

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	WT Docket No. 05-211
Enhancement Act and Modernization of the	)	
Commission's Competitive Bidding Rules and	)	
Procedures	)	
	)	
Auction of Advanced Wireless Services Licenses	)	AU Docket No. 06-30
Scheduled for June 29, 2006	)	

To: The Commission

**SUPPLEMENT TO MOTION FOR EXPEDITED STAY PENDING**  
**RECONSIDERATION OR JUDICIAL REVIEW AND**  
**PETITION FOR EXPEDITED RECONSIDERATION**

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	ii
I. ADDITIONAL PROCEDURAL, LEGAL AND POLICY ISSUES JUSTIFY A STAY AND EXPEDITED RECONSIDERATION OF THE RULES.....	2
<b>A.</b> The <i>Second Report and Order</i> Violates Section 309(j) of the Communications Act.....	2
<b>B.</b> The <i>Second Report &amp; Order</i> Did Not Comply With the Requirements of the Regulatory Flexibility Act. ....	3
<b>C.</b> The Commission’s New ‘Material Relationship’ Standards Were Adopted Without Adequate Notice To And Input From Affected Parties. ....	7
<b>D.</b> The Immediate Effectiveness of the “Material Relationship” Rules, Absent Any Prior Notice, Also Violates the APA. ....	9
<b>E.</b> The Commission Failed Adequately To Justify The New Material Relationship Standards And The Change In Its <i>Secondary Markets</i> Policies. ....	10
<b>F.</b> The Changes to the Designated Entity Rules Conflict With The National Goal of Promoting Deployment of Broadband Services to Underserved Areas. ....	11
II. CONCLUSION.....	15

## SUMMARY

In this supplement, the Joint Petitioners provide additional procedural, legal and policy support for their May 5, 2006 filings, further demonstrating that immediate grant of the requested relief will serve the public interest. First, the Commission has violated multiple subsections of Section 309(j) of the Communications Act. Furthermore, the Commission has contravened the Regulatory Flexibility Act, as amended by the Small Business Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601 *et seq* (“RFA”). Under the RFA, the FCC was required to provide public notice of its proposed rules, describe and analyze the impact of its regulatory actions on small entities and take steps to identify and minimize the significant economic harm to small entities consistent with the stated statutory objectives in the rulemaking, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule was rejected. Significantly, the FCC did not afford all affected small entities with adequate notice or opportunity to submit comments regarding the significant economic impact of the final rules.

In addition to violating the Administrative Procedure Act’s notice and comment provisions under Section 553(c), the new resale/leasing spectrum capacity rules also violate Section 553(d) of the APA, which requires 30 days notice of a rule becoming effective, unless an exception applies, which is not the case in this proceeding. Furthermore, the FCC has not provided a reasoned analysis to justify the imposition of a 25% attribution benchmark in the resale/leasing rules, particularly in light of its prior conclusion in its *Secondary Markets Second Report and Order* that “*substantially all* of the spectrum capacity of the licensee would trigger attribution,” nor has it rationally explained the underpinnings behind the specific numerical limits.

Finally, the FCC's actions in this proceeding are inconsistent with its stated priorities to encourage the rapid and efficient deployment of broadband to rural and underserved areas as the new rules will serve to limit the number of potential bidders in Auction 66, especially new entrants and small entities that wish to serve underserved areas but who cannot participate because of difficulty in securing financing.

The Commission should rescind the rule changes adopted in the *Second Report and Order* and retain its existing rules for Auction 66. To the extent that future changes in the DE Rules may be appropriate to protect the competitive bidding process from documented abuse, all such potential revisions should to be considered in an expanded Further Notice of Proposed Rule Making in this docket.

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To: The Commission

**SUPPLEMENT TO PETITION FOR EXPEDITED RECONSIDERATION/MOTION  
FOR EXPEDITED STAY PENDING RECONSIDERATION OR JUDICIAL REVIEW**

The Minority Media and Telecommunications Council (“MMTC”), Council Tree Communications, Inc. (“Council Tree”), and Bethel Native Corporation (“BNC”) (together referred to hereinafter as the “Joint Petitioners”), pursuant to Section 1.429(d) of the Commission’s Rules, 47 C.F.R. § 1.429(d), hereby supplement their May 5, 2006 filings seeking stay and reconsideration of the Commission’s *Second Report and Order and Second Further Notice of Proposed Rule Making* (FCC 06-52) adopted and released in WT Docket 05-211 on April 25, 2006 (“*Second Report and Order*”).<sup>1</sup>

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<sup>1</sup> A synopsis of the *Second Report and Order* was published in the Federal Register on May 4, 2006. See 71 Fed. Reg. 26,245 (2006).

**I. ADDITIONAL PROCEDURAL, LEGAL AND POLICY ISSUES JUSTIFY A STAY AND EXPEDITED RECONSIDERATION OF THE RULES**

**A. The *Second Report and Order* Violates Section 309(j) of the Communications Act.**

The Joint Petitioners' Petition for Expedited Reconsideration ("Petition") and companion Motion for Expedited Stay made clear that in the *Second Report and Order* the Commission contravened 47 U.S.C. § 309(j)(3)(E)(ii) by issuing new designated entity ("DE") bidding rules without providing the statutorily mandated "sufficient time" for parties "to develop business plans."<sup>2</sup> Indeed, the measures adopted in the *Second Report and Order* had the opposite effect – business plans that were already developed or being developed were extinguished on the eve of Auction 66, with no time to recover. It bears emphasis, however, that the inconsistency of the *Second Report and Order* with Section 309(j) of the Communications Act extends beyond Subsection 309(j)(3)(E)(ii).

For example, 47 U.S.C. § 309(j)(3)(A) demands, in relevant part, that the FCC promote rapid deployment of service to those "residing in rural areas" while also avoiding "judicial delays." The *Second Report and Order* undermines both of these objectives by (i) undercutting the financing of those very DE's, like BNC, which hold the greatest promise of bringing service to the most remote of rural areas; and (ii) risking judicial intervention (and attendant delay) by putting DE's in such peril. Likewise, 47 U.S.C. § 309(j)(3)(B) requires the Commission to promote "economic opportunity and competition" by "avoiding excessive concentration of licenses" and disseminating those licenses among a "wide variety of applicants," including small businesses and minority- and women-owned businesses. Unfortunately, in pursuit of preventing

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<sup>2</sup> The principal rules at issue are the new 10-year unjust enrichment term for licenses acquired with bidding credits (*see Second Report and Order* at ¶¶ 37-38), and the modified rules relating to spectrum leasing and resale arrangements, which make certain "material" relationships involving designated entities either impermissible or attributable in determining DE eligibility for bidding credits (*see id.* at ¶¶ 25-27).

unjust enrichment, the Commission has taken steps that have again had the opposite effect – an immediate *reduction* in the variety of applicants. For instance, legitimate financing sources have withdrawn in light of the Commission’s adoption of a 10-year holding period. See pp. 17-18 *infra*. Ultimately, these new changes in the bidding ground rules threaten the very existence of the DE program. The Commission’s *statutory* obligation to promote competition by facilitating the involvement of small businesses, minorities, and women does not allow the Commission to adopt unjust enrichment measures that have the primary practical effect of “safeguarding” large incumbent carriers. The unjust enrichment “cure” in this case, if not rescinded, will be “fatal” to the very same DE’s that the statute requires the FCC to help to flourish. The statute does not allow such a result, and the FCC must undertake immediate remediation.<sup>3</sup>

**B. The *Second Report & Order* Did Not Comply With the Requirements of the Regulatory Flexibility Act.**

In addition to the statutory violations previously addressed, the new rules also violate the Regulatory Flexibility Act.<sup>4</sup> The RFA required the FCC to provide public notice of its proposed rules, describe and analyze the impact of its regulatory actions on small entities and take steps to identify and minimize any significant economic harm to small entities consistent with the stated statutory objectives of the rulemaking, including a statement of the factual, policy and legal

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<sup>3</sup> The Joint Petitioners acknowledge that at the end of last week two parties filed Oppositions to the pending Motion for Stay. See T-Mobile USA, Inc. Opposition To Stay, filed May 12, 2006; CTIA – The Wireless Association Opposition To Motion For Expedited Stay Pending Reconsideration Or Judicial Review, filed May 11, 2006. The Joint Petitioners intend to file a Joint Reply to these pleadings shortly.

<sup>4</sup> 5 U.S.C. §§ 601 et seq. (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996).

reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule was rejected.<sup>5</sup>

Pursuant to the RFA, the FCC included an Initial Regulatory Flexibility Analysis (“IRFA”) in the Further Notice of Proposed Rule Making in WT Docket 05-211 (“FNPRM”).<sup>6</sup> The purpose of an IRFA is to describe the impact of a proposed rule on small entities and to provide a description of and, where feasible, an estimate of the number of small entities to which the rule will apply.<sup>7</sup> The IRFA in this case was materially flawed and did not provide an adequate basis for the FCC or public to address the significant economic impact of the proposed rules – much less the expanded rules that were ultimately adopted and included in the required Final Regulatory Flexibility Analysis (“FRFA”).<sup>8</sup> The FCC’s failure to comply with the RFA was not harmless error.<sup>9</sup> In this proceeding, the IRFA was misleading regarding the potential scope and applicability of the final rules. First, the IRFA was narrow in applicability, stating that the proposed rule changes “would be of general applicability to all services, applying to all entities of any size *that apply* to participate in Commission auctions.”<sup>10</sup> However, the final rules, by the FCC’s own admission, also apply to entities that already “*hold licenses* won through

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<sup>5</sup> 5 U.S.C. §§ 603, 604. Violations of the RFA are judicially reviewable under Sec. 611 of the RFA, 5 U.S.C. § 611, and a reviewing court is afforded considerable discretion to formulate an appropriate remedy for failure to comply with the RFA. *Southern Offshore Fishing Ass’n v. Daley*, 995 F.Supp 1411, 1437 (M.D. Fl. 1998). Violations of the RFA may subject a final rule to stay, remand, or vacature upon judicial review. *See. e.g., United States Telecom Ass’n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (remanding the Intermodel Order to the FCC for failure to comply with the RFA).

<sup>6</sup> 5 U.S.C. § 603.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 604.

<sup>9</sup> *United States Telecom Ass’n*, 400 F.3d at 42.

<sup>10</sup> *FNPRM*, Appendix, IRFA at 19 (emphasis added).

competitive bidding that are subject to designated entity benefits.”<sup>11</sup> The IRFA gave no indication to the public that these rules were to be applied retroactively to current DE licensees, or that they would negatively impact a DE that had no intention of partnering with a large incumbent wireless provider. The FCC must make its views known in a “concrete and focused form so as to make criticism or formulation of alternatives possible.”<sup>12</sup>

Second, Section E, which was supposed to describe the significant economic impact on small entities, mentions the Council Tree proposal but does not describe or identify the economic impact of the Council Tree proposal, as required.<sup>13</sup> Moreover, there is no mention or discussion of any other specific proposal, restriction, or proposed change to the DE rules - there is only a generic inquiry.<sup>14</sup> The FCC was “required to engage in a careful and meaningful study of the problem from the beginning.”<sup>15</sup> It was also required to make a “reasonable, good faith effort’ prior to issuance of a final rule, to inform the public about potential adverse effects of the proposals and about less harmful alternatives.”<sup>16</sup> The dearth of comments in response to the *FNPRM* or IRFA from affected DE’s and the absence of proposed alternatives to reduce, if not eliminate, the significant economic impact of the 10-year hold rule or resale/wholesale limitations was no doubt due to the inadequacy of the IRFA, including the absence of specific proposals for comment as required by the RFA.<sup>17</sup> Only one comment was submitted on the

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<sup>11</sup> *FNPRM*, Appendix C, FRFA at 50 (emphasis added).

<sup>12</sup> *Home Box Office Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

<sup>13</sup> IRFA, at 20.

<sup>14</sup> *Id.*

<sup>15</sup> *Southern Offshore Fishing*, 995 F. Supp at 1436.

<sup>16</sup> *Id.*, at 1437 (citing to *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114-15 (1st Cir. 1997)).

<sup>17</sup> *Southern Offshore Fishing*, 995 F. Supp. at 1436.

IRFA, and it requested that the FCC take steps to minimize the economic impact of the proposed rules, among other things, to narrowly tailor them to target the real abuse pertaining to DE relationships with large in-region wireless providers.<sup>18</sup> The absence of public comment on the IRFA with respect to these issues is likely traceable to the fact that affected entities simply had no knowledge that the FCC’s final rules would have much broader scope and applicability.<sup>19</sup>

Despite Congress’ and the FCC’s longstanding recognition that DE’s face unique market entry barriers and difficulties in accessing capital,<sup>20</sup> the Commission failed to provide adequate notice to both prospective auction participants and current DE licensees that a new 10-year holding period with severe unjust enrichment penalties for premature changes in DE status or failure to fully construct during the license term might result. These rule changes are crippling DE financing opportunities in the debt and equity markets, and already have derailed the financing arrangements for some potential Advanced Wireless Service (“AWS”) auction participants. The FCC did not rationally consider this real-world negative impact, or how to minimize the consequences of the 10-year hold rule and the restrictions on resale and leasing

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<sup>18</sup> FRFA, at 49 (citing to comments from the National Telecommunications Cooperative Association).

<sup>19</sup> The RFA also requires that the FCC “assure that small entities have been given the opportunity to participate in the rulemaking” by public notice that a proposed rule may have a significant economic impact on a substantial number of small entities, publication of a general notice of the proposed rules in publications likely to be obtained by small entities, or direct notification to small entities. 5 U.S.C. § 609 (outreach efforts to small entities are reviewable only in connection with § 604).

<sup>20</sup> See, e.g., *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169-70 (10<sup>th</sup> Cir. 2000) (citing to “striking” government evidence that documented discriminatory lending and venture capital financing practices against ethnic minorities), *cert. granted sub nom Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1401, and *cert. dismissed* 122 S. Ct. 511 (2001); see also 142 Cong. Rec. H1145, H1168 (daily ed. February 1, 1996) (statement of Congressman Towns on the passage of the Telecommunications Development Fund amendment by the House). The FCC also addressed access to capital issues in *In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business, Report*, 12 FCC Rcd 12802, 16825-27 ¶¶ 35- 41(1997) (detailing various financial impediments and market entry barriers due to lack of access to capital).

relationships, apparently because it “fundamentally misapprehended the unraveling economic effect” on DE’s.<sup>21</sup> The procedural deficiencies in both the IRFA and FRFA therefore were not harmless error and, justify immediate reconsideration or stay of the rule, and a stay of Auction 66, until the adverse impact of the rules on DE’s has been addressed.

**C. The Commission’s New ‘Material Relationship’ Standards Were Adopted Without Adequate Notice To And Input From Affected Parties.**

In their Petition for Reconsideration, the Joint Petitioners explained that the Commission failed to give adequate notice to and the opportunity for affected parties to be heard before it adopted the new unjust enrichment rule. These same procedural errors also infect the Commission’s adoption of its new “impermissible” and “attributable” material relationship standards.

The broad reach of the new material relationship standards ranges far beyond anything contemplated in the *FNPRM*.<sup>22</sup> The exclusive focus of the *FNPRM* on *in-region incumbent wireless service providers*, or at least those with other “significant interests in communications services” gave no hint that the Commission would adopt the radical new material relationship standards that it did, which apply to *all* DE resale or leasing relationships regardless of size or type of service provided by the other party thereto. Moreover, nowhere in the *FNPRM* does the Commission propose the numeric “spectrum capacity” limits eventually adopted. The term “spectrum capacity” was not even mentioned in the single paragraph in the *FNPRM* that sought

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<sup>21</sup> *Southern Offshore Fishing*, 995 F. Supp at 1436.

<sup>22</sup> *FNPRM* at ¶ 16. Although, as the *Second Report and Order* notes, Council Tree proposed that long-term *de facto* and spectrum manager leasing arrangements be deemed a material relationship, it only offered that proposal in the context of large in-region incumbent wireless service providers. See *FNPRM* at ¶ 1. Council Tree did not intend, and certainly cannot support, the significantly broader application of material relationships as defined and explained by the Commission in the *Second Report and Order*.

comment on spectrum leasing arrangements and the standards that should be used to determine such arrangements with large incumbent wireless providers.<sup>23</sup> It was mentioned in a footnote.<sup>24</sup>

Mere mention of the *Secondary Markets* proceeding in one paragraph and a footnote, as opposed to posting the docket number as part of the caption for this AWS proceeding, is insufficient to put the numerous parties that participated in WT Docket No. 00-230 on notice that the *Secondary Markets* proceeding was in play after a two-year hiatus<sup>25</sup> and that the FCC would impose definitive resale, wholesale, and leasing limitations on all DE's involved in any such arrangement, not just those contemplating or involved in relationships with larger incumbent wireless carriers. Consequently, interested parties were not put on proper notice of the substance of the significant new modifications adopted by the Commission, as required by the Administrative Procedure Act.<sup>26</sup> This is particularly the case given the fact that the modifications do not apply only to AWS auction participants, but affect the potential eligibility of *all* DE's in *all* future auctions *and* current DE licensees. The dearth of comments filed in response to the *FNPRM* strongly supports the conclusion that the Commission acted improperly, without first testing its rule modifications through exposure to diverse public input.<sup>27</sup> Absent the

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<sup>23</sup> *FNPRM*, para. 16.

<sup>24</sup> *McElroy Electronic Corp. v. FCC*, 990 F.2d 1351, 1362, 1364-65 (D.C. Cir 1993) (statement buried in a footnote did not provide clear notice to public of Commission's intent).

<sup>25</sup> The last order for the Secondary Markets Initiative proceeding, WT Docket No. 00-230, was adopted in July 2004. *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, FCC 04-167, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (*Secondary Markets Second Report and Order*).

<sup>26</sup> 5 U.S.C. § 553(b)(3) (requiring that notice shall include either the terms or substance of the proposed rule or a description of the subjects and issues involved).

<sup>27</sup> *See International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

relief requested by the Joint Petitioners herein, numerous entities will face radically new standards affecting their status as DE's without having an opportunity to comment on the matter.

**D. The Immediate Effectiveness of the “Material Relationship” Rules, Absent Any Prior Notice, Also Violates the APA.**

The *Second Report & Order* suffers from yet another APA procedural flaw in that it makes certain aspects of the rules immediately effective as to covered licensees without the statutory notice. While DE's with existing spectrum lease or resale arrangements covered by new Section 1.2110(b)(iv) are grandfathered permanently by the rule, any entity that may have been contemplating such business arrangements as of April 25, 2006 is now suddenly limited in ways it could not have foreseen prior to that date. With respect to these licensees, the rules adopted “apply to all determinations of eligibility for all designated entity benefits with regard to any application filed ... for an authorization, an assignment or transfer of control, a spectrum lease, or reports of events affecting a designated entity's ongoing eligibility filed on or after the release date of this *Second Report and Order*,” despite the fact that the rules, by law, will not actually become effective until 30 days following their publication in the Federal Register.<sup>28</sup> The specific date of release, April 25, 2006, is written into the rule.<sup>29</sup> Yet prior to this trigger date, no DE could have envisioned that failure to file an application prior to April 25, 2006 would have any impact on the legal consequences of an arrangement to lease or resell spectrum.

As a consequence of this material change in the rules, any DE that was on April 25, 2006 contemplating an arrangement that was previously consistent with the rules (e.g., a spectrum lease above the threshold) has been immediately and improperly foreclosed from pursuing this

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<sup>28</sup> Sec. 553(d) of the APA provides that official publication of a substantive rule must occur “no less than 30 days before its effective date,” subject to certain exceptions that are not relevant here. 5 U.S.C. § 553(d).

<sup>29</sup> See 47 C.F.R. § 1.2110(b)(3)(iv)(C)(2) (as adopted in the *Second Report & Order*).

opportunity -- without the requisite 30 days notice.<sup>30</sup> This is not merely a procedural change or harmless error, but a change that affects the licensee's substantive rights.<sup>31</sup>

**E. The Commission Failed Adequately To Justify The New Material Relationship Standards And The Change In Its *Secondary Markets* Policies.**

In the *Second Report and Order*, the Commission stated that the newly adopted material relationship standards were “additional safeguards” that built on the Commission’s *Secondary Markets* policies, which were informed by Congressional intent.<sup>32</sup> The Commission, however, failed to adequately reconcile its new “safeguards” with the conclusions it made in 2004 in its *Secondary Markets Second Report and Order*.

In the *Secondary Markets* proceeding, the Commission affirmed its existing rules for spectrum leasing agreements with DE’s 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.”<sup>33</sup> 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.”<sup>34</sup> By any measure, 25 percent of spectrum capacity does not amount to “substantially all” spectrum capacity, yet the Commission is silent on how the two concepts are compatible. Moreover, the Commission has not justified its change in conclusion nor adequately

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<sup>30</sup> See, e.g., *American Federation of Government Employees, AFL-CIO, et al., v. Block*, 655 F.2d 1153 (D.C. Cir. 1981)(Section 553(d) serves “the laudable purpose of informing affected parties and affording them a reasonable time to adjust to the new regulation.”)

<sup>31</sup> Cf. *United States Telecom Ass’n*, 400 F.3d at 41 (proposed rule virtually identical to adopted rule).

<sup>32</sup> *Second Report and Order* at ¶ 24.

<sup>33</sup> *Id.* at ¶24 (citing *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17503, 17538, 17541 & 17544) (emphasis added).

<sup>34</sup> *Id.* at ¶ 25.

explained the rational underpinnings behind the specific numerical limits.<sup>35</sup> Such an unexplained inconsistency is arbitrary and capricious.<sup>36</sup> At the time it makes such a change, the Commission must provide a “reasoned analysis that prior policies and standards are being deliberately changed and not casually ignored.”<sup>37</sup> Inviting informed comments from the public (and the very entities that will be directly affected) on the relevant issues, as the Joint Petitioners request, is a required first step towards fulfilling that mandate.

**F. The Changes to the Designated Entity Rules Conflict With The National Goal of Promoting Deployment of Broadband Services to Underserved Areas.**

Finally, the FCC’s actions in this proceeding are inconsistent with its statutory obligation and stated priority to encourage the rapid and efficient deployment of broadband to rural and underserved areas. Indeed, one of the most important current telecommunications policy goals is the achievement of full broadband deployment to underserved areas, including rural areas, tribal lands, and insular and high cost areas.<sup>38</sup> Congress, the Administration and the FCC<sup>39</sup> have frequently stressed the importance of these objectives. And Chairman Martin has specifically noted the significance of wireless technology in fulfilling these aims, commenting in 2003 that “Deployment of wireless services to rural America is particularly critical since wireless

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<sup>35</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-421 (2003) (citing to *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

<sup>36</sup> *Id.* at 408.

<sup>37</sup> *Id.* at 421.

<sup>38</sup> See 47 U.S.C. §254(b)(3) (“Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including ... advanced telecommunications and information services ....”).

<sup>39</sup> See *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078 (2000) (noting the Commission’s commitment to providing telecommunications services to tribal lands and noting the grounding for this commitment in the Communications Act), citing 47 U.S.C. §§ 214(e)(3) & (6) and 254(b)(3) & (i).

technologies provide the potential to reach people in more efficient ways.”<sup>40</sup> Commissioner Adelstein has echoed this view, stating his firm belief “that wireless solutions are essential for rural America,” and observing that “wireless ISPs and small mobile wireless companies ... are doing their best to provide the latest technologies to all Americans, no matter where they live.”<sup>41</sup> Commissioner Copps has also expressed similar views, questioning whether market forces alone can ensure adequate service to rural and tribal areas, and emphasizing the important role of bidding credits in promoting service to these areas.<sup>42</sup> And Commissioner Tate, in her relatively short time on the Commission, has already emphasized the importance of these matters.<sup>43</sup>

Consistent with these goals, the FCC is committed to facilitating “an environment that *stimulates investment* and innovation in broadband technology and services.”<sup>44</sup> Congress has also acted to advance its own strong interest in the funding of telecommunications service to

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<sup>40</sup> Remarks by Commissioner Kevin J. Martin To the Kickoff of the Federal Rural Wireless Outreach Initiative at 1, Washington, D.C. (July 2, 2003).

<sup>41</sup> Remarks of Commissioner Jonathan S. Adelstein, Wireless Internet Service Provider Forum, South Dakota School of Mines and Technology at 2, Rapid City, South Dakota (May 25, 2004).

<sup>42</sup> See Remarks of Commissioner Michael J. Copps, Quello Center Symposium, at 2, Washington, D.C. (February 25, 2004) (“given the scale of the challenge, given the difficult economics of rural areas, and given the rapidity with which other counties are building out their own broadband networks, we would be remiss if we didn’t ask whether the market alone can get the whole job done”), and Remarks of Michael J. Copps, Commissioner, Federal Communications Commission, The Indian Training Initiative., at 5, Phoenix, Arizona (September 19, 2002) (“action means making sure that our policies to promote wireless service on tribal lands are accomplishing their goals and that incentives are in place – real incentives– to ensure that our Tribal Lands Bidding Credits are a real and effective inducement for Native Americans to participate in spectrum auctions”).

<sup>43</sup> See Commissioner Deborah Taylor Tate’s Remarks to the Rural Cellular Association at 2 (May 9, 2006) (“Wireless providers will be critical to getting broadband out to that last, most difficult mile. To that end, I believe that the FCC must use a light regulatory touch that gives you the freedom to try new ideas and deploy new technology”).

<sup>44</sup> FCC Website, “FCC Strategic Priorities – Broadband” (available at [www.fcc.gov/broadband](http://www.fcc.gov/broadband), last viewed May 11, 2006) (emphasis added).

rural America and deployment of broadband.<sup>45</sup> Critical to fostering such development is a regulatory approach to spectrum assignment that, on one hand, maintains a balance between provision of adequate incentives for legitimate small businesses to enter the telecommunications marketplace with adequate financing, and on the other hand, provides sensible regulations on investment that protect the DE program from abuse. The degree to which the new ten-year holding requirement for DE licensees written into the unjust enrichment rules conflicts with the statutory scheme is illustrated by the established investment policies of the Telecommunications Development Fund (“TDF”). The TDF is a creation of the 1996 Telecommunications Act, established, among other reasons, “to promote access to capital for small businesses in order to enhance competition in the telecommunications industry.”<sup>46</sup> The FCC is charged by Congress with a key role in the operation of the TDF. By statute, the Chairman of the Commission appoints the board of directors of the TDF, including a representative of the Commission.<sup>47</sup> Chairman Martin himself currently serves on the board. At its inception, TDF sought investments where it had “an articulated exit strategy for its investment,” requiring that a stake in a company could be divested “between four to eight years out.”<sup>48</sup> Currently, however, the TDF’s time horizon is even shorter – three to six years.<sup>49</sup> In other words, the TDF could not even

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<sup>45</sup> See 47 U.S.C. §§ 309(j)(8)(C) and 614 (pertaining to the Telecommunications Development Fund); see also the Farm Security and Rural Investment Act of 2002, Pub. L. No. 17-101, 116 Stat. 415 (2002) (Title VI, Rural Broadband Access, to be codified at 7 U.S.C. § 950bb).

<sup>46</sup> 47 U.S.C. § 614(a)(1).

<sup>47</sup> *Id.* § 614(c)(1).

<sup>48</sup> Robert Schwaninger, “Barbarians at the Fund,” *Mobile Radio Technology*, October 1, 1998 (available at [http://mrtmag.com/mag/radio\\_barbarians\\_fund/index.html](http://mrtmag.com/mag/radio_barbarians_fund/index.html), last viewed May 13, 2006).

<sup>49</sup> See TDF Website, “Common Factors between Individual Angels and Venture Capitalists,” (available at [http://www.tdfund.com/entrepreneurs/courses/equity-financing/efc\\_21.html](http://www.tdfund.com/entrepreneurs/courses/equity-financing/efc_21.html), last viewed May 16, 2006).

consider, much less fund, an investment with a 10-year time horizon. Accordingly, the substantial penalties built into the Commission's revised unjust enrichment rule conflict with the core investment guidelines of the TDF, which are themselves even more generous than the standard five-year parameter in the financial industry. The Commission cannot impose "exit" restrictions on DE's which the TDF is not willing to accept.

As in the case of the TDF, it is critical for prospective investors to have the ability to reevaluate investments within a reasonable period of time, and to cut their losses if necessary. Maintaining investment flexibility is essential to ensure that new market entrants have a reasonable opportunity to secure financing. Small entities are harshly penalized when payback requirements extend to ten years. Such an unreasonable and unnecessary market entry barrier will fundamentally undermine the goals of the TDF and the Communications Act as a whole.

## II. CONCLUSION

For these reasons, and the reasons set forth in the previously filed Petition, the Commission should set aside each of the rule changes adopted as part of the *Second Report and Order* and retain its current rules for the licenses offered in Auction 66. At a minimum, the Commission should set aside the amendments to Section 1.2111(d)(2) of its Rules and retain the five-year unjust enrichment schedule currently set forth therein. The Joint Petitioners respectfully renew their request for expedited action on their pending petition.

Respectfully submitted,

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May 17, 2006

## CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, a secretary to the law firm Leventhal Senter & Lerman PLLC, hereby certify that a true and correct copy of the foregoing “Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration” was sent this 17<sup>th</sup> day of May, 2006 to each of the following via the methods identified:

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