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

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

To: The Commission

COMMENTS OF COUNCIL TREE COMMUNICATIONS, INC.

Steve C. Hillard
George T. Laub
Jonathan B. Glass
Council Tree Communications, Inc.
2919 17th Avenue
Suite 205
Longmont, CO 80503
(303) 678-1844

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SUMMARY

One of the central problems facing the Commission's designated entity program is the growing prevalence of national wireless service providers using designated entity relationships to extend their dominance in the commercial mobile radio services ("CMRS") industry. Control of the CMRS industry is already concentrated in the hands of a few national wireless service providers. These national wireless carriers are now leveraging designated entity investments to extend and deepen their CMRS spectrum footprints. As a result, designated entities associated with national wireless service providers have won growing shares of the licenses offered in recent CMRS spectrum auctions, permitting the national carriers to extend their already-substantial reach with the aid of government-sponsored preferences.

It is (and should be) the Commission's policy to encourage new entrants to look to skilled industry participants for capital and technical and industry expertise. That type of relationship is critical if designated entities are to succeed in this capital-intensive, technologically-complex business. Yet, the benefits of such a relationship are outweighed as a policy matter when the entity providing capital or management experience already occupies a dominant position in the industry. A national wireless service provider furnishing capital and management expertise to a designated entity will, by virtue of its role, see its influence extended in terms of geography, spectrum depth, technological reach, and marketing exposure.

The designated entity program was created to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants. Now, however, the ability of national wireless service providers to extend their influence through new entrants is greater then ever. Unless the Commission acts to update the eligibility standards for bidding credits and other preferences offered in auctions of CMRS spectrum rights, national wireless service providers will increasingly use their designated entity relationships to extend their spectrum holdings and influence.

As a result, national wireless service providers should not be permitted to invest at a material level in, or enter material operating arrangements with, new entrants that receive competitive bidding preferences. National wireless service providers have no need for such preferences, and the competitive effects of their participation with designated entities is increasingly contrary to the rationale of the preference system. Meanwhile, new entrants have many sources of capital and expertise that are not national wireless service providers. Adoption of the Commission's new rule will help to promote investment in and support of designated entities by companies offering competitive alternatives to the plans of national wireless service providers.

For these purposes, the Commission should define national wireless service providers as those with average gross wireless revenues for the preceding three years exceeding $5 billion. Gross wireless revenues should be revenues derived from a carrier's provision of CMRS, CMRS roaming, and CMRS-related equipment

sales. A $5 billion average gross wireless revenues threshold is the appropriate level at which to define a national wireless service provider because it is an objective measure by which to address carriers with operations that can be characterized as national in scope and scale and that, collectively, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue. The Commission should prohibit the award of designated entity benefits where these entities are materially involved.

In contrast, the Commission should not prohibit the award of designated entity benefits where an otherwise qualified designated entity applicant has a "material relationship" with an "entity with significant interests in communications services." There is no demonstrated problem concerning non-national wireless service providers with significant interests in communications services in this context. Moreover, undertaking to identify distinctions among such entities for the purposes of a prohibition would dramatically complicate this proceeding and delay its conclusion. And, most importantly, if adopted, such a prohibition would deny designated entities access to important sources of capital and expertise.

At a minimum, the Commission's new rule should addresses the dominance of national wireless service providers in their existing service regions. Once adapted to include AWS-1 and other spectrum to be licensed in the near term, the "significant overlap," "attributable interest," and "divestiture" standards in the now-sunset CMRS spectrum aggregation limit may be used to determine when a geographic overlap exists for the purposes of the Commission's new rule.

For the purposes of the Commission's new rule, a material financial arrangement should be any arrangement that, directly or indirectly, provides 33 percent or more of the total capitalization of the designated entity (equity plus debt) and all future interest agreements (such as puts, calls, options, warrants, and guarantees) that, individually or in the aggregate, involve such funding. According to the Commission, "we have consistently found otherwise nonattributable interests in excess of 33% to be 'meaningful' under a cross-interest policy designed to insure continued competition and diversity . . . ." By adopting a bright-line prohibition on the award of competitive bidding preferences to designated entities that have received 33 percent or more of their total capitalization from a national wireless service provider, the Commission can help to combat the effect of that increasing industry concentration.

For the purposes of the Commission's new rule, a material operating arrangement should be anything other than a non-discriminatory roaming or interconnection agreement or a short-term de facto transfer leasing arrangement. Thus, within the category of "material operating arrangements" should be (without limitation) management agreements, trademark license agreements, joint marketing agreements, future interest agreements, and long-term de facto and spectrum manager leasing arrangements. Though certain of these agreements may be structured to preserve the *de jure* and *de facto* control of the designated entity under the Commission's current rules, they nevertheless convey a level of influence

over the operations of the designated entity that is inappropriate in the hands of a dominant national wireless service provider.

Consistent with the requirements of the Communications Act, the Commission has established unjust enrichment provisions applicable to those who use competitive bidding preferences to acquire Commission licenses. To ensure that the limitations adopted here are effective, the Commission should apply the same unjust enrichment provisions in this context. Finally, the Commission should ensure that its new rule is set before short-form applications are due for the upcoming auction of AWS-1 licenses. The auction of AWS-1 licenses is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources. The Commission should ensure that its new rule is known (or at least knowable) to potential applicants in advance of the short-form filing deadline and that it governs the results of that crucial competitive bidding event.

At bottom, the Commission must act to stop the erosion of the designated entity program, for recent trends will lead to the dismantling of the program altogether. In 1995, Congress eliminated the availability of tax certificates for members of minority groups in part because the program had ceased to serve the ends envisioned by Congress. The same result could apply here. As it prepares to award licenses to use AWS-1 spectrum, therefore, the Commission should see that its designated entity program is not used to extend the dominance of those who already control the CMRS industry.

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COUNCIL TREE COMMUNICATIONS, INC.

Council Tree Communications, Inc. ("Council Tree"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these comments in response to the captioned *Further Notice of Proposed Rule Making* (FCC 06-8), adopted by the Commission on January 27, 2006 and released on February 3, 2006 ("*FNPRM*").1/

I. INTRODUCTION

Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that business success can accompany the meaningful diversification of communications facilities ownership. As part of this work, Council Tree has long been an active supporter of

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1/ The *FNPRM* was published in the Federal Register on February 10, 2006. *See* 71 Fed. Reg. 6992 (Feb. 10, 2006).

responsibly-managed government efforts to encourage the participation of new entrants in the communications industry. In 2003, Council Tree president Steve C. Hillard was appointed to the Commission's Advisory Committee on Diversity for Communications in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

Among other groups, Council Tree works with Alaska Native Regional Corporations organized by Congress under the terms of the Alaska Native Claims Settlement Act,2/ the shareholders of which are recognized to be socially and economically disadvantaged for all purposes of federal law.3/ 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,"4/ 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 . . . ."5/ Given its investment mission,

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2/ *See* 43 U.S.C. § 1601 *et seq.*

3/ *See id.*, § 1626(e).

4/ 47 U.S.C. § 309(j)(3)(B).

5/ *Id.*, § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. *Id.*, § 257.

Council Tree has an interest in seeing that the Commission's spectrum auction rules and policies reflect these mandates, making room for those who could otherwise be excluded under a system of competitive bidding.

This is a crucial time for the Commission to refocus its designated entity program, for it is faced with problems that threaten the very availability of competitive bidding preferences for true new entrants. Among these is the growing prevalence of national wireless service providers using designated entity relationships to extend their dominance in the commercial mobile radio services ("CMRS") industry. Control of CMRS spectrum rights is already concentrated hands of a few national wireless service providers. It is clear from recent competitive bidding events that these national wireless carriers are now leveraging designated entity investments to extend and deepen their CMRS spectrum footprints. As a result, designated entities associated with national wireless service providers have won growing shares of the licenses offered in recent CMRS spectrum auctions, permitting these national carriers to extend their already-substantial reach with the aid of government preferences.

It is a central purpose of the designated entity rules to permit new entrants to access the capital and technical and management experience of existing industry participants, which contributes to the likelihood that the designated entity will be successful. The benefits of that access are outweighed, however, when the entity providing capital or experience already occupies a dominant position in the industry. In that case, the dominant position is only fortified as the national

wireless carrier will avoid providing capital, technical guidance, or management direction to an entity that undermines its market objectives. By permitting new entrants to look to already-dominant carriers for capital and management skill, the designated entity program becomes a tool for industry consolidation, not diversification.

In the *FNPRM*, the Commission tentatively concludes that, even where an entity qualifies for designated entity preferences under the Commission's existing rules, such preferences should not be available to that entity if it has a "material relationship" with a "large, in-region, incumbent wireless provider."6/ This is an essential step for the Commission, and adoption of new its new rule will contribute to more closely aligning the results of the designated entity program with its original purpose. Time is of the essence, however. The Commission is preparing to auction rights to use spectrum in the 1710-1755 and 2110-2155 MHz bands ("AWS-1"),7/ which will be the most important opportunity to acquire critical spectrum licenses in years. In the absence of a clear and enforceable Commission restriction, recent trends will continue and national wireless service providers will overwhelm the designated entity program in this and later auctions.

6/ *FNPRM* at ¶11.

7/ *See Public Notice: Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006*, DA 06-238 (WTB rel. Jan. 31, 2006) ("*Auction 66 Procedures Notice*").

Critically, such a restriction would not operate as a license eligibility limitation. National wireless service providers would not be prevented under the Commission's new rule from acquiring any license *directly* through competitive bidding. Large incumbents simply should not be permitted to invest at a material level in, or enter material operating arrangements with, new entrants that receive competitive bidding preferences. National wireless service providers have no need for such preferences, and the competitive effects of their participation with designated entities is increasingly contrary to the rationale of the preference system. Meanwhile, new entrants have many sources of capital and expertise that are not national wireless service providers. The Commission's new rule will help to promote investment in and support of designated entities by companies offering competitive alternatives to the plans of national wireless service providers. That is something the Commission could be proud of.

It is important to note that there are other problems with the designated entity program that are not addressed in the *FNPRM*. For example, Congress expressly warned that the Commission's competitive bidding process should not "inadvertently have the effect of favoring only those with 'deep pockets' . . . ."8/ Today, however, high net worth individuals recognize that the Commission does not count personal wealth in assessing the size of a business that applies for auction-related bidding credits or set-asides. If a high net worth individual does not have

8/ H.R. Rep. No. 103-111, at 255 (1993).

his or her wealth tied to ownership of other businesses — or if such other businesses have few or no gross revenues — the Commission's Rules permit that individual to receive the government benefits meant for disadvantaged enterprises.9/ In turn, national wireless service providers have increasingly shown a preference for working with such wealthy individuals, particularly if they are former colleagues or industry executives that qualify for the same auction-related preferences as persons with less industry experience. Adoption of the proposals outlined in the *FNPRM* will help to address *that* part of the problem, but the basic ability of high net worth individuals to take advantage of designated entity preferences will not be remedied. Council Tree continues to urge the Commission to close this loophole.

Also not addressed in the *FNPRM* is the continuing decline in the number of incentives available to designated entities in competitive bidding. The Commission no longer offers the installment payment financing that so enhanced the ability of members of minority groups to acquire licenses in competitive bidding,10/ it no longer permits smaller businesses to qualify for an auction with a reduced upfront

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9/ In 2004, Council Tree filed a Petition for Rulemaking in which it urged the Commission to institute a personal net worth limitation for competitive bidding small business preference eligibility. *See* Council Tree Communications, Inc., Petition for Rulemaking, RM 10956 (filed March 8, 2004). According to the Commission, its subsequent rejection of the same Council Tree proposal in WT Docket No. 02-353 "effectively disposed of Council Tree's petition for rulemaking." *FNPRM* at ¶5 n.17.

10/ *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) ("*Part 1 Fifth Report and Order*").

payment,11/ and it no longer sets aside licenses for bidding only by designated entities.12/ This trend is evident most recently in the Commission's competitive bidding rules for AWS-1 spectrum. The Commission determined that AWS-1 licensees would face capital requirements and deployment challenges similar to those that confronted broadband personal communications service ("PCS") licensees.13/ In the case of broadband PCS, the Commission determined in 1994 that designated entities would not realize meaningful opportunities through spectrum auctions "unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against."14/ In the case of AWS-1, however, the Commission refused to set aside any spectrum for designated entities and it refused to increase the AWS-1 bidding

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11/ *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) ("*Cincinnati Bell Remand Order*"). *Cf. Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5600 (1994) ("*Competitive Bidding Fifth Report and Order*").

12/ *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) ("*AWS-1 Report and Order*") (resolving not to set aside any advanced wireless services licenses for bidding only by designated entities).

13/ *See id.* at 25218.

14/ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 414-15 (1994) (emphasis added) ("*Competitive Bidding Fifth MO&O*").

credit above the broadband PCS level as an alternative.15/ Thus, legitimate designated entities will compete for AWS-1 spectrum with substantially less Commission support than they ever had in the case of broadband PCS.

The Commission cannot permit this erosion of the designated entity program to continue, for it could lead to the dismantling of the program altogether. In 1995, Congress eliminated the availability of tax certificates for members of minority groups16/ in part because the program had ceased to serve the ends envisioned by Congress. The Commission must ensure that its designated entity program is administered in a manner consistent with the goals of Congress to avoid a similar result here. In this case, as it prepares to award licenses to use AWS-1 spectrum, the Commission should see that its designated entity program does not simply extend the dominance of those who already control the CMRS industry.

Establishing and enforcing a meaningful limitation on the ability of national wireless service providers to expand their dominant positions through designated entity arrangements in the AWS-1 auction (and later auctions) will help to address the excessive concentration of CMRS licenses by disseminating new licenses among a wider variety of applicants. In turn, that will help to preserve the designated entity program for the benefit of those that legitimately deserve government assistance.

15/ *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Rcd 14058, 14075-77 (2005).

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

There is much the Commission should do to more carefully administer the designated entity program. Adoption of the Commission's tentative conclusions in the *FNPRM* is just one step, but it is a critical one, and it should be taken without delay to avoid excessive concentration of licenses and to preserve the program for those who truly merit government support to become Commission licensees.

II. THE COMMISSION SHOULD ADOPT ITS TENTATIVE PROPOSAL

In the *FNPRM*, the Commission describes Council Tree's proposal to prohibit the award of competitive bidding preferences where the entity has a material relationship with a large, in-region, incumbent wireless provider, indicating that "[w]e tentatively conclude that we should modify our rules to restrict the award of designated entity benefits where such a relationship exists."17/ The Commission seeks "comment on the factual assertions upon which Council Tree's proposals are based and the impact, if any, that the adoption of the proposed restriction would have on the ability of small businesses to provide spectrum-based services."18/ Here, Council Tree addresses the underpinnings of its proposal and the impact such a prohibition would have on the ability of smaller businesses to participate in the provision of spectrum-based services.

17/ *FNPRM* at ¶11.

18/ *Id.*

A. The Designated Entity Program was Created to Avoid Excessive Concentration of Licenses and to Disseminate Licenses Among a Wide Variety of Applicants

The designated entity program was created to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants. The need for this approach was apparent even before the advent of the Commission's auctions authority. According to a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

> The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.19/

The Report explained that:

> One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with "deep pockets", and therefore have the wherewithal to participate in the bidding process.20/

On that basis, as part of the grant of auction authority under Section 309(j), the Commission was directed to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants"21/ and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are

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19/ H.R. Rep. No. 103-111, at 254.

20/ *Id.* at 255.

21/ 47 U.S.C. § 309(j)(3)(B).

given the opportunity to participate in the provision of spectrum-based services . . . ."22/

In the service of these directives, the Commission in 1994 considered a series of initiatives calculated to improve the ability of designated entities to become Commission licensees through competitive bidding. According to the Commission, such initiatives would "enable the participation of a variety of entrepreneurs in the provision of wireless services and the resulting diversity of service offerings will increase customer choice and promote competition."23/ In the case of broadband PCS, the Commission instituted a number of preferences for new entrants, including (1) setting aside two broadband PCS spectrum blocks for bidding by smaller businesses only; (2) offering bidding credits to smaller businesses and businesses owned by members of minority groups and women; (3) permitting designated entities to pay for certain licenses in installments; (4) offering a tax certificate for businesses owned by members of minority groups and women; and (5) reducing the upfront payment required for designated entities to bid for licenses in the set-aside spectrum blocks.24/ The Commission noted that,"[a]ccording to NTIA, reserving two entrepreneurs' blocks

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22/ *Id.*, § 309(j)(4)(D).

23/ *Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2389 (1994) ("*Competitive Bidding Second Report and Order*").

24/ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5580.

helps significantly in satisfying the congressional directive that competitive bidding not result in an increase in concentration in the telecommunications industries."25/

In addition to improving the ability of designated entities to attract capital, a goal of the designated entity program was to help new entrants draw on the experience of established firms and managers as a way to increase their odds of success.26/ The Commission explained in the course of refining its broadband PCS designated entity provisions that new attribution rules would:

> (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.27/

According to the Commission, "[i]nvestments by cellular providers in . . . designated entities should increase the entities chances for success in the auctions and later in service competition by providing access to capital and valuable industry experience."28/ The Commission also resolved to apply its *Intermountain Microwave* standards in the case of management agreements entered by new entrants, explaining that the standards "will ensure that designated entities participate actively in the day-to-day management of the company while allowing

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25/ *Id.* at 5585-86 (footnoted omitted).

26/ *See, e.g.*, *id.* at 5603.

27/ *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 441.

28/ *Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5008-09 (1994) ("*Broadband PCS Reconsideration Order*").

reasonable flexibility to obtain services from outside experts as well."29/ The Commission was clear that it would not limit managers to performing discrete subcontractor functions because doing so "could prevent designated entities from drawing on managers with broad expertise."30/

Nevertheless, the Commission was sensitive to the impact that its policies would have on competition in the provision of CMRS. To guard against an excessive concentration of licenses, the Commission limited the number of broadband PCS entrepreneurs' block licenses that a single entity could win in competitive bidding.31/ Separately, the Commission restricted broadband PCS licensees to 40 MHz of broadband PCS spectrum in any geographic area,32/ explaining that doing so would "ensure that no individual person or single entity is able to exert undue market power through partial ownership in multiple PCS licensees in a single service area."33/ The Commission also limited cellular licensees to no more than 10 MHz of broadband PCS spectrum in their cellular service areas.34/

29/ *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 451.

30/ *Id.* (footnote omitted).

31/ *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5606.

32/ *See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd 7700, 7728 (1993) ("*PCS Second Report and Order*").

33/ *Id.*

34/ *See id.* at 7745. That limit was later relaxed to 15 MHz beginning after January 1, 2000. *See Amendment of the Commission's Rules to Establish New*

Then, in 1994, the Commission adopted its CMRS spectrum aggregation limit.35/ According to the Commission, "[w]e were concerned that excessive aggregation by any one or several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."36/ The Commission added that "[t]he lack of a spectrum cap could undermine other goals of the [Communications] Act, such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants."37/ On that basis, the Commission capped at 45 MHz the amount of combined broadband PCS, cellular, and specialized mobile radio service spectrum classified as CMRS in which an entity may have an attributable interest in any geographic area. The Commission relaxed the attribution threshold from 20 percent to 40 percent in the case of ownership interests held in designated entity licensees38/ as a means to make capital more readily available to new entrants.39/

Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 4957, 4984 (1994).

35/ *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8100-01 (1994) ("*CMRS Third Report and Order*").

36/ *Id.* at 8101.

37/ *Id.* at 8104.

38/ *See id.* at 8115.

39/ *See Cincinnati Bell Remand Order*, 11 FCC Rcd at 7883.

Thus, in crafting its original designated entity and CMRS rules, the Commission was careful to take steps intended to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants. The Commission wanted to see that new entrants could have access to sources of capital and management expertise as a way to overcome barriers to entry that threatened to keep them from acquiring licenses in a system of competitive bidding. At the same time, the Commission sought to avoid permitting incumbent firms from dominating the provision of CMRS through license aggregation and investments. The Commission originally attempted to take a balanced approach to achieving these various goals. It is this balance that is failing today.

B. Unless the Current Rules Are Changed, Future CMRS Spectrum Rights Will Be Concentrated in the Hands of Already-Dominant National Wireless Service Providers

As this history illustrates, the Commission originally evaluated a host of issues in crafting the designated entity program, including questions relating to designated entity viability and the promotion of competition through the program. Regulatory changes since the development of the program, however, have produced a trend that is increasingly contrary to the rationale of the preference system. Among other things, in 2000, the Commission adopted the so-called "controlling interest" standard as its general attribution rule in this context.40/ Under this standard, the Commission attributes to the applicant the gross revenues of those

40/ *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323.

individuals and entities with *de jure* and *de facto* control over the enterprise,41/ but it does not require any such controlling interest individual or entity to hold a particular level of equity in the applicant as part of the control test.42/ This was a break from the approach used in auctions of broadband PCS licenses, where the Commission prescribed the level of equity a controlling investor was required to maintain in a designated entity applicant and capped the level of equity that could be held by any non-controlling investor.43/

Separately, in late 2001, the Commission resolved to "sunset" its CMRS spectrum aggregation limit effective as of January 1, 2003.44/ In its place, the Commission provided that license transfers will be subject to review on a case-by-case basis to determine if any associated spectrum aggregation would be in the public interest.45/ The Commission had already eliminated its broadband PCS spectrum aggregation limit and its PCS/cellular cross-ownership limit in favor of the CMRS spectrum cap.46/ Therefore, coupled with the move to the controlling

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41/ *Id.* at 15324.

42/ *Id.* at 15325-26.

43/ *See* 47 C.F.R. § 24.709(b)(1)(v)-(vi) (setting forth the minimum equity requirements for eligibility under the broadband PCS control group attribution scheme).

44/ *See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, Report and Order*, 16 FCC Rcd 22668, 22693 (2001) ("*Spectrum Cap Order*"); 47 C.F.R. § 20.6(f).

45/ *See Spectrum Cap Order*, 16 FCC Rcd at 22693-95.

46/ *See Cincinnati Bell Remand Order*, 11 FCC Rcd at 7869.

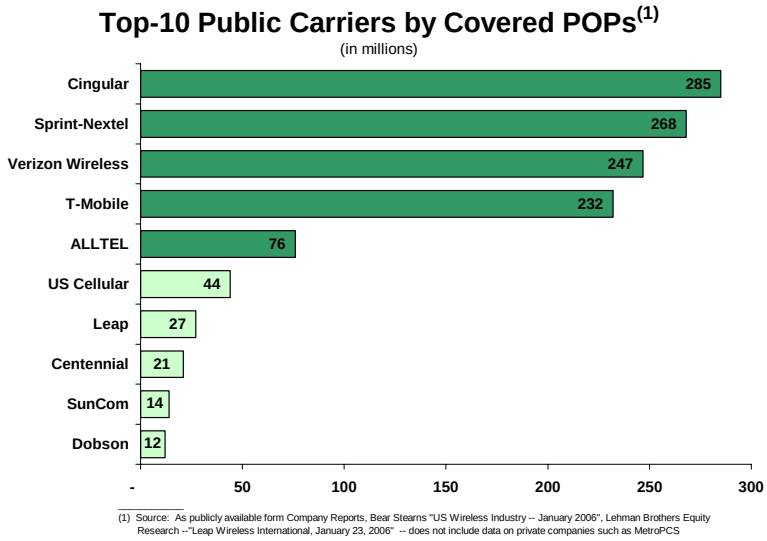
interest standard, the elimination of the CMRS spectrum cap meant that those with substantial CMRS spectrum holdings did not face a bright line prohibition on investing heavily in new entrants. Naturally, such investments are quite attractive when designated entities are able to secure the same spectrum rights as others at a substantial discount.

As a result of these and other shifts, the designated entity program increasingly is becoming a means by which the national wireless service providers can further extend their dominance in the provision of CMRS. If the Commission does not update the eligibility standards for bidding credits and other preferences offered in auctions of commercial mobile radio services spectrum rights — including AWS-1 — these spectrum rights will also be concentrated in the hands of national wireless service providers. More than ever before, the national wireless service providers will deploy their enormous financial resources to dominate the AWS-1 and later spectrum auctions.

1. Control of the CMRS Industry Is Already Concentrated in the Hands of a Few Companies

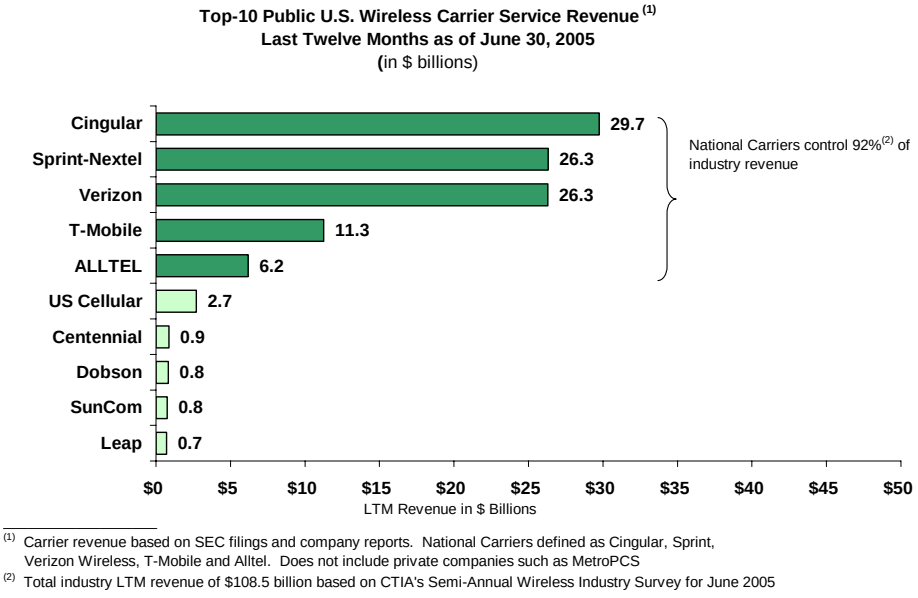
The underpinnings of this problem are evident in the overwhelming concentration of the provision of wireless services in the United States in the hands of a few national wireless service providers. As shown in Chart 1, five national wireless service providers dominate the CMRS industry on the basis of population covered by their CMRS networks:

Chart 1



As shown in Chart 2, the same five national wireless service providers dominate the industry on the basis of revenue from their CMRS operations:

Chart 2

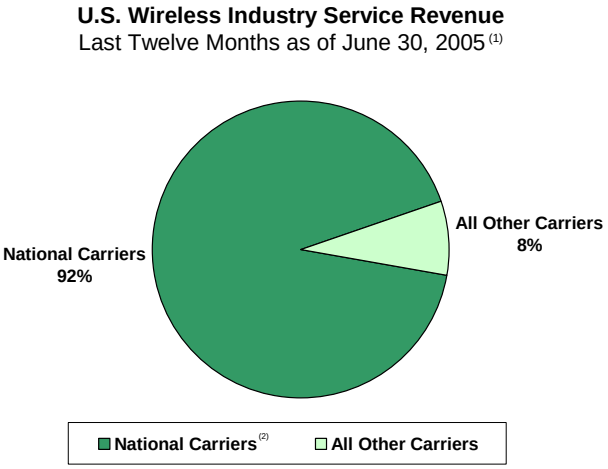


(1) Carrier revenue based on SEC filings and company reports. National Carriers defined as Cingular, Sprint, Verizon Wireless, T-Mobile and Alltel. Does not include private companies such as MetroPCS

(2) Total industry LTM revenue of $108.5 billion based on CTIA's Semi-Annual Wireless Industry Survey for June 2005

The top five national wireless service providers account for 92 percent of all United States CMRS-industry revenue:

Chart 3

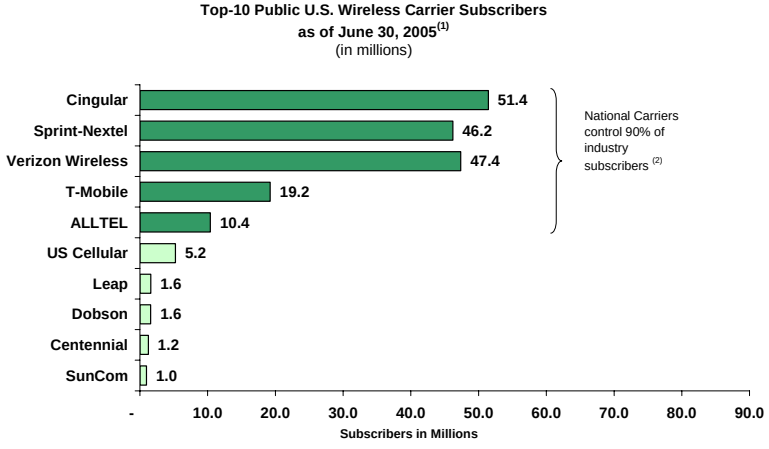


(1) Total industry LTM revenue of $108.5 billion based on CTIA's Semi-Annual Wireless Industry Survey for June 2005

(2) Carrier revenue based on SEC filings and company reports. National Carriers defined as Cingular, Sprint, Verizon Wireless, T-Mobile and Alltel

The same five national wireless service providers dominate the industry on the basis of CMRS subscribers in the United States:

Chart 4

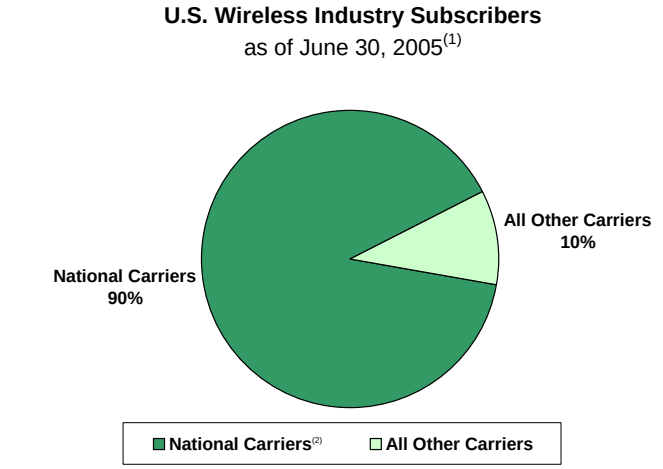


(1) Carrier subscribers based on SEC filings and company reports. National Carriers defined as Cingular, Sprint and its affiliates, Verizon Wireless, T-Mobile and Alltel. Does not include private companies such as MetroPCS

(2) Total industry subscribers of 194.5 million based on CTIA's Semi-Annual Wireless Industry Survey for June 2005

Those five national wireless service subscribers serve 90 percent of all CMRS subscribers in the United States:

Chart 5

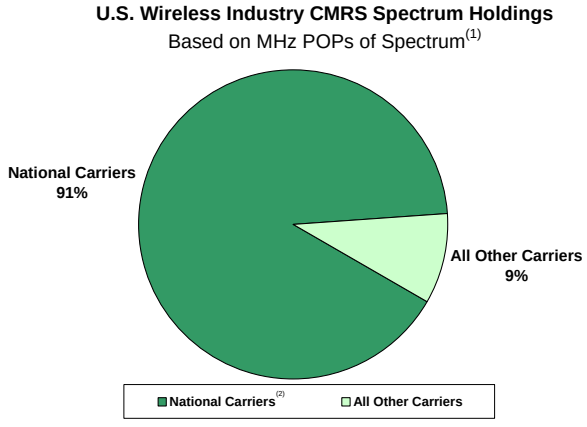


(1) Total industry subscribers of 194.5 million based on CTIA's Semi-Annual Wireless Industry Survey for June 2005

(2) Carrier subscribers based on SEC filings and company reports. National Carriers defined as Cingular, Sprint and its affiliates, Verizon Wireless, T-Mobile and Alltel

Taken together, these five national wireless service providers hold *91 percent* of the CMRS spectrum in the United States based on MHz-POPs:

Chart 6



(1) Derived using data from Kagan Research - Wireless Atlas & Databook 2005 by multiplying Average MHz POPs (page 4) by Wireless POP Ownership (page 10) to determine MHz POPs

(2) National Carriers are defined as Sprint-Nextel, Cingular, Verizon Wireless, T-Mobile and Alltel

2. National Wireless Service Providers Are Increasingly Using the Designated Entity Program to Extend Their Influence

Equally alarming is the encroachment of the large, incumbent wireless carriers on the designated entity program itself. National wireless service providers are increasingly using designated entity investments to acquire access to additional CMRS spectrum. This much is evident in the trend from Auction 35 to Auction 58, as shown in Chart 7, Chart 8, and Chart 9 (data and assumptions used in these charts are shown in Attachment 1 to these comments):

Chart 7

National Carrier License Investment:
Direct vs. Designated Entity Relationship
By Number of Licenses

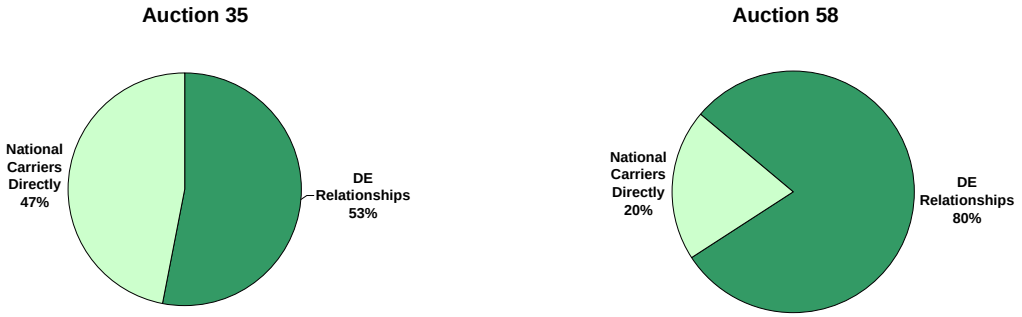


Chart 8

National Carrier License Investment:
Direct vs. Designated Entity Relationship
By Net License Purchase Price

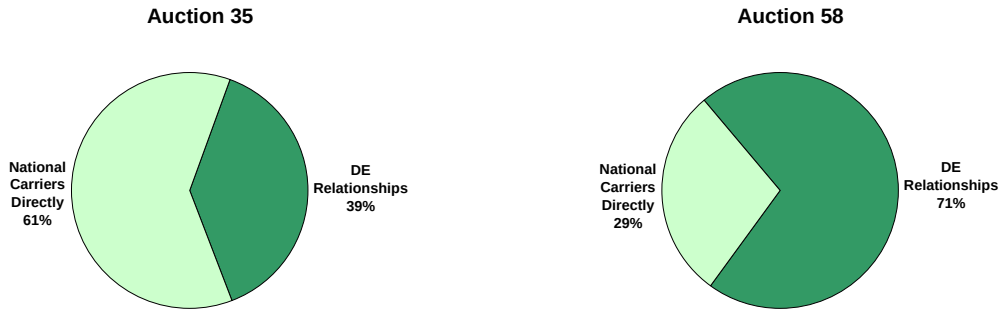
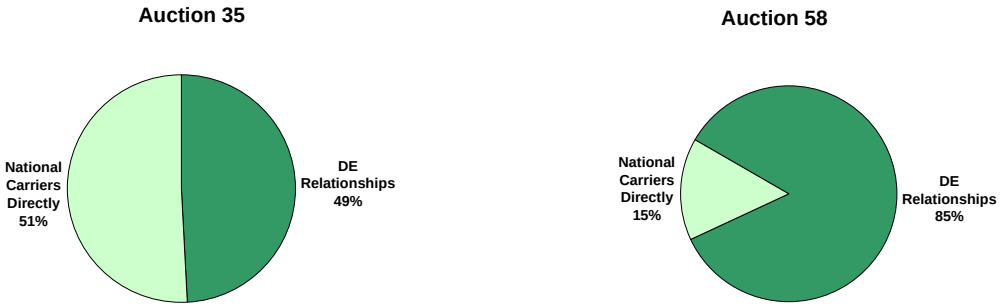


Chart 9

National Carrier License Investment:
Direct vs. Designated Entity Relationship
By MHz-POPs



As a result, designated entities associated with national carriers have won quite large and growing shares of the licenses offered in recent CMRS auctions.

This trend is shown in data from Auctions 22, 35, and 58 (the last three broadband PCS license auctions) as depicted in Chart 9, Chart 10, and Chart 11 (data and assumptions used in these charts are shown in Attachment 1 to these comments):

Chart 9

Auction Winnings by Designated Entities with
National Carrier Investments as % of Total Auction
By Number of Licenses

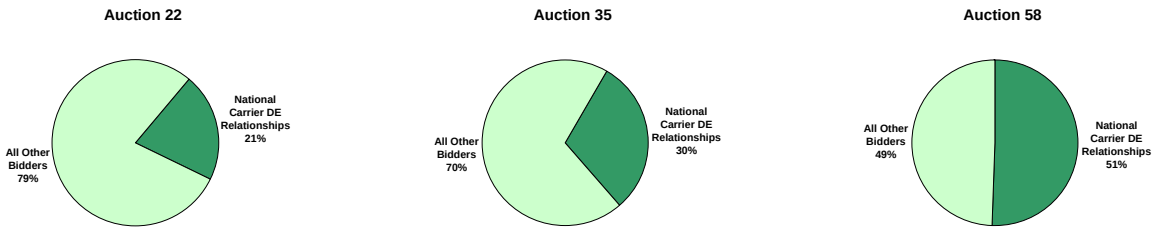


Chart 10

Auction Winnings by Designated Entities with
National Carrier Investments as % of Total Auction
By Net License Purchase Price

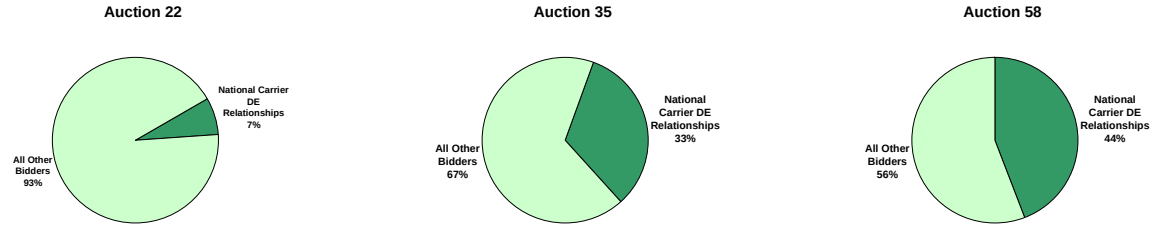
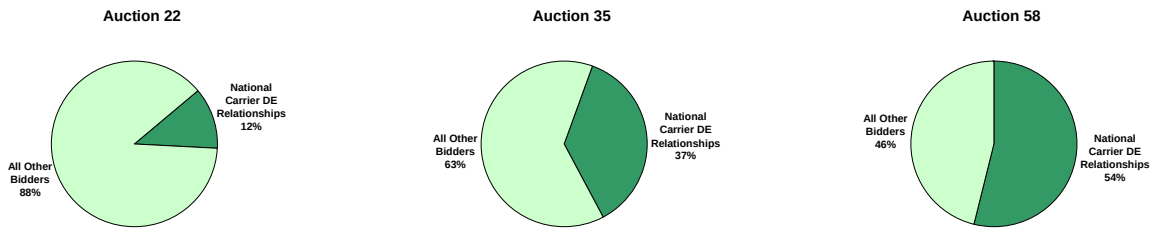


Chart 11

Auction Winnings by Designated Entities with
National Carrier Investments as % of Total Auction
By MHz-POPs



3. No Objective Spectrum Aggregation Limit Applies to the AWS-1 Bands

The trend that is apparent over the last several years will only continue in the upcoming AWS-1 auction in part because no objective spectrum aggregation limit applies to the AWS-1 bands. As noted above, the Commission originally developed service-specific spectrum aggregation limits and a CMRS spectrum aggregation limit to prevent excessive aggregation by any one or several CMRS licensees, which could have the effect of reducing competition by precluding entry by other service providers.47/ Today, however, the broadband PCS spectrum aggregation limit, the PCS/cellular cross-ownership rule, and the CMRS spectrum aggregation limit are no longer in effect. The broadband PCS spectrum aggregation

47/ *CMRS Third Report and Order*, 9 FCC Rcd at 8101.

limit and the PCS/cellular cross-ownership rule were eliminated in favor of the CMRS spectrum cap,48/ and the CMRS spectrum cap was then replaced by a system of case-by-case review.49/

Meanwhile, the Commission established no distinct spectrum aggregation limit for the AWS-1 bands.50/ According to the Commission:

> We believe that entities should have the unrestricted flexibility to aggregate spectrum in these bands. Parties should be afforded the flexibility at auction and in the secondary market to aggregate sufficient unencumbered spectrum for them to make available new and innovative service to the public.51/

The Commission also made clear that it chose geographic and bandwidth dimensions to *facilitate* aggregation of the AWS-1 spectrum rights during the auction should individual bidders find that to be valuable.52/ More recently, the Commission tentatively concluded that it will not impose a band-specific spectrum aggregation limit for advanced wireless services H Block and J Block licenses.53/ As a result, national wireless service providers, who already have succeeded in

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48/ *See Cincinnati Bell Remand Order*, 11 FCC Rcd at 7869.

49/ *See Spectrum Cap Order*, 16 FCC Rcd at 22693-95.

50/ *See, e.g.*, *AWS-1 Report and Order*, 18 FCC Rcd at 25189.

51/ *Id.*

52/ *See id.* at 25176, 25178.

53/ *See Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, Notice of Proposed Rule Making*, 19 FCC Rcd 19263, 19290-91 (2004).

gathering control of CMRS spectrum rights, will soon be permitted to aggregate AWS-1 spectrum rights and, possibly, H Block, and J Block rights as well.

4. National Wireless Service Providers will Extend their Dominance Through Material Transactions with Designated Entities

Unless the Commission acts to update the eligibility standards for bidding credits and other preferences offered in auctions of CMRS spectrum rights, national wireless service providers will use their designated entity relationships to extend their spectrum holdings and influence through material transactions with designated entities. The Commission's Rules correctly permit designated entities to look to non-controlling investors for capital and industry experience. This is a cornerstone of the designated entity program, and it is essential if new entrants are to be given a meaningful opportunity to participate in the provision of spectrum-based services.

Allowing dominant national wireless service providers to be the sources of capital and management expertise, however, has the effect of allowing them to extend their influence within the industry — even without a controlling interest in the designated entity licensee. The Commission acknowledged one aspect of this problem when it discussed its CMRS spectrum cap in 1996:

> We reject a control-based attribution test because significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. The CMRS spectrum cap ownership attribution rule, just as all other ownership attribution rules and similar statutory provisions, must take such interests into account. Economic theory predicts that where a CMRS licensee owns a substantial portion of one of its competitors, neither company has as

> strong an incentive to compete vigorously against its partner as it does with respect to an unrelated competitor. . . . Rather than compete on price, both companies have an incentive to maintain a high price level by coordinated interaction.54/

The Commission explained:

> [T]he minority shareholder[] would have an incentive to stifle vigorous price competition. It would also have the capability of doing so, because a minority owner may exert influence over the company by challenging various business decisions, by conducting (or even just threatening) litigation, by refusing to provide additional capital, by insisting upon business audits, or by using other mechanisms by which minority owners protect their investments in closely held firms.55/

The Commission was clear that "[e]ven 'silent financial interests' — *i.e.*, non-controlling shares — may affect the behavior of the partly owned company by causing the minority owner to take into account its behavior on the profits of its partly owned competitor."56/

Similarly, in establishing competitive bidding rules for broadcast permits, the Commission said "our general attribution rules are not merely concerned with *controlling* relationships, but also extend to relationships that provide 'a realistic

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54/ *Cincinnati Bell Remand Order*, 11 FCC Rcd at 7882.

55/ *Id.*

56/ *Id.* The Commission also discussed this prospect in the 1994 *Broadband PCS Reconsideration Order*, where, in addressing the attribution thresholds for its cellular/PCS cross-ownership rule, the Commission observed that "[a] PCS licensee that has a large equity stake (i.e., more than 20 percent) in a cellular licensee in the same area has less incentive to compete vigorously against its own equity interest in a cellular provider, even though it may not exercise control over the cellular licensee." *Broadband PCS Reconsideration Order*, 9 FCC Rcd at 5003.

potential' to influence core operating functions of licensees."57/ The Commission added that "we have consistently found otherwise nonattributable interests in excess of 33% to be 'meaningful' under a cross-interest policy designed to insure continued competition and diversity . . . ."58/ Thus, where matters of competition and diversity are at issue, the Commission looks beyond controlling interests to situations where non-controlling investors have the incentive and ability to dampen that price and service rivalry.

This is precisely the issue facing the Commission and its designated entity program now. The Commission was clear in 1996 that "'silent financial interests' — *i.e.*, non-controlling shares — may affect the behavior of the partly owned company by causing the minority owner to take into account its behavior on the profits of its partly owned competitor." If that is true in the abstract, it is certainly the case in the context of the designated entity program where it is (and should be) the policy to encourage new entrants to look to skilled industry participants for capital and expertise. When a designated entity relies on a strategic investor for funding and guidance, the interests of the designated entity are inevitably aligned with those of the investor, and the two entities benefit jointly. The designated entity benefits by gaining access to capital and industry experience, and the investor benefits by the

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57/ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order*, 14 FCC Rcd 12541, 12546 (1999) ("*Broadcast Auction MO&O*").

58/ *Id.* (footnote omitted).

growth in the value of its investment if the designated entity business is run well. That type of relationship is critical if new entrants are to succeed in this capital-intensive, technologically-complex business.

Yet, the benefits of such a relationship are outweighed as a policy matter when the entity providing capital or management experience already occupies a dominant position in the industry. A national wireless service provider furnishing capital and management expertise to a designated entity will, by virtue of its role, see its influence extended in terms of geography, spectrum depth, technological reach, and marketing exposure, among other things. That is partly due to the mutually-supportive relationship between the designated entity and the investor. According to the Commission, "[a] company that is entitled to a substantial percentage of the profit generated by its competitor will be reluctant to undercut the competitor's price — doing so would amount to taking money out of its own pocket."59/ It is also due to trademark license agreements and other operating arrangements, which are important for designated entities entering markets, but which also have the effect of extending the presence of already-dominant carriers.

The coming threat is very real. Industry press accounts indicate that national wireless service providers are expected to dominate the AWS-1 auction (designated Auction 66). As noted above, in Auction 58, national wireless service providers invested in spectrum rights as follows: 29 percent directly and 71 percent

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59/ *Cincinnati Bell Remand Order*, 11 FCC Rcd at 7882.

via relationships with designated entity partners. In Auction 66, if national carriers and related designated entities win, for example, $12 billion of AWS-1 spectrum rights (80% of the estimated auction total), then, based on these Auction 58 results, one may expect that the national carriers will acquire $3.5 billion (29 percent) of that total directly and $8.5 billion (71 percent) through relationships with designated entities. Simply put, a handful of designated entities with relationships with the national wireless service providers may be positioned to win $8.5 billion, or over half, of the expected $15 billion total Auction 66 proceeds.

The Commission originally designed the designated entity program to "enable the participation of a variety of entrepreneurs in the provision of wireless services and resulting diversity of service offerings will increase customer choice and promote competition."60/ In a market where national wireless service providers already have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue, the extension of their influence through entities that acquire spectrum with government preferences is not increasing customer choice or promoting competition and it should not be approved by the Commission. The Commission should certainly work to see that national wireless service providers do not dominate the CMRS industry directly. Whether it does so or not, the Commission must foreclose the opportunity that national

60/ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389.

wireless service providers have to extend their dominance *indirectly* with the aid of government preferences offered in the designated entity program.

C. Reserving Designated Entity Benefits for Those That Have No Material Relationship with a National Wireless Service Provider Will Help to Combat the Growing Concentration of CMRS Industry Ownership

Adoption of the Commission's new rule will help to combat the growing concentration of CMRS industry ownership in a number of ways. First, reserving designated entity benefits for those that have no material relationship with a national wireless service provider will mean that designated entities acquiring licenses in the AWS-1 auction (and later auctions) will not be dependent on national wireless service providers for capital and technical and industry expertise. In turn, these new entrants will be more likely to compete with the national wireless service providers on matters of price and customer choice.61/

In addition, adoption and enforcement of the Commission's new rule will encourage designated entities to look for investment and management experience from those who are already undertaking to compete with national wireless service providers to bring the type of consumer choice and price competition that the Commission seeks to promote. Through relationships with these non-national wireless service providers, designated entities can participate in the growth of the industry alongside those that do not dominate the provision of CMRS in the United States. New entrants will benefit from the capital and experience provided by these

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61/ *Cf. Cincinnati Bell Remand Order*, 11 FCC Rcd at 7882.

existing industry-participants without indirectly extending national wireless service provider hegemony. Doing so will help to promote the growth of competitive service offerings that benefit consumers.

Adoption and enforcement of the Commission's new rule will also encourage non-wireless service providers and venture capitalists to invest in new entrants, mindful that the national wireless carriers cannot neutralize the advantage of competitive bidding preferences through their own designated entity relationships. Companies or individuals that have not previously invested in the CMRS industry could view the opportunity to fund new entrants as more attractive under those circumstances. In turn, that influx of new capital would contribute to the likelihood that designated entities will succeed in constructing facilities and providing service, and it will contribute to the diversification of industry ownership.

It is true that the Commission's new rule will not prohibit national wireless service providers from acquiring Commission licenses directly. That could be done only with an eligibility limitation or a spectrum cap. The Commission's new rule will, however, prevent national wireless service providers from extending their already-considerable dominance with the indirect help of government-sponsored competitive bidding preferences. It will also restore the small advantage that a competitive bidding preference was intended to confer, which will encourage eligible investors and industry-participants to invest in new entrants. That is in the public interest, and it is consistent with the intent of Congress in enacting Section 309(j) of the Communications Act.

III. THE COMMISSION'S NEW RULE SHOULD APPLY TO NATIONAL WIRELESS SERVICE PROVIDERS

In the *FNPRM*, the Commission seeks comment regarding the proposal to define national wireless service providers as those with average gross wireless revenues for the preceding three years exceeding $5 billion.62/ The Commission also seeks comment on whether to evaluate a service provider's "gross revenues," as defined in Section 1.2110(n) of the Commission's rules, instead of "gross wireless revenues" and whether to consider alternative benchmarks.63/

A. National Wireless Service Providers Are Those that Have Average Gross Wireless Revenues for the Preceding Three Years Equal to or Exceeding $5 Billion

The Commission should define national wireless service providers as those with average gross wireless revenues for the preceding three years exceeding $5 billion. The Commission has long evaluated average gross revenues for the preceding three years in establishing small business preference eligibility,64/ which approach the Commission first adopted to ensure consistency with the requirements of the Small Business Act of 1953, as amended.65/ In this context, the Commission should use the same approach (*i.e.*, a three year average figure) for gross wireless

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62/ *See FNPRM* at ¶17.

63/ *See id.*

64/ *See, e.g.*, 47 C.F.R. § 1.2110(f).

65/ *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5608 n.152.

revenues. Gross wireless revenues should be revenues derived from a carrier's provision of CMRS, CMRS roaming, and CMRS-related equipment sales.

Using "gross wireless revenues" instead of "gross revenues" will present a more accurate picture of the carrier's size relative to the service sector at issue. A carrier with gross revenues in excess of the applicable benchmark but with small gross *wireless* revenues should not be subject to the Commission's new rule. For the purposes of this test, the Commission should attribute gross wireless revenues to a national wireless service provider using the Commission's existing controlling interest standard and affiliation rules.66/ Those provisions are in place and familiar to many in the industry. They may be employed for the purpose of attributing gross wireless revenues to a national wireless service provider in this context with a minimum of administrative burden.

A $5 billion average gross wireless revenues threshold is the appropriate level at which to define a national wireless service provider because it is an objective measure by which to address carriers with operations that can be characterized as national in scope and scale (in contrast to smaller regional carriers) and that, collectively, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue.67/ In the

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66/ *See* 47 C.F.R. § 1.2110(c)(2), (5).

67/ *See* Chart 3, Chart 5, and Chart 6 *supra*. It is not clear if Alltel would be covered under this definition, particularly if gross wireless revenues is determined based on the average of the preceding three years.

alternative, the Commission may define national wireless service providers as those with 10 million or more CMRS subscribers in the United States. This measurement, also an objective test that relates to industry concentration, would reach the same group of dominant companies. In either case, such a definition will help to prevent carriers that already dominate the provision of CMRS in the United States from extending their collective reach with the aid of government-sponsored competitive bidding preferences.

B. The Commission Should Not Expand the Scope of its Prohibition to Include Other "Entities with Significant Interests in Communications Services"

The Commission seeks comment on whether it should prohibit the award of designated entity benefits where an otherwise qualified designated entity applicant has a "material relationship" with an "entity with significant interests in communications services."68/ The Commission asks whether, if it extends the restriction in this manner, it should define "entities with significant interests in communications services" to include a broad category of businesses such as voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers.69/

The Commission should not extend the its restriction to prohibit the award of designated entity benefits where an otherwise qualified designated entity applicant

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68/ *See FNPRM* at ¶19.

69/ *See id.*

has a "material relationship" with an "entity with significant interests in communications services" for three reasons. First, there is no demonstrated problem concerning entities with significant interests in communications services in this context. Second, undertaking to prohibit relationships with such entities would unnecessarily complicate this proceeding. And, third, if adopted, such a prohibition would deny designated entities access to important sources of capital and expertise.

1. There is No Demonstrated Problem in this Context Involving Non-National Carriers with "Significant Interests in Communications Services"

First, the Commission should not expand the scope of its prohibition to include other "entities with significant interests in communications services" because there is no demonstrated problem concerning entities with significant interests in communications services in this context. There is no current concern that broadcasters, cable television companies, wireline telephone service providers, voice over Internet protocol service providers, satellite service providers, non-CMRS wireless service providers, non-national CMRS providers, or other entities with "significant interests in communications services" dominate the provision of CMRS in the United States.

In contrast, as shown above, national wireless service providers, taken together, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue. In turn, these entities increasingly are using designated entity relationships as vehicles through which to extend their influence using spectrum rights acquired with competitive bidding

preferences. That is the problem to be addressed by the Commission's new rule, and including within the scope of the prohibition entities that are not part of this problem would be an unnecessarily overbroad and unwise response.

2. The Job of Crafting Distinctions Among Non-National Carriers with "Significant Interests in Communications Services" Would Unnecessarily Delay the Resolution of this Proceeding

Second, the Commission should not expand the scope of its prohibition to include other "entities with significant interests in communications services" because the job of crafting distinctions among non-national carriers with "significant interests in communications services" would unnecessarily delay the resolution of this proceeding. As noted above, there is no demonstrated problem concerning other entities with significant interests in communications services in this context. As a result, the Commission would have to undertake to determine what other entities, if any, should be prohibited from providing capital and industry expertise based on a set of unrelated conditions.

The task of defining those conditions would be substantial. For example, the Commission asks "[i]f we extend the restriction in this manner, should we define 'entities with significant interests in communications services' to include a broad category of businesses such as voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers?"70/ The Commission also asks "[s]hould we

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70/ *Id.* at ¶19.

consider excluding some of these entities from our proposed definition"71/ and "[i]f so, which entities should we exclude and why?"72/ The Commission would be required to justify the distinctions that it crafts, based on objective evidence, and to articulate a rational connection between the facts found on the record of this proceeding and the choices made as a result thereof.

Importantly, to ensure that the it does not block essential sources of capital or expertise for designated entities (which is addressed more fully below), the Commission would be required to see that not all communications industry participants are included within the scope of its prohibition. To achieve *that* goal, however, the Commission would have to establish objective distinctions among those that are free to invest in and work with designated entities and those that are not. The process of undertaking to craft such distinctions among and between entities that have no necessary relationship to the problem being addressed by the Commission's new rule will surely extend the length and complexity of this proceeding, and it will contribute to the threat of a court challenge that could delay enforcement of the new rule even further.

Meanwhile, the Commission has announced that the auction of AWS-1 rights will begin on June 29, 2006,73/ and that auction is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources. It will be

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71/ *Id.*

72/ *Id.*

the first such major opportunity in many years, and that opportunity should not be delayed. Against that background, the Commission should not slow the resolution of this proceeding by taking time to find and defend distinctions that will have no bearing on the very real problem facing the designated entity program that the Commission is undertaking to address in the first instance.

3. Designated Entities Need Access to Sources of Capital and Technical and Industry Experience

Finally, and perhaps most importantly, the Commission should not expand the scope of its prohibition to include other "entities with significant interests in communications services" because designated entities need access to sources of capital and industry experience. It is (and should be) the Commission's policy to encourage designated entities to look to investors as sources of capital and technical and industry experience. Lack of access to capital is the central barrier to entry for designated entities competing to become Commission licensees through competitive bidding. In turn, whether a designated entity has access to sources of technical and industry expertise is often considered by lenders who are approached to loan funds to new entrants.

If the Commission rules that absolutely no "entities with significant interests in communications services" may enter a material financial or operating arrangement with designated entities, the Commission will have undermined one of the central objectives of the designated entity program. It is not the case that

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73/ *See Auction 66 Procedures Notice* at 1.

entities in the communications business are dominating the provision of CMRS, and it is not the case that these entities are using designated entity relationships to supplement that dominance.

Instead, some of these entities are themselves undertaking to compete with national wireless service providers and to bring the type of consumer choice and price competition that the Commission seeks to promote. Seeing that designated entities can look to these entities for capital and technical and industry expertise will help new entrants compete more successfully for Commission licenses, and it will permit the growth of competitive service offerings that benefit consumers. Meanwhile, other "entities with significant interests in communications services" are also valuable sources of capital, and the Commission should preserve, not foreclose, the ability of designated entities to attract investment. With the backing of non-wireless companies, new entrants will have a better opportunity to build networks and provide service in competition with the national wireless service providers.

At bottom, other "entities with significant interests in communications services" are not part of the problem affecting the designated entity program in this context. As a result, undertaking to prohibit relationships with such entities would needlessly complicate this proceeding and would expose the Commission to the threat of a court challenge that could even further delay enforcement of the new rule. Most importantly, whatever prohibition is ultimately set would have the effect of denying designated entities access to important sources of industry capital and

expertise. The very point of the rule change at issue is to help to see that the designated entity program in the future serves its original purposes. Needlessly depriving new entrants of the ability to attract industry capital and experience would be squarely at odds with that objective.

IV. THE COMMISSION'S NEW RULE SHOULD APPLY WHERE THE SERVICE AREA LICENSED TO THE DESIGNATED ENTITY OVERLAPS WITH THE SERVICE AREA LICENSED TO THE NATIONAL WIRELESS SERVICE PROVIDER

In the *FNPRM*, the Commission seeks "comment on whether geographic overlap should be an element in establishing any additional restriction on the availability of designated entity benefits."74/ The Commission also seeks comment on whether to apply the standard set forth in Section 20.6(c) of its Rules for purposes of determining significant geographic overlap in defining an in-region incumbent wireless service provider.75/ The Commission asks whether, if it determines that a significant geographic overlap does exist, the incumbent should be allowed to divest its interest in the subject service area to allow a designated entity applicant to maintain eligibility for a bidding credit.76/ Finally, the Commission seeks "comment on whether the application of the standard set forth in

74/ *FNPRM* at ¶18.

75/ *See id.*

76/ *See id.*

Section 20.6(c) of the Commission's rules or any other geographic overlap restriction would place an undue administrative burden on the Commission . . . ."77/

A. At a Minimum, the Commission's New Rule Should Address the Dominance of National Wireless Service Providers in Their Existing Regions

At a minimum, the Commission's new rule should addresses the dominance of national wireless service providers in their existing service regions. Commission regulations designed to promote competition and diversity through spectrum aggregation limits have generally entailed geographic components,78/ which tailor the regulatory limitation to areas where material aggregation or influence could negatively affect the achievement of the Commission's policy goals. Entities with meaningful investment positions in the same service area will not have the same incentive to compete against that partner as it will against unrelated rivals. Moreover, achievement of the congressional mandate to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants is most directly threatened when already-dominant wireless service providers provide capital and management expertise to new entrants in areas where the national entity provides existing service.

77/ *Id.*

78/ *See, e.g.*, *PCS Second Report and Order*, 8 FCC Rcd at 7728 (broadband PCS spectrum aggregation limit); *id.* at 7745 (cellular/PCS cross-ownership limit); *CMRS Third Report and Order*, 9 FCC Rcd at 8101, 8115-16 (CMRS spectrum aggregation limit).

In this case, national wireless service providers are extending their dominance of the CMRS industry through investments in and operating arrangements with designated entities. Viewed on a national basis, this trend is inconsistent with the policies of the Commission to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants. The problem is particularly acute, however, where national wireless service providers already are licensed to provide CMRS. There, the extension of the influence of national wireless service providers through designated entity relationships truly threatens to limit customer choice and competition. At a minimum, therefore, the Commission's new rule must enjoin material financial or operating arrangements in these national wireless service provider regions.

B. Once Adapted to Include AWS-1 and Other Spectrum, the "Significant Overlap," "Attributable Interest," and "Divestiture" Rules Associated with the Now-Sunset CMRS Spectrum Aggregation Limit May be Used Here

Once adapted to include AWS-1 and other spectrum to be licensed in the near term, the "significant overlap," "attributable interest," and "divestiture" standards in the now-sunset CMRS spectrum aggregation limit may be used to determine when a geographic overlap exists for the purposes of the Commission's new rule. First, Section 20.6(c)(1) of the Commission's Rules established that "significant overlap of a PCS licensed service area and CGSA(s) . . . or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area for the counties contained therein, as determined by the latest available decennial

census figures as comp[il]ed by the Bureau of the Census, is within the CGSA(s) and/or SMR service area(s)."79/

As an example, this standard (along with the presumption regarding SMR service area overlap set forth in Section 20.6(c)(2)) may be adapted to include AWS-1 spectrum by grouping the PCS and AWS-1 licensed service areas with the CGSAs and SMR service areas and inserting a reference to AWS-1 service areas in the position occupied by PCS in the rule passage quoted above. Thus, the Commission's new rule could provide that "significant overlap of an AWS-1 licensed service area and CGSA(s) . . . or SMR or PCS service area(s) occurs when at least 10 percent of the population of the AWS-1 licensed service area for the counties contained therein, as determined by the latest available decennial census figures as compiled by the Bureau of the Census, is within the CGSA(s) and/or SMR and/or PCS and/or AWS-1 service area(s)." The basis for this provision — the corresponding term in Section 20.6(c)(1) — was well-known to the industry and is susceptible to speedy use by the Commission in this context.

Likewise, Section 20.6(d) of the Commission's Rules established the ownership and other interests that would be deemed to be attributable for the purposes of the now-sunset CMRS spectrum aggregation limit. The terms of Section 20.6(d) may be applied for the purpose of attributing ownership and other interests of national wireless service providers in same-region broadband PCS,

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79/ 47 C.F.R. § 20.6(c)(1).

cellular, or SMR licensees under the Commission's new rule. Thus, as an example, a designated entity applicant or licensee may not receive (or retain) a competitive bidding preference if it has any material financial or operating arrangement with a national wireless service provider holding an "attributable interest" (determined under the modified terms of Section 20.6(d)) in a broadband PCS, cellular, SMR, or AWS-1 licensee in an area with "significant overlap" with the designated entity's licensed service area (determined under the modified terms of Section 20.6(c)(1)).

If the Commission resolves to apply an in-region restriction (instead of a national restriction, as discussed below), it should permit divestiture of a national wireless service provider's interest in the subject service area to allow a designated entity to retain a bidding credit. In that case, the Commission may apply the terms of Section 20.6(e) of its Rules, which addressed permissible divestitures under the now-sunset CMRS spectrum aggregation limit. Once adapted to include AWS-1 and other spectrum to be licensed in the near term, the provisions of Section 20.6(e) may be used to govern permissible divestitures under the Commission's new rule.

C. If the Commission Determines that Application of a Geographic Overlap Restriction Would Create an Undue Administrative Burden, the Commission Should Apply its New Rule on a National Basis

Finally, as noted above, the Commission seeks "comment on whether the application of the standard set forth in Section 20.6(c) of the Commission's rules or any other geographic overlap restriction would place an undue administrative burden on the Commission, making it difficult to monitor an applicant's compliance

with any adopted geographic overlap restriction."80/ Once modified, the standards set forth in Section 20.6(c) of the Commission's Rules — and in Sections 20.6(d) and 20.6(e) — can be a readily-administered tool with which to monitor an applicant's compliance with the governing geographic overlap restriction.

If the Commission determines, however, that application of the standards set forth in Section 20.6 of the Commission's Rules, or any other geographic overlap restrictions, would place an undue administrative burden on the Commission, the Commission should apply its new rule on a national basis. As noted above, national wireless service providers already control 90 percent of the CMRS market on the basis of industry subscribers, 91 percent on the basis of MHz-POPs, and 92 percent on the basis of industry revenue. These carriers do not require the ability to extend this already-profound dominance through material financial or operating arrangements with designated entities — irrespective of whether there is significant overlap between the service areas at issue.

At the same time, there are a great many separate sources of capital and expertise that may be tapped by new entrants undertaking to become Commission licensees. CMRS and AWS-1 licensees that have average gross wireless revenues for the preceding three years that do not exceed $5 billion, and other experienced companies and capital providers, will be free to invest in and work with new

80/ *FNPRM* at ¶ 18.

entrants without exacerbating the ownership concentration problems associated with turning to national wireless service providers for the same support.

It is also important to note that such a national restriction would not operate as a license eligibility limitation. A national wireless service provider would not be prevented under the plan from acquiring any covered license through competitive bidding itself. The large incumbent simply could not utilize a competitive bidding preference itself or invest at a material level in, or enter material operating arrangements with, a new entrant that wishes to use a competitive bidding preference. For these reasons, should the Commission determine that application of the standards set forth in Section 20.6 of the Commission's Rules, or any other geographic overlap restrictions, would place an undue administrative burden on the Commission, the Commission should apply its new rule on a national basis. Though not as tailored as an in-region restriction, such an approach will help to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants with little or no actual disadvantage to national wireless service providers or new entrants.

V. THE COMMISSION'S NEW RULE SHOULD APPLY WHEN A NATIONAL WIRELESS SERVICE PROVIDER HAS ANY MATERIAL FINANCIAL OR OPERATING ARRANGEMENT WITH A DESIGNATED ENTITY

In the *FNPRM*, the Commission "tentatively conclude[s] that a relationship between a 'large, in-region incumbent wireless service provider' and an otherwise qualified designated entity applicant should trigger a restriction on the availability

of designated entity benefits."81/ The Commission seeks "comment on the specific nature of the relationship that should trigger such a restriction."82/ The Commission also indicates that "[c]ommenters should address the appropriate level of financial or operational participation of a 'large incumbent wireless service provider' . . . that should trigger any proposed prohibition of the award of designated entity benefits to entities that are otherwise qualified."83/ Finally, the Commission asks whether it should "allow designated entities to obtain a bidding credit if they have only a 'material financial agreement' or only a 'material operational agreement' with a 'large incumbent wireless service provider' . . . but not both?"84/

A. A Material Financial Arrangement Should Be Any Arrangement that, Directly or Indirectly, Provides 33 Percent or More of the Total Capitalization of the Designated Entity (Equity Plus Debt)

First, for the purposes of the Commission's new rule, a material financial arrangement should be any arrangement that, directly or indirectly, provides 33 percent or more of the total capitalization of the designated entity (equity plus debt) and all future interest agreements (such as puts, calls, options, warrants, and guarantees) that, individually or in the aggregate, involve such funding. For the basis of this restriction level, the Commission may look to the terms of the new

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81/ *FNPRM* at ¶13.

82/ *Id.*

83/ *Id.* at ¶15.

84/ *Id.*

entrant bidding credit offered in connection with competitive bidding for broadcast permits.85/ There, the Commission defines an attributable interest to include an interest held by an individual or entity:

> if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder.86/

When the Commission adopted that standard, it explained that "our general attribution rules are not merely concerned with *controlling* relationships, but also extend to relationships that provide 'a realistic potential' to influence core operating functions of licensees."87/ The Commission added that "we have consistently found otherwise nonattributable interests in excess of 33% to be 'meaningful' under a cross-interest policy designed to insure continued competition and diversity . . . ."88/

The Commission should adopt the same approach here. Wholly apart from principles of *de jure* and *de facto* control, a national wireless service provider has the realistic potential to influence the core operating functions of a new entrant if the dominant carrier is source of a material portion of the designated entity's capitalization. Access to capital and management expertise is essential if designated entities are to succeed in the CMRS sector.

85/ *See* 47 C.F.R. § 73.5008(c).

86/ *Id.*

87/ *Broadcast Auction MO&O*, 14 FCC Rcd at 12546 (emphasis in original).

88/ *Id.* (footnote omitted).

When an already-dominant CMRS provider is the source of that funding or industry guidance, however, the provision of that capital or expertise becomes the vehicle through which industry consolidation is exacerbated. At that point, the benefits of such investment are outweighed by the larger negative effect on the CMRS sector. By adopting a bright-line prohibition on the award of competitive bidding preferences to designated entities that have received 33 percent or more of their total capitalization from a national wireless service provider (including future interest agreements that involve such funding), the Commission can help to combat the effect of that increasing industry concentration.

B. A Material Operating Arrangement Should Be Anything Other than a Non-Discriminatory Roaming or Interconnection Agreement or a Short-Term De Facto Transfer Leasing Arrangement

Second, for the purposes of the Commission's new rule, a material operating arrangement should be anything other than a non-discriminatory roaming or interconnection agreement or a short-term de facto transfer leasing arrangement. The Commission should exclude non-discriminatory roaming agreements from the category of material operating arrangements because they are essential for CMRS providers to offer reliable service to consumers, particularly when the CMRS provider is a new entrant with a limited operating territory. Likewise, non-discriminatory interconnection agreements (wireless or wireline) are necessary for the purposes of exchanging traffic with national wireless service providers and their affiliates. A non-discriminatory roaming or interconnection agreement with a national wireless service provider is not normally the type of arrangement that can

give the national carrier undue influence over the designated entity.

In contrast, where a national wireless service provider enters into a roaming or interconnection agreement that unreasonably discriminates in favor of a designated entity as compared to the agreements that the national wireless service provider has entered into with others (*e.g.*, non-national wireless service providers or other designated entities), the agreement *should* constitute a material operating arrangement for the purposes of the Commission's new rule. If that is not the policy, then national wireless service providers could confer special benefits on designated entities with which they have a funding arrangement as a means to improve the value of the national carrier's investment. Because a designated entity will not always be in a position to determine whether the terms of a roaming or interconnection agreement discriminate in its favor (*e.g.*, as compared to agreements between the national carrier and other parties), the designated entity should be given the reasonable opportunity to reform the subject roaming or interconnection agreement before the designated entity is denied a competitive bidding preference, or unjust enrichment provisions are invoked, as a result thereof.

The Commission should also exclude short term de facto transfer lease arrangements from the category of material operating arrangements because, under the Commission's Rules, such agreements are limited in scope and duration.89/ As a result, they are also not subject to unjust enrichment and transfer restrictions

89/ *See, e.g.*, 47 C.F.R. § 1.9035(a).

that apply in the case of licenses held by designated entities/entrepreneurs.90/ According to the Commission, "because of the short-term nature of the leases involved and because of the safeguards we adopt, this approach will not undermine the basic policies underlying our designated entity or entrepreneur rules by which licensees buildout their systems and provide spectrum-based services."91/ The same reasoning should apply here.

Within the category of "material operating arrangements" should be all other agreements, arrangements, or understandings of any kind, including, without limitation, management agreements, trademark license agreements, joint marketing agreements, future interest agreements (such as puts, calls, options, and warrants), and long-term de facto and spectrum manager leasing arrangements. Though certain of these agreements may be structured to preserve the *de jure* and *de facto* control of the designated entity under the Commission's current rules, they nevertheless convey a level of influence over the operations of the designated entity and the deployment of its spectrum that is inappropriate in the hands of a national wireless service provider who already dominates the provision of CMRS in the United States.

90/ *See id.*, § 1.9035(d)(2).

91/ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604, 20676 (2003) (footnote omitted).

It is important to note that there may be situations in which an otherwise material operating arrangement does not implicate the Commission's policy concerns. For example, a rural telephone company may have an existing (or future) marketing or management agreement with a national wireless service provider that aids the rural carrier in providing needed wireless services within its operating territories. The Commission should evaluate the extent to which such an agreement, when confined to discrete areas or circumstances, does not contribute meaningfully to the problem to be addressed by the Commission's new rule. Absent some additional risk factor, the effort to address the growing dominance of national wireless service providers should not disadvantage a rural service provider whose relationship with a larger carrier is not inconsistent with the goals of Section 309(j) of the Communications Act.

Finally, in the *FNPRM*, the Commission explains that it previously "concluded that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee would cause the spectrum lessee to become an attributable affiliate of the licensee, thus rendering the licensee ineligible for designated entity benefits and making such a spectrum lease impermissible."92/ The Commission seeks "comment on what, if any, standard should be used to determine whether a spectrum leasing arrangement is a 'material

92/ *FNPRM* at ¶16 (footnote omitted).

relationship' for the purpose of any additional restriction on the availability of designated entity benefits that we might adopt."93/

The Commission has determined that greater limitations should apply to leasing transactions involving designated entities.94/ The Commission's controlling interest standard and affiliation rules are designed to address matters of *de jure* and *de facto* control; the Commission should guard in this proceeding against the extension of the influence of already-dominant national wireless service providers through arrangements that may not affect *de jure* and *de facto* control. Long-term de facto and spectrum manager leasing arrangements, in whatever form, create the conditions under which a national wireless service provider has access to even more spectrum — spectrum that was likely awarded at a discount from the market price established at auction. That should no longer be permitted, to any extent, through relationships between national wireless service providers and designated entities.

93/ *Id.*

94/ *See, e.g.*, 47 C.F.R. § 1.9020(d)(4) (spectrum manager leasing arrangements); *id.*, § 1.9030(d)(4) (long term *de facto* transfer leasing arrangements); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17540-44 (2004).

C. The Commission's New Rule Should Prohibit the Award of Designated Entity Preferences Where the Applicant Has Any One or More Material Financial or Operating Arrangement(s) with a National Wireless Service Provider

Finally, the Commission should not "allow designated entities to obtain a bidding credit if they have only a 'material financial agreement' or only a 'material operational agreement' with a 'large incumbent wireless service provider' . . . but not both."95/ The Commission's new rule should prohibit the award of designated entity preferences where the applicant has any one or more material financial or operating arrangement(s) with a national wireless service provider. The types of material arrangements at issue here are those that tend to align the interests of the licensed designated entity with the interests of the national wireless service provider.

As has been noted several times before, it is a central purpose of the designated entity rules to permit new entrants to access the capital and management experience of existing industry participants, which contributes to the likelihood that the designated entity will be successful. The benefits of that access are outweighed, however, when the entity providing capital or management experience already occupy a dominant position in the industry. In that case, the dominant position is only fortified as the national wireless carrier will surely avoid providing management direction that undermines its own market objectives.

95/ *FNPRM* at ¶15.

It is important to note that the Commission's existing "controlling interest" standard and affiliation rules do not prevent the type of influence that should be addressed here.96/ The Commission's controlling interest standard and affiliation rules rely on principles of *de jure* and *de facto* control; the Commission should guard in this proceeding against the extension of the influence of already-dominant national wireless service providers through arrangements that may not affect *de jure* and *de facto* control. In this context, therefore, it is not appropriate to permit a designated entity with *any* material financial or operating arrangement to remain eligible for competitive bidding preferences.

As an example, a national wireless service provider furnishing services to a designated entity under a management agreement may have considerable influence over the operations and business decisions of the new entrant without affecting *de jure* or *de facto* control. In the abstract, that influence is not inconsistent with the purposes of the designated entity program. When a dominant national wireless service provider is involved, however, that influence is inconsistent with the Commission's goals of promoting competition and avoiding excessive concentration of licenses.

VI. THE COMMISSION'S NEW RULE SHOULD APPLY THE UNJUST ENRICHMENT PROVISIONS OF SECTION 1.2111

In the FNRPM, the Commission seeks comment on whether it should impose reimbursement obligations that apply when an entity that acquires a Commission

96/ *Cf. id.* at ¶14.

license using small business benefits later loses its eligibility for that benefit or transfers the license to another entity that is not eligible for the same level of benefits.97/ The Commission should do so. The Communications Act directs the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits . . . ."98/ To fulfill that directive, the Commission has established unjust enrichment provisions applicable to those who use competitive bidding preferences to acquire Commission licenses.99/ To ensure that the limitations adopted here are effective, and to prevent the abuse of the Commission's preference measures, the Commission should apply the same unjust enrichment provisions in this context.

Specifically, the provisions of Section 1.2111 of the Commission's Rules should apply to those who acquire Commission licenses using competitive bidding preferences subject to the limitations adopted here. Section 1.2111 establishes terms for unjust enrichment payments in connection with set-aside licenses,100/ installment payment financing,101/ and bidding credits.102/ In synthesis, under

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97/ *FNPRM* at ¶20.

98/ 47 U.S.C. § 309(j)(4)(E).

99/ *See, e.g.*, 47 C.F.R. §§ 1.2111, 73.5007(c).

100/ *See id.*, § 1.2111(b).

101/ *See id.*, § 1.2111(c).

102/ *See id.*, § 1.2111(d).

these terms, a licensee is required to reimburse the government for the remaining value of the preference as a condition of requesting approval to assign or transfer control of the subject license to an entity that does not qualify for the preference, or qualifies for a less favorable preference, or taking actions relating to ownership or control that will result in the loss of status as an eligible designated entity or eligibility for a less favorable preference.103/

Where applicable, the same terms should apply in this context. Thus, for example, if a designated entity used a bidding credit to acquire an AWS-1 license in the Commission's forthcoming auction, that licensee should be obligated to repay the bidding credit (a) as a condition of the Commission's approval of the assignment or transfer of control of the license to an entity that does not qualify for the bidding credit under the Commission's new rule or (b) when the licensee takes on new investment (equity or debt), or enters into any operating arrangement, that would have disqualified the licensee for the AWS-1 auction bidding credit had the investment or arrangement been in place at the time of the licensee's initial application. The terms of Section 1.2111 of the Commission's Rules may be applied in this context with only minor conforming edits to reflect the new limitations.

The Commission also seeks comment regarding over what portion of the license term should the unjust enrichment provisions apply.104/ There is no reason

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103/ *See generally id.*, § 1.2111(b)-(d).

104/ *See FNPRM* at ¶20.

to depart from the terms of Section 1.2111 in this context. In the case of set-aside licenses, Section 1.2111(b)(1) provides that no unjust enrichment payment is required if the license is transferred or assigned more than five years after its initial issuance, unless otherwise specified.105/ Likewise, in the case of bidding credits, Section 1.2111(d)(2) provides that the amount of the required reimbursement steps down over the course of the first five years of the license term.106/ (In the case of installment payment financing, Section 1.2111(c) addresses the repayment of remaining unpaid principal and interest, or the payment thereof under a less favorable payment plan, and does not relate to specific years of a license term.107/) The Commission already resolved to apply the terms of Part 1, Subpart Q of its Rules — including Section 1.2111 — to the licensing of AWS-1 spectrum unless otherwise provided.108/ Where necessary, the Commission should incorporate its new limitations into Section 1.2111 and continue to rely on that provision for the purpose of unjust enrichment terms and conditions.

VII. THE COMMISSION SHOULD ENSURE THAT ITS NEW RULE IS SET BEFORE APPLICATIONS ARE DUE FOR THE UPCOMING AWS-1 AUCTION

Finally, in the *FNPRM*, the Commission explains that "we intend any changes adopted in this proceeding to apply to AWS licenses currently scheduled to

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105/ *See* 47 C.F.R. § 1.2111(b)(1).

106/ *See id.*, § 1.2111(d)(2).

107/ *See id.*, § 1.2111(c).

108/ *See id.*, § 27.1101.

be offered in an auction beginning June 29, 2006."109/ Nevertheless, the Commission also indicates that "any changes that we adopt in this proceeding may become effective after the deadline for filing applications to participate in that auction."110/ On that basis, the Commission seeks comment on the proposal "to require such applicants to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to section 1.2110 of the Commission's rules effective as of the date of the statement."111/

The Commission should ensure that its new rule is set before short-form applications are due for the upcoming auction of AWS-1 licenses. In scheduling competitive bidding under Section 309(j) of the Communications Act, the Commission is required to see that an adequate period is allowed "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."112/ In the past, the Commission has adjusted

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109/ *FNPRM* at ¶21 (footnote omitted).

110/ *Id.* (footnote omitted).

111/ *Id.* (footnote omitted).

112/ 47 U.S.C. § 309(j)(3)(E).

bidding schedules to provide additional time for bidder preparation and planning when it perceived it to be appropriate.113/

In this case, the auction of AWS-1 licenses is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources. It will be the first such major opportunity in many years, and that opportunity should not be delayed. For this reason, the Commission should ensure that its new rule is known (or at least knowable) to potential applicants in advance of the short-form filing deadline for the upcoming auction of AWS-1 licenses. If the Commission is concerned about the effective date of the rule once it has been announced, the Commission may invoke its authority to direct that the new rule shall become effective upon publication in the Federal Register, without the normal thirty-day delay, "for good cause found and published with the rule."114/ The Commission used that approach when it modified its entrepreneurs' block rules in 1995 following the decision of the United States Supreme Court in Adarand Constructors, Inc. v. Peña.115/

113/ *See, e.g., Public Notice: Broadband PCS Spectrum Auction Start Date Rescheduled for January 26, 2005*, DA 04-3270, at 1-2 (Oct. 15, 2004) (rescheduling dates associated with Auction 58 "to provide additional time for bidder preparation and planning").

114/ 5 U.S.C. § 553(d)(3).

115/ *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 136, 167 (1995).

In any event, if potential applicants know (or can know) the substance of the Commission's new rule sufficiently in advance of the short-form filing deadline for the auction of AWS-1 licenses to incorporate it into their auction planning, the Commission may reasonably require a post short-form filing certification of compliance if the rule itself is not effective until some time thereafter. In any event, the Commission should work to avoid delaying the filing deadline for the auction or the start of the auction itself. Along with adoption of the new rule proposed in the *FNPRM*, a timely auction of AWS-1 spectrum rights is critical to the success of new entrants and smaller carriers.

VIII. CONCLUSION

Council Tree urges the Commission to adopt and implement its new rule proposed in the *FNPRM* in a manner consistent with these comments.

Respectfully submitted,

/s/ Steve C. Hillard

Steve C. Hillard
George T. Laub
Jonathan B. Glass
Council Tree Communications, Inc.
2919 17th Avenue
Suite 205
Longmont, CO 80503
(303) 678-1844

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Attachment 1

Attachment 1

	Net License Cost ($ millions)			Number of Licenses			MHz POPs (in millions)		
	(A)	(B) Total:	(A) / (B)	(A)	(B) Total:	(A) / (B)	(A)	(B) Total:	(A) / (B)
	Through DE Relationship	Direct Plus Through DE Relationship	%	Through DE Relationship	Direct Plus Through DE Relationship	%	Through DE Relationship	Direct Plus Through DE Relationship	%
A. National Carrier License Investment: Direct Versus DE Relationship									
Auction 35 [1]	$5,524	$14,305	39%	128	241	53%	1,473	2,990	49%
Auction 58 [2]	902	1,269	71%	110	138	80%	1,123	1,325	85%

	Net License Cost ($ millions)			Number of Licenses			MHz POPs (in millions)		
	(A)	(C) Total:	(A) / (C)	(A)	(C) Total:	(A) / (C)	(A)	(C) Total:	(A) / (C)
	National Carrier Through DE Relationship	Total Auction	%	National Carrier Through DE Relationship	Total Auction	%	National Carrier Through DE Relationship	Total Auction	%
B. National Carrier License Investment Through DE Relationships as % of Total Auction									
Auction 22 [3]	$30	$413	7%	64	302	21%	304	2,562	12%
Auction 35 [1]	5,524	16,857	33%	128	422	30%	1,473	4,029	37%
Auction 58 [2]	902	2,043	44%	110	217	51%	1,123	2,084	54%

(1) DEs with National Carriers Relationships are: Alaska Native Wireless, L.L.C. (AT&T Wireless), Salmon PCS, LLC (Cingular) and SVC BidCo, L.P (Sprint).

(2) DEs with National Carriers Relationships are: Vista PCS (Verizon Wireless), Cook Inlet/VS GSM VII PCS (T-Mobile), Edge Mobile (Cingular) and Wirefree Partners III (Sprint)

(3) DEs with National Carriers Releationships are believed to be: ABC Wireless, L.L.C. (AT&T Wireless) -- Nature of relationship between Licensee and AT&T Wireless at the time of auction is unclear