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

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FCC Mail Room

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	
Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License	)	

DOCKET FILE COPY DUPLICATE

ORDER

Adopted: January 31, 2012 **Released: February 1, 2012**

By the Commission:

1. In *Council Tree Communications, Inc. v. FCC*, the U.S. Court of Appeals for the Third Circuit vacated two modifications the Commission made in 2006 to its competitive bidding rules on the ground that the Commission failed to provide the public an adequate opportunity for notice and comment.[1] In this Order, we formally remove the two modifications in accordance with the Third Circuit's mandate and dismiss two pending petitions for reconsideration and associated filings that became moot as a result of the Court's decision.

2. In *Council Tree*,[2] the Third Circuit held that the Commission's impermissible material relationship rule in Section 1.2110(b)(3)(iv)(A) and its extension of the unjust enrichment period in 47 C.F.R. § 1.2111(d)(2) from five years to ten years had been adopted without the notice and opportunity for comment required by the Administrative Procedure Act.[3] The Court thus vacated the impermissible

[1] *See Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010) ("*Council Tree*"), *cert. denied*, __ U.S. __, 131 S. Ct. 1784 (2011).

[2] 619 F.3d 235.

[3] *See* 5 U.S.C. § 553. The affected rule sections were two provisions of the designated entity (DE) rules that the Commission adopted in 2006. *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753 (2006), *recons. pending*; *Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd 6703 (2006) (modified by *Erratum and Notice of Office of Management and Budget Approval of Information Collections*, 21 FCC Rcd 6622 (WTB 2006)), *petition for review dismissed sub nom. Council Tree Communications, Inc. v. FCC*, 503 F.3d 284 (3d Cir. 2007); *Second Order on Reconsideration of the Second Report and Order*, 23 FCC Rcd 5425 (2008), *vacated in part*, *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010).

material relationship rule and ordered reinstatement of the Commission's previous five year unjust enrichment payment schedule.[4] The Court also denied the petition with respect to the attributable-material-relationship rule articulated in 47 C.F.R. §§ 1.2110(b)(1) and (b)(3)(iv)(B).

3. This Order now conforms our rules to the Court's mandate by amending Section 1.2110 of the Commission's rules to delete subsection (b)(3)(iv)(A)[5] and Section 1.2111 by deleting subsection (d)(2)(i)[6] as no longer applicable and reinstating the previous version of the payment schedule in Section 1.2111(d)(2).[7] Additionally, we conform various Part 1 rules as necessary to remove several references to impermissible material relationships.

4. We also dismiss two petitions for reconsideration[8] and associated filings[9] that became moot as a result of the Court's vacatur of the impermissible material relationship rule. These pleadings concern the Commission's November 15, 2007, Order waiving, on the Commission's own motion, the application of the impermissible material relationship rule solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the Upper 700 MHz Band D Block license.[10] In vacating the impermissible material relationship rule, the Third Circuit decision rendered moot the petitions for reconsideration of the Commission's waiver of the rule and all of the filings associated with those petitions.[11] We also deny the Motion for Leave to File and dismiss as untimely Council Tree Investors, Inc.'s and Bethel Native Corporation's Supplement to Petition for Reconsideration, which was filed more than three and a half years after release of the *D Block Waiver Order*.[12]

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[4] 619 F.3d at 258-59. The court's mandate issued on October 15, 2010.

[5] 47 C.F.R. § 1.2110(b)(3)(iv)(A).

[6] *Id.* § 1.2111(d)(2)(i) (2010).

[7] *See id.* § 1.2111(d)(2) (1998).

[8] *See* Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, Petition for Reconsideration filed by Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council, filed Dec. 7, 2007 ("Council Tree Reconsideration Petition"); Petition for Reconsideration filed by Verizon Wireless, filed Dec. 3, 2007.

[9] An opposition was filed in response to each petition, followed by a reply to each of the oppositions and a surreply to one of the replies. Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, Opposition of Frontline Wireless, LLC to Joint Petition for Reconsideration, filed Dec. 17, 2007; Opposition of Frontline Wireless, LLC to Verizon Wireless Petition for Reconsideration, filed Dec. 13, 2007; Joint Petitioners' Reply to Opposition of Frontline Wireless, LLC to Petition for Reconsideration, filed January 2, 2008; Verizon Wireless Reply to Opposition of Frontline Wireless, LLC to Petition for Reconsideration, filed Dec. 21, 2007; Frontline Wireless, LLC Surreply to Reply of Verizon Wireless to Frontline Wireless Opposition to Petition for Reconsideration and Motion for Leave to file Surreply, filed Dec. 28, 2007.

[10] Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, *Order*, 22 FCC Rcd 20354 (2007) (*D Block Waiver Order*), *recon. pending*.

[11] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157-58 (D.C. Cir. 1969) ("The very essence of waiver is the assumed validity of the general rule . . . .").

[12] Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, Motion for Leave to File Supplement to Petition for Reconsideration filed by Council Tree Investors, Inc. and Bethel Native Corporation, filed May 18, 2011; Supplement to Petition for Reconsideration filed by Council Tree Investors, Inc. and Bethel Native Corporation, filed May 18, 2011 (arguing that the results of Auction 73, which was completed on March 18, 2008, should be vacated) (collectively, "Motion and Supplement"). *See* 47

(continued ....)

5. Accordingly, IT IS ORDERED that Section 1.2110(b)(3)(iv)(A) of the Commission's rules, 47 C.F.R. § 1.2110(b)(3)(iv)(A)(2010), IS REPEALED, and Section 1.2111(d)(2)(i), 47 C.F.R. § 1.2111(d)(2)(i)(2010), IS REPEALED and Section 1.2111(d)(2), 47 C.F.R. § 1.2111(d)(2), is amended as set forth in Appendix A, effective immediately upon publication in the Federal Register.

6. IT IS ORDERED that Part 1 of the Commission's rules, 47 C.F.R. Part 1, IS FURTHER AMENDED as set forth in Appendix A, effective immediately upon publication in the Federal Register.

7. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Verizon Wireless on December 3, 2007, and by Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council on December 7, 2007; as well as the related Oppositions to those petitions filed by Frontline Wireless, LLC, on December 13 and 17, 2007, the Reply to Opposition filed by Verizon Wireless on December 21, 2007, and the Frontline Wireless, LLC Surreply to the Verizon Wireless Reply filed on December 28, 2007, ARE DISMISSED.

8. IT IS ORDERED that the Motion for Leave to File Supplement to Petition for Reconsideration filed by Council Tree Investors, Inc. and Bethel Native Corporation, filed May 18, 2011; IS DENIED and the accompanying Supplement to Petition for Reconsideration IS DISMISSED.

9. The Commission finds that notice and comment are unnecessary for these rule amendments under 5 U.S.C. § 553(b), because this is a ministerial order issued at the direction of the United States Court of Appeals for the Third Circuit.

(Continued from previous page)
C.F.R. §§ 1.106(f) ("The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, ..."). While the Commission has some discretion to consider late-filed supplements to timely filed petitions for reconsideration, it has discretion to decline to do so where, as here, the arguments go beyond the scope of the underlying order, seek to expand substantially the scope of the relief sought in the reconsideration petition, and could have been made earlier. *See, e.g.*, Alpine PCS, Inc., Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, *Memorandum Opinion and Order*, 25 FCC Rcd 469, 479-80 ¶ 16 (2010); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003). We reject Council Tree and Bethel Native's argument that their untimely supplement seeking to challenge the Commission's application of its designated entity (DE) rules to Auction 73 raises a matter that could not have been raised earlier. The Commission decided to apply its DE rules to Auction 73 in an earlier order. *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Report and Order, 22 FCC Rcd 8064, 8067 ¶ 6 (2007). The *D Block Waiver Order*, however, neither addressed nor reopened the Commission's previous decision to apply its existing DE rules to Auction 73, and Council Tree and Bethel Native's original petition sought reconsideration of only the Commission's decision to waive the impermissible material relationship rule. *See also* Letter from CT Amici to the Federal Communications Commission, filed Oct. 11, 2011 (group of public interest and civil rights organizations and designated entities requesting that the Commission expedite resolution of the Council Tree Reconsideration Petition, as supplemented).

10. This action is taken pursuant to sections 4(i), 4(j), 303, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303 and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Rule Changes

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(j), 160, 201, 225, 303, and 309.

2. Section 1.2110 is revised by deleting paragraph (b)(3)(iv)(A) and redesignating paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) as paragraphs (b)(3)(iv)(A) and (b)(3)(iv)(B).

3. Section 1.2110 is amended by revising the newly designated paragraph 1.2110(b)(3)(iv)(B) to delete the example following Section 1.2110(b)(3)(iv)(B)(2), and revising newly designated paragraph 1.2110(b)(3)(iv)(B) and paragraph 1.2110(j) to read as follows:

§ 1.2110 Designated entities

* * * * *

(b) * * *

(3) * * *

(iv) * * *

(B) *Grandfathering* (1) *Licensees*. An attributable material relationship shall not disqualify a licensee for previously awarded benefits before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006.

(2) *Applicants*. An attributable material relationship shall not disqualify an applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006. Any applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregration filed after April 25, 2006, or in an application to participate in an

auction in which bidding begins on or after June 5, 2006, need not attribute the material relationship(s) of those entities that are its affiliates based solely on §1.2110(c)(5)(i)(C) if those affiliates entered into such material relationship(s) before April 25, 2006, and are subject to a contractual prohibition preventing them from contributing to the applicant's total financing.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements including oral agreements, establishing as applicable, *de facto* or *de jure* control of the entity or the presence or absence of attributable material relationships. Designated entities also must provide the date(s) on which they entered into of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to §1.2114.

* * * * *

4. Section 1.2111 is revised by deleting paragraph (d)(2)(i) and redesignating paragraphs (d)(2)(ii) and (d)(2)(iii) as paragraphs (d)(2)(i) and (d)(2)(ii).

5. Section 1.2111 is amended by revising the newly designated paragraphs 1.2111(d)(2)(i) and (d)(2)(ii) to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

* * * * *

(d) * * *

(1) * * *

(2) Payment schedule. (i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change or reportable eligibility event (see § 1.2114).

* * * * *

6. Section 1.2112 is amended by revising paragraphs (b)(1)(iii) and (b)(2)(iii) to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

* * * * *

(b) * * *

(1) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific

provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control or the presence or absence of attributable material relationships. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

* * * * *

(2) * * *

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control or the presence or absence of attributable material relationships. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

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