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March 19, 2014

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: *Ex Parte* Presentation**

*Implementation of the Commercial Spectrum Enhancement Act and  
Modernization of the Commission's Competitive Bidding Rules and Procedures,*  
WT Docket No. 05-211

*Expanding the Economic and Innovation Opportunities of Spectrum Through  
Incentive Auctions,* GN Docket No. 12-268

*Amendment of the Commission's Rules with Regard to Commercial Operations in  
the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands,* GN Docket  
No. 13-185

Dear Ms. Dortch:

On March 18, 2014, Michael McKenzie of Grain Management, LLC ("Grain") and Patrick Campbell of Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel to Grain, met in person with William Huber, Sue McNeil, Gary Michaels and Brian Regan, each of the Wireless Telecommunications Bureau.

During this meeting, the participants discussed Grain's Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule filed March 4, 2014 in the above-captioned dockets. Enclosed is a bullet-point summary of the specific issues discussed.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced dockets.

Respectfully submitted,

/s/ Patrick S. Campbell

Patrick S. Campbell

*Counsel to Grain Management, LLC*

cc: William Huber  
cc: Sue McNeil  
cc: Gary Michaels  
cc: Brian Regan

Enclosures

APPLICABILITY OF DESIGNATED ENTITY “ATTRIBUTABLE MATERIAL RELATIONSHIP” RULE TO NON-DE LICENSES

- The FCC issued an order in April 2006 (FCC 06-52, the “DE Order”) providing that “an applicant or licensee has an ‘attributable material relationship’ when it has one or more agreements with any individual entity . . . for the lease . . . or resale . . . of, on a cumulative basis, more than 25% of the spectrum capacity of any individual license that is held by the applicant or licensee.” These relationships can lead to disqualification as a Designated Entity (“DE”). DE Order ¶ 25.
- The “attributable material relationship” rule, as it is currently drafted, is overly broad and has the potential to deny entities whom Congress would have intended to receive DE benefits from receiving such benefits. For example, this rule could potentially disqualify an otherwise qualified DE by virtue of the entity’s mere participation in a leasing transaction with a non-DE that: (1) does not involve licenses acquired through DE benefits and, instead, involves only licenses acquired on the secondary market; and (2) carries no risk of a non-DE unduly influencing the DE’s activities or decision-making. This result is contrary to the intent of Congress and the public interest.
- In promulgating the new rule the FCC did not make any explicit distinction between licenses that were acquired by the licensee without the use of any DE benefits, such as licenses acquired in an auction without discounts or on the secondary market (“Non-DE Licenses”), and those acquired through the use of DE discounts or set-asides (“DE Licenses”). Nor did the FCC explain anywhere in its order why this new rule should in fact apply to every license held by an entity, whether or not it is a DE License.
- To the contrary, in explaining the rationale for the new rule, in several places in the order the FCC made it quite clear that its intent was to discourage these material relationships with respect to DE Licenses only (*i.e.*, licenses acquired using DE benefits), and that the rule was never intended to capture the leasing or resale of Non-DE Licenses. For example, the FCC stated the following (emphases added):
  - “Through the decisions we make today, we will ensure that a designated entity licensee will *preserve at least half of its spectrum capacity of each of its licenses for which it has been awarded and retained designated entity benefits* for the provision of service as a facilities-based provider for the benefit of the public.” DE Order ¶ 27.
  - “[T]hese definitions of material relationship are necessary to ensure that *the recipient of our designated entity benefits* is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public; that the Commission employs methods *to prevent unjust enrichment*; and that our *statutory-based benefits* are awarded only to those that Congress intended to receive them.” DE Order ¶ 26.
- It appears that the FCC assumed that, by definition, a DE would have acquired only DE Licenses, so there was no need to draw any distinction between an entity’s DE and Non-DE Licenses. As it turns out, however, it is quite possible for a DE or potential DE to obtain Non-DE Licenses on the secondary market, and it does not appear that the FCC

intended to include these licenses in assessing a DE's relationships with a larger carrier.

- Had the FCC intended, despite the statements quoted above, to consider the leasing or resale of Non-DE Licenses in determining the existence of material relationships, a reasonable explanation would have been necessary, given that the rationale for the new rule by its very nature would presumably implicate only DE Licenses.
- In any event, it would not be reasonable for the FCC to include the lease or resale of Non-DE Licenses in determining whether a relationship with a large carrier is attributable or impermissible. Because such Non-DE Licenses would have been acquired without bidding credits or set-asides, leasing those licenses would not implicate Congress' interests in ensuring that beneficiaries of DE benefits use their licenses for a particular purpose and do not receive unjust enrichment.
- Furthermore, the FCC made clear that one factor leading to the adoption of the “attributable material relationship” rule was the potential for non-DEs to “exert undue influence over a designated entity licensee’s decision making regarding its service provision or the use of its licensed spectrum.” DE Order ¶ 81. This concern was driven by the practical consideration that many DEs, when acquiring licenses or when entering into leasing transactions, form joint ventures, LLCs, governance or ongoing business relationships with larger non-DE carriers. But simply because many DEs choose to enter into such business relationships does not mean that *all* DEs do so. In the absence of any mechanism permitting a non-DE to exercise undue influence over a DE’s activities or decision making, such as those described herein, there is no logical basis to assume that every leasing arrangement between a DE and a non-DE poses a risk of undue influence.
- Moreover, in its *Secondary Markets Report and Order*, the Commission expressly stated that rule changes designed to expand opportunities for secondary market transactions were critical in furthering the “ability of licensees and entities that seek to gain access to spectrum, including *entrepreneurs and small business*, to enter into arrangements best suited [to] the parties’ respective needs and business models.” Indeed, the Commission went so far as to note that “[f]acilitating the development of . . . secondary markets enhances and complements several of the Commission’s major policy initiatives and public interest objectives, including . . . access for the provision of communications services by designated entities.” But, contrary to the Commission’s goal of encouraging secondary market spectrum transactions, application of the “attributable material relationship” rule to secondary market transactions involving only Non-DE Licenses has the effect of stymieing the growth of a vibrant secondary market for wireless spectrum by discouraging small, independent, minority-owned businesses from engaging in secondary market transactions due to the risk of losing DE benefits.
- The Commission should clarify the “attributable material relationship” rule by making clear that this rule is not applicable to leasing transactions between DEs and non-DEs where: (1) the licenses involved in the transaction were not acquired through the use of DE benefits and, instead, such licenses were acquired on the secondary market; and (2) the transaction does not involve a structure permitting a non-DE to exercise undue influence over a DE’s activities or decision making.