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May 31, 2006

Honorable Kevin J. Martin, Chairman
Honorable Michael J. Copps, Commissioner
Honorable Jonathan S. Adelstein, Commissioner
Honorable Deborah Taylor Tate, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: WT Docket No. 05-211 – Revisions To The Commission's Designated Entity Rules

Dear Chairman Martin and Commissioners Copps, Adelstein and Tate:

I am the Chief Executive Officer of Royal Street Communications, LLC ("RSC"), a successful Designated Entity ("DE") participant in Auction No. 58 ("Auction 58") and a potential participant in the upcoming Advanced Wireless Services Auction No. 66 ("Auction 66"). As such RSC is extremely concerned about substantive modifications to the Commission's DE rules adopted in the Second Report And Order And Second Further Notice Of Proposed Rulemaking in the referenced docket ("Order"), modifications adopted without notice or the opportunity to comment by RSC or other interested DEs. RSC firmly believes that these changes will, if allowed to remain in effect, as Commissioner Adelstein has commented, "actually do more harm than good to DE participation" in the upcoming, as well as future, FCC auctions.[1] Therefore, RSC urges that the Commission, on its own motion, rescind these changes before the new window for filing applications for Auction 66.

I believe RSC has been a textbook example of how the DE program should work. I founded the company in late 2004, with the objective of acquiring licenses in Auction 58, developing wireless networks in the markets in which licenses were won, and selling the capacity of those networks to retail wireless service providers and resellers. Recognizing the need to gain access to existing relationships and certain technical expertise related to the construction and operation of wireless networks to complement my own entrepreneurial background in business, finance and management, I sought a relationship with MetroPCS in accordance with the Commission's DE current rules.

Even under the terms of those rules, obtaining commitments for the requisite billions in capital to build out RSC's potential systems was not easy or inexpensive, since RSC was too small and too new to tap the public capital markets readily available to the major wireless service providers. But RSC succeeded, not least in part because the bidding credits which would be afforded us on the basis of our DE status made a critical difference.

RSC thus went into Auction 58 well managed and well capitalized. RSC participated very actively in that Auction and, as the Commission is aware, ended up making the largest financial commitment by a single bidder, some $293 million after the application of bidding credits. Thereafter, RSC cooperated in good faith with the Commission's Staff over a period of eight (8) months to ensure that its organization documents were in full compliance with the Commission's DE rules and the grant of its licenses

[1] FCC Public Notice, FCC 06-71, released May 19, 2006, Concurring Statement of Comissioner Jonathan S. Adelstein.

became final at the end of January of this year. Development of RSC's new wireless networks in Los Angeles and the five markets in northern Florida is well under way. By year-end 2006, or early 2007, the competitive position that the national carriers, which now control 89 percent of wireless subscribers nationwide, have enjoyed in these markets will be challenged by a viable new competitor.

The Commission's sudden and unanticipated shift in its policies supporting the competitive force DEs can provide will serve to undermine legitimate DE's and frustrate their ability to participate meaningfully in the provision of spectrum-based services. Moreover, the Commission's ongoing rulemaking proceeding, and the uncertainly as to what future further adjustments to the DE rules might be made and to whom they will be applied, will have a decided chilling effect on participation in Auction 66 and future auctions unless or until the extant regulatory uncertainty and unpredictability is resolved.

RSC's concerns and recommendations herein relate to the following specific elements of the Order.

1. Retroactive Application of the 10-Year Unjust Enrichment Payment Schedule - The Order doubles the length of the unjust enrichment penalty period to ten (10) years, requiring the payment of a substantially higher penalty as a result of an assignment or transfer to a non-DE in years 3 through 5 of the license term and imposing substantial new penalties on assignments or transfers to non-DEs through the tenth year of the license term. There is some language in the Order that appears to indicate that the Commission did not intend this change to retroactively affect existing DEs like RSC. *Second Report*, para 41. However, the manner in which the new unjust enrichment schedule has been integrated into the DE rules clearly could be interpreted to make it apply to any transaction for which approval is sought after April 25, 2006, even for that matter pro forma assignments as part of internal licensee reorganizations.

The Commission contracted with DEs like RSC to receive their licenses under an entirely different set of rules and should not be subject to the revised unjust enrichment schedule. The Commission should promptly confirm that such retroactive application was not its intent and the rules do not so provide.

First and foremost, it is fundamentally unfair and inequitable in RSC's view for the Commission to change the rules that were the basis for RSC bidding and paying the Commission nearly $300 million for its licenses. RSC worked with the Commission for eight (8) months to respond to various comments and questions. The Commission's review and ultimate approval of its organizational documents, which reflected the long-established five (5) year unjust enrichment penalty provisions, was part and parcel of the Commission's grant of RSC's licenses. The retroactive application of a new unjust enrichment schedule is inconsistent with fundamental fairness as well as long standing principles of administrative law. As the Supreme Court clearly has indicated, "[r]etroactivity is not favored in the law." *Landgraf v. USI Film Products,* 511 U.S. 244, 265 (1994).

Further, from RSC's own recent experience it already is difficult for DEs to attract capital because financiers cannot be granted the elements of control and exit rights that would be common in other financing transactions. If potential financiers also get the sense that the applicable rules under which they invest are subject to retroactive change without notice and recourse, investment capital available for DEs will completely dry up. The Commission's action, including the pendency of the prospect for further rule changes, has at this point sent such a signal.

Neither RSC nor its investors had any basis for concluding that the Commission might impose retroactive changes to the unjust enrichment schedule; a structure they had every reason to believe was contractual in nature. Therefore, RSC never conceived of negotiating language in its organizational documents specifically addressing financial responsibility for the payment of an unjust enrichment penalty in the event of a doubling of the unjust enrichment period. This means that the retroactive rule change is likely to foment litigation that will disrupt DE operations.

Finally, the changes to the unjust enrichment schedule, particularly as applied to grandfathered DEs was completely unexpected. RSC certainly did not get adequate notice that the Commission was contemplating this action and did not get a fair opportunity to comment. There are, therefore, legitimate procedural objections to the manner in which these rule changes have been sprung on existing DEs and are to be implemented.

For all of these reasons, RSC supports the changes to the rules proposed by Salmon PCS in its ex parte filing of May 24, 2006 in this docket, which would make clear that grandfathered DE's like RSC would continue to be subject to the five (5)-year unjust enrichment penalty payment schedule set forth in 47 C.F.R § 1.211(d).

2. Prospective Application of the 10-Year Unjust Enrichment Payment Schedule – While certainly retroactive application is unfair and clearly disfavored, RSC also strongly believes that it is unwise, and contrary to the statutory mandate, for the Commission to double the unjust enrichment penalty period for DE licensees on a going forward basis, and to impose new penalties on the transfer of unconstructed DE licenses. Apparently the Commission would prefer for DEs to obtain their financial backing from financial institutions and venture capital firms, rather than from large incumbent nationwide wireless carriers (see Order, ¶ 81). If that is the case, then the Commission must understand the financial planning horizons of these types of financiers. The business reality is that a transaction where there is no clear path to liquidity, without penalty, for 10 years is a very unattractive investment for the types of financial institutions and venture capital firms that traditionally have supported wireless start-up ventures.

The Commission's express goal in the DE program is to strike a "reasonable balance between the competing goals of, first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses." Order, ¶ 8. From RSC's perspective the extended, 10-year unjust enrichment payment schedule fails to strike an appropriate balance.

Yet again, RSC, along with many others it appears, had no notice that the Commission was contemplating substantive changes of this nature or it would have commented on this issue. At a minimum RSC suggests that the new 10-year unjust enrichment schedule be suspended until there is a genuine opportunity for comment from interested and affected parties. Otherwise, RSC believes it is likely that Auction 66 will proceed with no significant representation of DEs among the winning bidders. In that case, it will be hard for the Commission to defend against the claim that its new rules failed to create meaningful opportunities, in the most significant spectrum auction in recent years, for DEs to participate in the provision of spectrum based services. The Commission cannot afford a repeat of the market disruption that occurred when the results of Auction 35 were largely voided by legal challenges. However, the Commission is assuming that risk by making changes to the DE program that have the effect of undermining the participation of *bona fide* DEs, particularly while affording no notice or opportunity to comment on the wisdom of doing so.

3. Imposition of Substantial Contract Filing and Approval Requirements - The Order also imposes substantial new burdens on DE licensees by requiring the prior submission and approval of a broad range of agreements, the precise scope of which is undefined. See 47 C.F.R. § 1.2114. RSC is very concerned that these procedures will subject it to additional costs and delays and thereby hamper its ability to succeed in a very competitive wireless marketplace.

RSC is certainly very recently familiar with the initial DE licensing process in which DE transaction documents are subject to an "under the magnifying glass" review. The process – while important and necessary – is time consuming and expensive. Indeed, under the new payment system, where an applicant must pay before the Commission engages in this process, RSC ran up millions in interest

expenses over eight (8) months. Extending this process throughout the DE's license term will, in effect, bring the Commission into the negotiation and resolution of virtually every significant RSC agreement, many of which will be time sensitive. The Commission could make much better use of its limited resources and the impact on RSC's efficient conduct of its business could be very substantial.

This problem is only exacerbated by the fact that the nature and extent of the contracts and amendments to contracts that are covered by the new filing and approval requirement could be exceedingly broad. The text of the Order refers to "management, credit, trademark, marketing and facilities agreements." This could mean that the FCC would need to review, for example, interconnection agreements that RSC enters into with LECs under Section 251 of the Act. Order, ¶ 46 and note 116.

RSC was again caught completely by surprise by this potentially pervasive proposed filing and approval process. The Commission's original Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753 (2006) (the "FNPRM"), which was the predicate to the Order, focused on considering DE rule changes for the upcoming auctions of broadband wireless spectrum, not on radically revamping the DE rules as applied to existing licensed DEs. The Commission gave no prior notice that it was considering changes of this substance and scope, and as a consequence, RSC and other interested parties did not have a fair opportunity to comment.

Therefore, RSC respectfully requests that any proposal to require DE-related contracts to be filed as a matter of course and approved in advance by the Commission be suspended and considered as part of the Second Further Notice of Proposed Rulemaking portion of the Order, and not be put in effect until interested parties have had an opportunity to comment and the Commission has had additional time to consider the implications of the new rules.

4. Imposition of Restrictions on DE Wholesale and Resale Business Structures - Finally, the Order, on a going forward basis, categorizes as impermissible for or attributable to DE applicants certain wholesale or resale arrangements – the types of arrangements that the Commission approved in the case of RSC and other Auction 58 applicants. Again, the Commission made these rule changes without affording RSC or other DEs notice and the opportunity to comment. Therefore, they are procedurally suspect and open to challenge. More importantly, these restrictions put the Commission in the business of doing what on a number of occasions it has foresworn – reducing the business flexibility of licensees who have paid millions for license rights and dictating how their business must be structured and conducted.

RSC respectfully submits that these restrictions will also contribute to investor and financier reluctance to back wireless licenses that are effectively limited to a retail business model, a model decidedly more expensive and administratively burdensome. The Order's restrictions ignore the fact that wholesale services are a wireless product increasingly in demand by MVNOs and other forms of wireless resale, all of which can add to the competitive options in the wireless marketplace. From a business and policy perspective, RSC believes it unwise to tie the hands of DE licensees in this fashion. The Commission has other vehicles for ensuring that only *bona fide* DEs obtain the benefits that are available under the DE rules. Restricting business structuring decisions and reducing DE licensee flexibility should not be one of them, particularly when imposed based on a record so infirm as to the impact of such a decision.

Finally, as has already been pointed out by other commenting parties, the benchmark for compliance with these restrictions (i.e., spectrum capacity) is undefined by the new rule. Yet it is susceptible to multiple interpretations based on the technology and other factual variables involved. So DE licensees would face the risk of trying to ensure compliance with an ambiguous requirement.

Again, RSC respectfully requests that any proposal to restrict the use of wholesale and resale agreements be considered in the Second Further Notice of Proposed Rulemaking portion of the Order,

and not be put in effect until interested parties have had an opportunity to comment and the Commission has had additional time to consider the implications of any such new rules.

Respectfully submitted,

Robert A. Gerard

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