**Case No. 08-2036**

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

COUNCIL TREE COMMUNICATIONS, INC.,
BETHEL NATIVE CORPORATION, AND THE
MINORITY MEDIA AND TELECOMMUNICATIONS
COUNCIL

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of Orders
of the Federal Communications Commission

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**MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE OF ANTARES HOLDING, LLC; ASIAN AMERICAN JUSTICE CENTER; BENTON FOUNDATION; FAITHFONE WIRELESS INC.; KINEX NETWORKING SOLUTIONS, INC.; MEDIA ALLIANCE; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL HISPANIC MEDIA COALITION; NATIONAL INDIAN TELECOMMUNICATIONS INSTITUTE; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.; OVTC, INC.; RAINBOW PUSH COALITION; WIREFREE PARTNERS, LLC; WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS; and XANADOO 700 MHz DE, LLC**

**IN SUPPORT OF PETITIONERS**

Pursuant to Rule 29.0 of the Circuit Rules for the United States Court of Appeals for the Third Circuit and Rule 29 of the Federal Rules of Appellate

Procedure, Asian American Justice Center ("AAJC"); Antares Holding, LLC ("Antares"); Benton Foundation ("Benton"); Faithfone Wireless Inc. ("Faithfone"); Kinex Networking Solutions, Inc. ("Kinex"); the Media Alliance; the National Association for the Advancement of Colored People ("NAACP"); the National Hispanic Media Coalition ("NHMC"); the National Indian Telecommunications Institute ("NITI"); the National Organization for Women Foundation ("NOW Foundation"); Office of Communication of the United Church of Christ, Inc. ("UCC"); OVTC, Inc. ("OVTC"); the Rainbow PUSH Coalition ("Rainbow PUSH"); Wirefree Partners, LLC ("Wirefree"); the Women's Institute for Freedom of the Press ("WIFP"); and Xanadoo 700 MHz DE, LLC ("Xanadoo") (collectively, the "DE and Public Interest Amici"), by and through their counsel, Jeneba Jalloh Ghatt of The Ghatt Law Group LLC, hereby move this Court to issue an order permitting these parties to file a Brief *Amici Curiae* in support of Petitioners Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council.

Amici Antares, Faithfone, Kinex, OVTC, Wirefree, and Xanadoo ("DE Amici") are companies that qualify as designated entities ("DEs") and participated in Federal Communications Commission ("FCC" or "Commission") auctions conducted prior to April 2006 and/or sought to obtain spectrum in FCC auctions initiated after April 2006, but were unable to do so because they 1) could not raise

sufficient capital or develop a viable pre-auction business plan; 2) applied to participate in a recent auction but did not complete the application process because they were not able to raise sufficient capital or develop a viable business plan; or 3) participated in a recent auction without successfully obtaining any licenses because they could not raise sufficient capital to compete.

Antares, as a result of the New DE Rules, participated unsuccessfully in Auction 66 and passed altogether on Auction 73. The owner of Antares had previously founded a successful DE, Northcoast Communications, LLC, that under the old DE rules won approximately $230 million of PCS licenses in Auction 11 and 35. Northcoast subsequently built out its markets and operated a new wireless business in three Ohio markets (Cleveland, Youngstown, and Canton), providing wireless service to approximately 80,000 subscribers.

Faithfone is a small business DE that filed an application to participate in Auction 73 with the objective of acquiring spectrum to deploy an innovative new service combining mobile telephony with faith and family content. Faithfone was not able to complete the application process for Auction 73.

Kinex is a small business DE that provides wireless and telecom services to business and residential customers. Kinex qualified as bidder in Auction 73, but was unsuccessful in obtaining any licenses.

OVTC is a minority-owned small business DE that filed an application to participate in Auction 66, but did not ultimately qualify to bid in that auction.

Wirefree is a small business DE that considered participating in both Auctions 66 and 73, but ultimately decided not to file an application in either one. Wirefree through its subsidiary, Wirefree Partners III, LLC had previously bid successfully for licenses in Auction 58, and has wireless licenses covering a population of 18 million in the U.S.

Xanadoo is a small business DE that filed an application and participated in Auction 73. Affiliates of Xanadoo (i) through the utilization of rights to licensed wireless frequencies in the 2.5 GHz frequency band, offer wireless broadband services to residential and business customers in Abilene, Lubbock and Wichita Falls, Texas; Lawton, Oklahoma; and Decatur and Springfield, Illinois; and (ii) are licensees of 700 MHz spectrum, originally acquired in FCC auctions, covering almost 156 million people in the U.S.

None of the DE Amici was able to participate fully and win licenses in either Auction 66 or 73 because none was able to raise sufficient capital to compete effectively due to the adverse impact of the changes in the DE rules adopted by the FCC in 2006. The changes served to substantially impair their business plans and/or access to investment capital.

Amici AAJC, Benton, Media Alliance, NAACP, NHMC, NITI, NOW Foundation, UCC, Rainbow PUSH, and WIFP (the "Public Interest Amici") are nationally renowned civil rights or public interest nonprofit organizations that collectively advocate on behalf of women, minorities and/or the public interest. The AAJC is a national nonprofit, nonpartisan organization whose goal is to advance the civil and human rights of Asian Americans. It works in conjunction with its Affiliates to provide legal public policy, advocacy, and community education on issues of discrimination that affect its constituents.

The mission of the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. Established in 1981, it is concerned with the use of communications media on democracy and the public interest.

The Media Alliance is a 32-year old media advocacy group that works for an accountable and accessible media system. Its mission is to promote excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

The NAACP is the country's oldest civil rights organization. Founded in 1909, the NAACP has state and local affiliates throughout the nation. Its core mission is to promote equality of rights, eradicate caste and racial prejudice among

citizens of the United States, and secure for African Americans and other minorities, increased opportunities in society.

The NHMC is a nonprofit media advocacy organization established in 1986 in Los Angeles, California. The organization now has several chapters in California and in other states: New York, Illinois, Arizona, Georgia and Michigan. NHMC's goals include advocacy for media and telecommunications policies that benefit the Latino community and increase opportunities for American Latinos in all facets of the media industry.

The NITI is a nonprofit organization which was founded by and is still operated by Native Americans. NITI is dedicated to opening channels for American Indians, Native Hawaiians, and Alaskan Native communities to present their own literary, artistic and educational contents in the media.

The NOW Foundation is the advocacy, education and litigation arm of NOW, the nation's largest feminist activist organization, devoted to empowering women and furthering women's rights and opportunities.

The UCC has been at the forefront of media access issues for more than 40 years. During the civil rights era, it was the first voice to demand that those holding FCC licenses and authorizations act on behalf of the public interest and be held accountable as stewards of the public trust. The UCC works to assure a just

and equitable media that gives meaningful voice to diverse people, cultures and ideas.

Rainbow PUSH is a progressive advocacy group that works to ensure workers, women and people of color have access to opportunities. The organization seeks to achieve social justice, protect civil rights and promote political activism among its constituent groups. Rainbow PUSH has been at the forefront of communications policy for decades and has been the lead party in various landmark decisions in communications law history.

Finally, the WIFP was established in 1972 as a research, education and publishing organization. It seeks to increase the role of women in the media by expanding freedom of the press, to enable all of society to have equal opportunities to present their views and concerns through a democratic process.

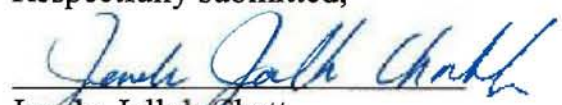
Each of the Public Interest Amici has a mission that includes advocacy to ensure that underrepresented groups have equal access to opportunities in the communications and media industries. These organizations have been and remain deeply concerned that the changes in the DE rules, in direct contravention of the intent of Congress in mandating DE benefits, have made it *more* difficult for small businesses, particularly those owned by women and minorities, to secure access to spectrum and compete in the wireless marketplace, and that, also contrary to law, these rule changes have helped accelerate the consolidation of public spectrum into

the hands of large incumbent entities rather than promoting new entry and competition.

As DE applicants or potential DE applicants to participate in FCC spectrum auctions, the DE Amici have a unique and important perspective to offer the court on the matters before it. Petitioners are not alone in suffering severe harm as a result of the changes in the DE rules that the FCC hastily adopted in April 2006. The DE Amici are entities whose business plans were derailed, and who are suffering damage on an ongoing basis, as a direct result of the FCC's improper and improvident actions. The Public Interest Amici are all groups dedicated to the protection and advancement of both competition and the rights of minority- and women-owned and other small businesses who have joined with the DE Amici in the Brief because of the importance of legally sound DE rules in promoting these public interest goals in the telecommunications marketplace. The participation of the DE and Public Interest Amici in this proceeding will therefore provide the court with critical insight concerning the scope of the problems caused by the FCC's rule changes, their significance to an entire class of potential wireless service competitors, and the continuing harm visited not only on them but on the public-at-large from the ongoing application of these defective rules to the FCC's competitive bidding scheme.

Accordingly, DE and Public Interest Amici hereby respectfully move this Court for leave to file their Brief as friends of the Court in favor of Petitioners.

Respectfully submitted,



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August 15, 2008

## Certificate of Service

I certify that on August 15, 2008, I served one copy of the foregoing Motion for Leave to File Brief of Amici Curiae via overnight courier and via electronic mail to the parties listed below:

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**IN SUPPORT OF PETITIONERS**

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August 15, 2008

Rule 26.1 Corporate Disclosure Statements

Pursuant to the Third Circuit Local Appellate Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Amici, by and through counsel, Jeneba Jalloh Ghatt, hereby certify that:

Asian American Justice Center, Benton Foundation, Media Alliance, National Association for the Advancement of Colored People, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Organization for Women Foundation, Office of Communication of the United Church of Christ, Inc., Rainbow PUSH Coalition, and Women's Institute for Freedom of the Press, collectively called Public Interest Amici, are tax-exempt nonprofit organizations. None of the Public Interest Amici has any corporate parent. None of the Public Interest Amici has any stock and therefore no publicly held company owns 10% or more of the stock of any of the Public Interest Amici.

Antares Holding, LLC, Faithfone Wireless, Inc., Kinex Networking Solutions, Inc., OVTC, Inc., and Wirefree Partners, LLC do not have a parent company, nor are they public corporations, and thus no publicly held company owns 10% or more of stock in them.

Xanadoo 700 MHz DE, LLC is a 100% wholly owned, indirect subsidiary of Xanadoo Company, which is a publicly held company.

Jeneba Jalloh Ghatt

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**IN SUPPORT OF PETITIONERS**

## I. Introduction and Background.

The United States Congress has made it explicitly clear that valuable communications spectrum licenses should be owned by a variety of Americans.

Specifically, Section 309(j) of the Communications Act of 1934, as amended, commands the Federal Communications Commission (the "FCC" or the "Commission"), when awarding spectrum licenses through competitive bidding, to

> promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[1]

In response to this 1993 Congressional directive, the FCC has, over the years, implemented rules and initiatives to promote robust participation in spectrum auctions by small businesses, rural telephone companies, and minority- and women-owned businesses – known collectively as designated entities (or "DEs"). These adopted initiatives (the "DE Program") reflect the Commission's recognition that, "although auctions have many beneficial aspects, *they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women* by raising the cost of entry into spectrum-based services."[2] Bidding credits are an essential part of the DE Program, and "function as a

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[1] 47 U.S.C. § 309(j)(3)(B).

[2] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 F.C.C.R. 5532, 5537 (¶10) (1994) ("*Fifth R&O*") (emphasis added). The Commission also recognized that it must "take the steps that are necessary to *ensure that designated entities have a realistic opportunity* to obtain [spectrum] licenses." *Id.*, (¶9) (emphasis added).

discount on the bid price a [DE] firm will actually have to pay to obtain a license."[3] Bidding credits were expressly intended to compensate for DEs' historical lack of access to capital – the "primary impediment to [auction] participation by designated entities."[4]

The DE Program worked successfully for a number of years to increase inclusion of women- and minority-owned businesses, which had been blocked from competitive participation. However, over the years, based on various challenges and reviews, the FCC abandoned various parts of the DE Program to the extent that, by 2006, bidding credits were the *sole means* by which the Commission complied with its statutory mandate.

In 2006, merely weeks before one of the largest, most important auctions of public spectrum in history was scheduled to begin, without Congressional approval, advance notice, or appropriate deliberation, the FCC effectively dismantled this last element of the DE Program. It did so by abruptly making several changes in its DE rules that were manifestly inimical to the interests of DEs (the "New DE Rules").

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[3] *Id.*, 5590 (¶132).

[4] *Id.*, 5537 (¶10). Bidding credits also "promote economic opportunity and . . . counterbalance the tendency of auctions to concentrate license ownership in the hands of several very large companies." *Id.*, 5539 (¶15).

The devastating effects of the New DE Rules were immediately seen in the very first auction after their adoption, Auction 66. DEs are frequently underrepresented telecommunications businesses such as those owned by women and minorities.[5] Instead of making it easier for these groups to compete and be represented as mandated by Congress, the New DE rules did the exact opposite. DEs found themselves unable to retain or arrange financing to bid on Auction 66 licenses that would allow them to compete with entrenched, incumbent providers.[6] Accordingly, with DE participants hobbled, the large incumbents were enabled to consolidate their hold on spectrum and the wireless industry.[7] The damage from

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[5] SJA 409-11, 557.

[6] Certain DEs (rural telephone companies) were ultimately able to obtain small slices of spectrum to cover their existing geographic service areas. Largely shut out were those DEs that sought to pursue a different business model, provision of new services in non-rural, urban markets on a local, regional or nationwide basis to compete with the major incumbent wireless carriers. For this reason, FCC references to the total number of licenses obtained by DEs in auctions since adoption of the New DE Rules obscure the abysmal performance by DEs, including minority- and women-owned DEs, seeking to provide new competition to incumbents in areas of high demand. *Compare Statement by FCC Chairman Kevin J. Martin*, FCC News Release (Mar. 20, 2008) (lauding the success of "small businesses" in Auction 73) *with Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction*, FCC News Release (Mar. 20, 2008) ("*Adelstein Release*") (decrying that minority- and women-owned bidders *together* won less than one percent of Auction 73 licenses).

[7] *See Petitioners' Reply Brief*, 16-21 (No. 06-2943); *see also FCC Spectrum Auction Ends on $13.7 Billion High Note*, RCR Wireless News, Sept. 18, 2006, *available at* http://www.rcrnews.com/apps/pbcs.dll/article?AID=/20060918/SUB/

the auction only deepened with the very next major auction, Auction 73.[8] Under the New DE rules, that auction too resulted in huge blocks of valuable and important spectrum, considered "beachfront property," being "sold" carte blanche to the large incumbent wireless carriers. Indeed, DE participation in spectrum auctions, measured by net value of licenses won, plummeted from an average of more than 70% in six major commercial mobile radio service auctions from 1996 to 2005, to 4.0% in Auction 66, and 2.6% in Auction 73.[9] Reviewing the abysmal results of Auction 73, Commissioner Adelstein noted that "women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%)."[10] This result is inexcusable considering

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609180768 (citing SprintNextel and T-Mobile's spectrum gains in Auction 66) (last visited Aug. 13, 2008).

[8] *See, e.g., Verizon and AT&T Dominate Airwaves Auction*, Reuters Business News, Mar. 20, 2008, *available at* http://www.reuters.com/article/technologyNews/idUSN20420234200803 21?feedType=RSS&feedName=technologyNews (stating that Verizon and AT&T "grabbed the lion's share" of the 700 MHz licenses) (last visited Aug. 13, 2008).

[9] *See Petitioners' Supplemental Appendix III*, Tab 1, Exhibits B and E (No. 08-2036).

[10] *Adelstein Release*, *supra* note 6.

"that women constitute over half the U.S. population and minorities around one-third of the U.S. population."[11] Commissioner Adelstein lamented that:

> It's appalling that women and minorities were virtually shut out of this monumental auction. It's an outrage that we've failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse. This gives whole new meaning to "white spaces" in the spectrum.[12]

Amici also take particular exception to the process by which the New DE Rules were adopted – without warning and without proper notice and comment, in violation of the Administrative Procedure Act.[13] Amici support Council Tree, *et al.* in asking the Court to overturn the Commission's unlawful actions, along with the results of auctions carried out under these deeply flawed rules.

## II. Statement of Interest.

Amici consist of two groups, both of whose interests are set forth in their Motion for Leave to Participate as Amici Curiae, in Support of Petitioners, and both of whom have been directly and adversely impacted by the unlawful New DE

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[11] *Id.; see also* SJA 461 ("auctions continue to disserve minority communities by excluding minority-owned businesses from owning needed licenses; wireless services in minority communications lag behind accordingly.").

[12] *Adelstein Release.*

[13] *See* 5 U.S.C. §§ 553(b) and (c). Here, the Commission supplied *no* notice and accepted *no* comment on the rules that ultimately became the New DE Rules.

Rules. The first group of amici is comprised of DEs which desire to participate in spectrum auctions as Congress intended – as vital players contributing to wireless competition and the dissemination of licenses to a wide variety of applicants ("DE Amici"). DE Amici share a common plight, representative of DEs broadly, in that the New DE Rules critically impaired their business plans and access to capital, in turn leading to their ultimate failure to participate successfully in at least two major spectrum auctions. Although many DEs objected to the New DE Rules before the FCC, and were immediately harmed by the application of these rules to Auction 66, several factors limited their ability to seek judicial review. As a fundamental matter, petitioning for review of agency orders in a federal court appeal is cost prohibitive for most DEs. In addition, the parallel timing of the first case (Case No. 06-2943) to Auction 66 was problematic. Under Section 1.2105(c) of the FCC's rules, all entities that filed a short-form application (Form 175) were subject to the anti-collusion rules, whether they ultimately qualified to bid or later withdrew. 47 C.F.R. § 1.2105(c). In each auction, the rule applies from the date the Form 175 is filed until the post-auction down payments are made. *Id.* § 1.2105(c)(1). Although the anti-collusion rules apply principally to discussions of bidding strategy or settlement negotiations, *id.*, DEs were extremely

concerned throughout the period from June 19, 2006[14] through October 4, 2006[15] about any communications with other wireless providers, desiring to avoid any appearance of impropriety that might risk adverse FCC action.[16] This period covered the entire window during which the original Third Circuit litigation was initiated and principal briefs were filed.[17] Accordingly, these DEs' participation herein at this time helps confirm the harm suffered by DEs generally.

The DE Amici include: Antares Holding, LLC, Faithfone Wireless Inc.; Kinex Networking Solutions, Inc.; OVTC, Inc.; Wirefree Partners, LLC ("Wirefree"); and Xanadoo 700 MHz DE, LLC.

The second group of amici includes civil rights, public interest, and minority and women's groups ("Public Interest Amici"), which support the use of public airwaves in a manner that encourages participation from groups traditionally

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[14] *See Auction of Advanced Wireless Services Licenses Rescheduled For August 9, 2006*, Public Notice, 21 F.C.C.R. 5598 (2006) (commencing application of the anti-collusion rules to Auction 66).

[15] *See Auction of Advanced Wireless Services Licenses Closes*, Public Notice, 21 F.C.C.R. 10521 (2006) (stating that applicability of the anti-collusion rules to Auction 66 continued through October 4, 2006).

[16] The FCC has vigorously enforced the rules, and imposed severe penalties against those found to violate them. *See, e.g.*, *Star Wireless, LLC v. FCC*, 522 F.3d 469, 476 (D.C. Cir. 2008) (affirming $75,000 in forfeitures for activity deemed to violate the anti-collusion rules).

[17] Petitioners Council Tree, *et al.* filed their *Petition for Review* on June 7, 2006, and their *Brief* on September 6, 2006.

locked out from owning a share of wireless spectrum, a public asset. The Public Interest Amici include the Asian American Justice Center ("AAJC"); Benton Foundation ("Benton"); Media Alliance; National Association for the Advancement of Colored People ("NAACP"); National Hispanic Media Coalition ("NHMC"); National Indian Telecommunications Institute ("NITI"); National Organization for Women Foundation ("NOW Foundation"); Office of Communication of the United Church of Christ, Inc. ("UCC"); Rainbow PUSH Coalition ("Rainbow PUSH"); and Women's Institute for Freedom of the Press ("WIFP").

AAJC is a national nonprofit, nonpartisan organization whose goal is to advance the civil and human rights of Asian Americans. It works in conjunction with its affiliates to provide legal public policy, advocacy, and community education on issues of discrimination that affect its constituents.

The mission of the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. Established in 1981, it is concerned with the use of communications media on democracy and the public interest.

Media Alliance is a 32-year old media advocacy group that works for an accountable and accessible media system. Its mission is to promote excellence,

ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

NAACP is the country's oldest civil rights organization. Founded in 1909, its core mission is to promote equality of rights, eradicate caste and racial prejudice among citizens of the United States, and secure for African Americans and other minorities increased opportunities in society.

NHMC is a media advocacy organization established in 1986. Its goals include advocacy for media and telecommunications policies that benefit the Latino community and increase opportunities for American Latinos in all facets of the media industry.

NITI is founded and operated by Native Americans. NITI is dedicated to opening channels for American Indians, Native Hawaiians, and Alaskan Native communities to present their own literary, artistic and educational contents in the media.

The NOW Foundation is the advocacy, education and litigation arm of NOW, the nation's largest feminist activist organization, devoted to empowering women and furthering women's rights and opportunities.

The UCC has been at the forefront of media access issues for more than 40 years. It works to assure a just and equitable media that gives meaningful voice to diverse peoples, cultures and ideas.

Rainbow PUSH is a progressive advocacy group that works to ensure workers, women and people of color have access to opportunities. It also pursues social justice, civil rights and political activism among its constituent groups.

WIFP was established in 1972 as a research, education and publishing organization. It seeks to increase the role of women in the media by expanding freedom of the press, to enable all of society to have equal opportunities to present their views and concerns through a democratic process.

The Public Interest Amici offer their unique views on the impact of the New DE Rules, which is so essential to the small business, minority and women constituencies they serve. Both DE and Public Interest Amici collectively encourage invalidation of the unlawful New DE Rules and the tainted auctions conducted under them.

## III. Argument.

### A. The New DE Rules Not Only Failed to Promote DEs, They Affirmatively Harmed DEs.

DEs have operated for years under a working business model that has evolved over time with the encouragement of the FCC. Unfortunately, the New DE Rules disrupted two critical components of that model: (1) the ability of DEs to lease, resell, and wholesale spectrum acquired from an auction; and (2) the option to offer investors a realistic and reasonable "exit strategy."

1. Leasing and Resale. DEs need considerable business plan flexibility in order to compete with incumbents that have extensive existing facilities and are able to benefit from economies of scale. For example, in order to build early revenue growth and facilitate access to financing capital, a facilities-based DE may need to wholesale sizable amounts of spectrum capacity to "anchor tenants," retail companies who need spectrum to compete effectively against the largest incumbents. DEs benefit from this "rental income" arrangement to help augment early revenue streams and finance network buildouts, in turn positioning DEs to utilize or market remaining spectrum as they see fit. Without a dependable income stream from such industry-standard arrangements, most DEs face massive barriers in attempting to compete directly against incumbent providers.

2. Clear Investor Exit Strategy. As Congress and the Commission have long recognized, lack of access to investment capital has traditionally hampered DEs, which thrive only when they are able to attract sufficient funding.[18]

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[18] *See, e.g.*, *Fifth R&O*, *supra* note 2, 5573 (¶97) ("Congress was well aware of the difficulties [DEs] encounter in accessing capital."). Congress also stated:

> [W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to

Given the dynamism and rapid technological evolution that characterize the wireless industry, investors demand rapid development of spectrum, coupled with a reasonable exit strategy to be employed in the event that business performance fails to meet reasonable projections, or to allow investors to reasonably capitalize on their successes. DEs necessarily craft their business plans to accommodate the reasonable entrances and exits of investors.

Given these fundamental realities for DEs, it is difficult to envision enactment of rules *more* harmful to DEs than the New DE Rules. Specifically, the two most harmful New DE Rules require:

1. A Large Percentage of Retail Sales by DEs from the Outset. The first New DE Rule jeopardizes through FCC attribution principles the bidding credit of a DE that leases, resells, or wholesales more than 25% of the spectrum capacity won at auction to any one entity, and eliminates the credit altogether for such leasing, reselling, or wholesaling of more than 50% of such capacity in the aggregate. 47 C.F.R. § 1.2110(b)(3)(iv). In effect, it requires a DE to use at least

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> be extremely underrepresented in the telecommunications field.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Cardiss L. Collins, sponsor of Section 257). *See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Third Report and Order, 9 F.C.C.R. 2941, 2942 (¶82) (1994) ("In particular, [minorities and women] have an especially difficult time assessing capital and, as a result, are severely underrepresented in the telecommunications industry.").

50% of its spectrum capacity to provide *retail* service directly to the public. This restriction severely inhibits DE business plans, because it removes often vital flexibility for DEs to offer substantial portions of their spectrum to already established retail companies that are themselves seeking to acquire access to spectrum capacity to augment their own, separate retail service offerings.[19] The end result of the Lease/Resale Restriction is even less competition and competitors in the wireless marketplace.

2. Mandated License "Holds." A second New DE Rule *doubles*, from 5 to 10 years, the period during which a DE must hold a license won with a bidding credit, or repay to the government all or a portion of its credit, plus interest. 47 C.F.R. § 1.2111(d). To many investors, this Ten-Year Hold Rule is an investment eternity, especially given the rapidly evolving telecommunications market and variable uses for wireless spectrum. The Ten-Year Hold Rule is, in short, an investment "non-starter" – a major obstacle to securing the venture or private equity capital that Congress and the Commission have recognized as so vital to DE participation.[20]

DEs' ability to attract financing on the basis of bidding credits precipitously collapsed in the face of the Lease/Resale Restriction and the Ten-Year Hold Rule.

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[19] *See, e.g.*, SJA 951-54; *see also Petitioners' Brief* 37-39.

[20] JA 1243, 1267-68, 1305-06, 1363-66, 1431, 1441-42, 1527, 1535; SJA 91-92.

With their access to investment capital severely restricted, many DEs were incapacitated as viable competitors, or precluded from even participating, in Auction 66 and the auctions that followed. Incumbents, large and small, found themselves in the enviable position of bidding without the DE competition envisioned by Congress. So long as the New DE Rules remain in effect, DE participation in spectrum auctions will remain anemic, in sharp contrast to the robust involvement of DEs envisioned by Section 309(j), and to the high level of DE participation that existed prior to the sudden and ill-considered adoption of the New DE Rules.

One DE, for example, that has been effectively precluded from participating in spectrum auctions because of the new rule change is Wirefree. Over the past decade, Wirefree's principals participated in five FCC spectrum auctions, each time as a very small business DE. Most recently, in 2005, Wirefree, through its subsidiary Wirefree Partners III, LLC, successfully bid in Auction 58, the most significant auction held prior to the FCC's change to the DE rules. It won 16 wireless licenses for which it paid $150 million. Significantly, Wirefree's business model and its ability to raise capital to participate in that auction were dependent on three important factors: (1) flexibility in the FCC's rules that allowed Wirefree to lease 50% of its spectrum capacity to a single third party; (2) ability to rely on an unjust enrichment repayment schedule commensurate with reasonable investor

expectations, effectively requiring a 5 year, not 10 year, license hold; and (3) FCC rules established sufficiently far in advance of an auction to permit it to raise necessary capital. Because the New DE Rules severely restrict leasing and wholesaling and impose longer license hold times, they have prevented Wirefree from participating in any further auctions. The short time frame between enactment of the DE changes and Auction 66 also contributed to Wirefree's decision not to participate. But even if the company did have more time, the New DE Rules made it impossible to raise the capital required to participate or to run a successful wireless company.

This virtual lock-out of companies like Wirefree will continue so long as these rules remain in effect. Ownership will remain consolidated among the traditional large wireless incumbents, and the status quo will continue, notwithstanding Congressional intent to the contrary.

**B. The New DE Rules Effectively Nullify Section 309(j) of the Communications Act.**

While Congress, in seeking to further DE participation, did "not mandate the use of any particular procedure. . . it specifically approve[d] the use of 'tax certificates, bidding preferences, and other procedures.'"[21]

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[21] *Fifth R&O*, 5571 (¶93) (quoting 47 U.S.C. § 309(j)(4)(D)).

Over time, a confluence of factors narrowed the DE Program's focus from minority- and women-owned businesses to small businesses, as well as rural telephone companies. Court cases subsequent to enactment of Section 309(j) established that federal programs that make distinctions based on race "must be analyzed . . . under strict scrutiny,"[22] and that "gender-based classifications in government programs must be justified by an 'exceedingly persuasive justification.'"[23] The Commission interpreted these decisions to "require[] that [it] reevaluate [its] method for accomplishing th[e] compelling objective" of "ensuring broad participation [in auctions] by minority- and women-owned businesses."[24] While stressing its continuing commitment "to the mandates and objectives"[25] of Section 309(j), the FCC concluded that, in light of these rulings, it was now compelled to implement Congress's objectives through race- and gender-neutral measures. In short, the FCC sought, post-*Adarand*, to honor the commands of

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[22] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

[23] *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 670 (D.C. Cir. 2003), (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

[24] *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Further Notice of Proposed Rulemaking, 10 F.C.C.R. 11872, 11877 (¶7) (1995).

[25] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Report and Order, 11 F.C.C.R. 136, 140 (¶5) (1995).

Section 309(j), including its imperative to support minority- and women-owned businesses, but through race- and gender- neutral programs.[26]

The Commission's solution was to restructure its DE rules to focus exclusively on small businesses, "because we have evidence which supports a conclusion that many designated entities, including minority and women-owned businesses would qualify as small businesses." These revised rules did not "target minorities and women, [but] because a large number of minority- or women-owned businesses are small businesses, [the] new rules . . . nonetheless afford[ed] designated entities opportunities to participate in the . . . auction[s]."[27]

As it adjusted its new rules to focus exclusively on small businesses, the Commission also gradually narrowed the mechanisms by which it would satisfy

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[26] In adopting its first post-*Adarand* DE rules, the FCC expressly acknowledged that Congress "mandated that small businesses, rural telephone companies, *and businesses owned by members of minority groups and women* . . . be ensured the opportunity to participate in the provision of such services." *Id.*, 138 (¶2) (emphasis added). Significantly, it indicated that "elimination of the race-and gender-based measures . . . would be consistent with our duty to implement the Budget Act, *since we believe that many designated entities would qualify as small businesses under our rules*." *Id.*, 141 (¶8) (emphasis added).

[27] *Id.*, 159 (¶42). In 2003, the FCC reaffirmed its belief, after extensive notice and comment for Auction 66, that the focus on then-current small business bidding credit incentives and five-year unjust enrichment provisions was acceptable for DEs and consistent with the congressional mandate of 309(j). *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 F.C.C.R. 25162, 25220 (¶149) (2003) *affirmed*, Order on Reconsideration, 20 F.C.C.R. 14058 (2005).

the Congressional mandate of supporting small businesses to one: bidding credits.[28] The Commission's adoption of the New DE Rules gutted even this last remaining DE benefit.

The FCC may not take actions that harm the DE Program mandated by Section 309(j) and *is also bound to honor Congress's Section 309(j) directive to ensure meaningful opportunities for women and minorities*,[29] which, post-*Adarand*, currently entails race- and gender- neutral measures. Congress's objectives "of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, *including small businesses*,"[30] remain intact, and the FCC is bound by law to "carry out Congress's directive to provide meaningful opportunities for small

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[28] Other alternatives, such as "closed auctions" for certain spectrum, installment payments, and tax certificates, were either not utilized, or tried but ultimately abandoned. *See Petitioners' Brief* 7.

[29] *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-21 (3d. Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) (emphasizing the FCC's longstanding obligations to promote minority ownership and to comply with 47 U.S.C. § 151). Congress has never amended Section 309(j). To the extent that the Congressional mandate encouraging participation in spectrum auctions by members of minority groups and women remains, Public Interest Amici note that at least *some* benefit engendered by the small business bidding credits inured to businesses owned by minorities and women. With adoption of the New DE Rules, even the limited benefits that flowed to minority- and women- owned businesses through auction bid credits have now dried up.

[30] *Fifth R&O*, 5572 (¶96) (emphasis added).

entities."[31] In 1996, the D.C. Circuit acknowledged the FCC's response to *Adarand* by upholding the FCC's modification of its DE rules to accommodate the Supreme Court decision in light of the Commission's 309(j)(4)(D) obligation.[32] The FCC is also required to continually evaluate its auction rules and results to ascertain their impact on DE involvement, and to adjust those rules to meet statutory mandates "in light of actual experience."[33] The Commission argues that *Telocator* and similar cases support the abrupt policy reversals represented by its

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[31] *Id.*, 5579 (¶110).

[32] *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 633-34 (D.C. Cir. 1996) ("The Commission complied with § 309(j)(4)(D) by considering the use of tax certificates, bidding credits and other procedures for the C block auction…[and] the modified rules will incidentally benefit businesses owned by women and minorities as many such businesses will qualify as small businesses.") (internal citations omitted).

[33] *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) (Commission has "duty to fine tune its regulatory approach as more information becomes available"); *see also Nat'l Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 203 (D.C. Cir. 1969) ("when the premises of [the FCC's] regulatory approach change, the Commission can and should consider the issues involved"). Here, the FCC failed to evaluate the impact of the New DE Rules on all classes of DEs (especially new entrants, minorities and women) *before* adoption, when it ignored the Administrative Procedure Act (and the Regulatory Flexibility Act) and provided no opportunity for DEs to comment. *See, e.g., Pillai v. CAB*, 485 F.2d 1018, 1027 n.27 (D.C. Cir. 1973) (agencies, like trial judges, "must necessarily *have been aware of the options* . . . open . . . and have *knowingly* made a selection of the . . . alternatives in relation to the facts of the particular case") (emphasis added). Then, it failed to evaluate such impact *after* adoption, when it blithely ignored the precipitous decline in DE participation in Auction 66. *See, e.g., American Airlines v. Civil Aeronautics Bd.*, 359 F.2d 624, 633 (D.C. Cir. 1966) ("it is the obligation of an agency to make re-examinations and adjustments [to policies] in light of experience").

New DE Rules. But nothing in the administrative record on which the Commission based those changes supports the notion that there were problems that the Lease/Resale Restriction and Ten-Year Hold Rule needed to "solve."[34] In fact, Intervenor T-Mobile admitted that there was no "documented abuse" of the DE Program as it existed prior to the Commission's sudden adoption of the New DE Rules.[35]

The combination of the Lease/Resale Restriction and the Ten-Year Hold Rule has abruptly destabilized the very business model favored by DEs, and, consequently, strangled their access to sustaining capital. As a result, the wireless industry has moved farther down the path of consolidated ownership among a few large entities in a marketplace that now, for all intents and purposes, excludes diverse owners and participants. The New DE Rules run directly and unambiguously contrary to Congress's unmistakable intent that the FCC devise spectrum auctions in a way that encourages involvement of DEs, *including small businesses*.[36] The rules are therefore contrary to law.[37]

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[34] *See Petitioners' Supplemental Brief* 13 n.23 (No. 08-2036).

[35] *See* JA 695.

[36] *See* 47 U.S.C. § 309(j)(3)(B).

[37] Despite compelling evidence of the negative impact of the New DE Rules on DEs, and especially women- and minority-owned businesses, the Commission has stubbornly pressed forward, plowing through to completion four wireless auctions since Auction 66. At each step, it has failed to objectively review the

Further, with adoption of the New DE Rules, the FCC relegated DEs to the sidelines of spectrum auctions, boosting the concentration of entrenched incumbents large and small, while thwarting Congress' call for robust competition and diversity in spectrum auctions. In short, the New DE Rules turned Section 309(j) on its head, and must be vacated.

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administrative record compiled in this proceeding, so as to gauge the significant economic impact of its rules on all DEs, especially new entrants, women- and minority-owned DEs. Absent this Court's curative action, and with auctions ongoing, *e.g.*, Auction 78 which commenced on August 13, 2008, there is little doubt that such auctions, too, will continue to be conducted unlawfully.

## IV. Conclusion

For all of these reasons, Amici strongly urge the Court to grant, on an expedited basis, all of the relief sought by Petitioners in this case.

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August 15, 2008

**Certificate of Bar Membership**

I, Jeneba Jalloh Ghatt, counsel of record, respectfully certify pursuant to Third Circuit Rules 28.3(d) and 46.1(e), that I am a member of the bar of this Court.

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**Certificate of Compliance with Rule 32(A)(7)**

I hereby certify that (1) this Brief of Amici Curiae complies with the type-volume limitation under Fed. R. App. P. 29(d) which restricts Amicus Curiae Briefs to no more than one-half of the principal brief, and the July 2, 2008 Court Order (No. 08-2036) limiting the principal brief to 10,000 words, because it contains 4,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this Brief of Amici Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared using Microsoft Word 2003 in a proportionally spaced 14-point Times New Roman typeface.

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Pursuant to Local Appellate Rule 31.1, I hereby certify that the PDF of the Brief of Amici Curiae which was electronically filed on August 15, 2008, the ten hard copies sent to the Clerk of this Court, and each of the two copies sent via overnight courier to each of the Respondents and Intervenors listed on the attached Certificate of Service, on this same date are identical.

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I hereby certify that on August 15, 2008, a virus scan was performed on the Brief of Amici Curiae sent electronically to the Third Circuit using McAfee Virus Scan Plus 2008. No viruses were detected.

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## Certificate of Service

I certify that on August 15, 2008, I served two copies of the foregoing Brief of Amici Curiae and one copy of the Motion for Leave to File Brief of Amici Curiae via overnight courier and via electronic mail to the parties listed below:

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