Council Tree Investors, Inc.

May 9, 2014

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, SW
Washington, DC 20554

Re: Grain Management LLC's Request for Clarification or Waiver of "Attributable Material Relationship" Rule

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 27, 2014 the Federal Communications Commission (the "Commission") sought comments on Grain Management LLC's March 4, 2014 request to clarify or waive the "attributable material relationship" (the "AMR") rule regarding the eligibility of Designated Entities ("DEs") (the "Grain Request").[1] On March 18, 2014 Council Tree Investors, Inc. ("Council Tree") filed an ex parte letter in response to the Grain Request,[2] which we have attached to this letter for reference.

In addition to Council Tree, the Minority Media and Telecommunications Council ("MMTC") also filed comments relating to the Grain Request.[3] Both MMTC and Council Tree argue that the Grain Request highlights a larger problem, and that is the AMR rule itself. In summary, and as discussed in detail below, Council Tree urges the Commission to: (i) eliminate the AMR rule, which is the underlying cause of Grain's waiver request, and which is also a formidable impediment for DEs in building competitive new wireless businesses, and (ii) not to merely "patch" the situation with a unique waiver to Grain, a waiver which would be analytically illogical and unsupportable in the face of a continuing AMR rule.

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[1] *See* Grain Management, LLC's Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule, WT Docket No. 05-211 et al. (March 4, 2014) ("Grain Request"). *See also Wireless Telecommunications Bureau Seeks Comment on Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule, Public Notice,* WT Docket No. 05-211 (rel. March 27, 2014).

[2] See Council Tree Investors, Inc. Ex Parte Letter Re: Grain Management LLC's Request for Clarification or Wavier of "Attributable Material Relationship" Rule, WT Docket No. 05-211 et al. (March 18, 2014).

[3] See Minority Media Telecommunications Council (MMTC) Comments Re: Grain Management LLC's Request for Clarification or Wavier of "Attributable Material Relationship" Rule, WT Docket No. 05-211 et al (April 25, 2014).

As a prefatory note, Council Tree and its principals have for two decades actively supported the Commission and its initiatives, including: (i) testifying before Congress in support of the Commission's policies and programs, in particular those programs that have focused on new entrants and enhancing diversity; (ii) participating in the Commission's Diversity Advisory Committee under appointment of several FCC chairmen; and (iii) working closely with the 8th Floor and staff on dozens of issues. We offer these reply comments as a continuation of our supportive approach of the Commission's efforts in these areas.

By way of background, we understand that the analytical foundation of the AMR rule, stated simply, is the proposition that a lease of more than 25% of spectrum capacity in a given license by Party A to Party B creates "undue influence" by Party B on Party A. However, we commend to the Commission's consideration that if this proposition is true, there is no reason to believe that it is untrue in the case of the Grain Request. The undue influence arising out of the lease relationship would be in effect for Grain as an FCC licensee, whether Grain is currently a DE or not. It would presumably have that effect in the future if Grain becomes a DE.

We note that, placed in a real world context, Grain's principal business appears to be leasing 100% of its spectrum capacity to the two largest wireless carriers in the United States. If leasing at *some* level to *some* parties creates undue influence, then one would assume it must create undue influence at these maximum levels to these lessees. And yet, the FCC found that the Grain transactions served the public interest, in addition to providing additional access to capital and the promotion of opportunities for entrepreneurs and other small businesses.

To our knowledge, nothing in the record before the Commission indicates a basis for distinguishing the Grain Request from the situation of DEs in general. Accordingly, to grant the Grain Request but leave the AMR rule intact for other FCC licensees (namely DEs) would, we believe, be an unsound decision.

A more central problem is the indefensibility of the AMR rule itself. We believe that the Grain Request in effect re-opens the AMR rule for review. Council Tree welcomes this re-opening as a long overdue opportunity to rejuvenate competitive entry in the wireless market and small business participation in FCC auctions. The AMR rule should not be sustained because, as Grain indicates, and Council Tree concurs, there is no evidence of per se undue influence arising out of any leasing relationship. In fact, as MMTC's White Paper[4] demonstrates, spectrum leasing and wholesaling are very important, well-established and commonplace practices in the wireless industry. They promote flexibility of capital structures, which can open access to capital, the primary need for start-up wireless businesses seeking to bring new competition into the telecommunications industry. In any event, we note that eliminating the AMR rule would leave in place and intact as a safeguard the 2003 secondary markets report and order that places certain limitations on spectrum leasing by DEs.[5] Quite properly, facilities-based wholesaling would not be similarly restricted.

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[4] See S. Jenell Trigg and Jeneba Jalloh Ghatt, Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry (Feb. 25, 2014) ("White Paper").

[5] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking (FCC 03-113), rel. October 6, 2003.

As a final matter, we ask the Commission to note the overall state of the record in the AWS-3 proceeding with respect to DE matters. The Grain request has received what might be termed conditional support, or, stated otherwise, conditional opposition.

By contrast, MMTC's proposal to provide higher levels of DE bidding credits in the AWS-3 and Incentive Auctions is supported extensively by numerous parties and is without opposition in the record in this proceeding. Nevertheless, the Commission has yet to address the merits of the higher bidding credit proposal. We believe that MMTC's proposal merits the Commission's consideration, particularly given: (i) the proposal's extensive record of support, (ii) the absence of any opposing comments whatsoever, and (iii) the mandate to the Commission set forth in Section 309(j) of the Communications Act. Increasing DE bidding credits is within the Commission's mandate under 309(j) and the Commission's existing authority under the generic auction rules. To deny the bidding credit proposal under these circumstances, and with substantial support and no opposition, would be contrary to the public interest, particularly given the Commission's own goals and mandates. Indeed, given the state of the record, to grant the Grain Request while denying the bidding credit proposal would only compound the problem.

For the reasons stated above and in our attached March 18, 2014 letter, we urge the Commission to eliminate or waive the AMR for all DEs and to implement higher bidding credits for the AWS-3 and 600 MHz auctions.

Sincerely,

/s/ Steve Hillard

Steve Hillard
Council Tree Investors, Inc.

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Dear Ms. Dortch:

On March 4, 2014, Grain Management LLC filed a request for the Federal Communication Commission (the "Commission") to clarify or waive the "attributable material relationship" rule (the "AMR") regarding the eligibility of Designated Entities ("DEs") (the "Grain Request").

The Grain Request underscores the unfortunate current policy situation regarding the AMR: (i) it is a lonely remnant of a failed and unreasonable policy initiative, (ii) it is outdated, (iii) it is unnecessary, (iv) it defeats the goals it purported to serve by effectively eliminating virtually all DEs from the spectrum auction market, and (iv) it needs to be eliminated all together and not just waived in the instance highlighted in the Grain Request.

Council Tree Investors, Inc. ("Council Tree") is a small business which aspires to participate in the upcoming AWS-3 and 600 MHz spectrum auctions. Its founding principle is to promote the diversity of ownership of communications licensees. As the Commission considers the Grain Request, we respectfully commend to the Commission that the AMR be eliminated or waived in its entirety, and broader relief for all DEs be fashioned based on the following considerations:

(i) The near absence of DE participation in the spectrum auction market.
In recent years DE participation in major spectrum auctions has diminished considerably. DEs won a meager 4 percent of spectrum by dollar value in Auction 66 in 2006, 2.6 percent in Auction 73 in 2008 and zero percent in Auction 96 in 2014. These three auctions totaled $34.2 billion of licenses, with just 3.1% of licenses won by DEs.

(ii) The near absence of DE participation is due in large part to the AMR

The AMR's unreasonable and arbitrary 25 percent limit on DE wholesaling, leasing, and reselling compared with no limit at all on non-DEs, hamstrings otherwise viable DE business plans from raising capital. DEs are hobbled because, in today's wireless market, the need for substantial flexibility in developing capital and cash flow is absolutely necessary to create and fund a viable business plan, especially when competing against incumbents. The AMR deprives DEs of that flexibility by artificially restricting secondary market transactions.

(iii) The AMR is a lonely remnant of a flawed and unreasonable policy

The AMR is the last surviving fragment of the set of rules otherwise found to be unlawful by the Third Circuit U.S. Court of Appeals in 2010[1]. These rules were adopted under ex-Chairman Martin's regime in 2006, on the eve of Auction 66. In light of the poor DE results in Auctions 66 and 73 under the full set of rules and Auction 96 with the AMR still in place, 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 for all DEs in the upcoming AWS-3 and 600 MHz auctions.

(iv) The AMR is unnecessary

The Commission has plenary and specific authority to police all DE transactions for both *de jure* and *de facto* control. Additionally, the Commission's random audit and affiliate control regulations can be used to determine whether one entity unduly controls another. The AMR is a blunt instrument that is unnecessary in light of these powers. The blunt (so to speak) truth is that rather than "police" DEs, the AMR simply clubs them to death.

(v) The AMR defeats the goals it purports to serve

The AMR serves to inhibit DEs, but not non-DEs, from wholesaling, reselling 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. This effectively prevents DEs from entering into wholesale, resale or leasing contracts of scale with a large or small entity. Non-DEs function without such constraints and such relationships are standard in today's wireless industry. 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 commitments in turn provide new entrants with projectable revenue streams, which in turn facilitate the financing and build-out of operations. The Commission previously recognized the value of leasing arrangements, especially for DEs, but has undermined the benefits of its secondary markets policy for DEs with this rule.

(vi) The Grain request can only be considered in light of a review of the AMR, its effects and its policy rationale

If the original Grain Transaction is in the public interest, then the influence of its 50% lessees, Verizon and AT&T, cannot have been found to have created impermissible influence on or a material relationship with Grain as an FCC licensee. If such is the case, then a similar situation by a DE also cannot be found to have created undue influence or a material relationship. Unless there are different standards of influence for different FCC wireless licensees – a situation we believe the Commission has

[1] Council Tree Communications, Inc. v. FCC, 619 F.3d 235, 253 (2008 3d Cir.) (affirming 47 C.F.R. § 1.2110(b)(3)(iv)(B) (2006)). The Third Circuit also questioned the FCC's failure to consider its secondary markets policy and the benefits of wholesaling under the 50% impermissible relationship rule, which was vacated. Id. at 254-55. Those same issues apply to the AMR, especially given today's technology and the need to avoid further excessive concentration of licenses at auction.

never articulated, much less adopted – then the AMR cannot be rationally sustained. It cannot rationally be sustained after the original Grain transaction, and certainly not after any waiver or clarification of the AMR to favor Grain, but not all other DEs. The merit of the Grain Request goes to the defects of the AMR as a whole for all DEs, and not to an exception favoring one party. Consideration of this matter can only be done as part of a review of the AMR, its policy rationale, and its effect on all DEs.

In addition to eliminating or waiving the AMR for all DEs, we encourage the Commission to take an equally or more important step to encourage Designated Entity participation. We wholeheartedly support MMTC's recommendations highlighted in their recent paper[2] filed in these proceedings and discussed with the Commission and supported by a substantial array of public interest organizations and individuals, to increase the level of bidding credits available to DEs. As such we propose the following level of bidding credits to encourage measurable DE success:

(i) A DE bidder with attributable annual gross revenues that do not exceed an average of $40 million for the preceding three years receives a 30 percent discount on its winning bid.

(ii) A DE bidder with attributable annual gross revenues that do not exceed an average of $15 million for the preceding three years receives a 40 percent discount on its winning bid.

For the reason stated above, we urge the Commission to eliminate or waive the AMR for all DEs and to implement higher bidding credits for the AWS-3 and 600 MHz auctions.

Sincerely,

/s/ Steve Hillard

Steve Hillard
Council Tree Investors, Inc.

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[2] See S. Jenell Trigg and Jeneba Jalloh Ghatt, Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry (Feb. 25, 2014).