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

In the Matter of	)	
	)	
The State of Mobile Wireless Competition And the Role of Minority- and Women-Owned Business Enterprises	)	WT Docket No. 13-135
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	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	WT Docket No. 12-268
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	)	
	)	

To: The Commission

COMMENTS OF
COUNCIL TREE INVESTORS, INC.

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July 25, 2013

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SUMMARY

With major wireless spectrum auctions on the horizon, notably the 600 MHz and H-block auctions, the Commission now holds a unique opportunity to address in an effective manner the dramatic dearth of participation by Minority- and Women-Owned Business Enterprises ("MWBEs") in the wireless industry. The Commission can effect needed change by implementing two overdue and entirely feasible changes designed to promote participation in FCC-conducted wireless auctions by small businesses, including women- and minority-owned small businesses, otherwise known as designated entities (DEs).

Since 1995, the number and quality of incentives utilized by the FCC to facilitate DE participation in FCC spectrum auctions, including the set aside of licenses for DE-only (closed) auctions and DE use of installment payments, have steadily eroded or disappeared altogether. Today, DEs' access to the one remaining incentive (bidding credits) remains hobbled by the Commission's ill-considered "25% Wholesale Rule," hastily adopted in 2006 on the eve of Auction 66. Taken together, these considerations have decimated DE participation in wireless license auctions, in contravention of Congress' directive that the Commission promote that very goal for DEs. The problem is starkly illustrated by the dismal performance of DEs in Auctions 66 and 73, and is compounded by the dramatic escalation of wireless carrier concentration.

For future spectrum auctions, the Commission must adopt measures that will promise once again to provide DEs with a reliable pathway to acquire spectrum licenses and build competitive wireless businesses for the benefit of consumers.

Given the continuing absence of closed DE auctions, Council Tree urges the Commission to: (i) implement maximum 45 percent DE bidding credits, a level previously and successfully utilized, and one that is particularly appropriate in light of DEs' inability to participate in a meaningful fashion in Auctions 66 and 73; and (ii) eliminate or waive the 25% Wholesale Rule, a rule which severely and unnecessarily crimps a particular business model which DEs need to compete in the concentrated wireless marketplace.

With these two discrete, readily achievable changes, the Commission can help seed a new generation of DEs positioned to follow in the footsteps of remarkably successful companies such as T-Mobile, MetroPCS and Leap Wireless, all of whose origins are firmly rooted in the DE program. These companies and other DEs have clearly served the public interest by bringing to market the innovative service offerings and lower pricing from which consumers, and most particularly unserved and underserved consumers, continue to benefit today.

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To: The Commission

COMMENTS OF
COUNCIL TREE INVESTORS, INC.

Council Tree Investors, Inc. ("Council Tree") submits these comments in response to the *Public Notice: Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises* (DA 13-1457) released in Docket No. 13-135 on July 1, 2013 ("*Public Notice*").[1]

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[1] *See* Public Notice: Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises released on Docket No. 13-135 (rel. July 1, 2013), issued in part in response to the Minority Media and Telecommunications Council (MMTC) Letter to Mignon Clyburn, Acting Chairwoman, (May 20, 2013), available at http://apps.fcc.gov/ecfs/document/view?id=7022415051 regarding the role minority and women-owned business enterprises (MWBEs) play in mobile wireless competition.

I. INTRODUCTION

Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of small businesses and new entrants, including those owned by members of minority groups and women. Given its investment mission, Council Tree has an interest in seeing that the Commission's rules and policies for upcoming wireless license auctions, including the 600 MHz auction and the H-block auction, reflect this participation goal in a rational and effective manner.

As the Commission recognizes, MWBEs currently have a disproportionately small representation in the wireless industry, and DE participation in spectrum auctions is the primary policy vehicle through which the Commission can address this issue. Accordingly, Council Tree's comments focus on MWBE participation as DEs, including DEs who are new entrants to the wireless industry.

In recent years DE participation in major spectrum auctions has languished, plummeting from a robust 70% of net winning bids in major spectrum auctions conducted by the FCC prior to the 2006 adoption of new DE rules discussed below, to just 4 percent in Auction 66 in 2006 and 2.6 percent in Auction 73 in 2008.[2] The reason for this precipitous decline is twofold. First, the Commission has eliminated measures that have historically been critical to assisting new entrants and DEs. Most notably, the Commission no longer employs two measures that were vital to past DE success – the "set aside" of license blocks in auctions for DEs only (i.e.,

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[2] *See Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 248 (3d Cir. 2010), *cert. denied sub nom.*, *Council Tree Investors, Inc. v. FCC*, 131 S. Ct. 1784 (2011).

closed license auctions) and DE installment financing. Second, in 2006 the Commission hastily adopted, on the eve of Auction 66, three ill-considered limits on DEs, including the " Ten Year Hold Rule", the "50% Wholesale Rule" and the "25% Wholesale Rule". While all three of these rules severely damaged DE auction participation, the first two were vacated by the Third Circuit Court of Appeals in 2010, while the third, the 25% Wholesale Rule, remains on the Commission's books, to the continuing detriment of DEs planning to participate in FCC spectrum auctions.

At this important juncture, the Commission has an opportunity to restore DE competitiveness to historical levels with two rule changes proposed by Council Tree, namely: (i) the restoration of a 45 percent bidding credit for DEs; and (ii) the elimination or waiver of the 25% Wholesale Rule. With these modifications, the Commission can lay the groundwork for replication of its many DE success stories of 1995 – 2005, an era when T-Mobile, MetroPCS, Leap and many other wireless carriers got their starts as DEs. These (and other DEs) successfully acquired over $21 billion of spectrum licenses[3] at FCC auctions, and from there built out companies that ultimately become major wireless carriers, blazing new trails by offering consumers lower-priced wireless service plans with novel feature bundles. The Commission should take *this* opportunity to seed a new generation of DEs who will, like their successful DE forebears, be afforded a viable pathway to acquire

[3] *See Council Tree Commc'ns, Inc. v. FCC*, Case No. 07-1454, U.S. Court of Appeals for the D.C. Circuit, Exhibit A.

meaningful spectrum which can be used to bring innovation and pricing competition to customers across the United States, including minority communities. It is particularly instructive that former DEs MetroPCS and Leap have led the industry in providing leading edge services at discount prices to unserved and underserved minority consumers.

II. THE CURRENT LEVEL OF DE PARTICIPATION IN THE PROVISION OF SPECTRUM-BASED WIRELESS SERVICES IS DISMAL

Current realities facing new entrant DEs looking for innovative ways to provide spectrum-based services are dismal. In the competitive bidding context, the Commission is directed under Section 309(j) of the Communications Act to promote "economic opportunity and competition . . . 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," 47 U.S.C. § 309(j)(3)(B), and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." *Id.*, § 309(j)(4)(D); *see also NPRM* at ¶ 84. Several Commission actions in recent years have undermined the achievement of these goals.

First, since 1995, the number and quality of Commission incentives available to DEs in competitive bidding have steadily eroded. Congress eliminated the

availability of tax certificates for members of minority groups.[4] For its part, the Commission has stopped setting aside licenses for bidding only by designated entities,[5] has stopped offering the installment payment financing that materially enhanced the ability of members of minority groups and women to acquire licenses through competitive bidding,[6] and has stopped allowing smaller businesses to qualify for an auction with reduced upfront payments.[7] In addition, though it originally permitted designated entities to enter into management or joint marketing agreements with experienced firms without contravening the attribution

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[4] *See* Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995) (repealing the minority tax certificate program).

[5] *See*, *e.g.*, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25162, 25189-90 (2003) (resolving not to set aside any advanced wireless services licenses for bidding only by designated entities).

[6] *See*, *e.g.*, Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 15293, 15322 (2000). The Commission first suspended installment payments for small businesses in 1997. *See, e.g.*, *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures; Allocation Of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz*, 13 FCC Rcd 374 (1997).

[7] *See*, *e.g.*, *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order,* 11 FCC Rcd 7824, 7859-60 (1996).

thresholds in its entrepreneurs' block rules,[8] the Commission *now* treats many management and joint marketing agreements as "attributable."[9] The Commission stated in its AWS-4 *NPRM*, "[o]ne of the principal means by which the Commission fulfills this [Section 309(j)] mandate is through the award of bidding credits to small businesses."[10] As a practical matter, the award of bidding credits is the *only* remaining means by which the Commission now works to fulfill this mandate.

Second, in 2006, the Commission issued new rules that did grave damage to the ability of designated entities to utilize even the bidding credit mechanism. In its *Second Report and Order* in WT Docket No. 05-211, the Commission, *inter alia*:

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[8] *See Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order*, 9 FCC Rcd 7123, 7124 (1994) ("We expect that investor/manager agreements are one of the many alternatives available to designated entities . . . . This does not mean, however, that these management agreements will be deemed 'attributable' for purposes of the revenue thresholds in the entrepreneur's blocks"); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5580, 5601 n.135 (1994) ("So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants").

[9] *See* 47 C.F.R. § 1.2110(c)(2)(ii)(H)-(I).

[10] *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, *Notice of Proposed Rulemaking and Notice of Inquiry*, 27 FCC Rcd 3561, 3588 (2012).

- doubled from five years to ten years the duration of its unjust enrichment schedule for licenses acquired with bidding credits ("Ten Year Hold Rule");[11] and

- modified rules relating to spectrum leasing and resale arrangements to effectively deprive designated entities of the value of their bidding credits if they lease, wholesale, or permit to be resold more than 25 percent of their "spectrum capacity" to any one party (the "25% Wholesale Rule") and to prohibit entirely DE wholesaling/leasing/resale of more than 50 percent of "spectrum capacity" in the aggregate (the "50% Wholesale Rule").[12]

The new rules were first announced when the *Second Report and Order* was released on April 25, 2006, and the Commission made clear that the rules would immediately apply to designated entities bidding in its auction of advanced wireless services licenses ("Auction 66"),[13] which opened on August 9, 2006. The negative cumulative effect of the new rules on small business participation in the auction was enormous. Four years later, the United States Court of Appeals for the Third Circuit ruled that the Commission had acted unlawfully in adopting the Ten Year Hold Rule and the 50% Wholesale Rule and it vacated those two rules. However, the 25% Wholesaling Rule that limits leasing and wholesaling of more than 25 percent of DE "spectrum capacity" to any one party remains in place. Importantly, the 25% Wholesaling Rule does not apply to non-DEs.

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[11] *See 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 Rule Making*, 21 FCC Rcd 4753, 4766-67 (2006) ("*Second Report and Order*").

[12] *See id.* at 4763-64.

[13] *See Second Report and Order*, 21 FCC Rcd at 4771.

Finally, after twice announcing that the 50% Wholesale Rule would apply to all DE bidding activity in the 2008 auction of 700 MHz band spectrum rights ("Auction 73"), the Commission abruptly changed its mind "on its own motion" – without any public participation – and waived application of the 50% Wholesale Rule for any potential DE winner of a the so-called D Block of 700 MHz band spectrum, while renewing its adherence to the new 2006 rules in all other respects. *See 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) (subsequent history omitted). This action came a mere two business days before the FCC Form 175 "short form" window for Auction 73 was to open and eleven business days before that window's December 3, 2007 close. For the single block of spectrum to which the waiver applied, the Commission's action came at such a late time and in such a manner that designated entities once again could not adjust to the shifting regulatory environment and obtain financing based on the suddenly changed rules. In the end, the Commission's waiver merely reinforced the widespread perception in the financial community that the regulatory environment for designated entities is negative and unstable.[14]

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[14] As an example of the impact of the rule changes, in the recent Public Interest statement related to Grain Spectrum, LLC and Grain Spectrum II, LLC (collectively "Grain") transaction with Cellco Partnership and AT&T Mobility Spectrum LLC (File No. 0005627587) the parties stated that "Mr. Grain's participation in Auction 73 did not materialize in large part due to changes that the Commission made to the rules for participation by designated entities in the 700 MHz auction."

The cumulative impact of these various events on competitive bidding has been clear. Prior to Auction 66, DEs had won an average of some 70 percent[15] of licenses by value (as a percentage of net winning bids) in major auctions preceding Auction 66 in which designated entity preferences were offered. In Auction 66, however, designated entities won just 4 percent of licenses by value (as a percentage of net winning bids) – by far the lowest of any major CMRS auction in which the Commission offered DE preferences and a shocking drop from the 70 percent DE success rate in the earlier major auctions just noted.

This harmful trend accelerated in Auction 73. Just two carriers – AT&T and Verizon – acquired approximately $16 billion, or 84.4 percent,[16] of the nearly $19 billion of spectrum sold. Meanwhile, DE participation fell even more, to a mere 2.6 percent of licenses won by value, a material reduction from the already meager 4 percent of licenses won by value in Auction 66. The 2.6 percent included incumbent rural telcos. Preliminary Commission data regarding winning bidders in Auction 73 indicated that "based on self-reporting, women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses

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[15] *See Footnote 2* above.

[16] *See* http://wireless.fcc.gov/auctions/auction_results_files.htm?id=73&type=full&setSize=0, File--"73_261_pwb.txt" found within "73_261_all_files.zip."

(7 of 1,090 licenses, or 0.64%), despite the fact that women constitute over half the U.S. population and minorities around one-third of the U.S. population."[17]

These results are reflected in widely consulted data regarding the CMRS industry. According to data included in the Commission's Sixteenth Report on the state of competition in the mobile services marketplace, Verizon Wireless and AT&T provide service to more than 62 percent of all mobile telephone subscribers nationwide, and the top four CMRS providers serve more than 92 percent of subscribers. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Sixteenth Report*, 28 FCC Rcd 3700, 3754 (Table 13), 3854 (overall industry connections of 316 million reported by CTIA) (2013) ("*Sixteenth Report*"). The report also states the "four nationwide service providers accounted for about 92 percent of the nation's mobile wireless service revenue in the first half of 2012. The service revenues of Verizon Wireless and AT&T accounted for about 67 percent of total service revenue."[18]

The scale and resources of these large national wireless carriers have in turn allowed them to amass huge amounts of wireless spectrum. The same Commission report concludes that "five providers together – Verizon Wireless, AT&T, T-Mobile, as well as Sprint Nextel and Clearwire – hold more than 80 percent of all spectrum, measured on a MHz-POPs basis, that is potentially usable for the provision of

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[17] *Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction, FCC News Release*, at 1 (rel. Mar. 20, 2008).

[18] Sixteenth Report, 28 FCC Rcd at 3752.

mobile wireless services."[19] This existing market concentration formed the basis of a finding of the Commission staff that the proposed 2011 AT&T acquisition of T-Mobile would likely have led to substantial lessening of competition. *See Applications of AT&T Inc. and Deutsche Telekom AG, Order*, 26 FCC Rcd 16184, ¶¶ 3, 8 (Wir. Tel. Bur. 2011) (releasing Staff Analysis and Findings, WT Docket No. 11-65).

In the context of minority- and women-owned businesses, outside of the DE program, only a few, very faint "rays of hope" for new entry opportunities have emerged in the context of merger transactions such as the merger of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc.[20] and Cellco Partnership's divestiture of certain 700 MHz spectrum.[21] These transactions have opened up a few very limited opportunities for MWBEs. In the case of Sirius and XM, the parties agreed to set-aside 4% of the merged entity's channel capacity to be

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[19] *Id.* at 3787.

[20] On July 25, 2008, the Commission approved the transfer of control of licenses and authorizations subject to the Applicants' fulfillment of several voluntary commitments and other conditions. Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57 Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12408.

[21] Grain Spectrum, LLC and Grain Spectrum II, LLC (collectively "Grain") transaction with Cellco Partnership and AT&T Mobility Spectrum LLC (File No. 0005627587) ("Grain FCC Transaction").

programmed by and/or leased to "Qualified Entities."[22] In the case of the recently announced Cellco Partnership divestitures of spectrum to AT&T Wireless, Cellco and AT&T agreed to sell four spectrum licenses to Grain Spectrum, an MWBE.

Unfortunately, these relatively minor opportunities for MWBEs have been few and far between, and have occurred only in the context of very large merger transactions or divestitures. MWBEs should not be forced to wait for large transactions to receive a chance to participate in the wireless industry.

III. THE COMMISSION MUST TAKE STEPS TO REMEDY THE LACK OF OWNERSHIP DIVERSITY IN THE WIRELESS INDUSTRY

Against this background, the Commission must take this opportunity to craft competitive DE bidding rules for future spectrum auctions that address, and redress, the current state of market concentration and the current lack of ownership diversity. Particularly given the absence of blocks "set aside" for bidding only by designated entities, Council Tree strongly urges the Commission now to adopt the following practical measures that can facilitate the achievement of realistic objectives – a material increase in the levels of bidding credits and the elimination or waiver of the 25% Wholesale Rule. These two courses of action hold the promise of revitalizing DE participation in spectrum-based services, in a manner consistent with Section 309(j).

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[22] In the Sirius XM order, Qualified Entities were originally defined as "any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics."

A. In the Absence of Set-Aside Blocks, the Commission Should Offer Meaningful 45 Percent Bidding Credits to Designated Entities Bidding for Spectrum Rights

In Auction 66 ($14 billion), the Commission offered designated entity bidding credits of up to 25%. It has been seven years since the Commission first offered licenses in Auction 66, and the market conditions facing designated entities are today far worse than they were in 2006. Capital previously available to designated entities has been limited in the wake of the global market collapse of 2007-2008, and lenders and investors have not returned at the same levels to help capitalize new entrants. On the other hand, the large incumbent carriers' access to capital has improved significantly since that global market collapse. For example, Verizon Communications and AT&T had a combined $71 billion of cash flow, or EBITDA, in 2012,[23] giving them the ability to divert enormous cash flows towards the purchase of spectrum at FCC auctions, and putting them in position again to dominate such auctions as they did in Auction 73 (winning 84 percent of licenses by value). The Commission must consider current market conditions in assessing bidding credit percentages that will now be meaningful. Qualified MWBEs can raise necessary capital only if the playing field is level and incumbents do not have an unfair advantage.

Moreover, prior to Auction 66 DEs had won an average of some 70 percent of licenses by value (as a percentage of net winning bids) in major auctions in which

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[23] *See Wireline & Wireless Telecom Services 2Q13 results preview & model book – A good time for towers*, Bank of America Merrill Lynch Report (July 16, 2013), AT&T data p.24; Verizon data p.76.

designated entity preferences were offered prior to Auction 66. In Auction 66, however, designated entities won just 4 percent of licenses by value (as a percentage of net winning bids). And, that trend worsened in Auction 73 with DEs winning just 2.6 percent of licenses by value (as a percentage of net winning bids) under the very same the 25 percent maximum bidding credits offered for DEs. In short, recent history teaches that the Commission must take steps to increase the percentage of bidding credits available to DEs going forward.

The Commission in recent auctions has offered bidding credits of 15 percent to businesses with average annual gross revenues not exceeding $40 million and 25 percent to businesses with average annual gross revenues not exceeding $15 million. The standardized schedule of bidding credits set forth in Part 1 of the Commission's rules provides that businesses with average annual gross revenues not exceeding $3 million are eligible for a bidding credit of 35 percent. *See* 47 C.F.R. § 1.2110(f)(2)(i).

Given the current state of the markets and the increased concentration of CMRS license ownership, the Commission should offer in any future auctions, including the upcoming 600 MHz and H-block auctions, bidding credits of 25 percent to businesses with average annual gross revenues not exceeding $40 million, 35 percent to businesses with average annual gross revenues not exceeding $25 million, and 45 percent to businesses with average annual gross revenues not exceeding $15 million. Increasing the bidding credit offered to smaller businesses in this way and under these circumstances would be consistent with the

Commission's prior decisions to use a *higher* bidding credit level in the absence of other designated entity preferences.[24] Importantly, in 1997, the Commission expressly compensated for the lack of installment payments plans for Local Multipoint Distribution Service ("LMDS") licenses by offering bidding credits of 25 percent, 35 percent, and 45 percent (applied to slightly different business size standards).[25] The Commission characterized the higher bidding credits as "a reasonable adjustment . . . for the unavailability of installment payment plans for LMDS licensees."[26] By the same logic – and especially considering market obstacles DEs face and escalating levels of industry concentration – such higher bidding credits should be offered to designated entities in future spectrum auctions.

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[24] *See*, *e.g.*, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 201, 215-16 (1994) (raising bidding credit offered to businesses owned by members of minority groups and women from 25 to 40 percent to help in bidding for licenses that were not within blocks set-aside for designated entities); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), Report and Order*, 12 FCC Rcd 10785, 10878-79 (1997) (raising bidding credit levels due to unavailability of installment payment financing for WCS licensees); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10013 (1997) (raising bidding credit levels due to unavailability of installment payment financing for 800 MHz SMR licensees).

[25] *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 -29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Order on Reconsideration*, 12 FCC Rcd 15082, 15095-96 (1997).

[26] *Id.* at 15096.

Council Tree acknowledges that the Commission in the past established a maximum *35 percent* bidding credit level in crafting its uniform Part 1 competitive bidding rules as part of a broader increase in the value of bidding credits to offset its decision to suspend the availability of installment payment financing.[27] An eventful period of more than fifteen years has passed since the Commission reached that decision. Within the last seven years alone, the success rate of designated entities in major Commission auctions has been abysmal, due in part to the FCC's ill-advised adoption of new DE-related rules in 2006. In light of this, and in light of prevailing conditions in the CMRS market – including CMRS market concentration that did not exist in 1997 – Council Tree urges the Commission in future spectrum auctions to apply the three-tiered approach to bidding credits set forth in its uniform Part 1 competitive bidding rules, but to incorporate therein the bidding credit levels utilized for LMDS, including a maximum 45 percent bidding credit.

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[27] *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 403 (1997) ("*Part 1 Third Report and Order*"). The Commission has relied on this 35 percent bidding credit to offset the absence of other designated entity incentives since adopting the schedule in 1997. *See*, *e.g.*, *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 (1999) ("To balance the impact on small businesses of eliminating installment payments, we amend our rules to increase the tiered bidding credits available to paging bidders, consistent with the schedule of bidding credits adopted in the *Part 1 Third Report and Order* . . . ."); *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Report and Order*, 17 FCC Rcd 1960, 1974 n.86 (2002) (resolving to supplement the broadband PCS bidding credit scheme with the 35 percent bidding credit for its auction of RSA cellular licenses "because smaller businesses may be interested in acquiring licenses to provide service in these markets.").

B. The Commission Should Eliminate or Waive Its 25% Wholesale Rule in Order to Level the Playing Field for DEs and Promote DE Use of A Viable, Pro-Competitive Business Model

The 25% Wholesale Rule is essentially the last surviving fragment of the set of rules otherwise found to be unlawful by the Third Circuit Court of Appeals in 2010.[28] These were the Commission's ill-considered new DE rules adopted under ex-Chairman Martin's regime in 2006, on the eve of Auction 66. In light of the disastrous DE results in Auctions 66 and 73, it is now long past due for the Commission to strike the last of these unreasonable rules from its books, or in the alternative, to waive its application to the upcoming 600 MHz and H-block auctions.

The 25% Wholesale Rule serves to inhibit DEs, but not non-DEs, from wholesaling or leasing more than 25 percent of their "spectrum capacity" to any one party. This rule essentially deprives designated entities of the value of their bidding credits if they lease or wholesale spectrum capacity beyond such limits to established companies.

This 25% Wholesale Rule effectively prevents DEs from entering into wholesale, resale or leasing contracts of scale. Non-DEs function without such constraints. In today's wireless industry, new entrants, whether DE or non-DE, are highly likely to develop one or more established anchor tenants with whom they can wholesale or lease spectrum capacity. These relationships and revenue

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[28] *Council Tree Commc'ns, Inc.*, 619 F.3d 253 (affirming 47 C.F.R. § 1.2110(b)(3)(iv)(B) (2006)).

commitments in turn provide new entrants with projectable revenue streams, which in turn facilitate the rapid financing and buildout of efficient operations.

As an example, wholesaling of wireless capacity is commonplace today in the wireless industry and is regarded as strongly pro-competitive. Clearwire has a long history of wholesaling capacity to multiple parties, including Sprint, MVNE Simplexity, FreedomPOP and Leap, relationships that have helped Clearwire complete its operational deployment.[29] Lightsquared and Frontline (headed by ex-FCC Chairman Hundt) assembled businesses with national wireless deployment business plans predicated on large scale wholesaling. AT&T and Verizon provide wholesale capacity to Tracfone whose subscribers exceed 21 million.[30] Finally, Grain Spectrum has entered into spectrum leasing transactions with Verizon and AT&T, both awaiting regulatory approval, in which Grain recounts in its public interest statement that "the leases to AT&T and Verizon Wireless will provide Grain with additional capital that will help enable Grain to expand its wireless business in the future. These transactions will further the Commission's goals by enabling Grain, a minority-owned firm, to expand its existing telecommunications

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[29] *See* Phil Goldstein, *Fierce Wireless: After Leap, Clearwire looks to add more wholesale customers*, http://www.fiercewireless.com/story/after-leap-clearwire-looks-poach-more-customers-lightsquared/2012-03-15#ixzz2J19tBHLD (Mar. 15, 2012).

[30] http://www.americamovil.com/amx/cm/reports/Q/3Q12_VF.pdf – "AMÉRICA MÓVIL'S THIRD QUARTER OF 2012 FINANCIAL AND OPERATING REPORT."

infrastructure business and participate in complementary spectrum-based services, initially on a wholesale basis."[31]

Looking forward, the presence of an unreasonable and arbitrary 25 percent limit on DE wholesaling, compared with no limit at all on non-DEs, will continue to hamstring otherwise viable DE business plans. Without revenue certainty, DE plans will continue to flounder in the capital markets. And the national incumbent wireless carriers will remain sheltered from the potentially vibrant competition DEs can bring.

Such a result would be analogous to the Commission, at the advent of spectrum auctions in 1995, restricting DEs' ability to bid effectively against the dominant Bell companies. But, of course, the opposite happened at that time. In 1995, the Commission seemingly explored every available avenue, and adopted many innovative incentives, all to help ensure that viable DEs would emerge successfully from wireless auctions with substantial amounts of spectrum, fortified by well-conceived business plans, bringing new waves of competition to the shores of the entrenched Bells. Indeed, today is a "back to the future" moment for the Commission, where this Commission can renew and build on the diligent work of its predecessors and promote DE competition as a means to further the interests of consumers and ownership diversity alike.

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[31] *See* Grain FCC Transaction, Public Interest Statement at 14, *supra* n.24.

IV. CONCLUSION

For these reasons, Council Tree urges the Commission to offer increased 45 percent DE bidding credits and strike or waive the 25% Wholesale Rule in order to promote competition and further ownership diversity in wireless for the next generation of industry innovators.

Respectfully submitted,

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