

**Abundantly Clear Need to Implement DE Program Reforms
Immediately for the AWS Auction**

Including the Commission's Pending NPRM to:
Disallow National Carrier Partnerships with DEs in the AWS Auction



Council Tree Communications, Inc.

January 11, 2006

Summary and Agenda

We urge the Commission to immediately undertake DE Program reforms in order to prevent AWS auction delays and bigger problems down the road

- ▶ **Recent events serve clear notice of need to immediately reform the DE Program**
 - Growing press attention / inquiries, also sparking congressional interest
- ▶ **Unearthing now plainly evident DE Program loopholes and abuses**
 - Notably the pattern of national carriers and their DE partners, controlled by wealthy individuals, dominating the DE Program
 - Undermining legitimate DEs and new entrants as competitors to national carriers
- ▶ **Highlighting a uniquely toxic situation for the \$20+ billion AWS auction**
 - With disastrous consequences to all involved – FCC and carriers alike
- ▶ **Solution: Immediately implement a DE Reform Program for the AWS auction**
- ▶ **(1) Immediate release of NPRM to disallow national carrier DE partnerships**
 - Commissioners approved release 6 months ago in August 2005
- ▶ **(2) Announce FCC resolve to tighten existing DE rules and enforcement**
 - (a) Personal Net Worth Test for DE eligibility
 - (b) Explicit requirement for minimum level of real DE equity in all DE ventures
 - (c) Tighter policing of all DE rules

Recent Events Mandate Immediate DE Reform

Recent developments expose DE Program loopholes to the light of day

- ▶ **On 12/27 we saw the first “Page 1 WSJ” article critical of the DE Program**
 - Yoga instructors and basketball players as DE fronts for Mario Gabelli
 - Journalist got a small part of the story – focusing on enforcement
 - The national press is now sniffing around for the bigger stories

- ▶ **“Welfare for Millionaires” is the next, bigger “Page 1 WSJ / NYT” story**
 - Subtext is: “National Carriers Co-opt Small Business Benefits”
 - As national carriers and their high net worth DE partners usurp DE benefits

- ▶ **Auction 58 puts DE abuses in perfect focus**
 - Auction 58 was the \$2 billion auction of PCS licenses in January 2005
 - (1) National carriers used DEs to acquire 71% of their spectrum
 - National carriers have zero need of government assistance
 - (2) 4 wealthy individuals, masquerading as DEs, bought 64% of total DE spectrum worth \$1 billion (please see Appendix A for data)
 - Wealthy individuals have zero need for government assistance
 - These are wealthy individuals with cozy ties to senior management of national carriers – more great fodder for press expose

Recent Events Mandate Immediate DE Reform (cont'd)

- ▶ **Paints a prospective picture of a handful of very wealthy, well connected individuals masquerading as DEs and partnered with national carriers to win the bulk of AWS licenses in the biggest-ever \$20+ billion AWS auction**
 - Specter of a half dozen wealthy DEs winning 90%+ of the AWS licenses
- ▶ **A NextWave-like outcome with disastrous consequences for all involved**
 - Fallout would be extraordinary in the press, congress and the courts
 - Accountability for the FCC, who was forewarned
 - Disruption for auction participants, with licenses suspended / terminated
- ▶ **The specter of this AWS auction outcome will fuel press accounts and congressional investigations as the auction start date approaches**
 - A “perfect storm” snowballing effect
- ▶ **All of which will serve to delay the AWS auction until the FCC takes action**
 - Which can be prevented through prompt FCC action
- ▶ **Solution: Announce a DE Reform Program immediately rather than when the Commission’s hand is forced closer to the planned auction start date**
 - See next page

Actionable FCC Response

Following is a readily implementable 3-point solution for DE Program reform

- ▶ **Immediate announcement that the Commission will undertake much more aggressive policing / scrutiny of the DE program and rules going forward**
 - Serving public notice of new FCC intent on 3 points below
- ▶ **(1) Immediate release of NPRM to disallow national carrier DE partnerships**
 - Commissioners approved release of NPRM over 6 months ago in August 2005
- ▶ **(2) Intent to implement a Personal Net Worth Test for DE eligibility**
 - High Net Worth is > \$3 million (excluding the value of primary residence)
 - SBA has rules in place; FCC had provisions in original DE rules
 - Does not preclude wealthy individuals from having a non-controlling investment in a DE or being a non-controlling director or officer
- ▶ **(3) Intent to tighten scrutiny of all DE ventures**
 - Including clear and substantial standards for the amount of minimum DE equity required in DE ventures, as the original DE rules used to have
 - The amount of DE equity is a key, and easily digestible, indicia of control
 - Including other important indicia of DE control
- ▶ **12 year history of loosening DE rules – pendulum must swing the other way**

NPRM: Immediate Release to Avoid Further Auction Delay

Release the NPRM immediately to avoid further AWS auction delays

- ▶ **NPRM to disallow national carriers from partnering with DEs in-region**
 - National carrier = \$5 billion or more of wireless revenues
 - In-region = areas where national carriers already have CMRS spectrum
 - Dominant incumbent national carriers do not need DE Program assistance
- ▶ **Original July 2005 Council Tree proposal had included a broader plan**
 - (1) Disallow national carrier partnerships with DEs, and
 - (2) Personal Net Worth Test for DE eligibility, and
 - (3) Increase the DE bid credit from 25% to 35% / 45%
- ▶ **August 2005 – Commissioners approved release of NPRM on (1) only**
 - September / October – statements by Commissioners Copps and Adelstein
 - Urging an expedited proceeding to ensure inclusion in AWS
- ▶ **Council Tree urges immediate NPRM release to avoid AWS auction delay**

Summary

- ▶ **The DE Program has unequivocally been severely undermined**
 - Overrun by dominant national carriers and their DEs run by wealthy individuals
- ▶ **Our solutions fix the loopholes and are also pro-competition / pro-consumer**
 - Limits DE benefits, helping real DEs compete with entrenched national carriers
 - An antidote to industry consolidation
 - Fosters delivery of competitive new services, benefiting consumers
- ▶ **Our solutions will increase auction proceeds to the U.S. Treasury**
 - Again by disallowing national carrier access to DE bid credits
- ▶ **Our solutions foster minority ownership – languishing at near zero**
 - Reinforce recommendations of the Commission’s own Diversity Committee
- ▶ **Our solutions fix the DE Program, preventing a meltdown later**
 - Addressing those 11th hour actions that will cause further AWS delay
 - When the most important FCC auction in history is undermined by a toxic formula brewing in clear daylight

Appendix A: Detail of AWS DE Problems
Wealthy Individuals Preempt Legitimate DEs

High net worth individuals, who have no need for government assistance, dominate the DE Program at the expense of legitimate DEs

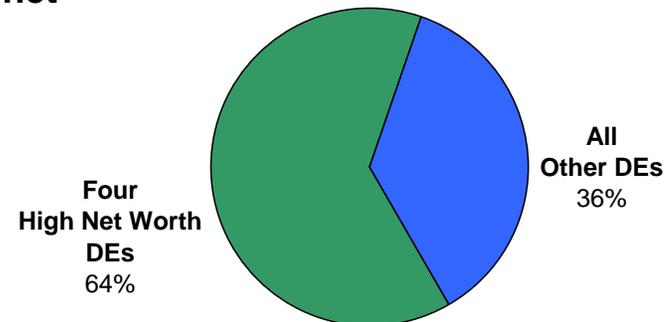
Auction 58: Analysis of DE License Winners

(By Dollar Value)

\$1.5 billion of DE Winning Bids

- ▶ **Just four DEs, controlled by high net worth* individuals, dominated all other Auction 58 DE**

- Won at least 64% of the dollar value of DE licenses



- ▶ **Wealthy individuals, masquerading as DEs, usurp DE opportunities**
 - Typically wealthy individuals well-connected with large carrier executives
 - Clearly not the intent of Congress or 309(j)
- ▶ **This is another page-1 *WSJ* / *NYT* story waiting to unfold**
 - Highly compelling story in the context of a \$20+ billion AWS auction
 - With a disastrous outcome for all parties – FCC and carriers alike

(*) High Net Worth DEs estimated to include: Vista PCS (Verizon), Edge Mobile (Cingular), Wirefree Partners III (Sprint), and Royal Street Communications (MetroPCS).

Appendix A: Detail of AWS DE Problems
Top-5 National Carriers Have Usurped the DE Program

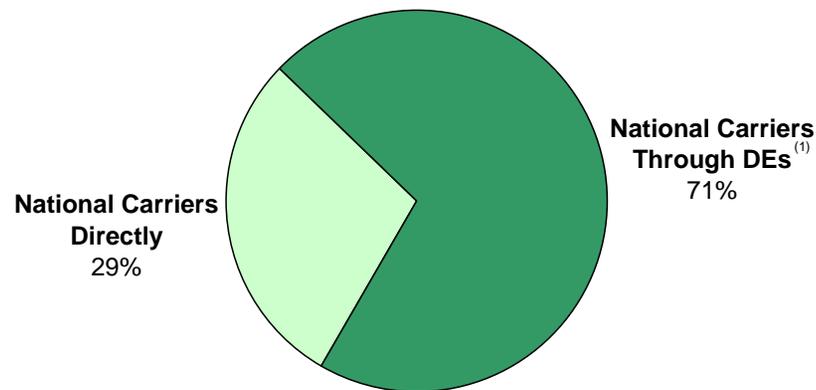
The 2005 Auction 58 results again demonstrate that the national carriers use DEs as spectrum acquisition platforms

- ▶ **Large national carriers acquired 71% of their Auction 58 spectrum using DEs**
- ▶ **Large national carriers have no need for DE benefits**
 - Congress did not envision a DE Program to benefit national carriers

Auction 58: Analysis of National Carrier Licenses Won

(By Dollar Value)

\$1.3 billion of Winning Bids



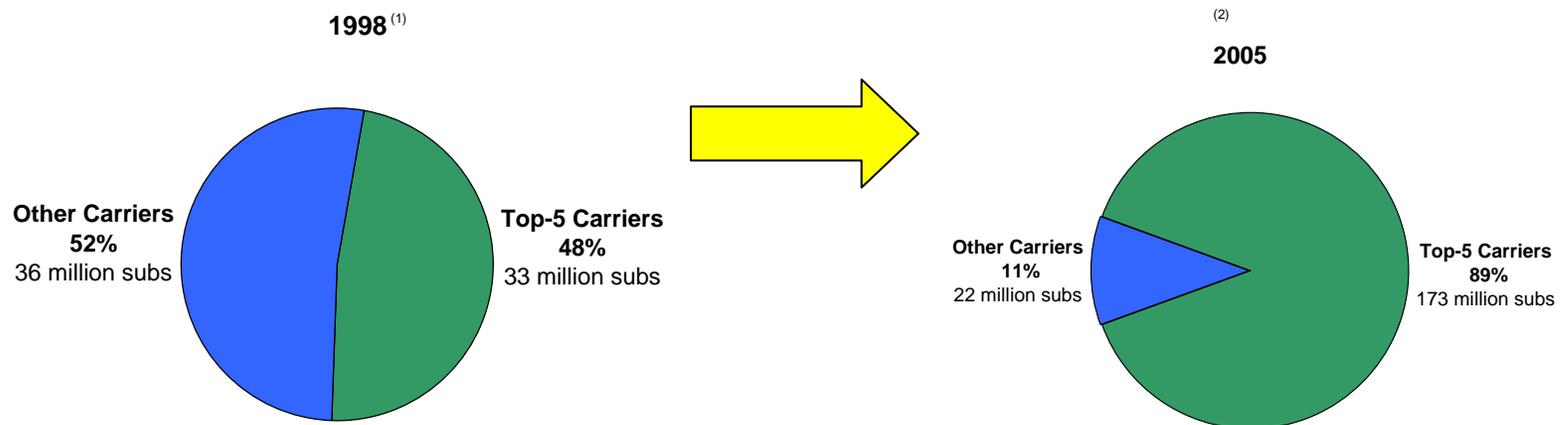
(1) National carrier DEs include: Vista PCS (Verizon), Cook Inlet/VS GSM VII PCS (T-Mobile), Edge Mobile (Cingular) and Wirefree Partners III (Sprint).

National Carrier Dominance = Barrier to Entry for Competitors

Entrenched national carriers will dominate spectrum auctions as never before

- ▶ National carriers will use overwhelming resources to shut out auction competitors
- ▶ Analogous to the dominant airline carriers years ago
 - Who warehoused landing gates to keep out competitors
 - However, with access to gates, Southwest, JetBlue and others have flourished

Top-5 Wireless Carrier Market Share by Subscribers



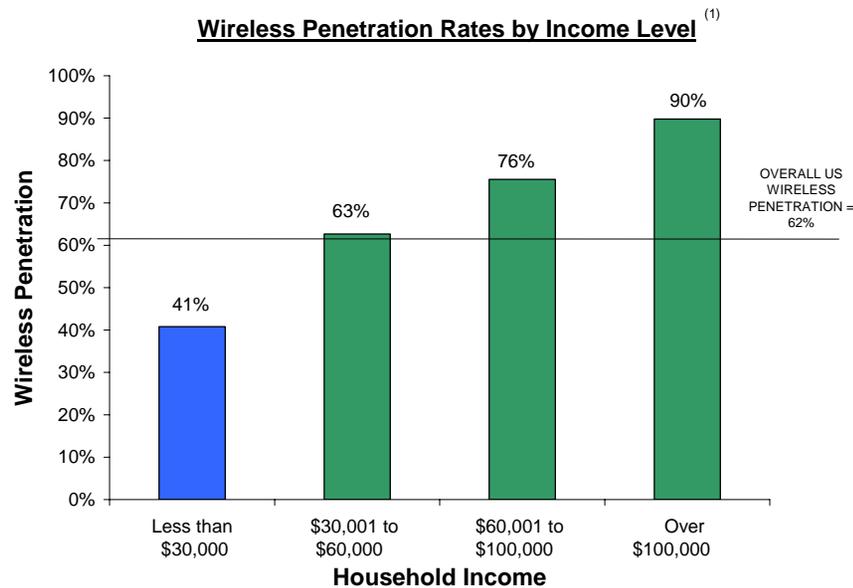
(1) Source: FCC Second Annual Report and Analysis Of Competitive Market Conditions With Respect to Commercial Mobile Services.

(2) 6/30/05. Pro forma for the following completed or announced mergers: Sprint / Nextel, Alltel / Western Wireless. Pro forma Top-5 carriers are Verizon Wireless, Cingular Wireless, Sprint PCS/Nextel, T-Mobile, ALLTEL.

Certain Population Segments Are Not Well Served by National Carriers

While the wireless community generally has been slow to penetrate the lower income segment of the population, smaller carriers and new entrants have excelled

- ▶ **Wireless penetration lags at just 41% for the lower income population segment**
 - Large national carriers focus on more lucrative segments
 - Also don't want to cannibalize their existing customer base
- ▶ **Many non-national carriers have embraced these segments**
 - Providing valuable services – regional carriers, Leap, MetroPCS and others



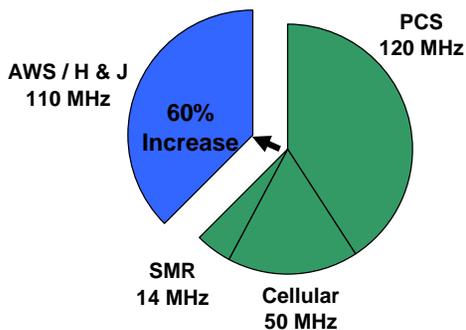
(1) Source: Estimate based on data derived from Bear, Stearns & Co, Inc and Compete, Inc. report dated February 2005

Appendix A: Detail of AWS DE Problems

AWS Spectrum Is Critical for All Carriers

Broad access to AWS licenses is vital to the future of real wireless competition

CMRS Spectrum



- ▶ **Mission critical spectrum for regional carriers, small carriers and new entrants**
 - AWS represents a 60% increase in CMRS spectrum nationwide
 - “Must have” spectrum necessary to deploy new 3G services
- ▶ **National wireless carriers can and will shut out competitors**
 - Control 89% of subscribers today
 - Inexorable trend will continue
 - Overwhelming financial resources to lock-up / warehouse spectrum
- ▶ **Spectrum has been the lifeblood of innovation and competition**
 - Legacy of VoiceStream, Sprint PCS, Leap, MetroPCS and many others
 - Benefiting consumers with more choices and better values
- ▶ **Council Tree’s solution ensures access to spectrum and competition**
 - Through practical changes to the DE Program

Appendix A: Detail of AWS DE Problems
DEs Will Be Crippled without Closed Licenses

Council Tree's DE Program modifications are also necessary to compensate for the Commission's decision to eliminate closed licenses from the AWS auction

- ▶ **AWS may be the first major CMRS auction ever with no closed licenses**
- ▶ **Closed licenses have accounted for 80% of total DE licenses won historically**
 - Closed licenses are central to DE success
- ▶ **DEs won't win material open licenses without changes to the rules**
 - Bidding credits alone fail for DEs against large incumbents
- ▶ **Longtime understanding, borne of Commission practice, that DE bid credits would be increased in the absence of closed licenses**

Appendix B: AWS Spectrum Overview

FCC band plan				
Blocks	Pairings	Bandwidth	Licensed area	Licenses
A	1710-1720 and 2110-2120	20 MHz	MSA/RSA	734
B	1720-1730 and 2120-2130	20	EA	176
C	1730-1735 and 2130-2135	10	EA	176
D	1735-1740 and 2135-2140	10	REAG	12
E	1740-1745 and 2140-2145	10	REAG	12
F	1745-1755 and 2145-2155	20	REAG	12
<i>H^(a)</i>	<i>1915-1920 and 1995-2000</i>	<i>10</i>	<i>Not determined</i>	<i>Not determined</i>
<i>J^(a)</i>	<i>2020-2025 and 2175-2180</i>	<i>10</i>	<i>Not determined</i>	<i>Not determined</i>
		110 MHz		

Note: EA – Economic Area, REAG – Regional Economic Area Groupings, MSA/RSA – Metropolitan Statistical Area/Rural Service Area.

(a) Added to original 90 MHz allocation for AWS to create total spectrum of 110 MHz. FCC has not clarified if the H and J-blocks will be sold along side AWS during the same auction process.

Source: *FCC and Deutsche Bank*

*Friends and Family***In FCC Auctions of Airwaves,
Gabelli Was Behind the Scenes**

**Firms Backed by Financier Got
Small-Business Discounts;
Suit Labels Deals a Sham**

He Says Case Is 'Extortion'

By JOHN R. WILKE

When the government auctioned off slices of radio spectrum for cellphone service, one big winner was Victoria Kane, an aerobics instructor who had no experience in the industry. Her start-up firm, Aer Force Communications, paid \$18.9 million for five licenses that were later sold in a deal valued at \$144 million.

Ms. Kane's firm entered the auction as a "very small business," a designation that brought it millions of dollars in federal subsidies. They included a 25% bidding discount and a low-interest loan through the Federal Communications Commission. But her small business was backed by a big one: that of wealthy money manager and mutual-fund impresario Mario Gabelli, one of the most prominent names on Wall Street.

Affiliates of Mr. Gabelli incorporated her firm, filed its FCC applications and handled its bidding, according to documents filed in a civil suit in federal court that names Mr. Gabelli, Ms. Kane and others. Through various entities, the documents say, he also held a large stake in her company, lent most of the money she bid and profited handsomely on the sale of the licenses. In all, Mr. Gabelli or his affiliates backed more than a dozen bidders for radio spectrum, which is a license to use a portion of the airwaves in a particular region.

Call it the friends-and-family plan: Each of the principals had social, business or family ties to Mr. Gabelli. They included Trent Tucker, a Gabelli client and former New York Knicks basketball player with a graceful outside shot; Alfred Angelo, a New Jersey accountant who had referred clients to Mr. Gabelli; Nara Cadorin, an 82-year-old retired administrative assistant for a Gabelli associate; and Kathy Stafford of Moose, Wyo., a property manager at one of his vacation homes.



Mario Gabelli

Sky King

Firms related to Mario Gabelli backed bidders at FCC auctions of cellphone spectrum and profited when that spectrum was later sold. Here is how one deal worked:

- Firms affiliated with Mr. Gabelli help set up Beta Communications, owned 50.1% by accountant Alfred Angelo and 49.9% by Mr. Gabelli's affiliates.
- Beta wins three auctions in April 1999 with bids totaling \$17.2 million.
- Small-business discount means that Beta has to pay just \$12.9 million.
- Beta provides no cell service, sells licenses a year later for \$98 million.
- Beta pays Gabelli-affiliated companies fees that allow them to end up with about 75% of sale proceeds.

They all got small-business discounts despite their dependence on Mr. Gabelli, whose extensive assets would have made him ineligible for such breaks. Many of the bidding companies were formed just weeks or days before the auctions.

None of those who told the FCC they controlled these firms had experience in building or running a cellphone service. None provided such service to customers after winning a license. Gabelli affiliates put up most of the money for the bids and took 49.9% stakes in most bidding firms. Then, when the licenses acquired at auction were sold, the Gabelli firms collected the majority of the proceeds.

The FCC didn't say small bidders couldn't borrow from big business, and many other bidders did. But to exclude speculation and fraud, the FCC said backers couldn't control the bidding firms. Bidders had to stand "not merely as fronts for other companies, but as active entrepreneurs," the FCC said. FCC rules also said winning bidders were expected to start building cellphone systems.

Whether Mr. Gabelli and his partners stayed within those rules is the issue in the federal suit, tentatively set for trial early next year. It was filed by an individual under the False Claims Act, a Civil War-era law that lets citizens sue on the behalf of the federal government. The suit alleges that bidders defrauded the U.S. by getting small-business subsidies they weren't entitled to.

Mr. Gabelli—widely known for his skillful stock-picking and frequent guest appearances on financial TV shows—says he played by the rules. Lynch Inter-

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In FCC Auctions, Gabelli Was Behind the Scenes

Continued From First Page

active Corp., a firm he leads that formed at least 10 partnerships with small-business bidders, said it "followed the spirit and letter of the law" and relied on "highly qualified external counsel" to ensure compliance. Mr. Gabelli, chief executive and a major shareholder of Lynch, declined to be interviewed because of the suit, but in the past has denied the suit's allegations and derided it as "extortion."

Documents produced in the suit long were confidential. Unsealed recently after a request by The Wall Street Journal, they show how aggressively Mr. Gabelli maneuvered to take advantage of breaks the FCC gave to small-business bidders.

Some bidders Mr. Gabelli or affiliates of his backed didn't have control over their own bank accounts, and some principals didn't even have authority to write checks, court papers show. One bidder in the sale of radio spectrum told the court she didn't know what spectrum was.

Another, Mr. Tucker, testified that he thought he was a "passive investor" in a bidding entity, even though he was listed in its application to the FCC as a director and an owner. Ms. Cadonin, listed as president of a bidding company, testified that she wasn't aware whether that company had a budget, employees or customers. "It was always my hope that at one point I would be more involved," she said.

Ms. Kane, the former aerobics instructor, certified to the FCC that she had full control, "acting alone, to manage the business and affairs" of Aer Force, the partnership that bid at the auction. She used her home address and phone number as its address. Ms. Kane's husband, Theodore Kane, who like Mr. Gabelli is a money manager in Rye, N.Y., also was an investor in the bidding company.

Through a lawyer, Ms. Kane said that "the facts...disclose our active management all the way along the processes, from license bidding strategies to ultimate sales, and reveal our considerable efforts and significant additional investments to meet our FCC financial requirements." She cited "the FCC's thorough review of our qualifications and actions" and called the suit "insulting."

Gabelli-backed bidders who were successful at the auctions are defendants in the federal suit along with Mr. Gabelli. They are represented by Lanny Breuer, a former White House lawyer in the Clinton administration, who called the suit's allegations "without merit." Mr. Breuer said several top former FCC officials, including a former chairman, would testify on his clients' behalf.

Mr. Breuer said he had advised his clients not to comment while the case is pending. Mr. Tucker, the former basket-

ball pro, said he would have no comment. Ms. Stafford and Ms. Cadonin didn't return calls seeking comment.

The gregarious, silver-haired Mr. Gabelli, 63, runs an operation in Rye that manages \$27 billion in assets. He is one of the highest-paid fund managers in the business. He reported earning \$55 million in 2004 as chairman and CEO of Gamco Investors Inc., following more than \$38 million the year before.

The suit alleges that in the FCC auctions, Mr. Gabelli and affiliates formed small businesses that got \$90 million in federal discounts they shouldn't have gotten, because the bidding firms weren't actually independent. It also says they improperly received \$70 million of financing breaks on federal loans.

If the court found all of these subsidies improper and assessed a full \$160 million in damages—and if those were tripled, as the law provides—damages could conceivably total \$480 million. In addition, should Mr. Gabelli and co-defendants lose at trial, it's possible that as much as \$206 million in net proceeds from their sales of licenses could be in jeopardy.

The plaintiff is Russell C. Taylor III, who said he witnessed the alleged fraud while working as a paralegal and attorney at a law firm. In a False Claims Act suit such as this, the government typically gets 75% of any damages, even if it didn't join the suit, as was the case here. The plaintiff gets the rest, usually to be shared with lawyers.

Under Seal

The suit was filed under seal in early 2001. Its existence, but not the evidence in it, became public knowledge a year later. At the time, Mr. Gabelli, in a statement, called the suit "a form of legal extortion" seeking "to extract money by assaulting the character and competence of minority and female entrepreneurs and small business people who did nothing wrong, and who were only seeking to participate in a process that the U.S. government was encouraging them to enter."

Mr. Gabelli also said that "like Dracula, we believe this lawsuit can't survive the light of day." Still, his lawyers managed to keep most evidence, such as financial records and correspondence, confidential for several years until Judge Paul Crotty recently unsealed the material, with defendants' consent.

Lawyers for the plaintiff, Mr. Taylor, said he wouldn't comment. They said the 36-year-old Virginian now is studying public policy at Oxford University.

When the FCC first adopted auctions for its radio-spectrum sales in 1994, Congress told it to grant preferences for small business, women, minorities and rural firms. Some got bidding discounts as deep as 45%. The way that worked was that a bidder could win an auction by

posting the highest bid, but then have to pay the government only 55% of the figure. A white male with more than \$40 million in assets got no discount.

A court overturned the preference system in 1995, so the FCC dropped race and sex as categories and gave breaks only to small business. Mr. Gabelli, who had backed mostly female or minority bidders in early rounds, then widened the circle of people he backed, records show.

A Case History

One later bidder was Mr. Angelo. The Cranford, N.J., accountant put \$200,000 in a start-up firm, Beta Communications, five years ago and told the FCC he was its controlling owner. Beta won licenses in Reno, Nev.; Roswell, N.M.; and Phoenix in a 1999 auction.

Thanks to its small-business discount, Beta had to pay the U.S. only \$12.9 million for the licenses. Beta built no cell-phone services. Within a year, the licenses it won were sold for \$98 million.

Newly unsealed records show that Mr. Angelo, who told the FCC he owned 50.1% of Beta, got just 25% of the license-sale proceeds. Gabelli-affiliated companies, including Gabelli Group Capital Partners, owned the rest of Beta but ended up with the majority of the proceeds, thanks to a series of fees they levied on Beta.

Memos filed in court portray Mr. Gabelli and his associates as sometimes selling licenses and divvying up proceeds with scant input from the nominal owners of the bidding companies. After the sale of Beta's licenses, Mr. Gabelli wrote a memo to associates on how the proceeds should be divided. "Life is simple," he wrote, attaching a series of charges to be assessed to Beta that had the effect of bringing Gabelli affiliates about three-quarters of the sale proceeds. Mr. Angelo wasn't copied on the memo.

Gabelli companies charged Beta a \$4 million commitment fee, a \$10 million "special" fee, a second \$2.75 million "special" fee and a \$6 million finder's fee, in addition to a \$14 million "investment banking services" fee, records show.

Bidders were supposed to disclose significant business terms to the FCC. Beta didn't tell the agency about at least some of these large fees. In court papers, Mr. Angelo called this "an oversight."

'Everything That Was Legal'

In an interview, Mr. Angelo said, "We made a lot of money, and we wrote a big check to the IRS. We took advantage of everything that was legal."

He added, "People would line up from here to the moon to be able to go into business with Mario Gabelli. It was just a great opportunity. He put up the seed capital, and we relied on his judgment." Mr. Angelo said that "the government got a lot more money than it would have if we hadn't been in the auction, because they had more bidders and higher bids."

In one 1998 auction, the FCC raised concerns about the independence of a Gabelli-backed bidder. A lawyer for the bidder and Gabelli affiliates assured the FCC the firm had complied with the rules and had been formed in order to develop a wireless-data service. Four months later, though, a memo shows Mr. Gabelli already seeking to get this firm's license sold off. He told a subordinate: "You were supposed to develop a bidding war. What is the status?"

At times, the FCC did reject a small-business bidder for being controlled by others. It did so in this same auction. The FCC said the bidder in question was actually controlled by an affiliate of cable giant Adelphia Communications, and its general partner was a nephew of John J. Rigas. Mr. Rigas's family controlled Adelphia before Mr. Rigas was convicted of fraud in another matter.

Attorney's Concerns

In all, Gabelli-backed companies won 96 licenses in eight auctions. Defending against the suit's allegation that some were sham bidders, the Gabelli legal team said in court papers that FCC rules were "complex, ambiguous and continually evolving" and that the FCC reviewed and approved each application. Gabelli lawyers have sued the FCC seeking internal documents to bolster the point.

Attorneys for Mr. Gabelli also said he and associates "relied on the advice of experienced communications counsel." By taking this stance, they waived attorney-client privilege for documents written by Gabelli lawyers, some of which appear to reveal doubts.

James Barker, a lawyer who helped set up many of the small partnerships, wrote a memo for his files saying he had warned Gabelli executives that Mr. Gabelli was "seriously considering backing a [small business] venture" with Ms. Kane, who had "business experience only as an aerobic dance instructor." The memo said he had "reiterated...the concerns I have consistently relayed over the past months regarding the Commission's focus on discouraging and sanctioning 'sham'...ventures."

While Ms. Kane's participation was "not impermissible, her perceived lack of business experience might raise eyebrows and invite further investigation," wrote Mr. Barker. His memo, filed in court, said that an executive of Lynch, the firm Mr. Gabelli leads, "relayed similar concerns to Gabelli, but that Gabelli was inclined to move forward anyway."

In a deposition, Mr. Barker, from the law firm Latham & Watkins, said he was simply giving his client an assessment of regulatory problems that could arise. The FCC's rules kept changing and contained "no bright lines" on key issues, he said, adding that interpreting the rules was "art...not science."

The plaintiff's legal team includes Williams & Connolly, a corporate-defense firm serving in the unusual role of contingent-fee plaintiff's counsel, and Phillips & Cohen, a specialist in false-claims

cases. On the Gabelli side are Skadden Arps Slate Meagher & Flom and Covington & Burling, Mr. Breuer's firm.

Mr. Gabelli's lawyers have raised questions about the motives of the plaintiff, who has said he discovered the fraud while filing FCC applications for other bidders. In one email, filed in court by Mr. Gabelli's lawyers, Mr. Taylor joked that preparing FCC applications wasn't necessarily the legal specialty he wanted to pursue "but somebody already had 1-888-SUE-THEM."

The suit says Gabelli affiliates and Gabelli-backed small-business bidders shared \$206 million in net proceeds from selling the licenses won at auction. Mr. Gabelli's lawyers dispute the figure. Most of the licenses were sold while the market for cellphone spectrum was still hot; it has since cooled.

Judge Crotty ruled last month that even if the bidding breached FCC rules, the plaintiff can't sue to recover bidders' profits—only the federal government could. The ruling was a victory for the

defense. And he encouraged the Justice Department to seek recovery of those profits in the event he ultimately rules in the plaintiff's favor.

The Justice Department told the court in 2001 that it had decided not to intervene in the case. It added that this decision "should not be construed as a statement about the merits" and said the U.S. might decide to intervene later. The department said the suit couldn't be settled or dropped without its consent.

A former official of the FCC said the agency didn't want the Justice Department to join the case, for several reasons. Among them, according to the official: It worried that a U.S. endorsement of the suit would embarrass the FCC, which didn't detect the alleged fraud.

A Justice Department official who oversees False Claims Act cases, Peter Keisler, declined to comment. So did an FCC spokesman. Without commenting on the merits of the case, Jonathan Adelstein, an FCC commissioner, said, "If we were taken for a ride, then we want our money back."