

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Implementation of the Commercial )  
Spectrum Enhancement Act and ) WT Docket No. 05-211  
Modernization of the Commission’s )  
Competitive Bidding Rules and )  
Procedures )

TO: The Commission

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits these comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> In the *Second Further Notice*, the Commission sought comment on a variety of measures to augment the effectiveness of its rules governing auction benefits, such as bidding credits, for small businesses and others qualifying as “designated entities” (“DEs”). In earlier related proceedings, the Commission had tentatively concluded that it should restrict the award of DE benefits to otherwise qualified DEs that have a “material relationship” with a “large in-region incumbent wireless service provider.” *Second Further Notice* at ¶ 2. The Commission had also previously requested comment on whether it should further restrict the award of DE benefits in cases where

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<sup>1</sup> NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

<sup>2</sup> *Second Further Notice of Proposed Rulemaking* in WT Docket No. 05-211, FCC 06-52 (rel. April 25, 2006) (“*Second Further Notice*”).

an otherwise qualified DE has a “material relationship” with a large entity that has a “significant interest in communications services,” including “voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers.” *Id.* at ¶¶ 14, 56. In this *Second Further Notice*, the Commission has now sought further guidance on whether it should restrict the award of DE benefits “under certain circumstances and in connection with relationships with certain entities.” *Id.* at ¶ 54.

NAB understands and supports the Commission’s interest in both facilitating the participation of small businesses in competitive bidding and ensuring that only legitimate small businesses obtain the benefits of the DE program. However, we continue to believe that the proposal to make a small business ineligible for DE benefits if it has a relationship to any large entity with an interest in the provision of any type of “communications services” appears unnecessarily broad. If adopted, this proposal could unduly hinder small businesses in obtaining investors and financing and impede their participation in spectrum auctions.

As a general matter, NAB observes that the Commission’s DE rules should be as narrow as possible while still fulfilling the goal of preventing abuse of the DE program. If the Commission were to adopt unnecessarily restrictive DE rules, small businesses would be more limited in their ability to raise capital and attract investors. As the Commission has previously documented, “access to capital” is a “primary market entry obstacle for small businesses.”<sup>3</sup> Small businesses, especially start-up companies, are unable to obtain financing through methods such as stock offerings, which are more readily available to larger, established companies. *Small*

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<sup>3</sup> Report, *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd 16802, 16824 (1997) (“*Small Business Report*”). See also *Second Further Notice* at ¶ 82 (FCC does “not want to create a situation in which” its DE rules “render a designated entity without any avenues for access to much needed capital”).

*Business Report*, 12 FCC Rcd at 16825-26. Consequently, start-ups and other small communications businesses must depend more on other sources of capital, such as personal financing and venture capital. *Id.*<sup>4</sup> Access to capital is even more crucial for small entities where, as currently required by the Communications Act, initial licenses are, in almost all cases, subject to competitive bidding. *See* 47 U.S.C. § 309(j).

In light of the serious difficulties that start-ups and other small businesses face in attracting capital sufficient to obtain licenses, finance their enterprises and succeed in the communications marketplace, the Commission's DE rules should not exacerbate these problems by inadvertently discouraging investment in small entities by established firms. Overly restrictive DE rules would also be contrary to congressional intent, which clearly favors the elimination of market entry barriers for small businesses and the participation of small entities in spectrum auctions.<sup>5</sup>

Moreover, the need for greatly more restrictive DE rules may be questioned. The Commission's existing rules, as recently amended, already provide significant safeguards to ensure that only legitimate small businesses receive DE benefits.<sup>6</sup> Last April, the Commission revised its DE eligibility rules to include certain relationships involving the lease or resale of spectrum capacity as factors in determining such eligibility, and modified its unjust enrichment

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<sup>4</sup> Small businesses with fewer assets and less leverage also often experience greater difficulties in securing bank loans than larger, established firms. *Small Business Report* at 16826.

<sup>5</sup> *See* 47 U.S.C. § 257 (FCC directed to conduct a proceeding to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the provision of telecommunications and information services); 47 U.S.C. § 309(j)(3)(B) (in statute granting auction authority, FCC directed to promote the dissemination of licenses among a wide variety of applicants, including small businesses).

<sup>6</sup> *See, e.g.*, 47 C.F.R. § 1.2110(b) (setting forth rules regarding attribution of gross revenues of an entity and its controlling interests and affiliates to determine whether that entity meets eligibility standards for DE benefits).

rules so as to better deter entities from circumventing the DE eligibility requirements.<sup>7</sup> Such changes should be sufficient to ensure that DE benefits are not abused.

However, the Commission's additional proposal for a much broader restriction on "material relationships" with small entities that would otherwise be eligible for DE benefits goes beyond necessary limits to prevent abuse and would discourage needed investment. NAB is also concerned that the Commission's focus on the "financial threshold" that should be considered "in defining the appropriate class of entity that would trigger" a DE "eligibility restriction" may be misplaced. *Second Further Notice* at ¶ 61 (inquiring as to the level of gross revenues that should be used to define the class of communications services providers restricted from forming relationships with DEs). It is not the mere size of the communications services provider that should be the primary focus of any additional DE restrictions – it should be whether there is some significant policy reason, such as an anti-competitive concern, for example, that this larger provider should not have a relationship with the entity seeking DE status. Indeed, looking at this issue in the context of incumbent wireless providers, Commissioner Adelstein earlier questioned this proposed broader restriction on "material relationships" with communication service providers, explaining that the "DE program . . . may be an appropriate opportunity for smaller wireless providers, with the backing of non-wireless companies, to build new networks to compete with large wireless incumbents."<sup>8</sup> But as set forth in the *Second Further Notice*, the proposal by its terms would prevent small wireless or other communications businesses with

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<sup>7</sup> See *Second Report and Order* in WT Docket No. 05-211, FCC 06-52 (rel. April 25, 2006), as clarified, *Order on Reconsideration of the Second Report and Order* in WT Docket No. 05-211, FCC 06-78 (rel. June 2, 2006).

<sup>8</sup> Statement of Commissioner Jonathan S. Adelstein, *Further Notice of Proposed Rulemaking* in WT Docket No. 05-211, 21 FCC Rcd 1753, 1773 (2006).

relationships with even geographically distant “media interests,” such as broadcasters, from qualifying for DE benefits. *See id.* at ¶ 56.

And certainly the further proposals (*id.* at ¶ 84) to define a disqualifying “material relationship” as “any relationship, financial and/or operational” between a DE applicant and another entity are overbroad, and would severely undermine the benefits of the DE program. NAB also observes that numerous types of agreements that apparently would be encompassed within such a definition of “material relationship” are entirely appropriate and routine business arrangements.<sup>9</sup> Such extraordinarily broad DE rules would not serve the public interest, and are not supported by concrete evidence of abuse by these other “media interests,” including broadcasters.

In sum, NAB urges the Commission to refrain from making start-ups and other small businesses ineligible to receive DE benefits simply because they have a relationship, such as an investment or similar passive financial arrangement, with an entity (perhaps an even geographically distant one) that has an interest in some (perhaps even unrelated) area of communications. The adoption of such an overly restrictive DE rule would exacerbate the access to capital problems routinely experienced by small businesses, and would discourage the “disseminati[on]” of “licenses” to “small businesses,” in contravention of clear congressional intent. 47 U.S.C. § 309(j)(3)(B). As discussed above, the Commission’s interest in preventing

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<sup>9</sup> For example, management agreements can be appropriate tools through which inexperienced licensees may take advantage of the expertise of experienced providers of communications services. Trademark licensing and joint marketing agreements, for instance, can provide much needed flexibility to DE licensees in forming their business arrangements and in determining the most efficient structure for them to provide their services to the public.

abuse of DE benefits in spectrum auctions can be achieved by the adoption of more narrow, targeted rules that directly serve an anti-competitive or other significant policy purpose.

Respectfully submitted,

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September 20, 2006