

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

September 20, 2006

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CTIA – The Wireless Association® (“CTIA”)¹ submits these comments in response to the FCC’s Second Further Notice of Proposed Rulemaking in the above-captioned proceeding (“*Second Further Notice*”).² In the *Second Further Notice*, the Commission seeks guidance on whether it should adopt additional safeguards to ensure that designated entity (“DE”) benefits are awarded to the entities and for the purposes intended by Congress.³ The Commission further requests comment on whether it should restrict the award of DE benefits to entities that have entered into arrangements with other third parties. CTIA believes that now is not the time for the FCC to consider additional changes.

I. INTRODUCTION AND SUMMARY.

While the FCC seeks comment on whether or not to adopt new rules, it very recently adopted a number of revisions to the existing rules. In April of this year, the FCC modified its

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. CTIA membership covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52 (Apr. 25, 2006) (“*2nd R&O*” or “*2nd FNPRM*”).

³ *Id.* at ¶ 54.

rules governing benefits reserved for DEs to include certain “material relationships” as factors in determining designated entity eligibility. In particular, the FCC prohibited the award of designated entity benefits to any applicant or licensee that has “impermissible material relationships” and required attribution, for qualification purposes, of “attributable material relationships” created by certain agreements with one or more other entities for the lease or resale of a DE’s spectrum capacity. Concurrent with this decision, the FCC sought comment on a variety of additional measures that it could take with respect to its DE program.

The FCC’s current DE rules adequately ensure that the recipients of DE benefits are limited to those entities and for those purposes Congress intended and that smaller and rural companies have access to spectrum. As such, the FCC should not consider additional changes at this time. For these reasons, CTIA opposes further modifications to the DE eligibility rules. In particular, CTIA opposes the proposal to broaden the definitions of “impermissible material relationship” and “attributable material relationship” and any proposals to discriminate between different types of companies. In addition, the Commission should reject Council Tree’s proposal to prohibit individuals with a net worth of \$3 million or more from having a controlling interest in a DE.

II. THE FCC’S PROPOSED LIMITATIONS ARE UNNECESSARY TO ENSURE SMALLER AND RURAL COMPANIES’ PARTICIPATION IN AUCTIONS.

As highlighted by the results of the recently-concluded Advanced Wireless Services Auction, small and rural companies have the ability to actively participate in auctions. For example, in Auction 66, 73 applicants self-identified as rural telephone companies and 100 applicants were granted DE status as small or very small businesses. Of those, 68 rural telephone company or small business entities were the high bidders for 247 licenses for a net bid amount of nearly \$562.4 million. In aggregate, those licenses cover approximately 185.7 million

POPs, including—as shown in Exhibit A—a large portion of rural America. Indeed, these numbers may, in fact, substantially understate the impact of rural telephone company participation because a number of small telephone cooperatives and companies did not identify themselves as such. Thus, the FCC’s current DE bidding credits and service rule decisions allow rural telephone companies and small companies to aggressively compete for licenses that are key to providing new “3G” and other services to rural areas and small markets. Moreover, they provide the FCC with the flexibility necessary to address various auction scenarios.

The Commission currently has procedures in place to ensure that DEs have access to spectrum. The Commission defines eligibility requirements for small businesses on a service-specific basis.⁴ This allows the Commission to take into account the capital requirements and other characteristics of each particular service, and adopt provisions that will encourage DE provision of that particular service.⁵

Based on the characteristics of the individual service, the FCC may utilize a combination of mechanisms to encourage participation by smaller and rural entities. For example, in the AWS band, the Commission utilized a combination including bidding credits, a range of geographic licensing areas, and a range of spectrum block sizes to promote DE participation. First, the FCC adopted a two-tiered bidding credit for small businesses. Here, the FCC defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.⁶ It provided small businesses

⁴ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245, ¶ 145 (1994).

⁵ *Id.*

⁶ *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, FCC 03-251, ¶149 (Nov. 25, 2003) (“AWS-1 Service Rules Order”).

with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.⁷ In addition, the FCC licensed the 1710-1755 MHz and 2110-2155 MHz bands using a range of geographic licensing areas, including large regional licensing areas, smaller licensing areas, and local licensing areas across multiple spectrum blocks.⁸ By adopting such varied geographic licensing areas, the Commission ensured that the available licenses would be disseminated among a wide variety of applicants.⁹

The Commission has repeatedly found that its DE procedures provide qualifying entities with an opportunity to compete successfully in auctions.¹⁰ Indeed, 76 percent of the winning bidders in the 34 auctions that have utilized small business bidding credits were small or very small businesses.¹¹ These mechanisms also proved extremely effective in promoting DE participation in the AWS auction. As an initial matter, 100 DEs were eligible to participate in Auction 66.¹² In addition, 98 of these DEs submitted at least one bid in the auction.¹³ Of these DE participants, 57 ultimately placed the highest winning bid for at least one license in Auction

⁷ *Id.*

⁸ *Id.* at ¶ 35.

⁹ *Id.*

¹⁰ *See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, ¶ 112 (1999); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, ¶ 178 (1997).

¹¹ *AWS-1 Service Rules Order* at ¶148. Given the timing of the recent auction, this percentage does not take into consideration the winning bidders in Auction 66. As discussed in detail below, however, DEs were also successful in Auction 66.

¹² *See Auction of Advanced Wireless Services Licenses, 168 Bidders Qualified to Participate in Auction No. 66, Information Disclosure Procedures Announced, Public Notice, DA 06-1525, Attachment A (July 28, 2006) (list of qualified bidders).*

¹³ *See Auction 66 bidding results at* http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66.

66. In other words, over half of the 104 winning bidders in the auction were DEs.¹⁴ Specifically, 19.8 percent of the AWS licenses were won by DEs, including 21.4 percent of the CMA licenses, 14.5 percent of the BEA licenses and 16.7 percent of the REA licenses. The success of DEs in Auction 66 clearly demonstrates that the FCC’s rules are effective at promoting small and rural entities’ access to spectrum.

III. THE COMMISSION SHOULD NOT FURTHER BROADEN THE DEFINITION OF IMPERMISSIBLE MATERIAL RELATIONSHIPS OR ATTRIBUTABLE MATERIAL RELATIONSHIPS OR CONDITION THE APPLICABILITY OF THESE DEFINITIONS ON OTHER FACTORS.

In the *Second Further Notice*, the Commission seeks comment on whether it should further broaden the definition of impermissible and attributable material relationships to include other types of agreements.¹⁵ In particular, the Commission requests insight into whether it should expand its definition of “impermissible material relationship” or “attributable material relationship” to include any financial relationship between a DE applicant or licensee and another entity that represents more than a certain percentage of the DE’s total financing.¹⁶ Similarly, the FCC asks if management agreements, trademark license agreements, joint marketing agreements, future interest agreements, and long-term *de facto* and spectrum manager leasing arrangements should be considered impermissible material relationships or attributable material relationships.¹⁷ In seeking comment on these issues, the Commission indicates that it believes prohibitions on these types of arrangements may be necessary to prevent “an ineligible

¹⁴ See Statement of Chairman Kevin J. Martin on Conclusion of Advanced Wireless Services Auction, News Release (Sept. 18, 2006) (“I am particularly pleased that more than half of the winning bidders were small businesses”).

¹⁵ 2nd FNPRM at ¶¶ 78-86.

¹⁶ *Id.* at ¶ 82.

¹⁷ *Id.* at ¶ 83.

entity [from]...gain[ing] undue advantages in the communications marketplace through the benefits offered to a designated entity applicant.”¹⁸

The FCC’s current DE rules are designed to protect against the fraud and abuse that the Commission seems concerned about here. The FCC’s rules prohibit DEs from entering into arrangements with third parties that convey the benefits of DE status on non-eligible entities and require DEs to reimburse the Commission, in full or in part, for any benefits received if the DE subsequently enters into such an arrangement during the ten years following grant of the license.¹⁹ Indeed, in April 2006, the FCC strengthened its unjust enrichment rules by, among other things, extending the period during which unjust enrichment would apply and requiring reporting of certain eligibility-changing events.²⁰ CTIA submits that further modification of the Commission’s DE rules is unnecessary unless and until there is evidence that the revised rules are ineffective at addressing the Commission’s concerns.

The present regulations strike a workable balance between regulatory oversight and ensuring participation of only legitimate DEs. Broadening the definition of “impermissible material relationship” and “attributable material relationship,” in contrast, goes beyond the Commission’s historic concerns regarding abuse of the DE process, and threatens to be unworkable. Expanding these concepts will lead to an amorphous test for DE eligibility and, by necessity, would lead to the Commission’s involvement in countless factual inquiries regarding contractual relationships.

¹⁸ *Id.* at ¶ 80.

¹⁹ See 47 C.F.R. § 1.2111(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”).

²⁰ See 2nd R&O at ¶¶ 37-38, 46-48.

The Commission’s current rules provide a definitive test as to what relationships are permissible. By broadening the definition, however, the Commission would have to review virtually every contract entered into by a DE to determine if it is a prohibited management contract or some other type of prohibited or attributable contract. This potential expansion also would create an overbroad and vague category of relationships that would be forbidden. Indeed, many agreements would be prohibited that are beneficial to DEs and designed to encourage a DE to become a facilities-based provider. By moving from a regime in which DEs have a clear understanding of what agreements are prohibited to one of uncertainty, this approach would stifle legitimate DEs’ ability to effectively and efficiently provide service. In addition, this approach would be extremely burdensome to the Commission. Accordingly, the Commission should not broaden the definition of either “impermissible material relationship” or “attributable material relationship.”

Finally, as discussed below, the Commission should not condition any broadening of these definitions on other factors—such as whether the third party with whom the DE has an agreement is an existing licensee of Commercial Mobile Radio Service (“CMRS”) spectrum. No evidence exists that CMRS providers are more likely than other classes of communications providers—or, indeed, any other class of companies generally—to exploit the DE rules to their benefit. In fact, the Commission has reviewed and approved multiple relationships between existing CMRS licensees and new DE licensees.²¹ Crafting rules that vary with respect to different classes of entities would place some entities at a significant disadvantage to others. The

²¹ See, e.g., Application of Vista PCS, LLC, File No. 0002069013 (filed Mar. 7, 2005) (granted Mar. 8, 2006) (disclosing Verizon Wireless’ 80 percent ownership interest in Vista PCS); Application of Edge Mobile, LLC, File No. 0002069630 (filed Mar. 7, 2005) (granted Nov. 4, 2005) (disclosing Cingular Wireless’ 85 percent ownership interest in Edge Mobile); Wireless Telecommunications Bureau Grants Broadband Personal Communications Services (PCS) License, Public Notice, DA 05-1696 (June 20, 2005) (granting Cook Inlet/Vs GSM VII PCS, LLC, in which T-Mobile USA has an ownership interest, license application).

Commission is not (and should not be) in the business of choosing winners and losers in this competitive communications market.

IV. IF THE COMMISSION DETERMINES THAT CHANGES TO THE RULES ARE NECESSARY, THE CHANGES SHOULD BE NON-DISCRIMINATORY.

As shown above, modifications to the Commission’s designated entity rules are not essential to ensure DE participation in auctions. However, should the Commission determine that changes are necessary to further the purposes of the DE program, it should not implement rules that unfairly discriminate against larger in-region carriers, nationwide wireless carriers, or any other class of carrier – including the small carriers who are the intended beneficiaries of the DE rules. The wireless communications market is vibrant and extremely competitive, and the Commission should not burden that market with regulations that could skew competition by artificially restricting mutually beneficial commercial agreements that are available to non-DE licensees. Specifically, the Commission should not limit the applicability of any partnering prohibitions to a specific category of companies and should not adopt an arbitrary “personal net worth” limitation as proposed by Council Tree.

A. The Commission Should Not Limit the Applicability of DE Partnering Prohibitions to a Specific Class of Companies.

As Chairman Martin noted in his statement accompanying the *Further Notice*,²² if the Commission decides to implement rules that prohibit DEs from partnering with a certain class of carriers or companies, it should not limit the applicability of those rules to large incumbent wireless carriers. Doing so would discriminate between entities with similar financial resources and expertise. In addition, as the Commission noted in the *Second Further Notice*, convergence

²² Statement of Chairman Kevin J. Martin, *Implementation of Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-52A2.pdf.

is driving many communications companies to offer a bundle of services, making distinctions between types of companies less meaningful over time.²³ Most important, there is no evidence of abuse of the DE rules by wireless carriers or any class of carriers, and the rough, inexact nationwide analysis of market concentration proffered by supporters of this limitation is insufficient to justify these proposals.

If the goal of the Commission is to eliminate large companies' access to bidding credits that were designed to assist smaller companies, limiting the applicability of partnering prohibitions to large wireless carriers would not effectively serve that goal. Indeed, the only impact that such a rule would have would be to discriminate against incumbent wireless carriers, while providing other similarly-situated large companies, like wireline, satellite, cable, and other large non-communications companies, an advantage in the form of partnering with companies with access to bidding credits. Similarly, adopting rules with a geographic element would only serve to discriminate against carriers with *any* presence (no matter how small) in a given area, which would be barred from partnering with DEs in that area. Again, this would not address the concerns regarding inappropriate access to DE benefits.

Finally, there also would be a discriminatory result if the Commission imposed these rules only on CMRS providers or another class of providers based on spectrum interest held, as proposed in the *Second Further Notice*.²⁴ Limiting the applicability of these rules based on spectrum interests would not be appropriately spectrum- or technology-neutral and could limit DEs' access to the very entities with the greatest expertise in designing, constructing, and operating wireless communications systems. Moreover, if there are concerns over undue

²³ 2nd FNPRM at ¶ 59.

²⁴ *Id.* at ¶ 62.

concentration in a specific geographic market, it makes little sense for the FCC to seek to address these concerns by imposing limits on the smallest of the new entrants in the market. Now that Auction 66 has been concluded, it is clear that the marketplace was able to rationally develop successful business plans and bidding strategies pursuant to the existing DE requirements. As such, calls for additional restrictions on DE partnering with certain wireless providers are seeking to resolve a problem that does not exist. The Commission should not implement these limitations on partnership, which will only serve to burden certain classes of carriers based on criteria that have no logical relation to avoiding alleged abuse of the DE program.

B. The Commission Should Not Adopt a “Personal Net Worth” Limitation.

The *Second Further Notice* requests comment on Council Tree’s proposal to prohibit individuals with a personal net worth of \$3 million or more from having a controlling interest in a DE. CTIA opposes this prohibition. As an initial matter, the proposal has no logical connection to the purpose behind the Commission’s inquiry here, which is to promote access to spectrum licenses by small businesses. Such a limitation eliminates those very individuals with the business acumen, knowledge, and experience to succeed in the highly competitive – and capital intensive – wireless world by restricting the entry of anyone who has previously commanded a successful enterprise, or who currently is operating a successful small wireless provider (as controlling an existing small wireless company alone may place an individual over the threshold). In addition, the proposal, by effectively requiring public disclosure of personal worth and income statements, would have a chilling effect on all participation, even those with a net worth under the limit. For the same reason as the Commission previously rejected personal net worth requirements, the Commission should not adopt a \$3 million limit—or any other

arbitrary prohibition—on an individual’s net worth.²⁵

V. CONCLUSION.

The Commission’s current DE and auction rules are sufficient to ensure both that DEs have the opportunity to effectively participate in spectrum auctions and that other non-DE parties cannot abuse the DE system. Therefore, the Commission should not adopt additional rules or expand the scope of existing rules, which could lead to confusion and further burdens on the industry and on the Commission’s resources. However, should the Commission determine that additional modifications to the DE rules are necessary, it should adopt rules that are non-discriminatory, it should eschew rules that favor one type of carrier over another, and it should not adopt a personal net worth test.

Respectfully submitted,

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²⁵ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 420-421, ¶¶ 28-30 (1994) (Commission acted to “eliminate the personal net worth limits...for all applicants, attributable investors, and affiliates” noting that even where individual investors may have a high net worth “the affiliation rules...will continue to apply and require that such an entity's assets and revenues be included in determining an applicant's size).

EXHIBIT A