IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 07-1454

COUNCIL TREE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and *amici* appearing in this Court are listed in petitioner Council Tree Communications, Inc.'s brief.

All parties, intervenors, and *amici* filing formal comments before the Commission are listed in Appendix A to the order on review.

2. Ruling Under Review

Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order, 22 FCC Rcd 15289 (released August 10, 2007), 72 Fed. Reg. 48814 (August 24, 2007) (J.A. 255).

3. Related Cases

The order on review has not previously been before this or any other Court. Petitioner Council Tree Communications, Inc. challenges the order on review insofar as the Commission declined to rescind, in connection with the 700 MHz auction, designated entity rules that the Commission previously had adopted in another administrative docket. Petitioner currently is challenging those designated entity rules directly in the United States Court of Appeals for the Third Circuit in *Council Tree Communications, Inc., et al. v. FCC*, No. 08-2036 (3d Circuit filed April 4, 2008). In addition, petitioner previously sought direct review of those same rules in *Council Tree Communications, Inc., et al. v. FCC*, 503 F.3d 284 (3d Cir. 2007), which dismissed that petition for review on jurisdictional grounds.

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GLOSSARY

AWS	Advanced Wireless Service
Br.	Brief
Commission (or FCC)	Federal Communications Commission
Communications Act	Communications Act of 1934
Council Tree	Petitioner Council Tree Communications, Inc.
DE	Designated entity
DTV Act	Digital Television Transition and Public Safety Act, Pub. L. No. 109-171 (Title III), 120 Stat. 4 (2006)
J.A.	Joint Appendix
PCS	Personal Communications Service
SBA	Small Business Administration

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES

In a petition for review proceeding currently pending in the United States Court of Appeals for the Third Circuit (*Council Tree Communications, Inc., et al. v. FCC*, No. 08-2036 (3d Circuit filed April 4, 2008)), petitioner Council Tree Communications, Inc. is seeking direct review of rules the Commission adopted in 2006 to guard against abuse of its program for giving bidding credits to certain small businesses (known as "designated entities" or "DEs") for use in auctions for spectrum licenses. In this case, which Council Tree pursues only "out of an abundance of caution,"[1] Council Tree seeks review of the Commission's *700 MHz* Second

[1] Supplemental Brief of Petitioners Council Tree, *et al.*, 3d Circuit No. 08-2036, at 24-25 n.42 (filed August 11, 2008).

Report and Order (hereafter referred to as the "*Order*")[2] insofar as that *Order* allegedly applied the 2006 DE rules to the auction of spectrum licenses in the 700 MHz Band. Council Tree asks the Court to nullify the 700 MHz auction, a step that would require the return of $19 billion from the U.S. Treasury and the cancellation of numerous spectrum licenses just as the innocent third parties that won them are planning to deploy wireless broadband service to the public. The case presents the following issues for review:

1. Whether Council Tree's petition for review should be dismissed as untimely under 28 U.S.C. § 2344, because the agency decision to apply the 2006 DE rules to the 700 MHz auction was made in an earlier unchallenged order and that decision was not reopened in the *Order* that is on review here.
2. If Council Tree's petition is timely, whether its arguments are barred by 47 U.S.C. § 405(a) because they were not adequately presented to the Commission.
3. If Council Tree's petition is timely and its claims preserved, whether the Commission's decision to apply its generally applicable DE rules to the 700 MHz auction was reasonable and consistent with law.
4. If the Court has jurisdiction and finds the Commission erred, whether it should avoid disruption of public and private interests by remanding the case to the Commission for further proceedings without nullifying the auction.

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[2] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (released August 10, 2007), 72 Fed. Reg. 48814 (August 24, 2007) (J.A. 255).

STATEMENT OF JURISDICTION

As explained below, the Court lacks jurisdiction because the decision petitioner asks the Court to review (the application of the Commission's generally-applicable DE rules to the 700 MHz auction) was not made in the *Order* on review but instead in an earlier, unchallenged order. *See infra* Argument Section I.

Even if Council Tree's petition were timely, this Court would nonetheless lack jurisdiction over many of its claims because they were not first presented to the Commission. *See* 47 U.S.C. § 405(a); *infra* Section II.A.

STATUTES AND REGULATIONS

Pertinent statutes and regulations, in addition to those included in petitioner's opening brief, are appended in the addendum to this brief.

COUNTERSTATEMENT

I. Background

The Auction Program. Since 1993, the Communications Act has required the FCC to award most spectrum licenses "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). The statute directs the Commission, in designing auction procedures, to seek to promote various – sometimes competing[3] – objectives, including the development and deployment of new technologies and services for the benefit of the public "without administrative or judicial delays;" the promotion of economic opportunity and competition by avoiding "excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including [designated entities, such as] small businesses [and] rural telephone companies;" "recovery for the public of a portion of the value of the public spectrum resource made available

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[3] *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999).

for commercial use;" and the "avoidance of unjust enrichment." 47 U.S.C. § 309(j)(3)(A) – (C); *see also id.* § 309(j)(4) (directing the Commission to consider additional priorities when prescribing regulations to implement the objectives of "paragraph (3)").[4] In implementing the auctions program, the Commission has sought "to find a reasonable balance" among the statute's competing goals. *DE Second R&O* ¶ 8.

The Commission's primary method of promoting designated entity participation in spectrum license auctions has been to award bidding credits – "percentage discounts on winning bid amounts" – to small business applicants. *DE Second R&O* ¶ 9. Under this program, for example, a qualifying DE receiving a 25 percent bidding credit could win a spectrum license at auction by effectively bidding up to 25 percent less than a competing non-DE bidder.

At the same time, the Commission's intent since the inception of the auctions program has been to ensure that small business benefits are available only to bona fide small businesses. To this end, the agency has engaged in "numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules."[5] Among the measures the Commission has adopted to maintain the integrity of the DE program have been unjust enrichment rules, which require a DE that has benefited from bidding

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[4] Though the Commission's rules define "designated entities" as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies" (47 C.F.R. § 1.2110(a)), after the Supreme Court decided *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), DE benefits have been available only to small businesses and, to a lesser extent, rural telephone companies. *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), 21 FCC Rcd 4753 (¶ 3 n.8) (2006) ("*DE Second R&O*").

[5] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753 (¶ 6) (2006) ("*DE Further Notice*").

credits to return some or all of those benefits if it transfers its license to a non-DE or otherwise loses its eligibility for such benefits. These rules prevent a small business that obtained a valuable spectrum license at a discount because of bidding credits from "flipping" it to a large entity at a market rate and keeping the difference. At various points during the history of the auction program, such rules had required repayment of the entire bidding credit if the licensee lost eligibility at any time during the 10-year license term.[6] On the eve of the Commission's most recent revisions to the DE eligibility rules in 2006, the unjust enrichment repayment obligation attached if a licensee lost its DE eligibility during the first five years after winning the license.[7]

II. The Docket 05-211 Designated Entity Rulemaking

A. Commission Action to Repair DE Rules

By 2005, the Commission had become aware that, "[i]n recent auctions, some entities [had] put themselves forward as small companies in order to qualify for auction discounts * * * having already entered into agreements to lease the spectrum rights they win to industry giants that do not qualify for a discount themselves." *DE Further Notice* (Statement of Commissioner Michael J. Copps). And well-publicized litigation was pending involving allegations that certain

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[6] *See Implementation of Section 309(j) of the Communications Act*, 11 FCC Rcd 136, 180 (1995) (governing Auctions 5, 10 and 11, and requiring total reimbursement of bidding credits if eligibility is lost anytime during the 10-year license term). *See also In re Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10918-19 (1997) (governing Auction 14, and providing for 100% reimbursement for loss of eligibility during the first 5 years of the license term, with declining reimbursement obligations for years 5 through 10).

[7] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Order on Reconsideration of the Second Report and Order, 21 FCC Rcd 6703 (¶ 37) (2006) ("*DE Reconsideration Order*") (noting that unjust enrichment period had been five years prior to the revisions adopted in the *DE Second R&O*).

designated entities had been "established for the purpose of acquir[ing] federally discounted licenses as investments to be later sold for profit in the after-market, and not for the legitimate objective of develop[ing] or offer[ing] spectrum services under acquired licenses, or to operate actual business operations." *United States v. Gabelli*, 345 F. Supp. 2d 313, 321-22 (S.D.N.Y. 2004).[8]

It was against this backdrop that petitioner Council Tree submitted to the FCC a proposal to tighten the DE eligibility rules by denying such benefits to DEs that have material operational or financial relationships with large in-region wireless carriers. The Commission took the elements of Council Tree's proposal as a point of departure to initiate further rulemaking proceedings to repair the DE rules in advance of the August 2006 auction of spectrum licenses for Advanced Wireless Service ("AWS"). *DE Further Notice* ¶ 1. For example, the Commission sought comment on Council Tree's proposal that it restrict financial and operational arrangements between DEs and "large incumbent wireless service provider[s]," but also asked whether a focus on only this limited universe of possible DE partners would "be sufficient to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities." *Id.* ¶ 15. The Commission also noted that it had previously "concluded that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee" were prohibited and now asked "whether other arrangements should be taken into account" and "[i]f so, what arrangements should we consider?" *Id.* ¶ 16. Finally, the Commission noted that its unjust enrichment rules at the time required a DE to pay back its bidding credit if it lost its eligibility in the first five years of the license term. *Id.* ¶ 20. The

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[8] *See* John R. Wilke, *Gabelli, U.S. Discuss Settlement In Fraud Case*, Wall Street J., June 1, 2006, at A3.

Commission asked whether, in the event it adopted new eligibility restrictions, it should change that time period, seeking comment on "over what portion of the license term should such unjust enrichment provisions apply." *Ibid.*

The rulemaking that followed generated a substantial record suggesting that the existing DE rules were inadequate, but contained divergent views on the wisdom of imposing Council Tree's specific proposals.[9] The Commission thus responded, in April 2006, by tightening its DE rules in two respects. First, to curb abuses and help vindicate Congress's intent that "'the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license,'"[10] the Commission provided: (a) that a licensee would be ineligible for DE benefits if it has lease or resale agreements with one or more entities covering, on a cumulative basis, more than 50 percent of its spectrum under any license; and (b) that a DE that has lease or resale agreements with a single entity covering more than 25 percent of the DE's spectrum under any license must attribute the lessee's revenues to itself for purposes of determining eligibility for DE benefits. *DE Second R&O* ¶ 25.

Second, to complement the new lease/resale restrictions aimed at encouraging DE-provided facilities-based service and to address concerns about license "flipping," the Commission strengthened its unjust enrichment rules. In particular, it decided to go back to a ten-year unjust enrichment period, *i.e.*, the time period during which a DE will have to repay

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[9] *See DE Second R&O* ¶¶ 57-58 (cataloguing comments).

[10] *DE Second R&O* ¶ 24 (quoting *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503 (¶ 82) (2004)); *see also* H.R. Rep. No. 103-111, at 257-58 (1993) (stating that "[t]he Committee anticipates that the Commission will use this authority [(to prevent unjust enrichment)] to deter speculation and participation in the licensing process by those who have no intention of offering service to the public").

some or all of its bidding credits if it sells the license to a non-DE or otherwise loses eligibility for those benefits. *DE Second R&O* ¶ 37. The Commission determined that this increase from five years was needed to deter "speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit." *DE Second R&O* ¶ 36.

In June 2006, the Commission affirmed its revised DE rules (with some clarifications) in a reconsideration order issued "on [its] own motion." *DE Reconsideration Order* ¶ 1.

B. Judicial Review of the DE Rulemaking

On June 7, 2006 – a week before Federal Register publication of the *DE Reconsideration Order* – Council Tree filed a petition for review of the *DE Second R&O* and the *DE Reconsideration Order* in the Third Circuit. Petition for Review, No. 06-2943 (3d Circuit filed June 7, 2006). Following briefing and argument on the merits, the Third Circuit dismissed Council Tree's petition for want of jurisdiction. *Council Tree Communications, Inc., et al. v. FCC*, 503 F.3d 284 (3d Cir. 2007). The Court found that the petition for review was "incurably premature" with respect to both the *DE Reconsideration Order* (because Council Tree's petition for review had been filed prior to Federal Register publication of that order) and the *DE Second R&O* (because Council Tree had filed a petition for administrative reconsideration that remained pending before the agency). *Id.* at 287-88.

On March 26, 2008, the Commission formally denied Council Tree's petition for reconsideration of the *DE Second R&O*.[11] That jurisdictional impediment to judicial review

[11] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Second Order on Reconsideration of the Second Report and Order, 23 FCC Rcd 5425 (2008).

having been eliminated, on April 8, 2008, Council Tree returned to the Third Circuit with a new petition for review of the DE rules. Petition for Review, No. 08-2036 (3d Circuit filed April 8, 2008). In that proceeding, Council Tree has presented virtually all of the substantive challenges to the DE rules that it presents here (and more), and seeks vacatur of the DE rule revisions adopted in the *DE Second R&O* and *DE Reconsideration Order* and the nullification of both the AWS auction ("Auction 66") and the 700 MHz auction ("Auction 73") to which the revised DE rules applied.[12] Briefing of that case has been completed, and the parties are awaiting the scheduling of oral argument.

III. The 700 MHz Rulemaking

In August 2006, the Commission issued a notice of proposed rulemaking seeking comment on service rules applicable to the prospective auction of spectrum licenses in the 700 MHz band, which historically had been occupied by television broadcasters, but was being made available for new wireless broadband services as a result of the digital television transition.[13] Among other things, the Commission sought comment on whether "any changes to Commission competitive bidding rules are necessary or desirable" in connection with the upcoming auction. *700 MHz Notice* ¶ 56 (J.A. 34); *see also* Council Tree Br. 9.

Responding to the *700 MHz Notice*, some commenters (including Council Tree) argued that the Commission should set aside significant blocks of the 700 MHz spectrum for licensing

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[12] Auction 66 was commenced on August 9, 2006, and closed on September 18, 2006. *See* Auction of Advanced Wireless Services Licenses Closes, *Public Notice*, 21 FCC Rcd 10521 (2006) ("*Auction 66 Closure Notice*"). Auction 73 was commenced on January 24, 2008, and closed on March 18, 2008. *See* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008) ("*Auction 73 Closure Notice*").

[13] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 21 FCC Rcd 9345 (¶ 1) (2006) ("*700 MHz Notice*") (J.A. 8).

only to designated entities or, absent the adoption of set-asides, that the Commission should adopt a third tier of bidding credits – at the 35 percent level – to augment the 25 percent and 15 percent bidding credit levels already provided under the Commission's rules. *See, e.g.,* Council Tree Comments at 11-16 (September 29, 2006) (J.A. 556-561); Council Tree Reply Comments at 1-8 (October 20, 2006) (J.A. 563-570). In its April 2007, *700 MHz R&O*, 22 FCC Rcd 8064 (¶ 6) (2007) (J.A. 88)), the Commission rejected these proposals, concluding that its "existing competitive bidding rules do not require modification for purposes of an auction of commercial 700 MHz Band licenses."

The Commission explained that "setting aside licenses risks denying the licenses to other applicants that may be more likely to use them effectively or efficiently for the benefit of consumers." *700 MHz R&O* ¶ 63 (J.A. 110). Moreover, the Commission stated, its recent experience of applying the existing Docket 05-211 rules governing DE eligibility for bidding credits in the AWS auction (Auction 66) had demonstrated that those rules afford DEs "substantial opportunity to compete with larger businesses for spectrum licenses * * * without any set-asides." *Ibid.* In that auction, the Commission observed, "more than half the winning bidders were designated entities that received discounts on their gross winning bids," and DEs "won over twenty percent of the licenses sold." *Ibid.* With respect to Council Tree's proposal for a third tier of 35 percent bidding credits, the Commission noted that it had rejected a similar request in connection with Auction 66 without compromising DE performance and that the availability of licenses covering relatively small geographic areas in the 700 MHz auction made steeper bidding credit discounts unnecessary. *Id.* ¶ 65 (J.A. 111).

In the same order in which it definitively declined to alter the Docket 05-211 DE competitive bidding rules for the 700 MHz auction, the Commission initiated a new round of

comments leading to the August 2007 *Order* that is on review here. That further notice did not include any questions regarding whether the existing DE rules should be loosened in connection with the 700 MHz auction. The only question that the further notice posed with respect to DE eligibility pertained narrowly to one party's proposed "Public Safety Broadband Deployment Plan" for a nationwide license involving less than one-sixth of the 700 MHz Band spectrum at issue in the upcoming auction. *See 700 MHz R&O* ¶¶ 268-290 (J.A. 181-189) (seeking comment on aspects of the so-called "Frontline Proposal" to have the licensee construct and operate a common infrastructure to support a broadband public safety network as well as its own commercial broadband network). And the Commission did not seek comment on whether DE eligibility restrictions should be relaxed for that slice of spectrum (which became known as the "D Block"), but rather questioned whether DE bidding preferences would be appropriate for the pertinent spectrum *at all* in light of the "very high" capital costs associated with "constructing a robust [nationwide] network to meet the needs of critical public safety service providers – and the public – in times of emergency." *Id.* ¶¶ 285-286 (J.A. 187). Indeed, the Commission noted in connection with that inquiry that, because the Frontline Proposal expressly would have required the licensee to operate only as a wholesaler with respect to commercial uses of the D Block, the proposal appeared to be inconsistent with the agency's DE eligibility rules, in any event. *Id.* ¶¶ 287-288 (J.A. 187-188).

In response to the Commission's targeted request for comment on the Frontline Proposal, Council Tree informed the Commission that it was seeking general relief from the Commission's Docket 05-211 DE eligibility rules in the pending Third Circuit litigation, and that it therefore would "not address the merits" of rescinding those rules here. Council Tree Further Notice

Comments at 10 (May 23, 2007) (J.A. 796); *accord* Council Tree Further Notice Reply Comments at 8-9 & n.19 (June 4, 2007) (J.A. 1124-1125).

In the *Order* on review, the Commission concluded that it would allow DEs bidding on the D Block to receive bidding credits. *Order* ¶ 535 (J.A. 439). It also rejected Frontline's proposal that the winner of the D Block license be *required* to adopt a wholesale business model. *Ibid.*

IV. Related Developments

The Commission has conducted two major auctions of spectrum licenses (as well as several smaller auctions) under the DE eligibility rules adopted in the *DE Second R&O* and *DE Reconsideration Order*.

The first such auction – for Advanced Wireless Service licenses (Auction 66) – commenced on August 9, 2006, and closed on September 18, 2006. That auction raised more than $13.7 billion in winning bids (net of bidding credits).[14] DEs comprised 100 of the 168 total qualified bidders in the auction and 57 of the 104 total winning bidders. *See generally Auction 66 Closure Notice,* Attachment A.[15] All Auction 66 licenses were granted by the end of 2007. *See FCC News Release,* Wireless Telecommunications Bureau Completes Review of Applications for Licenses for Advanced Wireless Services (April 30, 2007); *Public Notice*,

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[14] Federal Communications Commission, Auction 66 Summary, http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66 (last visited December 18, 2008).

[15] In all, DEs won 215 of 1087 (or 20% of) auctioned licenses. *See* Oral Statement of FCC Chairman Kevin J. Martin Before the House Committee on Energy and Commerce, Exhibit 3 (April 15, 2008) ("*April 15 Martin Statement to Congress*"). Chairman Martin's Oral Statement is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A1.pdf. The exhibits to that statement are available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A2.pdf.

Report No. 3672 (Dec. 19, 2007). Proceeds from the auction have been distributed to federal agencies to assist in the relocation of federal users from the AWS spectrum.[16] And the roll-out of broadband service by Auction 66 license winners is now well underway.[17]

On March 20, 2008, the Commission announced the conclusion of Auction 73, the second major auction of spectrum licenses conducted under the revised DE rules. *Auction 73 Closure Notice*, 23 FCC Rcd 4572. The 700 MHz spectrum at issue in Auction 73 – which is being relinquished by broadcasters in connection with the conversion from analog to digital broadcast television – "is attractive to both industry and public safety organizations because it is especially well-suited for wireless broadband, is capable of carrying large amounts of data, can travel far distances, and easily penetrates walls with great efficiency and speed."[18] Auction 73, the largest FCC spectrum auction in history, raised approximately $19 billion in winning bids, nearly doubling congressional estimates of its likely proceeds. *March 18 Martin Statement* at 1. At the same time, DE participation and performance in the auction was robust: 119 of 214 total qualified bidders and 56 of 101 total winning bidders claimed DE bidding credits. *FCC News*

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[16] *See* U.S. Department of Commerce, First Annual Progress Report: 1710-1755 MHz Spectrum Band Relocation, at 1-2 (March 2008), available at: http://www.ntia.doc.gov/reports/2008/SpectrumRelocation2008.pdf.

[17] T-Mobile, for instance, has informed the Commission that it "has already launched high speed wireless service in New York City" pursuant to licenses obtained in Auction 66, that it plans to "deploy in 25 more markets in 2008," and that it already has "placed about one million AWS-ready handsets either into customer hands or the supply chain." Letter, dated July 18, 2008, from Howard J. Symons, counsel for T-Mobile, to FCC Secretary, WT Docket No. 07-195, Attachment at 3 (available at: http://webapp01/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034787).

[18] *FCC News Release*, Statement of FCC Chairman Kevin J. Martin, at 2 (March 18, 2008) ("*March 18 Martin Statement*"), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280887A1.pdf

Release, Statement by FCC Chairman Kevin J. Martin (March 20, 2008).[19] And DEs won 35 percent of all licenses auctioned in Auction 73. *Ibid.* The proceeds of Auction 73 have been transferred to the U.S. Treasury, as required by statute, to support public safety and digital television transition initiatives.[20] After broadcasters cease analog transmissions in February 2009, the spectrum won in Auction 73 will become fully available to licensees for the provision of service to the public.

SUMMARY OF ARGUMENT

1. The Court should dismiss Council Tree's petition for review, because it is an untimely challenge to the April 2007 *700 MHz R&O*, rather than a challenge to any action taken in the *Order* that is the nominal subject of Council Tree's petition. In particular, the decision to continue to apply the Docket 05-211 DE rules to the 700 MHz auction was made in the *700 MHz R&O* (¶¶ 6, 63, 65 (J.A. 88-89, 110, 111)) and not reopened in the *Order* on review. Council Tree never filed a petition for review of the *700 MHz R&O*, and the 60-day window for doing so has long since passed. 28 U.S.C. § 2344.

2. Even if the *Order* had reopened the question whether to apply the Docket 05-211 DE rules to the 700 MHz auction, Council Tree's claims would fail. Council Tree itself affirmatively disclaimed any request below that the Commission forbear from applying the Docket 05-211 rules to the 700 MHz auction, and the few commenters who did ask the Commission to stay or waive those rules in this proceeding presented only skeletal arguments

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[19] Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280968A1.pdf

[20] *See Order* ¶¶ 15, 318 (J.A. 262, 371) (citing the Digital Television Transition and Public Safety Act ("DTV Act"), Pub. L. No. 109-171 (Title III), 120 Stat. 4 (2006)); *March 18 Martin Statement* at 1; *TR Daily* (July 7, 2008) (reporting that "[t]he FCC met a June 30 [2008] statutory deadline for ensuring proceeds from the 700 megahertz band auction were deposited into the U.S. Treasury"), available at: http://www.tr.com/online/trd/2008/td070708/index.com.htm.

that did not provide the Commission an opportunity to pass on the augmented claims Council Tree now presents in its brief. *See* 47 U.S.C. § 405(a).

Council Tree's challenges to the Commission's action are insubstantial in any event. The auction statute does not guarantee any particular level of DE success in wireless auctions. Moreover, DEs operating under the rules that Council Tree opposes actually comprised the majority of winning bidders in the major AWS auction that took place prior to these proceedings.

3. If, contrary to our argument, the Court finds that it has jurisdiction to consider Council Tree's claims and that the Commission erred, the Court should remand the case to the Commission and should reject Council Tree's request for nullification of the 700 MHz auction. Nullification would require the repayment of $19 billion in auction proceeds, would penalize innocent third parties (including many DEs) that obtained licenses in good faith and have built business plans around them, and would deprive the public of access to valuable spectrum for wireless broadband service.

STANDARD OF REVIEW

Insofar as Council Tree challenges the FCC's interpretation of the Communications Act, the Court's review is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

To the extent that Council Tree challenges the reasonableness of the FCC's decision, the Court must affirm that decision unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Judicial deference to the FCC's "expert policy judgment" is especially appropriate in cases like this one, where the

"subject matter * * * is technical, complex, and dynamic," *National Cable & Telecommunications Ass'n v. Brand X*, 545 U.S. 967, 1002-03 (2005) (internal quotations omitted), and where the agency must make predictive judgments about market behavior within the industry it oversees, *FCC v. National Citizens Committee For Broadcasting*, 436 U.S. 775, 814 (1978).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER COUNCIL TREE'S CHALLENGE BECAUSE IT IS UNTIMELY

Council Tree's challenge in this case consists entirely of its claim that the Commission erred (in various ways) in continuing to apply the Docket 05-211 DE rules to the 700 MHz auction. This Court lacks jurisdiction to consider that claim, however, because the decision to apply the DE rules in the 700 MHz auction was not made in the *Order* that is on review here, but rather in the earlier *700 MHz R&O*. The time for challenging the *700 MHz R&O* has long since passed. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (requiring petitions for review of FCC orders to be filed within 60 days after issuance); *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 38 (D.C. Cir. 2006) ("a petitioner's failure to file within [the 60-day statutory window] constitutes a bar to our review").

Council Tree acknowledges that the Commission, in its August 2006 *700 MHz Notice*, "posed a generic inquiry concerning whether 'any changes to Commission competitive bidding rules [were] necessary or desirable'" in connection with the then-upcoming 700 MHz auction. Br. 9 (quoting *700 MHz Notice* ¶ 56 (J.A. 34)). Responding to comments on that inquiry in its April 2007 *700 MHz R&O*, the Commission concluded that its "existing competitive bidding

rules do not require modification for purposes of an auction of commercial 700 MHz licenses." *700 MHz R&O* ¶ 6 (J.A. 88). The Commission explained that its recent experience in applying Docket 05-211 competitive bidding rules for DEs in the AWS auction had demonstrated that those rules afforded DEs "substantial opportunity to compete with larger businesses for spectrum licenses." *Id.* ¶ 63 (J.A. 110). Indeed, the Commission stressed, "more than half the winning bidders [in that auction] were designated entities that received discounts on their gross winning bids," and DEs "won over twenty percent of the licenses sold." *Ibid.* Had Council Tree wished to challenge those conclusions, it should have filed a petition for review of the *700 MHz R&O*. It did not do so.

Nonetheless, Council Tree argues, in effect, that the Commission in the further notice portion of the *700 MHz R&O* reopened the question it had just answered earlier in the same document. Br. 17-18 & n.38. In particular, Council Tree claims that the Commission raised "broad and open-ended" inquiries in that further notice that were "inextricably linked with the most basic questions" about the Docket 05-211 DE rules. Br. 17 n.38; *see also* Br. 9-10 & nn.17-21. And, in the *Order*, Council Tree asserts, the Commission "addressed and denied the SBA Office of Advocacy's request to suspend the application of the [Docket 05-211] DE Rules to Auction 73" "without any hint of concern" that those comments "were beyond the proceeding's scope." Br. 17 n.38; *see also* Br. 12 & n.31. Neither of these contentions, however, establishes that the Commission reopened the question of whether to apply the DE rules to the 700 MHz auction in the *Order* on review.

This Court has stressed that "[t]he Commission's intention to initiate a reopening must be clear from the administrative record." *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) (citing *Charter Communications v. FCC*, 460 F.3d at 38). And here, there is no indication of

intent by the Commission generally to reopen in the *Order* on review the question of applying the Docket 05-211 DE rules to the 700 MHz auction – much less a "clear" indication to do so. Although Council Tree characterizes the further notice portion of the *700 MHz R&O* as raising "broad and open-ended" questions regarding the DE rules, the Commission, in fact, sought further comment *only* on whether DE bidding credits should be available *at all* for the limited slice of spectrum addressed in the Frontline Proposal, *700 MHz R&O* ¶¶ 284-88 (J.A. 186-188).[21] The Commission did not seek comment on any other issues pertaining to designated entities. Moreover, all of the further notice paragraphs that Council Tree cites in its brief, many of which do not mention the designated entity rules at all, address only the treatment of the D Block. *Compare 700 MHz R&O* ¶¶ 268-90 (J.A. 181-189) (seeking comment on various aspects of the Frontline Proposal), *with* Council Tree Br. 9-10 (& nn.17, 19, 20, 21), 17 n.38 (citing paragraphs 277-290, 287, 277, and 284-288 of the *700 MHz R&O*). These inquiries – targeted to discrete and uniquely encumbered spectrum in which Council Tree expressly had no interest – cannot plausibly be characterized as reopening the Commission's conclusions from earlier in the same document that its existing Docket 05-211 DE rules were performing well (*700 MHz R&O* ¶¶ 63, 65 (J.A. 110, 111)) and that those "existing competitive bidding rules do not require modification for purposes of an auction of commercial 700 MHz Band licenses" (*id.* ¶ 6 (J.A. 88)).

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[21] The Commission explained that the nationwide licensee under the Frontline Proposal would incur "extremely high implementation costs" and "would be responsible for constructing a robust network to meet the needs of critical public safety service providers – and the public – in times of emergency." *700 MHz R&O* ¶¶ 285, 286 (J.A. 187). In these circumstances, the agency expressed concern that "[t]he public interest would not appear to favor giving applicants a preference when bidding * * * based on their limited financial resources." *Id.* ¶ 286 (J.A. 187).

Nor did the Commission reopen the issue in the *Order* by "not[ing]" in a passing footnote (and labeling as not "persuasive") an unsolicited proposal by the Office of Advocacy of the Small Business Administration ("SBA") that the Commission "stay" the Docket 05-211 DE rules in connection with the 700 MHz auction. *Order* ¶ 532 n.1083 (J.A. 438) (citing SBA Further Notice Comments at 2 (filed May 21, 2007) (J.A. 764)). It is well settled that "an agency [does not] reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter." *Biggerstaff v. FCC*, 511 F.3d at 186 (internal quotation omitted). Indeed, although Council Tree contends that "*Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988) and its progeny" permit constructive reopening under the circumstances of this case, this Court has made clear that the reopening rule of those cases does not provide "a license for bootstrapping procedures by which petitioners can comment upon matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (internal quotation omitted).

Because the Commission decided to continue the application of the Docket 05-211 DE rules in connection with the 700 MHz auction in the April 2007 *700 MHz R&O* and did not reopen that question for decision in the *Order* that is on review here, Council Tree's challenge is untimely and should be dismissed. *See Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003).

II. EVEN IF COUNCIL TREE'S PETITION WERE TIMELY, ITS ARGUMENTS WOULD BE WAIVED AND, IN ANY EVENT, ARE MERITLESS.

Even if the *Order* on review here had actually reopened the question whether to apply the Docket 05-211 DE rules to the 700 MHz auction, Council Tree's claims would fail. Council

Tree's arguments are not properly before the Court because they were not first presented to the Commission. And, to the extent that Council Tree's claims are properly before the Court, they are insubstantial.

A. Council Tree's Claims Are Barred Because They Were Not Presented To The Commission.

Council Tree itself never argued before the Commission that the agency should rescind the Docket 05-211 DE rules in connection with the 700 MHz auction. To the contrary, as previously noted, in the round of comments leading to the *700 MHz R&O*, Council Tree urged the Commission to adopt *additional* rules that would set aside portions of the 700 MHz spectrum for bidding by DEs alone[22] or, alternatively, increase to 35 percent the size of bidding credits available to certain DEs in the 700 MHz auction.[23] And in the comment round leading to the *Order* on review, Council Tree urged the Commission *not* to exempt the slice of spectrum identified in the Frontline Proposal from the application of the Docket 05-211 DE rules.[24] At the same time, Council Tree affirmatively disclaimed any request that the Commission forbear from applying the Docket 05-211 rules in the 700 MHz auction, saying that it would "not address the merits" of those rules in the *700 MHz* proceeding in light of its pending court challenge to them.[25]

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[22] *See* Council Tree Comments at 11-13 (J.A. 556-558); Council Tree Reply Comments at 6-7 (J.A. 568-569).

[23] Council Tree Comments at 13-15 (J.A. 558-560); Council Tree Reply Comments at 7-8 (J.A. 569-570).

[24] *See* Council Tree Further Notice Comments at 8-12 (J.A. 794-798); Council Tree Further Notice Reply Comments at 7-11 (J.A. 1123-1127).

[25] Council Tree Further Notice Comments at 10 (J.A. 796); Council Tree Further Notice Reply Comments at 8-9 n.19 (J.A. 1124-1125).

Unlike Council Tree, a small handful of commenters did urge the Commission to waive or stay the application of the Docket 05-211 DE rules to the 700 MHz auction in the round of comments leading to the *Order*,[26] although one such commenter freely acknowledged that, in doing so, it was "encourag[ing] the Commission to take additional measures beyond those proposed in the Further Notice." Wirefree Partners Further Notice Comments at 1 (J.A. 951). The commenters seeking that relief repeated, at a very high level of generality, some of the criticisms of the resale/wholesale restrictions and 10-year unjust enrichment period that opponents of those provisions had raised in Docket 05-211 and that Council Tree has pursued in its direct challenge to those rules in the Third Circuit. They argued that: DE performance in the AWS auction was depressed under the Docket 05-211 rules;[27] the Docket 05-211 DE rules "may hinder small business participation [in] the 700 MHz auction;"[28] and such hindrance – in general, unspecified ways – would harm the policies underlying section 309(j) of the Communications Act.[29]

The Commission had already found in the *700 MHz R&O*, however, that DE performance in the AWS auction had confirmed that the Docket 05-211 DE rules afforded designated entities "substantial opportunity to compete with larger businesses for spectrum licenses and provide

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[26] SBA Further Notice Comments at 2, 9-10 (J.A. 764, 771-772); Further Notice Comments of Wirefree Partners at 1, 8 (May 23, 2007) (J.A. 951, 958); Further Notice Comments of the Ad Hoc Public Interest Spectrum Coalition at 37-38 (May 23, 2007) (J.A. 1001-1002).

[27] SBA Further Notice Comments at 8-9 (J.A. 770-771); Wirefree Partners Further Notice Comments at 3 (J.A. 953).

[28] SBA Further Notice Comments at 4 (J.A. 766); *see also* Wirefree Partners Further Notice Comments at 5 (J.A. 955) (arguing that the rules "make it extremely difficult for start up enterprises and small businesses to build successful business models").

[29] SBA Further Notice Comments at 7-8 (J.A. 769-770); Wirefree Partners Further Notice Comments at 4 (J.A. 954).

spectrum-based services."[30] It had also justified in detail the statutory and record basis for those rules when it adopted them in 2006.[31] The Commission thus reasonably found that the broad-brush requests for a stay of those rules – which fell outside the scope of the proceeding – had offered "nothing persuasive" to support their position. *Order* ¶ 533 n.1083 (J.A. 438).

In its appellate brief, Council Tree now seeks to augment the skeletal challenges voiced below. Because those claims were not presented to the Commission in the proceedings leading to the *Order* on review with sufficient clarity or specificity, they are not properly before the Court. The Communications Act bars claims that rely on "questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass." 47 U.S.C. § 405(a). This Court "strictly applie[s] that section," *Charter Communications,* 460 F.3d at 39, generally holding that it "lack[s] jurisdiction to review arguments" when the requirements of section 405(a) have not been met, *In re Core Communications, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006) (internal quotation omitted). "The Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner." *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997); *see also MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (even where the record below may be sufficient, as a jurisdictional matter, to preserve a point for judicial review, the point may not have been presented to the Commission "with sufficient force to require [the] agency to formally respond"). Because the vague and generalized assertions by other parties about the DE rules did not adequately tee up the claims Council Tree now asserts, those claims are barred by section 405(a).

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[30] *700 MHz R&O* ¶ 63 (J.A. 110); *see also id.* ¶ 65 (J.A. 111) (rejecting claims of poor DE performance in Auction 66).

[31] *See DE Second R&O* ¶¶ 15-41; *DE Reconsideration Order* ¶¶ 7-41.

Even if Council Tree does have an adequately preserved generic challenge to the Commission's application of the DE rules to the 700 MHz auction, several of its more specific claims are clearly barred. First, Council Tree contends that allegedly poor DE performance in the 700 MHz auction itself demonstrates the unreasonableness of the Commission's decision to retain the Docket 05-211 rules for that auction. Br. 25-26. However, arguments based on the Auction 73 results, which post-date the order on review, obviously were not presented to the Commission before it adopted the *Order* on review, and they are therefore barred by section 405(a).[32]

Council Tree also claims, without record citation, that the Commission erred in applying the Docket 05-211 DE rules to the 700 MHz auction because those rules allegedly were adopted without required APA notice. Br. 18. That argument was not raised below and is thus not properly before the Court. See 47 U.S.C. § 405(a).[33]

Council Tree asserts, finally, that the Court should grant its petition for review because the Commission's decision in the *DE Second R&O* to place limitations on wholesaling by DEs

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[32] In any event, Council Tree's contention that DE performance in Auction 73 was poor fails as a factual matter. As discussed above (at pages 13-14), DEs comprised 119 of 214 total qualified bidders, 56 of 101 total winning bidders, and won 35 percent of all licenses auctioned in Auction 73. Moreover, various DEs (*e.g.*, King Street Wireless, Continuum 700, and Cavalier) won licenses covering, among other cities, St. Louis, Milwaukee, Des Moines, Charlotte, Richmond, Jacksonville, Honolulu, Louisville, Buffalo, Syracuse, and Albany. *Auction 73 Closure Notice*, Attachment A. Finally, even if DE performance in that auction were fairly characterized as poor, such performance would suggest, at most, that the Commission's assessment of its DE rules "appears *ex post* to have been mistaken," while the only legally relevant inquiry is whether "the Commission's decision was unreasonable *ex ante*." *Fresno Mobile Radio*, 165 F.3d at 971.

[33] In any event, because challenges to the "procedural lineage" of a rule may be brought only on direct review of the order adopting it (and not when the rule is merely enforced or applied), that claim would fail even if it had been presented below. *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324-25 (D.C. Cir. 1994).

was based on the allegedly erroneous view that section 309(j) requires DEs to provide facilities-based service *directly* to the public. Br. 26. In Council Tree's view, that alleged error is demonstrated by the Commission's decision, in an order issued subsequent to the *Order*, to waive limitations on wholesaling by DEs in connection with Frontline's proposal for the D Block segment of the 700 MHz Band. Br. 26-27 (citing *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License*, 22 FCC Rcd 20354 (2007) ("*Waiver Order*")). No party advanced this argument prior to the *Order* (nor could they have done so, since the *Waiver Order* was released afterwards), so this claim is barred by section 405(a) as well.[34]

B. Council Tree's Claims Fail On Their Merits.

Even if Council Tree's general claim that the Commission should not have applied its generally applicable DE rules to the 700 MHz auction were adequately preserved, it would nonetheless fail on the merits. Council Tree faces a heavy burden when arguing that the Commission's decision to continue applying the Docket 05-211 DE rules to the 700 MHz auction was unreasonable or foreclosed by section 309(j). Section 309(j)(3) of the

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[34] In any event, Council Tree's claim fails as a substantive matter since allegedly inconsistent *subsequent* action by an agency cannot form the basis for a claim of agency error. *See Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (noting that "the Commission [can] hardly be faulted for ignoring 'precedents' that did not precede") (internal quotations omitted). Moreover, there is no inconsistency between the Commission's decision to continue generally applying its generally applicable rules to an auction, but to waive one of those rules when confronted with unique circumstances for a particular slice of spectrum. The action taken in the *Waiver Order* was taken in light of "the unique circumstances and obligations of the D Block license," which would have required the licensee to "construct[] and operat[e] a nationwide, interoperable broadband network * * * to provide both a commercial service and a broadband network service to public safety entities." *Waiver Order* ¶¶ 7, 9. The circumstances that made waiver appropriate in that case have no bearing on potential licensees, like Council Tree, who were seeking ordinary spectrum unencumbered by such unique obligations.

Communications Act does not establish a statutory guarantee of any particular level of DE success in spectrum auctions. Instead, it requires the FCC to balance competing statutory goals as it establishes auction rules. *Fresno Mobile Radio,* 165 F.3d at 971; *Melcher v. FCC*, 134 F.3d 1143, 1153-55 (D.C. Cir. 1998). Among those goals – none of which is prioritized by the statute – are: "the development and rapid deployment of new technologies, products, and services for the benefit of the public;" "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses;" "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;" and "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A)-(F).

A separate portion of the statute includes a separate list of competing priorities (again, none of which is prioritized by the statute) that the Commission must consider when establishing auction rules. *See id.* § 309(j)(4)(A)-(F). Specifically, the statute directs the Commission not only 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," but also to impose "performance requirements" on successful bidders "to promote investment in and rapid deployment of new technologies and services," and adopt such "antitrafficking restrictions * * * as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses." *Ibid.* Given the complexity and multiplicity of these competing priorities, it is not surprising that Congress left to the Commission's discretion the choice of specific "bidding methodology." *Id.* § 309(j)(3).

The Commission has modified and refined its DE rules over the years to balance these goals in light of its experience in successive auctions. *See generally DE Second R&O* ¶¶ 7-13. The Docket 05-211 rules – which seek to promote auction participation by legitimate small businesses while preventing the abuses that had developed under the preexisting rules (*see* pages 5-8, above) – reflect the Commission's reasonable judgment on how best to balance the statutory goals in light of past experience and the Docket 05-211 record. *See DE Reconsideration Order* ¶¶ 39-40 (explaining that the resale/wholesale restrictions and 10-year unjust enrichment period would create strong incentives for DEs to use spectrum to provide facilities-based service to the public instead of holding their licenses and selling them for a profit). As such, the rules are clearly within the Commission's statutory discretion and are not arbitrary or capricious. *See Fresno Mobile Radio*, 165 F.3d at 971 (holding that the Commission's predictive judgment regarding how best to balance the objectives of section 309(j) is entitled to deference).[35] Council Tree points to nothing in the pertinent record of the *700 MHz* proceeding that required the Commission to alter its balancing for that auction.

Council Tree argues that in considering whether to apply the Docket 05-211 DE rules to the 700 MHz auction, the Commission arbitrarily ignored the allegedly poor performance of DEs under those rules in the AWS auction. Br. 6-7, 16-19, Addendum III. This claim is insubstantial. As a threshold matter, DE performance in any particular auction has no necessary bearing on the lawfulness of the Commission's rules. Section 309(j) speaks of giving DEs an

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[35] Council Tree fleetingly claims that the Commission's decision below violates the goals of 47 U.S.C. § 257. Br. 24. That claim was not presented to the Commission below and therefore is not properly before the Court. 47 U.S.C. § 405(a). In any event, the reasonable balance that the Commission struck in implementing its DE program under section 309(j) also satisfies the overlapping goals of section 257.

opportunity to participate in the provision of "'spectrum-based services' as a unit;" it does *not* require that DEs "must have access to *each* spectrum-based service." *Melcher v. FCC*, 134 F.3d at 1155 (citing sections 309(j)(4)(D) & 309(j)(3)(B)). Moreover, bidding credits for DEs are intended to give them only an "*opportunity*" to compete for licenses against larger entities, 47 U.S.C. § 309(j)(4)(D) (emphasis added); they are not designed to guarantee any particular level of DE success, as Council Tree apparently believes.

In any event, as the Commission found in the *700 MHz R&O* (¶¶ 63, 65 (J.A. 110, 111)), DEs did very well in Auction 66, and there was thus no basis for rescinding the rules for the 700 MHz auction. Among other things, DEs comprised 57 of the 104 winning bidders and won approximately 20 percent of all the licenses issued in that auction. Council Tree seeks to disparage these numbers by complaining that DEs tended to win the smaller (and less costly) licenses. Br. 19 n.40. But it should come as no surprise that (legitimate) small businesses would tend to focus on small licenses and build from there; and the Commission, accordingly, has employed not just bidding credits, but a range of geographic licensing areas and spectrum block sizes to promote DE participation.[36] It is nevertheless noteworthy that DEs did not just win small rural licenses in Auction 66. DE Denali Spectrum License, LLC won a regional license covering over 58 million people in the Great Lakes Area, and DE Barat Wireless, L.P. won a regional license in the Mississippi Valley Area covering over 30 million people.[37]

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[36] *See, e.g., Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands*, 20 FCC Rcd 14058 (¶¶ 5-21) (2005); *Order* ¶¶ 62-73 (J.A. 281-287).

[37] *See Auction 66 Closure Notice*, 21 FCC Rcd at 10582, 10583; *see also* http://wireless.fcc.gov/auctions/66/charts/66press_5.pdf, at 26 (last updated 9/18/06).

Moreover, Council Tree has failed to support its contention that the new rules caused DEs to do poorly in Auction 66 (or Auction 73) compared with earlier auctions. *See* Br. 7 & n.12, 17-18, Addendum, Exh. B. For example, all of the prior auctions that it uses for comparison (*see* Exhibits A-J attached to its brief) included substantial "set asides" or "closed licenses," spectrum on which only DEs could bid, while Auctions 66 and 73 did not. It is impossible to tell from Council Tree's comparison how much of the decline that it alleges resulted from the elimination of set asides or other factors, and how much, if any, from the Docket 05-211 rule changes. The charts, therefore, show nothing of value here.[38]

III. NULLIFICATION OF THE RESULTS OF AUCTION 73 IS NOT WARRANTED

If, contrary to our argument, the Court were to find that it has jurisdiction to review Council Tree's petition for review and, further, to determine that the Commission did not justify its decision to apply the Docket 05-211 DE rules to the 700 MHz auction, the Court nevertheless should not grant Council Tree's request that it nullify Auction 73. First, in the event the Court finds that the Commission erred, it should remand without vacating the *Order* on review.

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[38] In any event, it is speculative whether DEs as a group would have performed any better if the Commission had followed Council Tree's alternative recommended course in Docket 05-211 of barring DEs that had "material relationships" with large in-region carriers. *See* Council Tree Br. 4. Commission statistics show that the DE success rates in Auctions 66 and 73 are very similar to those in prior auctions if DEs that were partnered with nationwide incumbent carriers (essentially the ones Council Tree would have barred) are excluded from the count. *See April 15 Martin Statement to Congress* at 4 & Exhibits 2, 3 (demonstrating that DE performance in both Auctions 66 and 73 was very similar to that in the prior PCS auctions (Auctions 35 and 58) when the results are corrected to exclude from the PCS auction results DEs that *were partnered with nationwide incumbent carriers*), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A1.pdf, and http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A2.pdf.

Second, even if the Court were to vacate, there is no basis for it to direct the Commission to nullify the auction.

It is well established that remand without vacatur is the appropriate remedy with respect to a rulemaking order "when it seems likely that the agency will be able to correct a flaw or gap in its reasoning process on remand." Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.13, at 521-22 (4th ed. 2002). In determining whether to remand without vacating, courts properly consider "'the seriousness of the * * * deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Because Council Tree has provided no basis on which to conclude that the Commission would be unable to readopt its decision to apply the Docket 05-211 DE rules on remand after providing further explanation, the Court should simply remand the case to the Commission.

In any event, regardless of whether the Court vacates the order on review, there is no basis for it to direct the Commission to nullify the auction. As this Court recently noted, "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (internal quotation omitted). For this reason, "[o]nly in extraordinary circumstances do[es] [this Court] issue detailed remedial orders." *Id.*

No such extraordinary circumstances are present here. In fact, it is the remedy that Council Tree seeks in this case that is extraordinary.[39] Auction 73 was the largest in the FCC's history, and garnered nearly $19 billion for the U.S. Treasury. Nullification of the auction would have wide-ranging adverse impact on the public and private interests at stake. Congress ordered the Commission to begin that auction no later than January 28, 2008, and to deposit the auction proceeds in the U.S. Treasury by June 30, 2008, in order to promote public safety and to assist in the scheduled February 2009 transition from analog to digital broadcasting. *See Order* ¶ 15 (J.A. 262). The remedy Council Tree seeks would effectively nullify those statutory deadlines. In addition, the proceeds from the auction have now been deposited,[40] and are already being spent to pay for coupons for tens of millions of digital converter boxes needed to adapt existing analog television sets to digital broadcast transmissions[41] and to fund public safety programs, including a "NYC 9/11 digital transition" program for the New York City area designed to promote interoperable communications for public safety.[42] The fact that the money Council Tree would require the Commission to refund is already being spent counsels strongly against the remedy it seeks. *Cf. Allied-Signal*, 988 F.2d at 151 (refusing to order remedy that would entail the "disruptive consequence[]" of requiring refunds).

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[39] Unlike the two cases Council Tree cites (Br. 28 n.60) for the proposition that the Court properly should nullify the auction results, this case presents no serious question of the Commission's statutory authority to conduct the auction.

[40] *See* n.20, above.

[41] DTV Act § 3005. As of December 17, 2008, more than $1.1 billion of the money from the auction had been spent on digital converter box coupons. *See* https://www.dtv2009.gov/Stats.aspx (visited Dec. 18, 2008).

[42] DTV Act § 3007; *see also id.* §§ 3006 & 3010 (authorizing programs to support public safety interoperable grants and a National Alert and Tsunami Warning System).

Council Tree's request that the auction be unwound also utterly disregards the interests of the 101 entities that won licenses in that auction, including the 56 DEs that won over one-third of the auctioned licenses (*see* pages 13-14, above). *Cf. Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1171-72 (D.C. Cir. 1987) (declining to impose remedy that would "cause economic hardship to many companies that are not parties to the petition for review"). Those entities obtained their licenses in good faith and have been building business plans around them. The spectrum at issue will become fully available to these licensees in February, 2009, and they may begin offering service to the public. Taking these licenses back would not only gravely disrupt these licensees' plans but also hurt the public, which would likely have to wait for years before a new auction could be held and service deployed. In the meantime, this incredibly valuable spectrum, which broadcasters will have already surrendered by the time the Court decides this case, would simply lie fallow.

In contrast with the significant and concrete harms that necessarily would flow from vacating Auction 73, the allegedly offsetting equities Council Tree invokes are entirely speculative or are otherwise meritless. In particular, there is little substance to Council Tree's claimed harms to its own business operations from the DE rules. Council Tree cannot prove that it would have won any licenses in Auction 73 under any set of rules, either the ones now in effect, the ones Council Tree would have preferred, or the ones the Commission previously employed. It can only imagine that it might have won.

Similarly baseless is Council Tree's claim that the Docket 05-211 DE rules depressed the proceeds the government received from Auction 73. Br. 30. In fact, Auction 73 was the most lucrative in the history of the auctions program – generating nearly $19 billion in winning bids (net of bidding credits). *See* page 13, above. And emphatically dispelling Council Tree's

suggestion that the DE rules deterred bidding, the winning bid total in Auction 73 nearly doubled pre-auction Congressional estimates. *March 18 Martin Statement* at 1. Especially in light of current difficulties in the credit markets, Council Tree's suggestion that a reauction would increase revenues is fanciful.

In these circumstances, we respectfully submit that the Court should leave to the agency, in the first instance, the task of fashioning an appropriate remedy in the event the Court finds that APA violations have occurred. Such a course is well within the Court's authority. *See, e.g.*, *Brookings Mun. Tel. Co.*, 822 F.2d at 1171-72 (declining to order reassessment of settlement payments made under improperly adopted rules and instead leaving it to the Commission to determine "how best to accommodate [the relevant] interests"); *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376-77 (D.C. Cir. 1999) (indicating that the FCC could remedy legal error in connection with an auction by making alternative spectrum available to Qualcomm rather than divesting Sprint of a license to spectrum won at auction).

CONCLUSION

For the foregoing reasons, the Court should dismiss or deny Council Tree's petition for review.

Respectfully submitted,

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December 24, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 07-1454
	)	
RESPONDENTS.	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 9,991 words.

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February 17, 2009

STATUTORY ADDENDUM

47 U.S.C. § 405

The Digital Television Transition and Public Safety Act ("DTV Act"), Title III of Pub. L. 109-171, 120 Stat. 4 (2006)

47 U.S.C.A. § 405

UNITED STATES CODE
TITLE 47—TELEGRAPHS, TELEPHONES, and RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

UNITED STATES PUBLIC LAWS
109th Congress - Second Session
Convening January 7, 2005

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 109-171 (S 1932)
February 8, 2006
DEFICIT REDUCTION ACT OF 2005

An Act To provide for reconciliation pursuant to section 202(a) of the concurrent resolution on the budget for fiscal year 2006 (H. Con. Res. 95).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 42 USCA § 1305 NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the "Deficit Reduction Act of 2005".

SEC. 2. TABLE OF TITLES.

The table of titles is as follows:

SEC.1001. SHORT TITLE.

that such regulations may refer to "Bank Insurance Fund members" or "Savings Association Insurance Fund members".

TITLE III--DIGITAL TELEVISION TRANSITION AND PUBLIC SAFETY
<< 47 USCA § 309 NOTE >>

SEC. 3001. SHORT TITLE; DEFINITION.

(a) SHORT TITLE.--This title may be cited as the "Digital Television Transition and Public Safety Act of 2005".

(b) DEFINITION.--As used in this Act, the term "Assistant Secretary" means the Assistant Secretary for Communications and Information of the Department of Commerce.

<< 47 USCA § 309 NOTE >>

SEC. 3002. ANALOG SPECTRUM RECOVERY: FIRM DEADLINE.

(a) AMENDMENTS.--Section 309(j)(14) of the Communications Act of 1934 (47 U.S.C. 309(j)(14)) is amended--

<< 47 USCA § 309 >>

(1) in subparagraph (A)--

(A) by inserting "full-power" before "television broadcast license"; and

(B) by striking "December 31, 2006" and inserting "February 17, 2009";

<< 47 USCA § 309 >>

(2) by striking subparagraph (B);

<< 47 USCA § 309 >>

(3) in subparagraph (C)(i)(I), by striking "or (B)";

<< 47 USCA § 309 >>

(4) in subparagraph (D), by striking "subparagraph (C)(i)" and inserting "subparagraph (B)(i)"; and

<< 47 USCA § 309 >>

(5) by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively.

(b) TERMINATIONS OF ANALOG LICENSES AND BROADCASTING.--The Federal Communications Commission shall take such actions as are necessary--

(1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and

(2) to require by February 18, 2009, that all broadcasting by Class A stations, whether in the analog television service or digital television service, and all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).

(c) CONFORMING AMENDMENTS.--

(1) Section 337(e) of the Communications Act of 1934 (47 U.S.C. 337(e)) is amended--

<< 47 USCA § 337 >>

(A) in paragraph (1)--

(i) by striking "CHANNELS 60 TO 69" and inserting "CHANNELS 52 TO 69";

(ii) by striking "person who" and inserting "full-power television station licensee that";

(iii) by striking "746 and 806 megahertz" and inserting "698 and 806 megahertz"; and

*22
(iv) by striking "the date on which the digital television service transition period terminates, as determined by the Commission" and inserting "February 17, 2009";

<< 47 USCA § 337 >>

(B) in paragraph (2), by striking "746 megahertz" and inserting "698 megahertz".

<< 47 USCA § 309 NOTE >>

SEC. 3003. AUCTION OF RECOVERED SPECTRUM.

(a) DEADLINE FOR AUCTION.--Section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) is amended--

<< 47 USCA § 309 >>

(1) by redesignating the second paragraph (15) of such section (as added by section 203(b) of the Commercial Spectrum Enhancement Act (Public Law 108- 494; 118 Stat. 3993)), as paragraph (16) of such section; and

<< 47 USCA § 309 >>

(2) in the first paragraph (15) of such section (as added by section 3(a) of the Auction Reform Act of 2002 (Public Law 107-195; 116 Stat. 716)), by adding at the end of subparagraph (C) the following new clauses:

"(v) ADDITIONAL DEADLINES FOR RECOVERED ANALOG SPECTRUM.--Notwithstanding subpara-

graph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

"(vi) RECOVERED ANALOG SPECTRUM.--For purposes of clause (v), the term 'recovered analog spectrum' means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

"(I) the spectrum required by section 337 to be made available for public safety services; and

"(II) the spectrum auctioned prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.".

<< 47 USCA § 309 >>

(b) EXTENSION OF AUCTION AUTHORITY.--Section 309(j)(11) of such Act (47 U.S.C. 309(j)(11)) is amended by striking "2007" and inserting "2011".

<< 47 USCA § 309 NOTE >>

SEC. 3004. RESERVATION OF AUCTION PROCEEDS.

Section 309(j)(8) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)) is amended--

<< 47 USCA § 309 >>

(1) in subparagraph (A), by striking "subparagraph (B) or subparagraph (D)" and inserting "subparagraphs (B), (D), and (E)";

<< 47 USCA § 309 >>

(2) in subparagraph (C)(i), by inserting before the semicolon at the end the following: ", except as otherwise provided in subparagraph (E)(ii)"; and

<< 47 USCA § 309 >>

(3) by adding at the end the following new subparagraph:

"(E) TRANSFER OF RECEIPTS.--

"(i) ESTABLISHMENT OF FUND.--There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

"(ii) PROCEEDS FOR FUNDS.--Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the *23 use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

"(iii) TRANSFER OF AMOUNT TO TREASURY.--On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treas- ury.

"(iv) RECOVERED ANALOG SPECTRUM.--For purposes of clause (i), the term 'recovered analog spectrum' has the meaning provided in paragraph (15)(C)(vi).".

<< 47 USCA § 309 NOTE >>

SEC. 3005. DIGITAL-TO-ANALOG CONVERTER BOX PROGRAM.

(a) CREATION OF PROGRAM.--The Assistant Secretary shall--

(1) implement and administer a program through which households in the United States may obtain coupons that can be applied toward the purchase of digital-to-analog converter boxes; and

(2) make payments of not to exceed $990,000,000, in the aggregate, through fiscal year 2009 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,500,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) PROGRAM SPECIFICATIONS.--

(1) LIMITATIONS.--

(A) TWO-PER-HOUSEHOLD MAXIMUM.--A household may obtain coupons by making a request as required by the regulations under this section between January 1, 2008, and March 31, 2009, inclusive. The Assistant Secretary shall ensure that each requesting household receives, via the United States Postal Service, no more than two coupons.

(B) NO COMBINATIONS OF COUPONS.--Two coupons may not be used in combination toward the purchase of a single digital-to-analog converter box.

(C) DURATION.--All coupons shall expire 3 months after issuance.

(2) DISTRIBUTION OF COUPONS.--The Assistant Secretary shall expend not more than $100,000,000 on administrative expenses and shall ensure that the sum of--

(A) all administrative expenses for the program, including not more than $5,000,000 for consumer education concerning the digital television transition and the availability of the digital-to-analog converter box pro- gram; and

(B) the total maximum value of all the coupons redeemed, and issued but not expired, does not exceed $990,000,000.

(3) USE OF ADDITIONAL AMOUNT.--If the Assistant Secretary transmits to the Committee on Energy and Commerce of the House of Representatives and Committee on Commerce, *24 Science, and Transportation of the Senate a statement certifying that the sum permitted to be expended under paragraph (2) will be insufficient to fulfill the requests for coupons from eligible households--

(A) paragraph (2) shall be applied--

(i) by substituting "$160,000,000" for "$100,000,000"; and

(ii) by substituting "$1,500,000,000" for "$990,000,000";

(B) subsection (a)(2) shall be applied by substituting "$1,500,000,000" for "$990,000,000"; and

(C) the additional amount permitted to be expended shall be available 60 days after the Assistant Secretary sends such statement.

(4) COUPON VALUE.--The value of each coupon shall be $40.

(d) DEFINITION OF DIGITAL-TO-ANALOG CONVERTER BOX.--For purposes of this section, the term "digital-to-analog converter box" means a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service, but may also include a remote control device.

SEC. 3006. PUBLIC SAFETY INTEROPERABLE COMMUNICATIONS.

<< 47 USCA § 309 NOTE >>

(a) CREATION OF PROGRAM.--The Assistant Secretary, in consultation with the Secretary of the Department of Homeland Security--

(1) may take such administrative action as is necessary to establish and implement a grant program to assist public safety agencies in the acquisition of, deployment of, or training for the use of interoperable communications systems that utilize, or enable interoperability with communications systems that can utilize, reallocated public safety spectrum for radio communication; and

(2) shall make payments of not to exceed $1,000,000,000, in the aggregate, through fiscal year 2010 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,000,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) CONDITION OF GRANTS.--In order to obtain a grant under the grant program, a public safety agency shall agree to provide, from non-Federal sources, not less than 20 percent of the costs of acquiring and deploying the interoperable communications systems funded under the grant program.

(d) DEFINITIONS.--For purposes of this section:

(1) PUBLIC SAFETY AGENCY.--The term "public safety agency" means any State, local, or tribal government entity, or nongovernmental organization authorized by such entity, *25 whose sole or principal purpose is to protect the safety of life, health, or property.

(2) INTEROPERABLE COMMUNICATIONS SYSTEMS.--The term "interoperable communications systems" means communications systems which enable public safety agencies to share information amongst local, State, Federal, and tribal public safety agencies in the same area via voice or data signals.

(3) REALLOCATED PUBLIC SAFETY SPECTRUM.--The term "reallocated public safety spectrum" means the bands of spectrum located at 764-776 megahertz and 794-806 megahertz, inclusive.

<< 47 USCA § 309 NOTE >>

SEC. 3007. NYC 9/11 DIGITAL TRANSITION.

(a) FUNDS AVAILABLE.--From the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) the Assistant Secretary shall make payments of not to exceed $30,000,000, in the aggregate, which shall be available to carry out this section for fiscal years 2007 through 2008. The Assistant Secretary may borrow from the Treasury beginning October 1, 2006, such sums as may be necessary not to exceed $30,000,000 to implement and administer the program in accordance with this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(b) USE OF FUNDS.--The sums available under subsection (a) shall be made available by the Assistant Secretary by grant to be used to reimburse the Metropolitan Television Alliance for costs incurred in the design and deployment of a temporary digital television broadcast system to ensure that, until a permanent facility atop the Freedom Tower is constructed, the members of the Metropolitan Television Alliance can provide the New York City area with an adequate digital television signal as determined by the Federal Communications Commission.

(c) DEFINITIONS.--For purposes of this section:

(1) METROPOLITAN TELEVISION ALLIANCE.--The term "Metropolitan Television Alliance" means the organization formed by New York City television broadcast station licensees to locate new shared facilities as a result of the attacks on September 11, 2001 and the loss of use of shared facilities that housed broadcast equipment.

(2) NEW YORK CITY AREA.--The term "New York City area" means the five counties comprising New York City and counties of northern New Jersey in immediate proximity to New York City (Bergen, Essex, Union, and Hudson Counties).

<< 47 USCA § 309 NOTE >>

SEC. 3008. LOW-POWER TELEVISION AND TRANSLATOR DIGITAL-TO-ANALOG CONVERSION.

(a) CREATION OF PROGRAM.--The Assistant Secretary shall make payments of not to exceed $10,000,000, in the aggregate, during the fiscal year 2008 and 2009 period from the Digital Television Transition and Public

Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each eligible low-power television station may receive compensation toward the cost of the purchase of a digital-to-analog conversion device that enables it to convert the incoming digital signal of its corresponding full-power television station to analog format for *26 transmission on the low-power television station's analog channel. An eligible low-power television station may receive such compensation only if it submits a request for such compensation on or before February 17, 2009. Priority compensation shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) CREDIT.--The Assistant Secretary may borrow from the Treasury beginning October 1, 2006, such sums as may be necessary, but not to exceed $10,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) ELIGIBLE STATIONS.--For purposes of this section, the term "eligible low-power television station" means a low-power television broadcast station, Class A television station, television translator station, or television booster station--

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not purchased a digital-to-analog conversion device prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.

<< 47 USCA § 309 NOTE >>

SEC. 3009. LOW-POWER TELEVISION AND TRANSLATOR UPGRADE PROGRAM.

(a) ESTABLISHMENT.--The Assistant Secretary shall make payments of not to exceed $65,000,000, in the aggregate, during fiscal year 2009 from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each licensee of an eligible low-power television station may receive reimbursement for equipment to upgrade low-power television stations from analog to digital in eligible rural communities, as that term is defined in section 610(b)(2) of the Rural Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)). Such reimbursements shall be issued to eligible stations no earlier than October 1, 2010. Priority reimbursements shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) ELIGIBLE STATIONS.--For purposes of this section, the term "eligible low-power television station" means a low-power television broadcast station, Class A television station, television translator station, or television booster station--

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.

<< 47 USCA § 309 NOTE >>

SEC. 3010. NATIONAL ALERT AND TSUNAMI WARNING PROGRAM.

The Assistant Secretary shall make payments of not to exceed $156,000,000, in the aggregate, during the fiscal year 2007 through 2012 period from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement a unified national alert system capable of alerting the public, on a national, regional, *27 or local basis to emergency situations by using a variety of communications technologies. The Assistant Secretary shall use $50,000,000 of such amounts to implement a tsunami warning and coastal vulnerability program.

<< 47 USCA § 309 NOTE >>

SEC. 3011. ENHANCE 911.

The Assistant Secretary shall make payments of not to exceed $43,500,000, in the aggregate, from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement the ENHANCE 911 Act of 2004.

<< 47 USCA § 309 NOTE >>

SEC. 3012. ESSENTIAL AIR SERVICE PROGRAM.

(a) IN GENERAL.--If the amount appropriated to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, equals or exceeds $110,000,000 for fiscal year 2007 or 2008, then the Secretary of Commerce shall make $15,000,000 available, from the Digital Television Transition and Public Safety Fund established by section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)), to the Secretary of Transportation for use in carrying out the essential air service program for that fiscal year.

(b) APPLICATION WITH OTHER FUNDS.--Amounts made available under subsection (a) for any fiscal year shall be in addition to any amounts--

(1) appropriated for that fiscal year; or

(2) derived from fees collected pursuant to section 45301(a)(1) of title 49, United States Code, that are made available for obligation and expenditure to carry out the essential air service program for that fiscal year.

(c) ADVANCES.--The Secretary of Transportation may borrow from the Treasury such sums as may be necessary, but not to exceed $30,000,000 on a temporary and reimbursable basis to implement subsection (a). The Secretary of Transportation shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) and made available to the Secretary under subsection (a).

<< 47 USCA § 309 NOTE >>

SEC. 3013. SUPPLEMENTAL LICENSE FEES.

In addition to any fees assessed under the Communications Act of 1934 (47 U.S.C. 151 et seq.), the Federal Communications Commission shall assess extraordinary fees for licenses in the aggregate amount of

$10,000,000, which shall be deposited in the Treasury during fiscal year 2006 as offsetting receipts.

TITLE IV--TRANSPORTATION PROVISIONS

SEC. 4001. EXTENSION OF VESSEL TONNAGE DUTIES.

<< 46 App. USCA § 121 >>

(a) EXTENSION OF DUTIES.--Section 36 of the Act entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes", approved August 5, 1909 (36 Stat. 111; 46 U.S.C. App. 121), is amended--

*28

(1) by striking "9 cents per ton" and all that follows through "2002," the first place it appears and inserting "4.5 cents per ton, not to exceed in the aggregate 22.5 cents per ton in any one year, for fiscal years 2006 through 2010,"; and

(2) by striking "27 cents per ton" and all that follows through "2002," and inserting "13.5 cents per ton, not to exceed 67.5 cents per ton per annum, for fiscal years 2006 through 2010,".

<< 46 App. USCA § 132 >>

(b) CONFORMING AMENDMENT.--The Act entitled "An Act concerning tonnage duties on vessels entering otherwise than by sea", approved March 8, 1910 (36 Stat. 234; 46 U.S.C. App. 132), is amended by striking "9 cents per ton" and all that follows through "and 2 cents" and inserting "4.5 cents per ton, not to exceed in the aggregate 22.5 cents per ton in any one year, for fiscal years 2006 through 2010, and 2 cents".

TITLE V--MEDICARE

Subtitle A--Provisions Relating to Part A

SEC. 5001. HOSPITAL QUALITY IMPROVEMENT.

(a) SUBMISSION OF HOSPITAL DATA.--Section 1886(b)(3)(B) of the Social Security Act (42 U.S.C. 1395ww(b)(3)(B)) is amended--

<< 42 USCA § 1395ww >>

(1) in clause (i)--

(A) in subclause (XIX), by striking "2007" and inserting "2006"; and

(B) in subclause (XX), by striking "for fiscal year 2008 and each subsequent fiscal year," and inserting "for each subsequent fiscal year, subject to clause (viii),";

(2) in clause (vii)--

(A) in subclause (I), by striking "for each of fiscal years 2005 through 2007" and inserting "for fiscal years 2005 and 2006"; and

(B) in subclause (II), by striking "Each" and inserting "For fiscal years 2005 and 2006, each"; and

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Council Tree Communications, Inc., Petitioners,

v.

Federal Communications Commissiona & USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Respondents" was served this 17th day of February, 2009, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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