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May 31, 2006

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Commissioner Michael J. Copps
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Commissioner Jonathan S. Adelstein
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Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: WT Docket No. 05-211 (Designated Entity Rules)

Dear Chairman and Commissioners:

We write to you on behalf of several designated entity ("DE") clients (the "DE Commenters") to urge sua sponte action on the Commission's part to revise and clarify various aspects of the Commission's Second Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 05-211, released April 25, 2006 ("Second Report.")

**<u>The DE Commenters</u>**

The DE Commenters include: Aloha Partners, L.P. – the largest of the Commission's Lower Band 700 MHz licensees; Carroll Wireless, L.P. – an Auction No. 58 PCS licensee that holds sixteen (16) PCS licenses; CSM Wireless, LLC, and its affiliates – who are Auction No. 58 licensees who collectively hold eight (8) PCS licenses; Edge Mobile, LLC, and its affiliates – that collectively provide 3rd generation wireless services in a number of rural markets; Highland Cellular, Inc., and its affiliates – who hold multiple cellular, PCS and other licenses; and Milkyway Broadband, LLC, and its affiliates – which hold hundreds of MAS, 700 MHz, LMDS, paging and other DE licenses. All of the DE Commenters have paid for their licenses, in full and on time, as required by the Commission's rules. All would also be unfairly disadvantaged by retroactive application of the recently enacted rules.

## The Primary Concerns of the DE Commenters

The primary concerns of the DE Commenters are threefold: (1) retroactive application of the revised unjust enrichment and material relationship rules; (2) the unintended, but very real, burdens associated with new reporting obligations; and (3) the vagueness associated with various retroactively triggering mechanisms including assignments and transfers (are pro forma filings included?), and "resale/wholesale agreements" that arguably (do, but most certainly should not) include even non-exclusive agreements regarding spectrum use at a time when the licensee is providing facilities-based service.

## Retroactive Application of New Rules Should be Rescinded

Strong arguments can be made regarding the illegality of the retroactivity provided for the Second Report. The DE Commenters will save those for the legal challenges, if any, that may come in response to the Second Report.[1] Here, the DE Commenters focus only on public interest concerns. Chief among all auction-related needs is for the integrity of the auction process to be maintained. The announced retroactivity threatens that integrity. It does so by violating the bedrock principle that each party is entitled to receive what it bargained for at the auction. Just as the Commission is properly entitled to demand that auction winners comply with the payment terms they agreed to, so too are auction winners entitled to expect the sale conditions that the Commission had stipulated. Retroactivity threatens the Commission's compliance with its obligation to deliver by significantly altering the terms under which winning bidders purchased licenses. Many Venture Capital firms expect their investments to be repaid in 4-6 years. As a result, many DEs based their business plans on a sale of the licenses within 5 years. Had the DEs or their investors (either financial investors or carriers) known of the potential change in the rules, the DEs may have either bid less for the licenses or not bid at all. To set a precedent like this will also undermine bidder faith in future auctions, which will result in less revenues to the U.S. Treasury. For this reason alone, the retroactivity must be rescinded.

The retroactive application of rules governing the types of transactions that DEs can enter into is equally frustrating. As is the case with unjust enrichment obligations, DEs relied upon FCC rules governing these issues when they entered into financing and other arrangements, and when they decided how much to bid for specific licenses. It is not possible to change one element of the overall bidding plan without calling others into jeopardy. Nor does it make for sound policy to isolate DEs as the only sub-group of licensees who cannot take advantage of certain operational efficiencies that are open to all other licensees, and which the FCC has found generally to be in the public interest.

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[1] Many of the DE Commenters are likely to be parties to a legal challenge to the Second Report, if that becomes needed. Yet to be clear, their preferred strategy is for the Commission to obviate any need for such filings by taking corrective action sua sponte.

**Reporting Obligations**

The Second Report establishes a series of reporting requirements. Yet it does not clearly explain whether reporting is necessary when eligibility "might" be impacted (as per the Second Report) or when it "would" be impacted (as per the rules associated with the Second Report). The Commission should clarify that the "would" impact standard applies. It should also establish processes so that commerce does not grind to a halt whenever appropriate reports are submitted.

**Clarification is Needed on Several Issues Involving the Second Report and Order**

As discussed above, retroactive application of new rules involving reportable events is problematic on a number of fronts, and should be rescinded entirely. But if the Commission elects not to do that, the Commission should clarify several critical components of it. First, the Commission should clarify that pro forma transfers and assignments do not trigger retroactive application of the new rules. As the Commission has long recognized the vital differences between pro forma and other arrangements, there can be little question as to the appropriateness of this change. Second, with regard to resale/wholesale arrangements, the Commission should clarify that any non-exclusive arrangement, pursuant to which the licensee remains entitled to conduct facilities-based operations, does not constitute any type of impermissible or reportable arrangement. This clarification is needed both to bring the newly articulated restriction into sync with the Commission's objective in adopting it (i.e., to encourage facilities-based operations) and to avoid prohibiting DEs, and only DEs, from enjoying the option of entering into such competition-enhancing arrangements. To do otherwise would cause DEs to have cost structures that place them at a severe disadvantage compared to incumbent licensees. Lastly, the Commission should clarify its use of the term "agreements that form the basis" for certain arrangements so that, when the Commission has undertaken a review of core organizational documents prior to granting licenses, and those documents "form the basis for" relationships that later develop, it is the timing of execution of the core documents, not later ones, that matters.

The DE Commenters applaud the Commission for its desire to keep the DE program an honest one. The actions requested herein will further that goal, while also permitting the Commission's DE program to be the vibrant one that Congress demanded when it provided the Commission with auction authority.

Sincerely,

/s/

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