

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.

On Petition for Review of Orders
of the Federal Communications Commission

**MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE OF
ANTARES HOLDING, LLC; ASIAN AMERICAN JUSTICE CENTER;
BENTON FOUNDATION; FAITHPHONE 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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