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

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

To: The Commission

REPLY COMMENTS OF COUNCIL TREE COMMUNICATIONS, INC.

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March 3, 2006

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SUMMARY

The Commission should adopt its tentative proposal outlined in the *Further Notice of Proposed Rulemaking* ("*FNPRM*"). The Commission is faced with the material and accelerating problem of national wireless service providers using designated entity relationships to extend their dominance in the commercial mobile radio service industry. The vast majority of commenters support the Commission's tentative conclusion that designated entity preferences should not be available to an entity if it has a "material relationship" with a "large, in-region, incumbent wireless provider." The only commenters that opposed the Commission's plan to update its designated entity eligibility rules for the future were two national carriers, two designated entities associated with national carriers, and CTIA.

Two concerns articulated in comments merit treatment by the Commission. First, the Commission's new rule should include a reasonable exception for rural telephone companies if, and to the extent, they have certain common arrangements with national wireless service providers that do not implicate the Commission's policy concerns. Second, the Commission's new rule should not disqualify applicants with prior or continuing material arrangements involving national wireless service providers that are entirely unrelated to the future licenses at issue.

The Commission should *not* adopt certain other proposals made in comments. For example, some parties suggested defining a national wireless service provider as those with average gross wireless revenues of $1 billion. A $5 billion gross wireless revenues threshold is an objective measure by which to address national

carriers that, collectively, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue. A few other commenters suggested that the Commission's revenue test should apply to entities with "significant interests in communications services," not just wireless service providers. Yet, there is no demonstrated problem concerning non-national wireless service providers in this context, and undertaking to identify distinctions among such entities for the purposes of a prohibition would dramatically complicate this proceeding and delay its conclusion.

For their parts, Verizon Wireless and CTIA attempted to characterize this proceeding as something more than it is. The Commission is not here crafting some broad-scale spectrum cap or engaging in a detailed merger review. Indeed, *no party would be denied the right to obtain spectrum or required to divest existing licenses as a result of this rulemaking*. Instead, the Commission is merely undertaking to update the eligibility rules for designated entity preferences that it will award in future competitive bidding.

The record before the Commission shows that its designated entity preferences increasingly are being used to extend the dominance of national wireless service providers. National wireless service providers do not need the benefit of government-sponsored bidding credits to extend their dominant positions in the CMRS industry, and the Commission's rules should not provide them. The Commission's tentative conclusion set forth in the *FNPRM* is one based on common sense backed up by a solid factual record. It should be adopted without delay.

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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

REPLY COMMENTS OF
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 reply 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

The Commission's tentative conclusion set forth in the *FNPRM* is one based on common sense backed up by a solid factual record. As part of its responsibility to manage the designated entity ("designated entity" or "DE") program within the guidelines established by Congress, the Commission has the duty to correct what is a material and accelerating problem. Congress directed the Commission to

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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).

administer the designated entity program so as to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," but the record shows that the program increasingly is being used by already-dominant national wireless service providers to extend their influence in the commercial mobile radio services ("CMRS") industry. The trend is clear and continuing. The record in this proceeding shows a plain factual basis for the Commission actions outlined in the *FNPRM* and commenters expressed widespread support. The Commission has the reason and the duty to update its designated entity eligibility rules. It should do so without delay.

II. THE COMMISSION SHOULD ADOPT ITS TENTATIVE PROPOSAL

The Commission should adopt its tentative proposal outlined in the *FNPRM*. The vast majority of commenters support the Commission's tentative conclusion 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."2/ In addition, comments show that non-national carriers and venture capitalists will be more likely to invest in designated entities if the Commission's proposal is adopted. Nevertheless, two additional concerns articulated in comments merit treatment by the Commission. The Commission's new rule should include a

2/ *See FNPRM* at ¶11.

reasonable exception for rural telephone companies, and it should not disqualify applicants with "material arrangements" that are unrelated to the licenses at issue.

A. The Vast Majority of Commenters Support the Commission's Tentative Conclusion

First, the vast majority of commenters support the Commission's tentative conclusion. Of the thirty commenters that addressed the matters raised in the *FNPRM*, twenty-three supported the Commission's tentative conclusion.3/ Centennial explained that "Cingular, Verizon Wireless, Sprint, T-Mobile, and ALLTEL[] currently control more than 90% of the CMRS spectrum as a percentage of MHz POPs of spectrum. [I]n the most recent PCS auction, Auction 58, these

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3/ *See* Comments of Aloha Partners, L.P. ("Aloha Partners"); Comments of Antares, Inc.; Comments of Carroll Wireless, L.P. ("Carroll Wireless"); Comments of Centennial Communications Corp. ("Centennial"); Joint Comments of Columbia Capital LLC, MC Venture Partners, and TA Associates, Inc. ("Columbia Capital *et al*."); Comments of ComScape Telecommunications, Inc.; Comments of Council Tree Communications, Inc.; Comments of Doyon Communications, Inc., Bristol Bay Native Corporation, Chugach Alaska Corporation, Koniag Development Corporation, Bethel Native Corporation, The Kuskokwim Corporation, and St. George Tanaq ("Doyon *et al*."); Comments of John Staurulakis, Inc.; Comments of Leap Wireless International, Inc. ("Leap Wireless"); Comments of Madison Dearborn Partners, Inc. ("Madison Dearborn"); Comments of MetroPCS Communications, Inc. ("MetroPCS"); Comments of the Minority Media and Telecommunications Council ("MMTC"); Comments of MobiPCS; Comments of the National Association of Broadcasters ("NAB"); Comments of the National Hispanic Media Coalition, the Office of Communication of the United Church of Christ, Inc., and Media Alliance ("NHMC *et al.*"); Comments of Poplar Associates, LLC ("Poplar Associates"); Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("RTG/OPASTCO"); Comments of STX Wireless, LLC; Comments of SunCom Wireless, Inc. ("SunCom"); Comments of the Wireless Broadband Service Providers Association ("WBSPA"); Comments of United States Cellular Corporation ("U.S. Cellular"); and Comments of US Wirefree ("US Wirefree").

carriers acquired 71% of the licenses they won there through designated entity partnerships. . . . [R]eserving the designated entity benefits for those that have no material relationship with a national wireless service provider will combat the growing concentration in industry ownership."4/ According to MetroPCS, "the growth in size and scope of the national carriers means that the small or very small businesses with which they partner will not be serving the core objectives of the designated entity program to promote new entrants who will bring innovative new and unique services to the wireless telecommunications marketplace."5/

MMTC indicated that "[w]hile the largest incumbent national carriers structured agreements that are presumably within the Commission's guidelines, such agreements primarily serve to extend their influence and market position rather than promote the aims of the DE program."6/ Likewise, NHMC *et al.* explained that "[t]he material relationship can comply with FCC rules, yet still render the [designated entity] unlikely to engage in genuine price competition or disruptive innovation."7/ RTG/OPASTCO added that "[w]hen DEs have a significant material relationship with a large incumbent carrier, small businesses and rural telephone companies without such relationships with large entities are

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4/ Comments of Centennial at 5-6.

5/ Comments of MetroPCS at 9.

6/ Comments of MMTC at 6.

7/ Comments of NHMC *et al.* at 7

denied any meaningful opportunity to provide new, spectrum-based services, which is contrary to the mandate of Section 309(j)."8/ And, SunCom concluded that "[t]he designated entity program was designed to avoid concentration of licenses and to ensure opportunities for small businesses and new entrants to acquire licensed spectrum. The FCC must protect this objective by adopting the measures [in the *FNPRM*]."9/

In contrast, only five commenters that addressed the matters raised in the *FNPRM* oppose adoption of the Commission's tentative conclusion.10/ Of these, two are national wireless service providers (Verizon Wireless and T-Mobile), two are companies with material relationships with national wireless service providers (Cook Inlet and Wirefree Partners), and one is CTIA.11/ These commenters

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8/ Comments of RTG/OPASTCO at 2-3.

9/ Comments of SunCom at 2.

10/ *See* Comments CTIA – The Wireless Association ("CTIA"); Comments of Cook Inlet Region, Inc. ("Cook Inlet"); Comments of Verizon Wireless ("Verizon Wireless"); Comments of T-Mobile USA, Inc. ("T-Mobile"); and Comments of Wirefree Partners III, LLC ("Wirefree").

11/ The National Telecommunications Cooperative Association ("NTCA") indicated that it agrees "that modifications to the Commission's requirements regarding designated entity eligibility may be necessary to prevent abuse of those rules," NTCA Comments at 4, but it argued that "[i]f the Commission moves forward, it must tailor its rules narrowly enough to target only real abuse, rather than capturing all rural telephone companies with any ties to a large in-region wireless provider, or it should exempt rural telephone companies from the rules' provisions." *Id.* at 2. Separately, according to Dobson Communications Corporation ("Dobson"), "[i]f a record in this proceeding is developed that demonstrates that a change in the FCC's rules is even required to further the goals of the DE program,

generally sought to preserve the ability of national wireless service providers to extend their influence and access spectrum rights through material relationships with designated entities. Council Tree will address various claims made by these commenters in section IV of these reply comments. For immediate purposes, however, it is sufficient to note that they are the only commenters who affirmatively opposed an update to the Commission's eligibility rules for designated entities.

B. Non-National Wireless Service Providers and Private Equity Firms Will Be More Likely to Invest in Designated Entities if the Commission's Proposal is Adopted

Critically, comments submitted in response to the *FNPRM* indicate that non-national wireless service providers and private equity firms will be more likely to invest in designated entities if the Commission's proposal is adopted. For example, according to Columbia Capital *et al*., "[a] review of the results of the latest broadband auctions indicates that the designated entity program is moving dangerously close to a situation in which every significant participant is bidding with a bidding discount."12/ They added that "[t]he inevitable result of a situation in which all the most active bidders at auction are entitled to bidding discounts is

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Dobson respectfully submits that any restrictions of DE benefits that are deemed appropriate . . . should apply to any large, well-funded investor with a strategic interest in the use of the spectrum." Comments of Dobson at 2.

12/ Comments of Columbia Capital *et al*. at 3.

that venture capital firms will be less likely to invest in small or very small businesses as auction participants."13/ In summary:

> [Columbia Capital *et al*.] are ready, willing and able to make new investments in entrepreneurial wireless companies. However, in a marketplace that is increasingly dominated by a handful of large incumbent national carriers, the availability of a meaningful bidding discount to a small or very small business auction participa[nt] can be the determinative factor in whether an investment is made.14/

Likewise, Madison Dearborn indicated that "the current designated entity rules, in light of those national carrier partnerships with designated entities, serve only to exacerbate capital formation challenges for smaller wireless carriers."15/ According to Madison Dearborn, "[w]ith the prohibition outlined in the [*FNPRM*], providers of capital such as Madison Dearborn will be more likely to continue to finance designated entities as they have in the past because those designated entities will be more likely to have meaningful opportunities to acquire spectrum grow their businesses and compete."16/

U.S. Cellular argued that "[a]llowing small businesses to work with non-national carriers is also sound policy because of the benefits this class of carriers is

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13/ *Id.* at 4.

14/ *Id.* In contrast, Wirefree Partners argued that adoption of the Commission's tentative conclusion "would eliminate **any** realistic opportunity for participation and success by small businesses in the AWS auction." Comments of Wirefree Partners at 6 (emphasis in original). Wirefree Partners' hyperbole aside, this argument is plainly wrong. The record of the proceeding shows that.

15/ Madison Dearborn Comments at 2.

16/ *Id.*

providing to consumers. . . . As the industry has consolidated, the distinctions between national carriers and non-nationals are becoming sharper."17/ According to U.S. Cellular, "[t]he Commission is right to consider proposals to re-focus the designated entity program away from the national wireless carriers, while retaining options within this program to afford non-national carriers opportunities to help small businesses."18/ MMTC also indicated that, with an update to the eligibility rules for the designated entity program, the effect of bidding credits will not be "neutralized" and "arms-length lenders and passive investors will be more likely to support legitimate small entrepreneurs, thereby lifting their most significant barrier to entry — access to capital."19/

C. The Commission's New Rule Should Include a Reasonable Exception for Rural Telephone Companies

Two additional concerns articulated in comments merit treatment by the Commission. First, the Commission's new rule should include a reasonable exception for rural telephone companies. According to NTCA, some small rural telephone companies have non-equity relationships with national wireless service providers to help the rural companies serve their customers.20/ These relationships apparently range from marketing a national brand to operating as an agent or

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17/ U.S. Cellular Comments at 6.

18/ *Id.* at 2.

19/ MMTC Comments at 8.

20/ *See* NTCA Comments at 5-6.

coordinating pricing plans.21/ Similar comments were made by RTG/OPASTCO and John Staurulakis, Inc.22/

Among other things, the Commission is directed under Section 309(j) to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . rural telephone companies . . ."23/ 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 . . . ."24/ Against this background, the Commission's new rule should include a reasonable exception for these rural telephone companies so that they may benefit from competitive bidding preferences to which they would otherwise be eligible if, and to the extent, their arrangements with national wireless service providers do not implicate the Commission's policy concerns.

For example, the Commission may consider excluding from treatment as a "material arrangement" a branding agreement, an agreement to offer a coordinated/comparable pricing plan, or an agreement to act as a distribution agent if it is by and between and national wireless service provider and a rural telephone

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21/ *See id.*

22/ *See* RTG/OPASTCO Comments at 4-5; Comments of John Staurulakis, Inc. at 3-4.

23/ 47 U.S.C. § 309(j)(3)(B).

24/ *Id.*, § 309(j)(4)(D).

company, as defined in 47 U.S.C. § 153(37), or an entity owned and controlled by that rural telephone company, where no national wireless service provider directly or indirectly owns any (or more than a *de minimis* portion) of the equity of the rural telephone company or subsidiary or has furnished or guaranteed any debt financing, or holds any future interest involving any such equity interest or debt financing, of that rural telephone company or subsidiary.

D. The Commission's New Rule Should Not Disqualify Applicants with Material Arrangements Unrelated to the Licenses At Issue

Second, the Commission's new rule should not disqualify applicants with material arrangements involving national wireless service providers that are unrelated to the licenses at issue. According to Cook Inlet, "[i]t is not clear from the [*FNPRM*] to what extent a new rule restricting 'material relationships' would have a potentially retroactive effect on designated entities that previously participated in the Commission's auctions."25/ Cook Inlet argued that "[n]o designated entity should be prevented from participating fully in future auctions simply because it currently has or previously had a commercial arrangement with one of these targeted wireless carriers in full compliance with the Commission's rules."26/ On this basis, Cook Inlet concluded that "[a]t a minimum, any rule adopted by the Commission in this context must take account of past activities in compliance with

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25/ Comments of Cook Inlet at 16.

26/ *Id.*

the Commission's past rules, and must be drafted carefully to avoid any ambiguity or unfair retroactive penalty."27/

Council Tree agrees. A prior, or even continuing, material arrangement involving a national wireless service provider should not have the effect of restricting a designated entity in the future where the arrangement is unrelated to the licenses at issue in the future. For example, if the holder of an interest in a designated entity applying to bid in Auction 66 *also* holds an interest in a legally-separate licensee having a material arrangement with a national wireless service provider relating to the licensee's provision of service using spectrum rights acquired in Auction 58, the designated entity applying to bid in Auction 66 should not be denied a bidding credit for which it is otherwise qualified if the material relationship does not apply to, and has no bearing on, the designated entity's participation in Auction 66 or the provision of service using spectrum rights acquired therein. Council Tree urges the Commission to make this clear. In the circumstances of this example, the Commission should require the Auction 66 applicant (or the subject interest holder) to certify that the material arrangement from the Auction 58 venture does not apply to, and has no bearing on, the designated entity's participation in Auction 66 or the provision of service using spectrum rights acquired therein.

27/ *Id.* at 16-17.

The matter is more difficult to police where the licensee having the material arrangement with a national wireless service provider is the same legal entity as the one applying for future designated entity preferences, or where the material arrangement involves the interest holder directly. In those cases, at least in theory, the scope of certain material operating arrangements (*e.g.*, management agreements, trademark licenses agreements) may be contractually segregated between the existing and future ventures such that the future applicant or controlling interest holder could make a required certification. That sort of contractual division is likely not feasible in the case of material financial arrangements (*e.g.*, equity or debt interests).

For that reason, and to avoid unnecessary regulatory complexity, the Commission may reasonably require that a future applicant or interest holder will be eligible to make a required certification only if the material arrangement at issue (a) has been terminated or (b) remains in a separate legal entity that is neither the future applicant nor in the ownership chain of the future applicant. Such a provision should help to avoid the unfair situation identified by Cook Inlet without permitting existing material arrangements to undermine the point of the Commission's new rule.

III. THE COMMISSION SHOULD NOT ADOPT CERTAIN OF THE PROPOSALS MADE IN COMMENTS

The vast majority of commenters support the Commission's tentative conclusion that, even where an entity qualifies for designated entity ("designated

entity" or "DE") 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."28/ Nevertheless, some commenters offered proposals or alternatives that are inconsistent with the policy objectives of the Commission's tentative conclusion and that should not be adopted here.

First, Centennial and WBSPA recommended that the Commission should define national wireless service providers as those with average gross wireless revenues for the preceding three years exceeding $1 billion, not $5 billion as proposed by Council Tree and raised in the *FNPRM*.29/ Two commenters proposed even lower thresholds,30/ and one commenter proposed extending the Commission's prohibition to Tier II carriers (presumably referring to E911 Tier II wireless

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28/ *See FNPRM* at ¶11.

29/ *See* Comments of Centennial at 6; Comments of WBSPA at 5. Separately, Aloha Partners, Carroll Wireless, and Poplar Associates all understood the proposal to be a $5 *million* threshold, which they each characterized as too low. *See* Comments of Aloha Partners at 4; Comments of Carroll Wireless at 6; Comments of Poplar Associates at 3. Council Tree agrees that such a threshold would be vastly too low for the reasons set forth here.

30/ *See* Comments of US Wirefree at 3 (proposing a $400 million threshold); Comments of Verizon Wireless at 20 (opposing the tentative conclusion but suggesting a $125 million threshold if the Commission adopts its tentative conclusion).

carriers).31/ Contrary to the suggestions of these commenters, the Commission should not adopt a gross wireless revenues threshold below $5 billion.32/

As Council Tree demonstrated in its comments, a $5 billion average gross wireless revenues threshold 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.33/ Setting a threshold below that level, or extending the threshold to E911 Tier II carriers, would include within the scope of the Commission's new rule wireless service providers who are not dominating the provision of CMRS and who are not contributing to the dramatic concentration in the industry. As MetroPCS explained, it would also remove entities from the class of those who may provide much-needed capital and technical

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31/ *See* Comments of RTG/OPASTCO at 3. As used there, the term "Tier II carriers" appears to be a reference to CMRS carriers identified by the Commission for the purposes of E911 obligations as those that had over 500,000 subscribers as of the end of 2001. *See, e.g.*, *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order to Stay*, 17 FCC Rcd 14841, 14847 (2002).

32/ Aloha Partners, Carroll Wireless, and Poplar Associates argued that the Commission's revenue cap should apply both to existing and new wireless service providers. *See* Comments of Aloha Partners at 4; Comments of Carroll Wireless at 7; Comments of Poplar Associates at 3-4. Council Tree agrees, and that appears to be the manner in which a gross wireless revenues test, evaluated as an average over the preceding three years, would function. Any carrier that satisfies the test now or in the future should be subject to the Commission's new rule. Stated differently, the new rule should not, by its terms, single out existing wireless carriers.

33/ *See also* Comments of MetroPCS at 9-10.

and industry expertise to designated entities with no appreciable policy justification.34/ The Commission should not produce that result.

For the purposes of the Commission's new rule, Leap Wireless appeared to recommend using a "gross revenues" test35/ in lieu of a "gross wireless revenues" test, though it is not clear from the comments. As Council Tree demonstrated in its comments, however, 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 in this proceeding. A carrier with gross revenues in excess of the applicable benchmark but with small gross *wireless* revenues does not implicate the policy concerns before the Commission here and should not be subject to the Commission's new rule.

Next, certain commenters suggested that the Commission's revenue test should apply to entities with "significant interests in communications services," not just wireless service providers.36/ The Commission should not do so. There is no

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34/ *See id.* at 10.

35/ *See* Comments of Leap Wireless at 15.

36/ *See, e.g.*, Comments of Centennial at 7; Comments of Columbia Capital *et al.* at 5; Comments of WBSPA at 4-5; Comments of Verizon Wireless at 16-17. According to U.S. Cellular, the Commission should prohibit designated entities having material arrangements with entities with significant interests in communications service from using a bidding credit unless the population of its aggregate cellular, PCS, SMR, and AWS license areas does not exceed 10 percent of the national population. *See* Comments of U.S. Cellular at 12; *see also id.* at 12 n.12 (recommending application of $5 billion gross revenue threshold to define such large

demonstrated problem concerning non-national wireless service providers with significant interests in communications services in this context. Moreover, if adopted, such a prohibition would deny designated entities access to important sources of capital and expertise. As NAB commented:

> a much broader restriction on financial relationships generally with small entities that would otherwise be eligible for DE benefits would discourage needed investment while not serving any clear []competitive or similar purpose. A broadcaster with no wireless licenses providing investment capital to a small entity participating in a wireless auction would not raise the same anti-competitive or related concerns as an in-region wireless licensee providing such financing.37/

In addition, as Council Tree explained in its comments, undertaking to identify distinctions among such entities for the purposes of a prohibition would dramatically complicate this proceeding and delay its conclusion. Even CTIA recognized this problem with the notion of extending the Commission's tentative proposal:

> [T]he Commission has failed to define adequately the parties who would be governed by the "significant interest in communications service" label. The FCC's proposal seeks comment on including a broad category of businesses such as voice or data providers, content

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non-wireless carriers). The Commission should reject this proposal for the reasons set forth here. If a new rule is adopted, Dobson Communications urges the Commission to apply the rule to "any large, well-funded investor with a strategic interest in the use of the spectrum." Comments of Dobson Communications at 2. This proposal should be rejected for the reasons set forth here and because it would be difficult to police the circumstances under which an investor did or did not have a "strategic interest in the use of the spectrum."

37/ Comments of NAB at 4. *See also* Comments of Leap Wireless at 16-17; Comments of MMTC at 10-11.

> providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications service providers as having "significant interest in communications service." This proposal is extremely vague and leaves open to question as to what would be included in such an exclusion.38/

Time is of the essence in completing this proceeding and seeing that the objectives of Section 309(j) are served in Auction 66 and later auctions. There is no appreciable policy benefit to be achieved by dramatically extending the scope of the prohibition on investing in and entering material arrangements with designated entities, and the Commission should not delay this proceeding to undertake the enormously detailed effort needed to craft such an extension.

Wirefree Partners claimed that the Commission should not include spectrum leasing transactions within the scope of material arrangements under the Commission's new rule, arguing that spectrum leases "do not carry with them any attributes of control or ownership."39/ In the case of Wirefree, which has apparently leased 50 percent of its spectrum rights to subsidiaries of Sprint Nextel,40/ the spectrum rights at issue *are* employed by the national wireless service provider irrespective of control or ownership. Moreover, the lease payments from the national wireless service provider serve to guarantee payment of the debt

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38/ Comments of CTIA at 5-6 (footnote omitted) (emphasis added).

39/ Comments of Wirefree Partners at 7. *See also id.* at 8-9.

40/ *See id.* at 9.

financing obtained by Wirefree Partners, and guarantees are certainly material arrangements to be addressed here by the Commission.

Finally, US Wirefree "suggest[ed] that the Commission consider postponing the AWS auction and holding it no earlier than 180 days after the effective date of the new rules."41/ The Commission should not do so. 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. 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.

IV. THE COMMISSION MAY DISMISS THE CLAIMS OF CTIA, THE NATIONAL WIRELESS SERVICE PROVIDERS, AND THEIR TWO DESIGNATED ENTITIES

In their comments, CTIA and Verizon Wireless claimed that the Commission has no lawful basis on which to update the eligibility rules for its designated entity program. Verizon Wireless argued that the Commission's 2005 CMRS competition report found that the CMRS market is effectively competitive,42/ and that this conclusion "squarely contradicts Council Tree's position on the state of competition in the CMRS market . . . ."43/ For its part, CTIA claimed that "the Commission

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41/ *See* Comments of US Wirefree at 4.

42/ *See* Comments of Verizon Wireless at 8.

43/ *Id.* at 10. Verizon Wireless also argues that the Commission has evaluated competition on a market-by-market basis since it's CMRS spectrum cap sunset and

may be acting arbitrarily and capriciously both in establishing its goal of reducing the concentration of wireless licenses and in proposing the means of accomplishing that goal."44/ CTIA argued that there is not substantial evidence of a problem warranting Commission action to update the eligibility rules for its designated entity program,45/ and it claimed that restricting the award of bidding credits and other preferences to designated entities having materials relationships with national wireless service providers will not address the goal of avoiding the excessive concentration of licenses.46/ T-Mobile, Cook Inlet, and Wirefree Partners made similar arguments, though in a more limited way.47/

A. The Commission is Charged with Balancing a Number of Competing Objectives in its Administration of Competitive Bidding Under Section 309(j)

The Commission is charged with balancing a number of competing objectives in its administration of competitive bidding under Section 309(j) of the Communications Act. For example, Section 309(j)(3) directs the Commission to seek to promote economic opportunity, competition, and the rapid deployment of new

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that any evaluation of concentration on a national level is unsupported. *See id.* at 10-14.

44/ Comments of CTIA at 6.

45/ *See id.* at 8-10.

46/ *See id.* at 10-11.

47/ *See* Comments of Cook Inlet at 5-7, 15; Comments of T-Mobile at 8-9; Comments of Wirefree Partners at 11-12.

technologies and services by, *inter alia*, avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants.48/ Section 309(j)(4) directs the Commission, in prescribing regulations with respect to competitive bidding, to consider methods to promote the objectives of Section 309(j)(3), to include performance requirements and other measures to promote deployment of new technologies and services, and to consider the use of procedures to ensure that new entrants are not excluded from the competitive bidding system.49/ To serve these various objectives and to harmonize the results into a functioning system of competitive bidding, the Commission is required to make and enforce guidelines and limitations and to evaluate the efficacy of its policies as conditions change.

In this context, the authority of the Commission to update its policies is clear. As the United States Court of Appeals for the Sixth Circuit determined in 1995:

> A plain reading of Section 309(j)(3)(B), which directs the FCC to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants," indicates that Congress clearly conferred authority on the FCC to place restrictions and limitations on the bidding process.50/

That much is not in dispute. Moreover, discussing the directives of Section 309(j)(3), the United States Court of Appeals for the District of Columbia Circuit ruled that "[w]hen an agency must balance a number of potentially conflicting

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48/ *See* 47 U.S.C. § 309(j)(3).

49/ *See id.*, § 309(j)(4).

50/ *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 762 (6th Cir. 1995).

objectives, which these are, judicial review is limited to determining whether the agency's decision reasonably advanced at least one of those objectives and its decisionmaking process was regular."51/

When faced with a challenge to the Commission's actions in this context, a court must set aside the Commission's decisionmaking if it is "arbitrary, capricious . . . or otherwise not in accordance with law."52/ This is a highly deferential standard.53/ According to the Supreme Court:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. . . . [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."54/

This deference is particularly great where, as here, an agency must make judgments about *future* market behavior.55/ According to the D.C. Circuit, where "an agency is obliged to make policy judgments where no factual certainties exist . . . our role is more limited; we require only that the agency so state and go on to

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51/ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (citation omitted).

52/ 5 U.S.C. § 706(2)(A).

53/ *See, e.g.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 632 (D.C. Cir. 1996).

54/ *Motor Vehicles Manuf. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted).

55/ *See Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998).

identify the considerations that it found persuasive."56/ These are the standards applicable to the Commission's actions here, and they may readily be met based on the record of this proceeding.

B. National Wireless Service Providers Are Increasingly Using Designated Entity Investments to Extend Their Dominance in the CMRS Industry

In this case, the record reflects that national wireless service providers are increasingly using designated entity investments to extend their dominance in the CMRS industry. Data on the record also reveals that designated entities associated with national carriers have won large and growing shares of the licenses offered in recent CMRS auctions. As Council Tree showed in its comments in this proceeding, there is an unmistakable trend in national wireless service providers winning an increasing share of their CMRS spectrum rights through designated entity relationships and, as a result, in designated entities associated with national carriers winning quite large and growing shares of the licenses offered in recent CMRS auctions.57/ Nothing on the record of this proceeding suggests that this trend will suddenly reverse itself in upcoming auctions of CMRS spectrum rights.

56/ *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984) (internal quotations omitted), *cert. denied*, 469 U.S. 1227 (1985). *See also Melcher*, 134 F.3d at 1152-53.

57/ *See* Comments of Council Tree at 21-24.

Meanwhile, also on the record of this case is evidence of the profound concentration of CMRS industry control by national wireless service providers.58/ Tellingly, T-Mobile and Cook Inlet did not dispute the fact of industry consolidation. According to T-Mobile, "recent mergers and acquisitions have resulted in much of the currently available spectrum becoming consolidated with a few large wireless carriers,"59/ and "mergers have allowed certain carriers to amass significant amounts of spectrum . . . ."60/ Likewise, Cook Inlet discussed "the fact that a significant portion of the nation's wireless subscribers are customers of five large companies"61/ and the "fact of consolidation in the wireless industry . . . ."62/ This concentration, along with the obvious trend within the designated entity program, is a factor the Commission is entirely justified in considering when administering preferences that it awards in competitive bidding under Section 309(j).

For its part, Verizon Wireless argued that the Commission's 2005 CMRS competition report found that the CMRS market is effectively competitive,63/ and

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58/ *See id.* at 17-21.

59/ T-Mobile Comments at 1. *See also id.* at 4 ("[b]ecause of recent mergers and acquisitions in the wireless industry, much of the spectrum now available has become concentrated in the hands of T-Mobile's larger competitors").

60/ *Id.* at 6. T-Mobile also mentions the "growing disparity in spectrum holdings . . . ." *Id.* at 2.

61/ Cook Inlet Comments at 15.

62/ *Id.*

63/ *See* Comments of Verizon Wireless at 8; *see also* Comments of CTIA at 3-4.

that this conclusion, issued after Council Tree's June, 2005 *ex parte* filing on this subject, "squarely contradicts Council Tree's position on the state of competition in the CMRS market . . . ."64/ As a threshold matter, Verizon Wireless nowhere mentioned that the Commission's 2005 CMRS competition report did not take into account industry mergers consummated *during* 2005. The Commission explained:

> while the report acknowledges that the Sprint-Nextel and Alltel-Western Wireless mergers have occurred, these transactions closed too recently for their effects to be reflected in the indicators of market structure, carrier conduct, and market performance. However, the structural changes resulting from these transactions, and their potential impact on carrier conduct and market performance, will be reflected in future reports.65/

More importantly, as discussed below, the Commission does not need to make a finding that the CMRS market is not effectively competitive before it may update the rules for its designated entity program. The designated entity program was established to secure opportunities to participate in the provision of spectrum-based services for those who would otherwise be excluded under a system of competitive bidding and to promote the resulting diversification and competition. At issue is whether the Commission's program is achieving those goals or not. The Commission may surely reach the judgment, based on the record here, that there is

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64/ Comments of Verizon Wireless at 10. Verizon Wireless also argued that the Commission has evaluated competition on a market-by-market basis since it's CMRS spectrum cap sunset and that any evaluation of concentration on a national level is unsupported. *See id.* at 10-14.

65/ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Tenth Report*, 20 FCC Rcd 15908, 15911 n.1 (2005).

a material and accelerating trend within its designated entity program and that it must act to ensure that the preferences applied in competitive bidding will in the future serve their intended purpose. This is an entirely different undertaking than the imposition of an industry-wide spectrum cap or a market-specific merger review, and the different types of proceedings should not be confused.

Separately, Verizon Wireless argued that defining national wireless service providers as those with average gross wireless revenues for the preceding three years exceeding $5 billion is arbitrary.66/ Verizon Wireless and CTIA also claimed that adoption of the Commission's tentative conclusion would prohibit a designated entity from partnering with a national wireless service provider even if the large carrier had less spectrum than others in the same market.67/ As noted above, however, a $5 billion average gross wireless revenues threshold is an objective measure by which to address national carriers that, collectively, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue.68/ The Commission may rely on this convergence of relevant indices to draw a useful line for these purposes. And, even if a national wireless service provider holds less spectrum in a given market than another carrier, as in the Verizon Wireless and CTIA examples, the merits of permitting that national

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66/ *See* Comments of Verizon Wireless at 19.

67/ *See id.* at 7; Comments of CTIA at 11; *see also* Comments of T-Mobile at 9.

68/ *See also* Comments of MetroPCS at 9-10.

provider to extend its influence through a designated entity relationship are no more compelling.

Finally, Verizon Wireless suggested that updating the eligibility rules for the Commission's designated entity program would somehow conflict with 1993-94 effort to regulate all commercial mobile radio services in the same way.69/ It is not immediately clear to what Verizon Wireless was referring because the Commission's new rule would apply to all future CMRS spectrum auctions. If the point of Verizon Wireless's argument is that the Commission should strive to regulate the provision of CMRS or certain CMRS providers only when there is "a clear cut need,"70/ such a need plainly exists here, and the Commission's regulation is squarely within the authority and duty conferred separately under Section 309(j).71/

69/ *See* Comments of Verizon Wireless at 15-16.

70/ *See id.* at 16 (quoting *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order*, 10 FCC Rcd 7025, 7031 (1995)).

71/ Verizon Wireless also said that "[t]here is a fatal gap between what the [*FNRPM*'s] tentative proposal purports to achieve and the impact that it will have," Comments of Verizon Wireless at 6, claiming that the adoption of the Commission's new rule will not help to see that only *bona fide* designated entities receive Commission preferences. *See id.* The Commission has many mandates under Section 309(j). The Commission's new rule squarely serves to address the material and accelerating trend of national wireless carriers relying on designated entity relationships to extend their already dominant position in the CMRS industry, which trend was identified by Council Tree and raised in the *FNPRM*.

C. The Commission Has Already Determined That Those With Common Ownership Will Not Compete as Vigorously Against One Another in the Market

CTIA argued that there is not substantial evidence of a problem warranting Commission action to update the eligibility rules for its designated entity program,72/ and it claimed that restricting the award of bidding credits and other preferences to designated entities having materials relationships with national wireless service providers will not address the goal of avoiding the excessive concentration of licenses.73/ According to CTIA, "one appellate court rejected as 'arbitrary' a Commission decision to 'preclud[e] a class of potential licensees from obtaining licenses" when it failed to provide a 'supported economic justification' for the decision."74/

Here, in contrast, the Commission is not "precluding a potential class of licensees from obtaining licenses" at all. No party would be prevented under the Commission's new rule from acquiring any AWS-1 license through competitive bidding itself. In the *Cincinnati Bell* decision to which CTIA referred, it was the squarely-exclusionary nature of the cellular-PCS cross-ownership restriction that motivated the court to demand more of the Commission:

> The continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service

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72/ *See id.* at 8-10.

73/ *See id.* at 10-11.

74/ *Id.* (quoting *Cincinnati Bell*, 69 F.3d at 764) (footnote omitted).

> licenses. . . . Precisely because the Cellular eligibility restrictions have such a profound effect on the ability of businesses to compete in the twenty-first century technology of wireless communications, it was incumbent upon the FCC to provide more than its own broadly stated fears to justify its rules.75/

Nothing of the sort is at issue here. Instead, the Commission is merely updating the eligibility rules for bidding credits and other preferences that it awards in spectrum auctions, which is a far different and less central undertaking.

As it happens, however, the Commission has already developed the economic justification for its actions here. Allowing dominant national wireless service providers to be the sources of capital and management expertise to new entrants 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 this problem when it discussed its CMRS spectrum cap in 1996:

> significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. . . . 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.76/

75/ *Cincinnati Bell*, 69 F.3d at 764.

76/ *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, 7882 (1996) ("*Cincinnati Bell Remand Order*").

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.77/

Here, as NHMC *et al*. commented, a national wireless service provider's "material relationship can comply with FCC rules, yet still render the DE unlikely to engage in genuine price competition or disruptive innovation."78/ For that matter, in an affidavit accompanying the NHMC *et al*. comments, Gregory Rose indicated that "given the incentives and history of the incumbents, it appears far more likely that large wireless carriers will use these material relationships to prevent disruptive innovation or ruinous competition . . . ."79/

This phenomenon is clear. National wireless service providers are winning an increasing share of their CMRS spectrum rights through designated entity relationships, and designated entities associated with national carriers are winning quite large and growing shares of the licenses offered in recent CMRS auctions. Critically, in Auction 58, these acquisitions occurred *primarily within the national wireless service providers' existing regions*:

77/ *Id.*

78/ Comments of NHMC *et al*. at 7.

79/ *Id*., Declaration of Dr. Gregory Rose at 32.

Table 1

Auction 58 Results
Overview of Markets Where National Carrier DEs Acquired Licenses in Auction 58

	By Number of Licenses Acquired by DE			By POPs Acquired By DE (in millions)		
	Markets in which the DE's National Carrier Partner Had:			Markets in which the DE's National Carrier Partner Had:		
National Carrier DE	No CMRS Spectrum	Existing CMRS Spectrum	Total National Carrier DE Licenses Acquired	No CMRS Spectrum	Existing CMRS Spectrum	Total National Carrier DE Licenses Acquired
Cook Inlet/VS GSM VII PCS, LLC	2	**34**	36	0.8	**36.4**	37.2
% of Total	6%	**94%**		2%	**98%**	
Vista PCS, LLC	6	**31**	37	2.5	**30.8**	33.3
% of Total	16%	**84%**		7%	**93%**	
Wirefree Partners III, LLC	0	**16**	16	-	**18.0**	18.0
% of Total	0%	**100%**		0%	**100%**	
Edge Mobile, LLC	0	**21**	21	-	**22.6**	22.6
% of Total	0%	**100%**		0%	**100%**	
Total National Carrier DE Licenses	**8**	**102**	**110**	**3.3**	**107.8**	**111.1**
% of Total	**7%**	**93%**		**3%**	**97%**	

Sources:
Council Tree estimates using data from:
Kagan Research - Wireless Atlas & Databook 2005
Bear Stearns "US Wireless Industry -- June 2005"
Sprint Nextel Public Interest Statement -- "Attachment J - CMRS Aggregation (Sprint-Nextel)"
FCC ULS Database

As Table 1 shows, in Auction 58, 93 percent of the spectrum rights (POPs) for which Vista PCS, LLC was a high bidder was within the existing territory of Verizon Wireless, with whom it has a series of material arrangements. Ninety-eight percent of the spectrum rights (POPs) for which Cook Inlet/VS GSM VII PCS, LLC was a high bidder was within the existing territory of T-Mobile, with whom it has a series of material arrangements. And 100 percent of the spectrum rights (POPs) for which Edge Mobile, LLC (material arrangements with Cingular) and Wirefree Partners III, LLC (material arrangements with Sprint Nextel) was within the respective national wireless service provider's territory.

Moreover, when a designated entity investment and operating relationship involves a national wireless service provider, it has the effect of extending the influence of the already dominant carrier. For example, this is how T-Mobile described its relationship with Cook Inlet in a 2003 Securities and Exchange Commission ("SEC") filing:

> We do not qualify as a Designated Entity, and so in order to continue expanding service to our customers, we currently hold non-controlling ownership interests in two companies that qualify as Designated Entities, Cook Inlet/VS GSM V PCS Holdings, LLC ("CIVS V") and Cook Inlet/VS GSM VI PCS Holdings, LLC ("CIVS VI"). These two companies (hereafter referred to as the "CIRI Designated Entities") are controlled by an affiliate of Cook Inlet Region, Inc. ("CIRI"). Through wholesale reseller and other contractual arrangements, T-Mobile customers can obtain service in territories covered by the C and F Block spectrum licenses that are owned and operated by the CIRI Designated Entities.80/

Likewise, T-Mobile's parent said the following in a 2005 SEC filing:

> T-Mobile USA's joint venture with Cook Inlet Region Inc. successfully participated in FCC Auction 58 and, pending FCC review and formal approval, will acquire additional mobile communications licenses in 35 markets, including Cleveland, Denver, Kansas City, Minneapolis, Richmond, San Antonio, and Seattle for a total of $235 million. FCC approval and actual granting of the licenses is expected late in the second quarter or early in the third quarter of 2005. T-Mobile USA has resale agreements with the joint venture which will permit T-Mobile USA to significantly improve network capacity in those markets.81/

80/ T-Mobile USA, Inc., SEC Form 10-K (March 11, 2003) at 11.

81/ Deutsche Telekom AG, SEC Form 6-K (May 13, 2005) at 6.

Meanwhile, Cellco Partnership (d/b/a Verizon Wireless) essentially characterized the Vista PCS Auction 58 spectrum rights as if they are part of the Verizon Wireless portfolio:

> If we considered all acquisition transactions that are pending completion in 2005, including Auction No. 58 for both us and Vista, we would have access to spectrum in all of the top 100 BTAs, and in those BTAs, we would average 39.9 MHz.82/

Again, 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. 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. As indicated in the Table 1 figures and these SEC filings, that dominance is only extended through material relationship with designated entities.83/

Evidence of this problem is on the record before the Commission. Adoption of the Commission's new rule will not stop national wireless service providers from extending their dominant positions *directly*, but it will stop them from doing so with the aid of government-funded preferences. Contrary to CTIA's claim, the new rule

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82/ Cellco Partnership, SEC Form 10-K (March 13, 2005) at 11.

83/ CTIA attempts to avoid this problem by arguing that "it is difficult to rationalize how a regulatory loophole might arise for large incumbent carriers" but not other types of investors. Comments of CTIA at 3. *See also* Comments of Cook Inlet at 13. Contrary to CTIA's suggestion, at issue is not a loophole, but the harmful effect of permitting large incumbent carriers from extending their influence with government-sponsored preferences.

outlined in the *FNPRM* is well-tailored to address the very real problem before the Commission.

D. A Narrowly-Tailored Rule Intended Solely to Govern Access to the Designated Entity Program is Not the Same as a Broad-Scale Spectrum Cap or Merger Review

In the end, it is plain that CTIA and Verizon Wireless attempted to characterize this proceeding as something more than it is. The Commission is not here crafting some broad-scale spectrum cap or engaging in a detailed merger review. Indeed, no party would be denied the right to obtain spectrum or required to divest existing licenses as a result of this rulemaking. Instead, the Commission is merely undertaking to update the eligibility rules for designated entity *preferences* that it awards in competitive bidding.

It is entirely within the Commission's authority — and statutory duty — to preserve and protect the competitive bidding preferences that it established to satisfy the requirements of Section 309(j). The Commission must always evaluate the efficacy of its policies in light of changing conditions, and, in this case, the trends are unmistakable. Thus, contrary to the suggestion of Verizon Wireless, the Commission does not need to make a finding that the CMRS market is not effectively competitive before it may update the rules for its designated entity program. The record before the Commission shows that its designated entity preferences increasingly are being used to extend the dominance of national

wireless service providers. That is true regardless of whether or not the CMRS market is effectively competitive, and it should be addressed now.

Notably, Congress had such an approach in mind when it enacted Section 309(j). The Commission is directed under Section 309(j) to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . . ."84/ According to a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

> The Committee does not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach.85/

In this case, the common sense approach is clear. National wireless service providers do not need the benefit of government-sponsored bidding credits to extend their dominant positions in the CMRS industry. Increasingly, however, they have

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84/ 47 U.S.C. § 309(j)(3)(B).

85/ H.R. Rep. No. 103-111, at 254 (1993). In its comments, CTIA made much of the House Budget Committee Report with respect to industry concentration. According to CTIA, "Congress provided an instructive example: 'If a *single* licensee dominates any particular service, or if it dominates a significant group of services, then the Commission should take that into account. . . .'" Comments of CTIA at 10 (quoting H.R. Rep. No. 103-111, at 254) (emphasis added by CTIA). According to CTIA, "the presence of four nationwide carriers along with regional and smaller wireless carriers differs substantially from the circumstance Congress suggested may require the Commission's involvement." Comments of CTIA at 10-11. In other words, in CTIA's view, the Commission should not involve itself in addressing matters of excessive concentrations of licenses unless the situation is much closer to the case of a single licensee dominating a service. That would be a terrible policy if it were true, and it reveals a great deal about CTIA's approach to matters of industry concentration. It is nothing the Commission should endorse.

been relying on designated entities, which in turn have been acquiring a large and growing percentage of the spectrum-rights offered in recent auctions. The trend is plain, and it will continue in future auctions unless the Commission acts.

V. CONCLUSION

Council Tree urges the Commission to adopt and implement its new rule proposed in the *FNPRM* in a manner consistent with Council Tree's comments, filed on February 24, 2006, and these reply comments.

Respectfully submitted,

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March 3, 2006