



May 18, 2006

**EX PARTE NOTICE**

***Electronic Filing***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, D.C. 20554

**Re: WT Docket No. 05-211 and AU Docket 06-30**

Dear Secretary Dortch:

Representing T-Mobile USA, Inc. (“T-Mobile”), Tom Sugrue, Sara Leibman, William Lake, and the undersigned attended meetings on May 16 and 17, 2006, with the following Commission staff members regarding a motion for stay of the designated entity rules adopted in the *Second Report and Order*, and commencement of Auction 66, filed in the above-referenced dockets.

**May 16:**

Wireless Telecommunications Bureau: Jim Schlichting, Catherine Seidel, Margie Weiner, and Zenji Nakazawa.

**May 17:**

Office of Commissioner Adelstein: Barry Ohlson  
Office of Commissioner Copps: Bruce Gottlieb  
Office of Commissioner Tate: Aaron Goldberger  
Office of General Counsel: Sam Feder, Joel Kaufman, and David Horowitz

At the meetings, T-Mobile representatives discussed the stay motion filed by Minority Media and Telecommunications Council (“MMTC”), Council Tree Communications, Inc. (“Council Tree”), and Bethel Native Corporation (“BNC”) (collectively “Petitioners”). Consistent with its opposition (filed May 12, 2006) to Petitioners’ motion, T-Mobile asserted that a stay is unwarranted because Petitioners have not demonstrated that they are likely to prevail on the merits of their petition for reconsideration or any judicial appeal, that they will be irreparably harmed absent a stay, that other parties will not be harmed if a stay is granted, or that the public interest favors a stay.

If the Commission is nonetheless inclined to postpone Auction 66 for purposes of giving designated entities more time to adjust their business plans to comply with the

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rules adopted in the *Second Report and Order*, T-Mobile urged it to keep such delay as short as possible—no more than two-four weeks. In addition, to the extent the short-form application window is reopened, T-Mobile representatives stated that only parties applying as designated entities should be allowed to take advantage of the new window. A longer delay or broader invitation for new applications would likely result in additional legal challenges and operational difficulties, severely prejudicing parties that are relying on timely completion of the auction and expeditious access to the spectrum needed to satisfy consumer demand for an ever-increasing range of affordable and innovative wireless services.

A copy of this letter and the attached document, which was distributed at the meetings, are being sent by e-mail to the Commission staff who attended the meetings.

Respectfully submitted,

/s/ Kathleen O'Brien Ham

Managing Director, Federal Regulatory Affairs  
T-Mobile USA, Inc.

## THE COMMISSION SHOULD NOT STAY AUCTION 66 WT Docket No. 05-211; AU Docket No. 06-30

Petitioners (Minority Media and Telecommunications Council, Council Tree, and Bethel Native Corporation) have not met the criteria needed for a stay of the effectiveness of the FCC's revised designated entity rules ("New DE Rules") and the start of Auction 66.

### Petitioners Are Unlikely To Prevail on the Merits

- ***The New DE Rules were not unlawfully adopted.*** T-Mobile did not endorse revamping the previous DE program, but it was well within the Commission's discretion to do so in the manner it chose.
  - Although resale and leasing restrictions and a 10-year unjust enrichment period may well curtail the ability of some DEs to obtain financing, other DEs—those that intend to use their licenses to provide retail services to end users—will likely find their ability to raise capital enhanced.
  - While, unlike Petitioners, T-Mobile does not read the *Second Report and Order* to apply the new 10-year unjust enrichment period to DEs that hold licenses they have won in previous auctions, even if Petitioners' interpretation were correct, that portion of the order can be clarified or challenged in the normal course and does not warrant a stay of Auction 66.
- ***The Commission gave sufficient notice and opportunity for comment.*** The rule changes are a "logical outgrowth" of the Commission's *Further Notice*. Indeed, MMTC and Council Tree commented on these particular proposals.
  - *Further Notice* ¶ 20 asked: "If we require reimbursement by licensees that, either through a change of 'material relationships' or assignment or transfer of control of a license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt, over what portion of the license term should unjust enrichment provisions apply?"
  - *Further Notice* ¶ 19 asked whether "there [are] additional entities [other than large wireless carriers and communications companies] that we should consider including as part of our proposed definition" of what constitutes a prohibited material relationship."



- ***Petitioners do not need or seek a stay for purposes of auction preparation.***
  - Section 309(j)(3)(E) (which requires FCC to give adequate time to adjust to new auction rules) does not apply to substantive, non-auction-specific rules such as the New DE Rules.
  - May 10 short-form deadline did not represent a drop-dead date for negotiations because Petitioners may continue to add non-controlling investors throughout the auction.
  - Petitioners assert (without foundation) that, regardless of the amount of time given, the New DE Rules make it impossible for them to participate in Auction 66.

### **The Balance of Harms and Public Interest Militate Against a Stay**

- ***Petitioners have not demonstrated irreparable harm.*** The affidavit supplied by one Petitioner (BNC) does not satisfy D.C. Circuit requirement that injury claimed be “both certain and great.” BNC does not demonstrate that it could have secured financing under previous rules or that it would be able to do so if the New DE Rules were stayed.
- ***Other parties and the public interest would be harmed by a stay.***
  - Grant of the stay request would contravene directive in Section 309(j) that FCC ensure the “rapid deployment of new technologies, products and services . . . without administrative or judicial delays.”
  - Unlike BNC, wireless carriers have hundreds of millions of *existing* customers, virtually all of whom are demanding the high quality, reliable, ubiquitous service for which AWS-1 spectrum can and will be used.
  - Together with the Commission, Congress, the President, and the Department of Commerce have all expended significant effort to ensure a June 2006 auction of the AWS-1 frequencies.