By eliminating the AMR Rule, the Commission will allow these entrepreneurial business models to flourish, to the benefit of consumers and the telecommunications industry as a whole.

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[74] *See generally*, White Paper. *See also* MMTC Ex Parte Letter, WT Docket No. 05-211 et al. (Mar. 14, 2014); MMTC Ex Parte Letter, WT Docket No. 05-211 *et al.* (Apr. 3, 2014). *See also* FCC Advisory Committee on Diversity for Communications in a Digital Age ("Diversity Committee") Draft Resolution Supporting Retention of Designated Entity Rules (Oct. 4, 2004), available at http://transition.fcc.gov/DiversityFAC/recommendations.html (follow link to "Designated Entity Rules Draft") (last visited Feb. 20, 2015) (explaining, two years prior to the 2006 DE rule changes, the necessity of maintaining a stable regulatory climate to ensure DEs are able to secure capital to effectively compete in spectrum auctions). The Diversity Committee stepped in two more times to urge the Commission not to harm the viability of the DE program and rely instead on enforcement rules that allow the Commission to conduct compliance audits and enforce unjust enrichment penalties if violations occur. *See* Diversity Committee Resolution Regarding Designated Entity Investment Rules (Apr. 25, 2006), available at http://transition.fcc.gov/DiversityFAC/recommendations.html (follow link to "Designated Entity Rules") (last visited Feb. 20, 2015); Diversity Committee Resolution Regarding Designated Entity Investment Rules (Sept. 22, 2009), available at http://transition.fcc.gov/DiversityFAC/recommendations.html (follow link to "Designated Entity Investment Rules") (last visited Feb. 20, 2015) (urging the Commission to begin a rulemaking to reverse the 2006 Rule Changes and consult the Committee prior to all auctions).

[75] *See* Comments of the Minority Media and Telecommunications Council, GN Docket No. 13-185 (Apr. 25, 2014).

[76] *See generally*, White Paper.

III. THE COMMISSION SHOULD NOT EXTEND THE FIVE-YEAR REPAYMENT SCHEDULE.

The Coalition vehemently objects to the reinstatement of a ten-year unjust enrichment repayment schedule for DE licenses.[77] While the Coalition shares the Commission's concerns that only *bona fide* entities qualify for DE benefits and that the program retain its existing strong enforcement provisions, the Coalition urges the Commission to carefully balance this need against the underlying goals of the DE program – *to encourage diverse participation and competition*. To actually work towards this goal, the protections to prevent unjust enrichment must be reasonably tailored.

The Commission should not enact rules or conditions that hamper or eliminate the ability of DEs to raise and retain capital or operate their businesses with flexibility comparable to businesses in the rest of the industry. And, the Commission already knows from its ill-advised adoption of the Ten-Year Hold Rule in 2006 that such a rule creates overwhelming obstacles for DEs. Indeed, as described below, the Commission has in its files significant evidence illustrating that a Ten-Year Hold Rule substantially impacts a DE's ability to access the capital necessary to successfully participate in the industry.

Adopted in 2006 as part of an 11th hour rulemaking conducted on the virtual doorstep of Auction 66, the Ten-Year Hold Rule was vacated in 2010 by the U.S. Court of Appeals for the Third Circuit due to serious violations of the public notice and comment requirements under the

[77] The Commission seeks comment as to whether the Commission should "revisit" its unjust enrichment rules in order to "maintain the right balance considering our responsibility to safeguard the award of small business benefits to only eligible entities." *NPRM* at ¶ 8. "Extending the length of the unjust enrichment repayment schedule to 10 years could help deter speculation and prevent spectrum warehousing. At the same time, extending the length of the unjust enrichment repayment schedule could restrict small businesses' access to capital, especially new entrants, which could limit their ability to participate in the provision of spectrum-based services, contrary to our underlying goals in this proceeding." *Id.* at ¶ 45.

Administrative Procedure Act ("APA").[78] Significantly, the Court also expressed concerns about the substantive validity of the rule and the Commission's failure to "thoroughly consider the impact of the extended repayment schedule on DEs' ability to obtain financing."[79] Comments filed after the improvident 2006 adoption of the Ten-Year Hold Rule made clear that the extended unjust enrichment period would have a significant negative impact on DEs' access to capital. Comments were filed by established DEs and new entrant DEs, as well as their investors and the U.S. Small Business Administration ("SBA"). These various comments compellingly illustrated the fundamental deficiencies in the Ten-Year Hold Rule. Nearly a decade later, it is instructive to consult a sampling of those views, which remain valid today:

> - [T]he new ten year unjust enrichment schedule adopted in the Second Report and Order makes it more difficult for designated entities to secure financing and find strategic partners because it is less likely that they can easily exit the business in the event of significant changes in the industry. … The ten year unjust enrichment schedule makes it difficult for Doyon to provide for liquidity in its telecommunications investments if it is needed to pay dividends to its Alaska Native shareholders.[80]
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> - [T]he effect of this rule change was effectively to stifle *almost entirely* investment by such players in DE ventures, since the change eliminated virtually any flexibility for strategic exit or refinancing during the term of the DE license. (emphasis in original) (footnote omitted). Such a result, in Leap's view, has 'thrown the baby out with the bath water.' The five-year unjust enrichment schedule

[78] *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 256 (2010) (subsequent history omitted) ("[W]e hold that the 10-year repayment schedule, to the extent it applies to qualifications for DE status that were in effect before its enactment, was adopted without the notice and comment required by the APA").

[79] *Id.* at 256.

[80] Doyon, Limited, Oral Ex Parte Presentation, WT Docket No. 05-211 and AU Docket No. 06-30 (May 24, 2006), at 1. Alaska Native communities are some of the poorest in the Nation and are unserved in advanced telecommunications services. Reinstatement of a longer unjust enrichment period would impose another market entry barrier to bringing broadband to underserved rural and low income communities.

struck a reasonable policy balance that allowed DEs to access sufficient capital for license acquisition and development. Leap would urge the Commission to restore the status quo on that point if the DE program is to be preserved.[81]

- The changes to the Commission's longstanding unjust enrichment schedule . . . greatly undermine, or even eliminate, DEs' ability to attract investment. . . . . The flexibility to exit the business is central to the ability of DEs to secure financing. The Commission's sudden actions in the Second Order eliminate that flexibility. As a result, fewer DEs will undertake to participate in competitive bidding, and those that do will receive limited, if any, financial support from investors and lenders. This cannot have been what the Commission intended.[82]

- It is unwise, and contrary to the statutory mandate, for the Commission to impose a 10-year unjust enrichment schedule on DE licensees on a going forward basis, and to impose new penalties on the transfer of unconstructed DE licenses. If, as appears to be the case, the Commission would prefer for DEs to get their financial backing from financial institutions and venture capital firms rather than from large incumbent nationwide wireless carriers (see Order, para 81) then the Commission must be sensitive to the financial planning horizons of these types of investors. A business transaction where there is no clear path to liquidity for 10 years is a very unattractive investment for the financial institutions and venture capital firms that traditionally have supported wireless start-up ventures.[83]

- At Advocacy's roundtable, several parties mentioned that the FCC does not provide evidence of systematic abuse of the designated entity program. … Small businesses noted that the Commission could handle almost every instance of unjust enrichment by scrutinizing the applications of

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[81] Comments of Leap Wireless International, Inc., WT Docket No. 05-211 (Sept. 20, 2006) at 4.

[82] Written Ex Parte Presentation of The Eezinet Corporation; Doyon Limited; Attucks Capital LLC; Greenwood 361º LLC; Opportunity Capital Partners; and Catalyst Investors, LLC, WT Docket No. 05-211 and AU Docket No. 06-30 (June 19, 2006) at 1.

[83] Ex Parte Comments of Coral Wireless Licenses, LLC; Coral Wireless II, LLC; Cleveland Unlimited, Inc.; 3G PCS, LLC; Triad AWS, LLC; Harbor Wireless, LLC; Harbor Guardband, LLC; M/C Venture Partners; Columbia Capital III, LLC; and Columbia Capital IV, LLC, WT Docket No. 05-211 (May 30, 2006) at 3. The joint commenters were existing and new entrant DEs and their investors.

> designations in advance of the auction. … Instead of concentrating on preventing unjust enrichment, small businesses believe that the Commission should concentrate on promoting opportunities for designated entities by removing market entry barriers and creating a regulatory environment that encourages funding for designated entities. In particular, small businesses are concerned that the 10-year limitation on transfer of a spectrum license is overly burdensome, impedes their ability to attract funding, and is unnecessary to prevent unjust enrichment.[84]
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> - It is respectfully submitted that [the Ten Year Unjust Enrichment Period] rule change should be rescinded, or modified as discussed below. … More importantly, the rule change is actually harmful to small businesses and rural telephone companies in its present form. … The benefits to be gained by the new rule are unclear at best, and unsupported in the record.[85]

In sum, the administrative record compiled during reconsideration of the 2006 DE Rules and during the *Council Tree* litigation contains ample comment support for the proposition that five, not ten years, is a reasonable investment horizon for venture and private equity firms.[86]

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[84] Comments of the Office of Advocacy, U.S. Small Business Administration, of the Notice of Proposed Rulemaking and Initial Regulatory Flexibility Analysis, WT Docket No. 05-211 (Sept. 20, 2006) at 5.

[85] Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP Petition for Partial Reconsideration and/or Clarification, WT Docket No. 05-211 (June 2, 2006) at 3. *See also* National Telecommunications Cooperative Association Comments in Support of Petitions for Reconsideration, WT Docket No. 05-211 (July 14, 2006) at 2 ("NTCA agrees with the Blooston Petition and the Council Tree Petition that the Commission should rescind the ten-year unjust enrichment period. … NTCA and the record supported restrictions on specific business arrangements between large carriers and small licensees that enable large carriers to circumvent the intent of the designated entity provisions and take advantage of bidding credits. However, the rules adopted restrict the business opportunities of small businesses and rural telephone companies, but do not target actual abuse.").

[86] In this same vein, the former Telecommunications Development Fund ("TDF"), an investment fund established by the Telecommunications Act of 1996 "to promote access to capital for small businesses in order to enhance competition in the telecommunications industry," and administered in part by the Commission, set its investment time horizon between three and six years. *See* 47 U.S.C. § 614(a)(1). By statute, the FCC Chairman appoints TDF's Board of Directors, including a representative of the FCC. 47 U.S.C. § 614(c)(1). Council Tree Communications, Inc. Supplement to Petition for Expedited Reconsideration/Motion for Expedited Stay Pending Reconsideration or Judicial Review, *Implementation of the Commercial Spectrum Enforcement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211 (May 17, 2006) at 13 n.49 (citing to TDF's website, http://www.tdfund.com/entrepreneurs/courses/equity-fiancing/efc_21.html). Further, while some may note that the Commission previously employed a 10-year unjust enrichment holding period in a few

Gilbert H. Scott, Sr., President and CEO of Hurshell Associates,[87] likened his experience participating in the 2006 Auction to crossing the finish line in a 50 yard dash only to discover the race had been changed to 200 yards.[88] Ultimately, Mr. Scott's company was not successful in acquiring any spectrum and, as a result of his negative experience attempting to participate, Mr. Scott has no plans to re-engage. In his interview, Mr. Scott explained the harms of an extended holding period. "When making an investment decision, any investor first asks about the profit and how long they have to wait before realizing that profit and getting their money back," Mr. Scott shared. In his view, DEs need to be able to present an exit strategy to illustrate the value proposition and the time of payoff. In his words, "This is the American business model."[89] Expressing support for a three to five year holding period, Mr. Scott noted that a holding period would be sufficient, and comparable to other businesses. "As a result of the rules, DEs are starting from a disadvantaged position, they need to be able to produce flexible and viable business plans that generate an assurance of return."[90] Mr. Scott also asserted the views of the previous case study respondent, Stanley Campbell that DEs should be allowed to lead with

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previous auctions without major opposition, the context in which the ten-year unjust enrichment period was formerly implemented is important to review. For example, in three Broadband PCS auctions (Auctions 5, 10 and 11) between 1995 and 1997, the Commission set a ten year license term with a required 100% repayment for the full length of the term, but the Commission also granted DEs at that time a much more expansive set of benefits, including installment payment plans that allowed winning DE bidders to pay their winning bids at low interest rates over a ten-year period, along with auction set asides for DE only auctions. *See, e.g.*, *Fifth Report & Order*, 9 FCC Rcd at 5580 ¶ 113. The combined incentives negated the need for private or institutional capital and significantly lessened the impact of the longer holding period. Today, there are no similar offsetting incentives for DEs on the table; only bidding credits remain.

[87] Gilbert H. Scott, Sr. is an established leader and entrepreneur. In 1998, Mr. Scott left a distinguished corporate career to start a black-owned management consulting and training firm that helps companies achieve their business development goals. More information on Mr. Scott and his company can be found at http://www.hurshell.com/about_us.htm (last visited Feb. 20, 2015).

[88] Interview with Gilbert H. Scott, Sr., President and CEO, Hurshell Associates, (Feb. 20, 2015) ("Gilbert Scott Interview").

[89] *Id.*

[90] *See id.*

flexible business models, even those that contain strategic alliances with incumbents that generate economic sustainability. "There are some DEs that can work within the rules closely with incumbents and that should be welcomed to foster our participation. And, there are those of us who can develop new business models, like acquiring spectrum to support schools, public safety or commercial services," stated Mr. Scott. "We just need that ability to be successful in a changing marketplace."

It is also noteworthy that in 1997, commenters in support of the (now-reinstated) five-year unjust enrichment period, originally standardized in the Part I Competitive Bidding Proceeding for DEs that receive bidding credits,[91] recognized that DEs and their investors need "more flexibility in situations of financial distress . . . [to] transfer . . . individual licenses that no longer comport with their business plans."[92] The Commission conformed its Part I unjust enrichment rules to the Broadband PCS rules regarding transfers, assignments, and changes in ownership, but it purposefully refrained from adopting a ten year period of time during which a DE would be subject to unjust enrichment payments, and instead adopted the five year term.[93]

For the aforementioned reasons, the Coalition strongly opposes reinstatement of the Ten-Year Hold Rule or any extended unjust enrichment holding period, and urges the Commission to retain the current and long-standing five-year unjust enrichment period, as adopted in 1997 in the Part I Competitive Bidding Proceeding and as restored in fulfillment of the Third Circuit's 2010 mandate. Reintroduction of the Ten-Year Hold Rule at this time would ignore the overwhelming weight of the evidence before the agency, sound the death knell for new entrant (and other) DE

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[91] Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 408 ¶ 56 (1997).

[92] *Id*. at 406 ¶ 52 (*citations omitted*).

[93] *See id*. at 408 ¶¶ 55-56.

auction participation, and contravene the Commission's basic mandate to serve the public interest by promoting competition in vital regulated services.

IV. THE COMMISSION SHOULD RETAIN EXISTING DE REPORTING REQUIREMENTS TO MAINTAIN A SYSTEM OF CHECKS AND BALANCES.

As noted above, the Coalition shares the Commission's concerns that only *bona fide* entities benefit from the DE program and that the program retain strong enforcement provisions. The Coalition believes that the Commission's existing, robust, and transparent reporting requirements[94] are preferable to rules that restrict flexibility in DE business planning and undermine the goals of the DE program, ostensibly as a means to maintain the efficacy of unjust enrichment rules. The Coalition believes that existing rules should remain in place and, for that reason, does not support the contemplated elimination of the annual DE audit requirement. Art Mobley, Broadcast Owner/Operator and Endowment Board Member, Walter Cronkite School of Journalism of Arizona State University (ASU) is another longtime owner in the areas of broadcast stations and spectrum ownership.[95] In the interview with Mr. Mobley, he described the interplay between policy and business decisions, and the particular impact on minority-owned business. He shared that "[a]s the Commission looks at its policies, it should be aware that the rules dictate how successful DEs are. Given the right ecosystem, DEs can develop new strategies and approaches to create and innovate." For Mr. Mobley, regulatory policies need to

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[94] The Commission is currently proposing to repeal annual DE reporting requirements. *See NPRM* at 12453 ¶ 77.

[95] Interview with Arthur ("Art") Mobley, Sr., Broadcast Owner/Operator and Endowment Board Member, Walter Cronkite School of Journalism, Arizona State University, (Feb. 20, 2015) ("Art Mobley Interview"). Mr. Mobley started his career in radio journalism and has turned his career in broadcast into leading AdviceAd, a full service public relations and advertising agency. Mr. Mobley strategically advises clients on marketing strategies and structuring companies from a financial and operational standpoint for ultimate flexibility.

align with the current business environment to ensure the success of DEs, especially those that lack the access to capital, where uncertainty can have a negative impact on their participation.[96]

Finally, as discussed in more detail below[97] the Coalition strongly urges the Commission to study DE participation throughout the auction process as a measure of industry competition to foster meaningful, diverse participation and to support thoughtful, data-driven policymaking. According to Mr. Mobley, "The Commission should be reporting regularly on how they are doing in these areas, and do a test to see if they are benefitting the organizations that the policies are intended to serve."

V. THE COMMISSION SHOULD INCREASE BIDDING CREDITS ACROSS EXISTING SMALL BUSINESS CATEGORIES TO A NEW MAXIMUM OF AT LEAST 40 PERCENT AND EXTEND BIDDING CREDITS, WHERE APPROPRIATE.

The Commission should increase bidding credits across all small business categories to fulfill the objectives of Section 309(j), counterbalance concentrated license ownership, and help small businesses overcome barriers erected by the 2006 DE rule changes. In previous filings and in the White Paper, MMTC suggested that the top level of bidding credits increase to at least 40 percent, with proportionate increases in the lower levels.[98] The Coalition believes that such higher levels will result in meaningful additional DE auction participation and success, all benefitting the public interest. The Coalition urges the Commission to extend bidding credits to new, race-neutral categories of DEs where the Commission has adequately established the necessary studies through a fact-based notice and comment period. Moreover, the Commission could explore increases in the revenue thresholds for the current small business size standards as the marketplace changes.

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[96] *See id.*

[97] *See infra* at 36.

[98] *See, e.g.*, White Paper at 32 and n.114.

Bidding credits are an essential way to encourage meaningful DE participation. The Commission has a significant history of using bidding credits to compensate for historical discrimination in the capital markets and help entrepreneurs gain access to capital in order to compete at auction.[99] The Commission could implement two new limited categories of DEs where the Commission has already gathered the necessary data and information. First, the Commission has previously requested, and received, comments on the Diversity Committee's proposal to establish an Overcoming Disadvantage Preference (ODP).[100] Second, the Commission has also collected data that illustrates the need to boost deployment to underserved areas and areas of persistent poverty.[101] However, the Commission has not undertaken the legwork necessary to extend bidding credits to other new categories of DEs. The Coalition urges the Commission to view its DE program as a statutory requirement, and realize that the agency

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[99] *See* White Paper at 7.

[100] *See* Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, Public Notice, GN Docket No. 10-244, DA 10-2259, 75 Fed. Reg. 81274 (Dec. 27, 2010) ("Notice") (citing Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (Oct. 14, 2010), available at http://www.fcc.gov/DiversityFAC/meeting101410.html ("Recommendation") (last visited Dec. 22, 2014). *See also* Comments of the Minority Media and Telecommunications Council, GN Docket No. 10-244 (Feb. 7, 2011).

[101] *See NPRM* at 12450 ¶ 67. As it conducts its Competition Report, the Commission looks at how services are deployed and adopted in low-income areas. "Several socio-economic and demographic factors such as household income and age are correlated with overall mobile wireless subscription rates as well as smartphone subscription rates. Based on August 2014 survey data from ComScore Mobilens, Chart III.B.1 shows that mobile wireless subscribers overall, and smartphone subscribers in particular, are in higher income brackets. For example, 24.7 percent of the population live in households with an annual income of less than $25,000, but only 16.5 percent of mobile wireless users and 13.1 percent of smartphone users are in this bracket. Conversely, 22.0 percent of the population live in households with an annual income over $100,000, but 28.2 percent of mobile wireless subscribers and 32 percent of smartphone subscribers are in this income bracket. The chart also shows that income may also be correlated with the choice of a prepaid plan or a postpaid plan: more postpaid users are in a higher income bracket, while the converse is true for prepaid subscribers." *Seventeenth Competition Report*, 2014 FCC LEXIS 4754 at ¶ 67.

has not taken the prerequisite steps necessary to make a race-based classification beyond the statutory mandate to:

> promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[102]

The Coalition believes that it would be inappropriate for the Commission to adopt new bidding credit preferences based on new size standards (based on factors other than revenue)[103] and definitions of DEs, as the issues have not been properly teed-up at this point. The Commission has not yet undertaken a comprehensive study regarding the performance of small businesses at auction or considered how new size standard and definitions might impact the performance of DEs. In our view, the adjustment of the rules would be too risky and have unintended consequences on DEs. To continue its policy of data driven rulemaking, the Commission can, and should, implement the White Paper's recommendation that they conduct ongoing recordkeeping of DE auction performance.[104] The Coalition welcomes further discussion on new small business size standards and evaluating the services to which the small business definition applies in a separate proceeding once the Commission takes the opportunity to analyze the performance of small businesses in each Commission auction, likely in a separate proceeding. The goal of the DE program reform should ensure that DEs have time to develop and market their business plans in time to participate in the incentive auction.

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[102] 47 U.S.C. § 309(j)(3)(B).

[103] The Coalition does support increasing the annual revenue thresholds for the current size standards to reflect the high cost of providing wireless services.

[104] *See* White Paper at 33.

VI. THE COMMISSION SHOULD IMPLEMENT ADDITIONAL POLICY RECOMMENDATIONS THAT WOULD FURTHER THE COMMISSION'S FACT-BASED POLICYMAKING.

Finally, the Coalition urges the Commission to consider additional proposals that would increase diversity in the communications industry. Moving forward, the Coalition urges the Commission to expand the record on DE participation by implementing the following recommendations presented in the White Paper. These proposals (numbers 4, 6 and 7) were developed to aid the Commission's efforts to increase diversity in the communications industry:[105]

- **Proposal 4**: Incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions ("M&As") and secondary market spectrum transactions. Such analysis would ensure that there are compelling factors in the determination of whether any transaction meets the public interest standard, including MBE and WBE participation. Such documentation should also be a part of the agency's annual Wireless Competition Report to Congress.

- **Proposal 6**: Complete the Adarand Studies, updating the Section 257 studies released in 2000. These studies should specifically detail market failures as defined by Section 257, and should include a comprehensive review of the successes or failures of the DE program as well as race-neutral measures to implement Section 309(j) since its inception.

- **Proposal 7**: Regularize procedural requirements. Such action would ensure that future regulatory and policy changes are conducted with ample time for public notice and comment, with outreach to all types of DEs to ascertain the real-world impact of such changes.

While the Commission may have to rely on the race-neutral small business standards to avoid constitutional scrutiny, the Commission should still be cognizant of minority and women participation, as a statutory requirement. The Commission should regularly collect the necessary

[105] The Commission has a dearth of data on DE participation that is not collected, or included, in its annual report on industry competition. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Seventeenth Report*, WT Docket No. 13-135 (rel. Dec. 18, 2014). These proposals address this severe oversight that the Commission must correct in order to create the type of data driven policies it desires. Once the Commission regularizes the data collection and studies DE participation, it can begin to create more targeted DE categories.

data to determine how its rules impact minority-and women-owned businesses. DE data should also be shown as an indicator of competition in the Commission's annual Wireless Competition Report.

VII. CONCLUSION

The Coalition applauds the Commission for undertaking this timely, substantive review of its DE rules before conducting the long-anticipated spectrum incentive auction. The Coalition urges the Commission to prioritize DE participation and the collection of diverse ownership data, to repeal the AMR Rule in order to facilitate DEs' access to capital and DEs' creation of flexible business plans, to maintain the five-year unjust enrichment period, and to increase the DE bidding credit to a new maximum of at least 40 percent level. Consolidating and building upon DEs' very recent gains in Auction 97 is the best way to prevent the mistakes of Auctions 66 and 73 from being repeated. The Coalition looks forward to working with the Commission to ensure that the goals of this proceeding are reached in a timely manner.

Respectfully submitted,

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