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May 19, 2006

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WT Docket No. 05-211
AU Docket No. 06-30
Written *Ex Parte* Presentation

Dear Chairman Martin:

In a *ex parte* communication notice filed in the referenced proceedings on May 18, 2006, T-Mobile USA, Inc. ("T-Mobile") set forth its view as to how the Commission should implement a postponement of Auction 66 in this case if it is inclined to do so.¹ Among other things, T-Mobile indicated that such a delay should be as short as possible, limited to no more than two to four weeks in duration.²

Council Tree Communications, Inc. ("Council Tree") shares T-Mobile's interest in seeing that Auction 66 is conducted as soon as possible without confusion or uncertainty. I am writing to propose for your consideration steps by which the Commission may proceed expeditiously to hold Auction 66 in the wake of the rules announced in the recently adopted *Second Report and Order* in WT Docket No. 05-211 ("*Second Report and Order*"):

- Set Aside Certain of the *Second Report and Order* Rules. Set aside the *Second Report and Order* rules relating to unjust enrichment and attributable and impermissible material relationships. Consider them as part of an expanded further notice of proposed rule making in the appropriate proceedings, making clear that any new rules adopted in that process will not apply to licenses offered in Auction 66 or earlier competitive bidding events. The Commission may reasonably retain the reporting and audit requirements announced in the *Second Report and Order*, with modifications to clarify a serious ambiguity in the text of the rule addressing the reporting of eligibility events (Section 1.2114(a)). A copy of the final rules adopted as part of the *Second Report and Order* marked to show these suggested changes is attached as **Exhibit A** for your consideration.

¹ See Letter from Kathleen O'Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 05-211, AU Docket No. 06-30 (filed May 18, 2006) at 1-2 ("T-Mobile Notice").

² *Id.*

- Postpone the Start of Auction 66. Announce that Auction 66 will be postponed to provide additional time for bidder preparation and planning, minimizing such delay as much as possible.
- Purge All Filed Auction 66 Short-Form Applications. Announce that all Auction 66 short-form (FCC Form 175) applications that have been filed are deemed ineffective and purged from the Commission's system and that interested parties may submit Auction 66 short-form applications in accordance with the new schedule. The Commission has routinely taken this step when it has postponed the start of an auction for which short-form applications had already been filed.³ Permitting some Auction 66 short-form applications to remain on file as suggested by T-Mobile⁴ would, at a minimum, generate confusion regarding application of the Commission's prohibition of collusion.
- Announce a New Auction 66 Start Date and Associated Deadlines. Announce a new Auction 66 start date (and a new mock auction date) and new deadlines for the filing of Auction 66 short-form applications and the submission of upfront payments. The new deadline for filing of Auction 66 short-form applications should be 30 days from the date of the Commission action setting aside the *Second Report and Order* rules to allow time for bidder preparation and planning.

One copy of this written presentation is being submitted electronically pursuant to Section 1.1206(b)(1) of the Commission's Rules. One copy is also being forwarded to each of the other Commissioners and to Fred Campbell, Barry Ohlson, Bruce Gottlieb, Aaron Goldberger, Sam Feder and Cathy Seidel.

Sincerely,

/s/ Steve C. Hillard

Steve C. Hillard

³ See, e.g., *1670-1675 MHz Band Auction (Auction No. 46) Postponed Until April 30, 2003, Public Notice*, 17 FCC Rcd 18325 (2002); *Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31) Postponed Until January 14, 2003; Auction of Licenses in the 698-746 MHz Band (Auction No. 44) Will Proceed As Scheduled, Public Notice*, 17 FCC Rcd 10108 (2002); *Auction of Licenses for Lower and Upper Paging Bands Postponed Until October 30, 2001, Public Notice*, 16 FCC Rcd 11113 (2001); *Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001, Public Notice*, 16 FCC Rcd 3947 (2001); *Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, Public Notice*, 15 FCC Rcd 13954 (2000); *Auction of Licenses for the 700 MHz Guard Bands Postponed Until September 6, 2000, Public Notice*, 15 FCC Rcd 21516 (2000); *Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 6, 2000, Public Notice*, 15 FCC Rcd 23656 (2000).

⁴ See T-Mobile Notice at 2.

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May 19, 2006
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Attachment

cc: The Honorable Michael J. Copps (w/ attachment)
The Honorable Jonathan S. Adelstein (w/ attachment)
The Honorable Deborah Taylor Tate (w/ attachment)
Fred Campbell (w/ attachment)
Bruce Gottlieb (w/attachment)
Barry Ohlson (w/ attachment)
Aaron Goldberger (w/ attachment)
Sam Feder (w/attachment)
Cathy Seidel (w/attachment)

Exhibit A

Final Rules

PART 1 – PRACTICE AND PROCEDURE

For the reasons discussed in the preamble, the FCC amends parts 1 of the Code of Federal Regulations to read as follows:

1. The authority citation for part 1 is revised to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

2. In § 1.913, paragraph (a) introductory text and the first sentence of paragraph (b) are revised and paragraph (a)(6) is added to read as follows:

§ 1.913 Application and notification forms; electronic and manual filing.

(a) Application and notification forms. Applicants, licensees, and spectrum lessees (see § 1.9003) shall use the following forms and associated schedules for all applications and notifications:

* * * * *

(6) FCC Form 609, Application to Report Eligibility Event. FCC Form 609 is used by licensees to apply for Commission approval of reportable eligibility events, as defined in § 1.2114.

(b) Electronic filing. Except as specified in paragraph (d) of this section or elsewhere in this chapter, all applications and other filings using the application and notification forms listed in this section or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS.

* * *

* * * * *

3. Revise paragraph (b) introductory text and add paragraph (b)(5) to § 1.919 to read as follows:

§ 1.919 Ownership information.

* * * * *

(b) Any applicant or licensee that is subject to the reporting requirements of §1.2112 or § 1.2114 shall file an FCC Form 602, or file an updated form if the ownership information on a previously filed FCC Form 602 is not current, at the time it submits:

* * * * *

(5) An application reporting any reportable eligibility event, as defined in § 1.2114.

* * * * *

4. Revise paragraph (a)(2)(ii)(B) of § 1.2105 to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) * * *

(ii)(B) Applicant ownership and other information, as set forth in 1.2112.

* * * * *

5. In paragraph § 1.2110, paragraphs (b)(1)(i)-(ii) and (j) are revised , paragraphs (n) and (o) are redesignated as paragraphs (o) and (p), and paragraphs (b)(3)(iv) and (n) are added to read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) * * *

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of ~~its the applicant's~~ controlling interests, ~~and the entities with which it has an attributable material relationship~~ shall be attributed to the applicant (~~or licensee~~) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues ~~for each of the previous three years~~ of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of ~~its the applicant's~~ controlling interests for each of the previous three years, ~~and the entities with which it has an attributable material relationship.~~

(ii) If applicable, pursuant to § 24.709, the total assets of the applicant (or licensee), its affiliates, its controlling interests, ~~the affiliates of its and affiliates of the applicant's~~ controlling interests, ~~and the entities~~

~~with which it has an attributable material relationship~~ shall be attributed to the applicant ~~(or licensee)~~ and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues ~~for each of the previous two years~~ of the applicant (or licensee), its affiliates, its controlling interests, ~~the affiliates of its~~ and affiliates of the applicant's controlling interests for each of the previous two years, ~~and the entities with which it has an attributable material relationship.~~

* * * * *

(3) * * *

~~(iv) Applicants or licensees with material relationships.~~

~~(A) Impermissible material relationships. An applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.~~

~~(B) Attributable material relationships. An applicant or licensee must attribute the gross revenues (and, if applicable, the total assets) of any entity, (including the controlling interests, affiliates, and affiliates of the controlling interests of that entity) with which the applicant or licensee has an attributable material relationship. An applicant or licensee has an attributable material relationship when it has one or more arrangements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.~~

~~(C) Grandfathering.~~

~~(1) Licensees. An impermissible or attributable material relationship shall not disqualify a licensee for previously awarded benefits with respect to a license awarded before April 25, 2006, based on spectrum~~

~~lease or resale (including wholesale) arrangements entered into before April 25, 2006.~~

~~(2) Applicants. An impermissible or attributable material relationship shall not disqualify an applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006. Any applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed after April 25, 2006, or in an application to participate in an auction in which bidding begins on or after [30 days after Federal Register publication], need not attribute the material relationship(s) of those entities that are its affiliates based solely on section 1.2110(e)(5)(i)(C) if those affiliates entered into such material relationship(s) before April 25, 2006, and are subject to a contractual prohibition preventing them from contributing to the applicant's total financing.~~

~~Example to paragraph (C)(2): Newco is an applicant seeking designated entity status in an auction in which bidding begins after the effective date of the rules. Investor is a controlling interest of Newco. Investor also is a controlling interest of Existing DE. Existing DE previously was awarded designated entity benefits and has impermissible material relationships based on leasing agreements entered into before April 25, 2006, with a third party, Lessee, that were in compliance with the Commission's designated eligibility standards prior to April 25, 2006. In this example, Newco would not be prohibited from acquiring designated entity benefits solely because of the existing impermissible material relationships of its affiliate, Existing DE. Newco, Investor, and Existing DE, however, would need to enter into a contractual prohibition that prevents Existing DE from contributing to the total financing of Newco.~~

~~* * * * *~~

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, ~~spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all~~ and other agreements, including oral agreements, establishing, as applicable, de facto

or de jure control of the entity ~~or the presence or absence of impermissible and attributable material relationships~~. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates, and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

* * * * *

(n) Annual reports. Each designated entity licensee must file with the Commission an annual report within five business days before the anniversary date of the designated entity's license grant. The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. Annual reports will be filed no later than, and up to five business days before, the anniversary of the designated entity's license grant.

(o) Gross revenues. * * *

(p) Total assets. * * *

6. Revise paragraphs (a), (b) introductory text, the first sentence of paragraph (c)(2), the first sentence of paragraph (c)(3), (d)(1), and (d)(2) of § 1.2111 to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements,

management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license (see § 1.948 [of this chapter](#)). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) Unjust enrichment payment: set-aside. As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of ~~or for entry into a material relationship (see §§ 1.2110, 1.2114) (otherwise permitted under the Commission's rules) involving,~~ a license acquired by the applicant pursuant to a set-aside for eligible designated entities under § 1.2110(c), or ~~which~~ who proposes to take any other action relating to ownership or control that will result in loss of eligibility as a designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No payment will be required if:

* * *

(c) * * *

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure ~~or to enter into a material relationship (see § 1.2110)~~ that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. * * *

(3) If a licensee seeks to make any change in ownership ~~or to enter into a material relationship (see~~

~~§ 1.2110~~) that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. * * *

(d) * * *

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change ~~or to enter into a material relationship (see § 1.2110)~~ that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify ~~after restructuring or entry into a material relationship~~), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of

the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change, or reportable eligibility event (see §1.2114).

~~(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be 100 percent of the value of the bidding credit prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met. If the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met, the amount of the payments will be reduced over time as follows:~~

~~(A) A loss of eligibility in the first five years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 100 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);~~

~~(B) A loss of eligibility in years 6 and 7 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 75 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);~~

~~(C) A loss of eligibility in years 8 and 9 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 50 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);~~

and

~~(D) A loss of eligibility in year 10 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 25 percent of the difference between the bidding credit received and the bidding credit for which it is eligible).~~

~~(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change, or reportable eligibility event (see §1.2114).~~

* * * * *

7. In § 1.2112, add new paragraphs (b)(1)(iii) and (b)(2)(vii), redesignate paragraph (b)(1)(iii) as (b)(1)(iv), and revise redesignated paragraph (b)(1)(iv) and paragraphs (b)(2)(iii) and (v) of to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

* * * * *

(b) * * *

(1) * * *

~~(iii) List all parties with which the applicant has entered into arrangements for the spectrum lease or resale (including wholesale agreements) of any of the capacity of any of the applicant's spectrum.~~

~~(iv) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: The applicant, its affiliates, its controlling interests, the and affiliates of its controlling interests, and the entities with which it has an attributable material relationship; and if a consortium of small businesses, the members comprising the consortium.~~

* * * * *

(2) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control ~~or the presence or absence of impermissible and attributable material relationships. Such; such~~

agreements and instruments include articles of incorporation and bylaws, partnership agreements, shareholder agreements, voting or other trust agreements, ~~management agreements,~~ franchise agreements, ~~spectrum leasing arrangements, spectrum resale (including wholesale) arrangements,~~ and any other relevant agreements (including letters of intent), oral or written;

(iv) * * *

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests, ~~and parties with which it has attributable material relationships;~~ and if a consortium of small businesses, the members comprising the consortium; and

(vi) * * *

~~(vii) List and summarize any agreements in which the applicant has entered into arrangements for the lease or resale (including wholesale agreements) of any of the spectrum capacity of the license that is the subject of the application.~~

8. Add new section 1.2114 to read as follows:

§ 1.2114 Reporting of Eligibility Event.

(a) A designated entity must seek Commission approval for all reportable eligibility events. A reportable eligibility event is:

(1) Any spectrum lease (as defined in § 1.9003) or resale arrangement (including wholesale agreements) with one entity or on a cumulative basis that ~~would cause a licensee to lose~~ relate to the licensee's eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under § 1.2110 and applicable service-specific rules.

(2) Any other event that ~~would lead to a change in~~ relates to the eligibility of a licensee for designated entity benefits.

(b) Documents listed on and filed with application. A designated entity filing an application pursuant to this section must –

(1) List and summarize on the application all agreements and arrangements (including proposed agreements

and arrangements) that give rise to or otherwise relate to a reportable eligibility event. In addition to a summary of each agreement or arrangement, this list must include the parties (including each party's affiliates, its controlling interests, and the affiliates of its controlling interests, ~~its spectrum lessees, and its spectrum resellers and wholesalers~~) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.

(2) File with the application a copy of each agreement and arrangement listed pursuant to this paragraph.

(3) Maintain at its facilities or with its designated agents, for the term of the license, the lists, summaries, dates, and copies of agreements and arrangements required to be provided to the Commission pursuant to this section.

(c) Application fees. The application reporting the eligibility event will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102.

(d) Streamlined approval procedures.

(1) The eligibility event application will be placed on public notice once the application is sufficiently complete and accepted for filing (see § 1.933).

(2) Petitions to deny filed in accordance with § 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the Public Notice listing the application as accepted for filing.

(3) No later than 21 days following the date of the Public Notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will grant the application, deny the application, or remove the application from streamlined processing for further review.

(4) Grant of the application will be reflected in a Public Notice (see § 1.933(a)(2)) promptly issued after the grant.

(5) If the Bureau determines to remove an application from streamlined processing, it will issue a Public Notice indicating that the application has been removed from streamlined processing. Within 90 days of that Public Notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(e) Public notice of application. Applications under this subpart will be placed on an informational public notice on a weekly basis (see § 1.933(a)).

(f) Contents of the application. The application must contain all information requested on the applicable form, any additional information and certifications required by the rules in this chapter, and any rules pertaining to the specific service for which the application is filed.

(g) The designated entity is required to update any change in a relationship that gave rise to a reportable eligibility event.