Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	WT Docket No. 11-65
	)	DA 11-799
Applications of AT&T Inc. and	)	
Deutsche Telekom AG	)	File Nos. 0004669383, 0004673673, 0004673727,
	)	0004673730, 0004673732, 0004673735,
For Consent to Assign or Transfer	)	0004673737, 0004673739, 0004675960,
Control of Licenses and Authorizations	)	0004703157, 6013CWSL11,
	)	6014CWSL11, 6015ALSL11,
	)	6016CWSL11, 0004698766,
		ITC-T/C-20110421-00109 - 00112

To: The Commission, Office of the Secretary

PETITION TO DENY OR, IN THE ALTERNATIVE, TO DEFER PROCESSING

Council Tree Investors, Inc. ("Council Tree") and Bethel Native Corporation ("BNC") (collectively, "Petitioners"), by their attorneys, hereby petition to deny or, in the alternative, to defer processing of, the above-captioned applications by which AT&T Inc. ("AT&T") seeks Commission consent to the transfer of control of various licenses, spectrum leasing arrangements, and international authorizations ultimately owned and controlled by Deutsche Telekom AG, parent of T-Mobile, USA ("T-Mobile"). In support whereof, the following is shown.[1]

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[1] This petition is timely filed. *See* Public Notice, DA 11-799, released Apr. 28, 2011 in WT Docket No. 11-65. Council Tree and BNC have standing to file this Petition. Council Tree is an investment company organized to identify and develop investment opportunities in the communications industry, focused on building competitive new wireless businesses through the Commission's designated entity (DE) program, including businesses owned by members of minority groups and women. BNC is an Alaskan Native Village Corporation which seeks, through the DE program, to participate in the development and improvement of telecommunications in rural and remote areas of Alaska, including the city of Bethel (with a population of 6,000). Petitioners have a direct interest in, and would be harmed by approval of,

I. Introduction.

By the captioned applications, AT&T, currently the second largest wireless carrier in the United States, seeks Commission consent to acquire the spectrum now licensed to T-Mobile, currently this country's fourth-largest wireless carrier. Approval of these various assignment and transfer of control applications (collectively the "Application") would enable AT&T to supplant Verizon Wireless ("Verizon") as America's largest wireless carrier. With the disappearance of T-Mobile from the competitive wireless landscape, AT&T and Verizon would together control nearly 80 percent of the United States wireless market.[2] Petitioners ask the Commission to deny this proposed egregious consolidation. Before it can even begin to consider the Application, however, the Commission must first remedy the competitive imbalances created by its own unlawful conduct of the last major spectrum auction, the so-called 700 MHz auction, or Auction 73. That remedy would take the form of Commission grant of Petitioners' recently supplemented December 7, 2007 petition for reconsideration ("Reconsideration Petition") of the Commission's November 2007 Order which selectively waived for Auction 73 the "50 Percent Retail Rule," as defined *infra* note 6 and accompanying text. *Order*, 22 FCC Rcd 20354 (2007) ("*Order*").[3] As explained below, the Reconsideration Petition presents an ideal vehicle for

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the proposed consolidation of AT&T and T-Mobile. As explained herein, spectrum that is at the very heart of the proposed transaction was acquired through two unlawfully conducted major spectrum auctions, one of which remains under direct legal challenge by Petitioners. As further explained herein, redress of Petitioners' injuries must be provided before the Commission may even begin to consider the inextricably linked, above-captioned transaction. This Petition is supported by the attached declaration of George T. Laub, Managing Director of Council Tree. *See* 47 C.F.R. § 1.939(d).

[2] Editorial, *Looks Like a Duopoly*, N.Y. TIMES, Mar. 28, 2011, cited in Attachment 2 hereto.

[3] Copies of Petitioners' May 18, 2011 Supplement to the Reconsideration Petition ("Supplement"), together with two companion pleadings filed the same day, a "Motion for Leave to File Supplement to Petition for Reconsideration" and a "Request for Expedited Processing and Decision," comprise Attachment 1 hereto.

addressing and resolving vitally important public interest issues that are inextricably linked with the Application.

II. Background.

Section 309(j) of the Communications Act of 1934, as amended (the "Act"), directs the Commission to design spectrum auctions so as both to promote the participation therein of small businesses, known in FCC parlance as designated entities or "DEs," and to avoid the excessive concentration of licenses. *See, e.g.*, 47 U.S.C. § 309(j)(3)(B), (4)(D).[4] This statutory scheme is premised on Congress' fundamental recognition that auctions present the best opportunity to introduce competition into spectrum-dependent businesses such as the wireless industry.[5] Prior to 2006, the Commission had utilized various measures to implement Section 309(j)'s directives, such as conducting spectrum auctions that were "closed" to all but DEs, and allowing DEs to use installment plans to pay for spectrum won at auction. By 2006, however, DE participation in spectrum auctions was facilitated by only a single mechanism – the award to qualified DEs of "bidding credits" of varying percentages, dependent on a particular DE's attributable gross revenues, that reduce the amount a winning DE bidder must pay at an auction's conclusion.

In April 2006, on the very threshold of Advanced Wireless Services Auction 66, a major auction of 90 MHz of prime spectrum that had been many years in the planning, the FCC abruptly and unlawfully adopted draconian new rules and made them applicable to all DE bidders in Auction 66 and all subsequent auctions. The two most prominent and harmful of those rules were (i) the impermissible relationship or "50 Percent Retail Rule" which effectively denied bidding credit benefits to DEs that leased or resold (including through wholesaling) more

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[4] The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. 47 U.S.C. § 257.

[5] *See* Supplement, 7 and nn.16 and 17.

than 50 percent of their aggregate spectrum capacity to third parties;[6] and (ii) the unjust enrichment or "10-Year Hold Rule" which doubled the period of time, from five to ten years, during which a DE must hold a spectrum license or face repayment of all or a portion of the bidding credit (plus interest) utilized by that DE at auction.[7] The FCC adopted the Unlawful Rules in a vacuum, without the benefit of the notice and opportunity to comment required by the Administrative Procedure Act.[8] By foreclosing DEs' utilization of pro-competitive, "100-percent-wholesaling" business models and lengthening DE investors' exit horizon to ten years, the FCC, in direct contravention of the primary purposes of Section 309(j) of the Act (i.e., to promote competition and avoid excessive license concentration), effectively ensured that no DE could raise the substantial investment funds necessary to launch a nationwide, new entrant challenge to any of the largest wireless carriers. Council Tree had labored long to structure such a new entrant DE, but its efforts were scuttled at the eleventh hour by the Unlawful Rules. *See* Supplement, Attachment 5.[9] Petitioners brought an immediate court challenge, but Auction 66 proceeded with the Unlawful Rules firmly in place.

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[6] 47 C.F.R. § 1.2110(3)(b)(iv)(A) (2006) (now vacated).

[7] 47 C.F.R. § 1.2111(d)(2) (2006) (now vacated). The 50 Percent Retail Rule and 10-Year Hold Rule are referred to collectively herein as the "Unlawful Rules."

[8] *See Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert. denied sub nom. Council Tree Investors, Inc. v. FCC*, 2011 U.S. LEXIS 2468 (U.S. Mar. 28, 2011) ("*Council Tree*").

[9] The damage done by the Unlawful Rules was in no way limited to the ruin of potential nationwide new entrant DEs. Those rules also, for example, vitiated BNC's plans to bring broadband service to geographically isolated, economically depressed, and unserved communities in Alaska. *See* Further Supplement to Motion for Expedited Stay, WT Docket No. 05-211, Declaration of Anastasia C. Hoffman, President and CEO of BNC. *Cf. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All American in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, FCC 11-78, released May 20, 2011 ("Seventh Report") (more than 26 million

Auction 66 proved disastrous for DEs and the pro-competitive purposes of Section 309. DEs won just 4 percent of the total dollar value of the some $13.7 billion in spectrum sold by the FCC in Auction 66, a precipitous drop from the DE average of approximately 70 percent in major spectrum auctions conducted before adoption of the Unlawful Rules. *Council Tree*, 619 F.3d at 248. By contrast, T-Mobile alone won 31% of the total value of these Auction 66 licenses (costing $4,182,312,000), and T-Mobile, Verizon, AT&T, and a consortium composed of Sprint Nextel Corp. ("Sprint") and several large cable companies won an aggregate 78% of that total value. *See* Public Notice, DA 06-1882, released Sept. 20, 2006. These results exploded any pretense that DEs could overcome the roadblocks to funding posed by the Unlawful Rules and participate in any meaningful way in spectrum auctions; conferred a windfall on the large incumbents by suppressing the ability of DEs to make competitive bids; and confirmed that the Unlawful Rules ultimately deprived consumers of the manifold benefits, in the form of technical innovation, more competitive pricing and expanded customer service offerings that would otherwise have been provided by robust competition from DEs.

The results of Auction 66 were so starkly illustrative of the debilitating effects of the Unlawful Rules on DEs that a sister federal entity to the Commission, the Office of Advocacy of the United States Small Business Administration ("Office of Advocacy"), was moved to take the unusual step of asking the FCC to suspend the application of the Unlawful Rules to Auction 73, the next major auction of 52 MHz of choice, versatile spectrum, then scheduled to commence in early 2008.[10] The Commission ignored the Office of Advocacy's entreaty and plunged ahead

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Americans, mostly in rural communities, are denied access to the jobs and economic opportunity made possible by broadband).

[10] *See Service Rules for the 698-746, 747-762 and 777-792 MHz* Bands, *Second Report and* Order, 22 FCC Rcd 15289, 15472 n.1083 (2007).

with Auction 73, Unlawful Rules in place, with the single exception of the *Order*, which implemented a highly unorthodox, last-minute change of course.

In the free-standing *Order*, the FCC elected on its own motion, outside the confines of any FCC rulemaking or other docketed proceeding, a mere three weeks before Auction 73 applications were due, to waive application of the 50 Percent Retail Rule to DE bidders for the so-called D Block of spectrum. The D Block, a nationwide 10 MHz license, was being made available to those private companies interested in partnering with public safety entities to create a nationwide wireless network that would provide seamless priority to first responders while also serving commercial users on a secondary basis. The *Order* expressly reaffirmed the continued application to Auction 73 of all DE rules in all other respects, including the 50 Percent Retail Rule and the 10-Year Hold Rule. *Order* ¶¶ 7, 8, 10. *See* Supplement, n.5. Petitioners timely filed the Reconsideration Petition, making clear that, rather than suspend just the 50 Percent Retail Rule for just one block of spectrum, the FCC needed to suspend all of the harmful and unlawful DE rules adopted in 2006 for all spectrum offered in Auction 73. Petition, iv, 3, n.10, 8 & 11. *See also* Supplement, 2-3. The FCC did not even place the Reconsideration Petition on public notice, and rushed ahead with Auction 73.

Auction 73 generated predictably calamitous results for DEs and spectacular spectrum gains for the two largest incumbents. DEs' share of the approximately $19 billion total dollar value of licenses won in Auction 73 shrunk even more sharply than in Auction 66, to a negligible 2.6%. In bold contrast, Verizon (49%) ($9,363,160,000) and AT&T (35%) ($6,636,658,000) completely dominated the auction, capturing a staggering and unprecedented aggregate 84% of the total dollar value of licenses won. *See* Public Notice, DA 08-595, released Mar. 20, 2008. Moreover, the *Order* failed to prompt the minimum bid for the D Block, not even from Frontline

Wireless LLC ("Frontline"), the company prominently associated with former FCC Chairman Reed Hundt that was not only the sole DE potentially in position to benefit from the release of the *Order* so close to the start of Auction 73, but the company that had lobbied intensely for relief from the 50 Percent Retail Rule in advance of the *Order*'s issuance.[11] With Petitioners' ongoing legal challenge to the Unlawful Rules, the on-the-record objections of a sister federal agency, and the dismal DE results of Auction 66 as backdrop, the FCC could feign no surprise that its "design" of Auction 73 again produced results exactly the opposite of those envisioned by Section 309(j) – meaningful DE participation was "avoided" while an excessive concentration of licenses was "promoted."

Last summer, the United States Court of Appeals for the Third Circuit confirmed in *Council Tree* what Petitioners had pointed out virtually from the moment of the Unlawful Rules' adoption in 2006. The Unlawful Rules were promulgated in "serious" violation of the APA. *Council Tree*, 619 F.3d at 258. They could not, and did not, survive judicial review and were vacated in their entirety. *Id.* at 258-59. The Court's decision included penetrating substantive criticisms of the Unlawful Rules.[12] On purely equitable grounds on the record then before it, the Court declined to overturn the results of either Auction 66 or 73, leaving for another day the questions of whether an order relating exclusively to Auction 73 was necessary to confer jurisdiction on the Court to reach Auction 73 (619 F.3d at 257 n.12) and whether the mandatory language of Section 706 of the APA ("shall… set aside") affords a reviewing court discretion to decline to set aside unlawful agency action (*id.* at 258 n.13).

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[11] Over the course of less than a month and a half in the autumn of 2007, Frontline filed no fewer than 22 letters memorializing ex parte contacts with decisionmaking FCC personnel on, *inter alia*, the issue of the need for relief from the 50 Percent Retail Rule. *See* Frontline Ex Parte Letters (10/05-11/16/07), on file with the Commission in WT Docket Nos. 06-150 et al.

[12] *See* Supplement, 4-5.

III. Argument.

Petitioners anticipate that this Petition will be part of a chorus of opposition to FCC approval of the Application.[13] Petitioners further expect many to argue that AT&T's proposed acquisition of T-Mobile is the anti-competitive "domino" that must not be allowed to fall, given its potential to create a de facto wireless duopoly in this country consisting of AT&T and Verizon, with Sprint's fate inevitably sealed as an ineffectual remnant of the current group of four largest carriers. Approval of the Application would push Sprint, faced with two competitors controlling nearly 80 percent of the wireless market, to the edge of the competitive gangplank, its value reduced essentially to that of an acquisition target. However characterized, Sprint's days as a competitor would be numbered.

This Petition underscores in bold lettering that the American wireless industry has been brought to this perilous competitive crossroads by the Commission's unlawful conduct of Auctions 66 and 73, to the detriment of Petitioners, DEs, competition, and the American consumer in general, and to the windfall benefit of the largest wireless incumbents, including both parties to the Application, AT&T and T- Mobile. The Commission's unlawful past actions have set the stage for the further competitive harms threatened by the Application. To be sure, under no circumstances should the FCC compound the damage caused by Auctions 66 and 73 by allowing the combination into a behemoth of two of today's four largest wireless incumbents, both of which reaped windfalls in those auctions.[14] But, at a minimum, *before* any of those

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[13] Numerous companies, various elected officials, and many groups have already announced their concerns with or opposition to grant of the Application, and multiple editorials, articles, and commentaries have addressed the important public interest considerations that favor denial of the Application. *See* Attachment 2 hereto for a partial summary thereof.

[14] The Clayton Act empowers the FCC to block anti-competitive mergers. 15 U.S.C. § 21(a). In deciding whether to exercise that authority, the FCC follows guidelines similar to those articulated in the FTC/DOJ's Horizontal Merger Guidelines. Jonathan B. Baker, *Sector-Specific*

questions posed by the Application can be properly addressed, the Commission must *first* resolve the Reconsideration Petition, which has already been languishing in the Commission's processing queue for three and a half years.

After all, the Court in *Council Tree* has now vacated the Unlawful Rules, eliminating all doubt that Petitioners correctly challenged their validity in advance of the conduct of both Auction 66 and Auction 73. Furthermore, at the present time, the application of the Unlawful Rules to Auction 73 remains under direct legal challenge, in the form of the Reconsideration Petition. That challenge poses the following fundamental questions that demand answers before the Commission can even begin to assess whether to allow this proposed *further* consolidation: (1) whether an auction, conducted pursuant to unlawful rules that directly and profoundly limit the composition of the bidder pool, can itself survive; and, if the Commission denies the Reconsideration Petition, (2) whether a reviewing court possesses the discretion to decline to set aside unlawful agency action, namely the conduct of Auction 73 pursuant to the Unlawful Rules, given the mandatory language of Section 706 of the APA, 5 U.S.C. § 706. *See* Supplement, n.20. Petitioners strongly urge the Commission to find that unlawfully conducted auctions

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Competition Enforcement at the FCC, NYU ANNUAL SURVEY OF AMERICAN LAW (2010) ("the FCC often looks to the Horizontal Merger Guidelines promulgated by DOJ and FTC for guidance in analyzing horizontal mergers.") One key factor in the Merger Guidelines is whether the merger will significantly increase concentration in the market. Here, the proposed merger should be denied, as the combination of T-Mobile's valuable spectrum with AT&T's already substantial spectrum holdings will further cement AT&T's super carrier status and eliminate a competitor in a market with extremely high barriers to entry, a market that Commissioner Michael Copps is concerned is already too concentrated. Ian Shapira and Jia Lynn Yang, *AT&T, T-Mobile Merger Blasted*, WASH. POST, March 21, 2011, at A11 (quoting Commissioner Copps) ("Specifically, the [14th Mobile Competition] Report confirms something I have been warning about for years – that competition has been dramatically eroded and is seriously endangered by continuing consolidation and concentration in our wireless markets."). In the end, consumers stand to suffer most from approval of the Application, as the loss of the competitive pricing associated with T-Mobile offerings would allow the remaining carriers to further raise their prices, and new entrants would find it that much more difficult to bring their competitive benefits to the market.

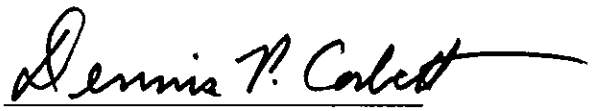
cannot survive and that, to restore competitive balance, the spectrum at stake in Auction 73 must be reauctioned without the Unlawful Rules in place. Because the Application is being prosecuted by a party (AT&T) whose spectrum holdings are directly tied to Auction 73, there is simply no way for the Commission to assess the Application and the competitive landscape into which it fits without first resolving the Reconsideration Petition and implementing the necessary and appropriate remedy.[15] The need to resolve badly backlogged agency work that so clearly implicates the *public interest* (the Reconsideration Petition) must be given sequencing priority over processing work that relates primarily to the *private* interests of the parties to the Application.

IV. Conclusion.

Accordingly, for all the reasons set forth herein and in the Reconsideration Petition, the FCC should deny the Application or, in the alternative, defer its processing until such time as the Reconsideration Petition has been adequately resolved.

Respectfully submitted,

COUNCIL TREE INVESTORS, INC. AND
BETHEL NATIVE CORPORATION

By: 

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May 31, 2011

Their Attorneys

[15] Prompt grant of the Reconsideration Petition would also be consonant with the FCC's recently acknowledge statutory obligation to "take immediate action to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Seventh Report, ¶ 5 (citing 47 U.S.C. § 1302(b)).

Attachment 1

RETURN COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules for the Upper 700 MHz Band D Block License	)	FILED/ACCEPTED MAY 18 2011 Federal Communications Commission Office of the Secretary

To: The Commission

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR RECONSIDERATION

Council Tree Investors, Inc.[1] ("Council Tree") and Bethel Native Corporation (collectively, "Petitioners"), by their attorneys, hereby seek leave to file the supplement ("Supplement"), submitted contemporaneously herewith, to their pending December 7, 2007 petition for reconsideration ("Petition") in the above-captioned matter.

Section 1.106(f) of the Commission's Rules (47 C.F.R § 1.106(f)) provides that supplements to pending reconsideration petitions submitted more than 30 days after FCC public notice of the action with respect to which reconsideration has been sought will be accepted only upon the submission of a motion for leave to file the supplement demonstrating adequate grounds therefor. Case law makes clear such grounds exist when a petitioner could not

[1] The company's name (previously Council Tree Communications, Inc.) was changed to Council Tree Investors, Inc., effective October 13, 2009.

reasonably have brought the developments addressed in a supplement to the Commission's attention at the time of the original filing.[2] Here, that test is easily met.

The Supplement focuses primarily on the impact on the Petition of the decision of the United States Court of Appeals for the Third Circuit in *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010) *cert denied sub nom. Council Tree Investors, Inc. v. FCC*, 2011 U.S. LEXIS 2468 (U.S. Mar. 28, 2011). The recent Third Circuit decision, by definition, could not have been incorporated in the Petition in 2007, when the Petition was due. In addition, the Supplement addresses other matters, such as the results of Auction 73, FCC decisions subsequent to the Petition's filing, and the recent application of AT&T to acquire the assets of T-Mobile USA, that could *not* have been addressed within thirty days of release of the FCC *Order*, 22 FCC Rcd 20354 (2007), which is the subject of the Petition. All of these events and developments are appropriately and efficiently addressed in consolidated fashion in the Supplement filed today. Petitioners note that the public is not prejudiced in any way by the timing of the Supplement's filing, particularly where the Commission has not yet sought public input on the Petition, nearly three and a half years after its filing. Furthermore, the public interest will be served by acceptance and consideration of the Supplement, because the developments addressed and issues raised therein are of paramount importance to bedrock principles of competition, diversity, and agency compliance with law.

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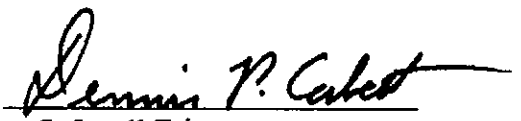
[2] *See Schroeder Manatee Ranch*, 15 FCC Rcd 10060, n.1 (Wireless Bur. 2000) ("Because the Supplemental Filing addresses events occurring after (or very shortly before) the Petition was filed, we will grant [the] request and accept the Supplemental Filing."); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Columbus and Monona, Wisconsin)*, 21 FCC Rcd 10012, n.2 (Media Bur. 2006) ("The Petitioner's Motion to Supplement, which was filed on April 11, 2006, seeks to update the record in this proceeding by providing information on facts that have changed since the Commission released its *R&O*. We will grant the Motion to Supplement because if will facilitate resolution of this case.") (citation omitted).

For the reasons set forth above, ample grounds support summary grant of this motion and prompt consideration of the Petition, as supplemented.[3]

Respectfully submitted,

COUNCIL TREE INVESTORS, INC. AND
BETHEL NATIVE CORPORATION

By: 

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May 18, 2011

Their Attorneys

[3] Petitioners are also this day filing a "Request for Expedited Processing and Decision" in this matter.

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, certify that on this 18th day of May, 2011, I served copies of the foregoing Motion for Leave to File Supplement to Petition for Reconsideration, by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
Waiver of Section 1.2110(b)(3)(iv)(A) of the	)
Commission's Rules for the Upper 700 MHz	)
Band D Block License	)
	)

To: The Commission

SUPPLEMENT TO PETITION FOR RECONSIDERATION

Council Tree Investors, Inc.[1] ("Council Tree") and Bethel Native Corporation (collectively, "Petitioners"), by their attorneys, hereby supplement their pending December 7, 2007 Petition for Reconsideration ("Petition") of the Federal Communications Commission's *Order*, 22 FCC Rcd 20354 (2007) ("*Order*") in the above-captioned matter.[2]

I. Background.

In the *Order*, the agency took two primary actions. *First*, on the doorstep of Auction 73 (also known as the 700 MHz auction), the *Order*, with respect to the so-called "D Block" of Auction 73 spectrum being made available to those private companies interested in partnering with public safety entities, waived application of the impermissible relationship rule to small

[1] The company's name (previously Council Tree Communications, Inc.) was changed to Council Tree Investors, Inc., effective October 13, 2009.

[2] A date-stamped copy of the Petition, as timely filed with the Commission, comprises Attachment 1 hereto. The Minority Media and Telecommunications Council, a co-petitioner in 2007, is no longer a party to the Petition. Petitioners are submitting contemporaneously herewith, as a companion to this Supplement, a "Motion for Leave to File Supplement to Petition for Reconsideration."

businesses known as designated entities ("DEs").[3] *Second*, the *Order* explicitly reaffirmed the continued application to Auction 73 of all DE rules in all other respects, including the 50 Percent Retail Rule and the unjust enrichment rule.[4] The Commission, for example, made clear in the *Order* that any waiver of the 50 Percent Retail Rule utilized by a winning DE bidder for the D Block in Auction 73 would *not* apply to any other spectrum won by that same DE in Auction 73.[5]

The Petition challenged the *Order* on multiple grounds. First, Petitioners reasserted their prior objections, then pending in the Third Circuit, that the 50 Percent Retail Rule and the 10-Year Hold Rule were substantively and procedurally unlawful. Petition at 4 n.5 ("Like Auction 66, the 700 MHz Auction is proceeding under unlawfully adopted, fundamentally

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[3] Bidding credits of varying percentages, dependent on a particular DE's attributable gross revenues, were available to qualified DEs in Auction 73. The impermissible relationship rule in effect at the time the *Order* was issued, 47 C.F.R. § 1.2110(3)(b)(iv)(A) (2006) (now vacated), referred to in the Petition and herein as the "50 Percent Retail Rule," effectively denied bidding credit benefits to DEs that leased or resold (including through wholesaling) in the aggregate more than 50 percent of their spectrum capacity to third parties.

[4] The unjust enrichment rule in effect at the time the *Order* was issued, 47 C.F.R. § 1.2111(d)(2) (2006) (now vacated), referred to in the Petition and herein as the "10-Year Hold Rule," had doubled the period of time, from five to ten years, during which a DE must hold a spectrum license or face repayment of all or a portion of the bidding credit utilized by that DE at auction.

[5] *Order* ¶ 7 ("We stress that this waiver applies *only* to arrangements for spectrum capacity on the D Block . . . . Also, because we are not waiving the rule with respect to arrangements for use of the spectrum capacity of licenses *other than* the D Block license, if an applicant or licensee has an impermissible material relationship with respect to the spectrum capacity of any other license(s), the normal operation of the current rules will continue to render it ineligible for designated entity benefits for the D Block license") (emphasis in original). *See also Order* ¶ 8 ("If a D Block applicant or licensee utilizes this waiver, it will remain subject to our other designated entity eligibility rules, including our controlling interest, unjust enrichment, attributable material relationship, audit, eligibility event and annual reporting rules"); ¶ 10 ("[C]*ontinued application* of the controlling interest rule, attributable material relationship rule, and the unjust enrichment rule, as well as all other designated entity eligibility rules, *will ensure* that only bona fide small businesses, exercising control over the D Block license in accordance with our rules, will benefit from bidding credits applicable to that license") (emphasis added; footnote omitted).

flawed DE rules."); *id.* at 7-8 ("Substantively, the *Order* amounts to nothing less than an explicit concession that the Lease/Resale Restriction is itself an irrational and debilitating obstacle" to accomplishment of the statute's objectives). Second, Petitioners argued that by exempting DEs from just one of those rules for just the auction of the D Block, without providing any prior notice or opportunity for comment, the *Order* was procedurally unlawful, *id.* at 3-7, while also being substantively arbitrary and capricious and contrary to law, *id.* at 7-12.[6]

Petitioners made clear that, rather than suspend just the 50 Percent Retail Rule for just one block of spectrum, the FCC needed to suspend *all* of the harmful and unlawful DE rules adopted in 2006 for all spectrum offered in Auction 73. Petition at iv, 3, n.10, 8, & 11. In support, Petitioners cited, *inter alia*, their then-pending challenge to the lawfulness of the new DE rules in the United States Court of Appeals for the Third Circuit, *id.* at 1-2, 3, 8; the dismal results in the real world laboratory of Auction 66 mustered by small businesses shackled by the various DE rules adopted in April 2006 (the "New DE Rules"), *id.* at iii;[7] and the position taken on the record at the FCC by the Office of Advocacy of the U.S. Small Business Administration ("SBA Office of Advocacy") with respect to Auction 73, that application of *all* of the New DE

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[6] On December 3, 2007, Verizon Wireless timely filed its own petition for reconsideration of the *Order*, in which Verizon Wireless stated (p.7 n.8): "[T]he Commission has made clear that the waiver does not extend to other 700 MHz spectrum blocks. Therefore, if anything, the *Waiver Order* creates inequity and unfairness among service providers because a D-Block DE licensee will hold a far broader power to sell wholesale services than other 700 MHz and AWS DE licensees." An FCC date-stamped copy of the Verizon Wireless petition comprises Attachment 2 hereto.

[7] DEs won only four percent of the total dollar value of the spectrum offered in Auction 66, as compared with an averaged percentage of approximately 70 percent in major spectrum auctions conducted before adoption of the unlawful New DE Rules in 2006. *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 248 (3d Cir. 2010), *cert. denied sub nom., Council Tree Investors, Inc. v. FCC*, 2011 U.S. LEXIS 2468 (U.S., Mar. 28, 2011) ("*Council Tree*"). A copy of the *Council Tree* opinion comprises Attachment 3 hereto.

Rules to Auction 73 should be stayed. Petition at 7. The Commission completely ignored the Petition and plunged ahead with Auction 73.

II. This Supplement Updates the Legal and Factual Record and Refashions the Requested Relief.

In the nearly three and one-half years since the Petition's filing, much has happened to warrant this supplement. First, both the 50 Percent Retail Rule which was the subject of the targeted "D Block" waiver effectuated by the *Order*, and the 10-Year Hold Rule, were vacated last year in their entirety by the U.S. Court of Appeals for the Third Circuit.[8] The Court concluded that the 50 Percent Retail Rule and 10-Year Hold Rule were adopted in "serious" violation of the APA's notice and comment requirements. *Council Tree*, 619 F.3d at 258. The Court found that the "contrast could not be more stark between the transparent discussion of [the issues in a prior rulemaking] and the run up to the rules promulgated in 2006 . . . ." *Id.* at 254. The Further Notice of Proposed Rulemaking issued by the agency in advance of the New DE Rules' adoption "had not so much as hinted that" the Commission was contemplating anything like the 50 Percent Retail Rule. *Id.* at 253. Similarly, the Court found that the FCC had failed to provide even "inferential notice" of the 10-Year Hold Rule, observing that "[i]ndeed, no commenter manifested an understanding that the FCC was considering changing the existing repayment schedule." *Id.* at 256.

The Court also found substantive problems with both Rules, noting "that the FCC does not appear to have thoroughly considered the impact of the extended repayment schedule on DEs' ability to retain financing." *Id.* at 257 n.10. It further found that the Commission was "confused" about "the maximum period for which investors are willing to lock up their capital (before being able to liquidate the spectrum license, in the event the DE proves

[8] *Council Tree*, 619 F.3d at 258-59.

unprofitable) . . . ." *Id.* Likewise, the Court criticized the agency's "inattention to the nature of the wireless wholesaling business," in which a DE would "build and operate" new, wireless transmission facilities and then sell that new capacity to other existing companies, thereby promoting competition. *See id.* at 255 n.8.[9]

The Third Circuit's decision confirmed that the Petition at issue here had it exactly right. The 50 Percent Retail Rule and 10-Year Hold Rule were unlawful and should never had been applied to DEs seeking to bid on *any* of the spectrum available in Auction 73.[10] The FCC's election to barrel blindly ahead with Auction 73 in the face of the timely-filed Petition constitutes unlawful action that the agency now bears responsibility for remedying in the first instance.[11]

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[9] On purely equitable grounds, the Court declined to overturn the results of either Auction 66 or 73, leaving for another day the question of whether the mandatory language of Section 706 of the APA ("shall . . . set aside") affords a reviewing court discretion to decline to set aside unlawful agency action. *See Council Tree*, 619 F.3d at 258, n.13 ("Petitioners argue that we are required to vacate any rules we find in violation of the APA, pointing out that the APA requires us to 'hold unlawful *and set aside*' any such agency action. 5 U.S.C. § 706(2) (emphasis added). . . . Because we find remand without vacatur to be inappropriate on the facts of this case, we express no view as to whether we are authorized to order this [remand without vacatur] remedy.").

[10] The FCC itself recently confirmed the arbitrariness of the 50 Percent Retail Rule by concluding that a wholesale-*only* model for provision of terrestrial mobile broadband services on a nationwide basis, the kind of business model Council Tree was precluded from implementing by the 50 Percent Retail Rule (*see* Attachment 5 hereto, described *infra* at note 13), would affirmatively "enhance competition among current mobile wireless providers" and potentially "be a catalyst for market changing developments in the use and sale of innovative new mass-market consumer devices," and that these and other benefits "arising from the wholesale provision of facilities-based 4G broadband services . . . significantly outweigh any potential harms" related to the specific proposal before it. *SkyTerra Communications, Inc. and Harbinger Capital Partners Funds*, 25 FCC Rcd 3059, 3087 (¶¶ 62-63) (IB/OET/WTB 2010).

[11] It is something of a tautology, but one that Petitioners nonetheless articulate here out of an abundance of caution, that the FCC's conduct of Auction 73 pursuant to unlawful rules was *itself* unlawful agency action. Rules pursuant to which auctions are conducted and the auctions themselves are, in this sense, agency actions that are inextricably intertwined – an auction conducted pursuant to unlawful rules is an agency action that cannot itself survive. Furthermore, given the seriousness of the agency's APA violations, the arbitrary and capricious nature of the

The FCC's conduct of Auction 73 with the 50 Percent Retail Rule (for all but the D Block) and the 10-Year Hold Rule in place generated predictably disastrous results.[12] With DEs' ability to raise funds and participate in that auction effectively nullified by the New DE Rules, their share of the total dollar value of spectrum purchased in Auction 73 fell even more precipitously than in Auction 66, to 2.6 percent.[13] Equally alarming, the two largest incumbent wireless companies in the United States, Verizon Wireless and AT&T, acquired an astonishing aggregated 84 percent of the total dollar value of all spectrum sold in Auction 73.[14] These Auction 73 results were the exact opposite of those that the congressional mandates embedded in Section 309(j) of the Communications Act direct the FCC to facilitate – to use auctions as a

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50 Percent Retail Rule and the 10-Year Hold Rule, and the extensive harm caused by those rules to DEs' ability to participate in Auction 73, the agency's unlawful action here was neither *de minimis* nor non-prejudicial.

[12] *See* Attachment 4 hereto for an analysis of the results of both Auction 66 and Auction 73.

[13] *Council Tree*, 619 F.3d at 248. Attachment 5 hereto consists of the Declaration of George T. Laub, Managing Director of Council Tree, explaining that the 50 Percent Retail Rule and 10-Year Hold Rule prevented Council Tree from participating in Auction 73.

[14] *See* Matthew Lasar, *Verizon, AT&T Rule 700MHz Auction; Block D Fate Unsettled*, ARS Technica, 2008, *available at* http://arstechnica.com/old/content/2008/03/verizon-att-rule-700mhz-auction-block-d-fate-unsettled.ars. The two most prominent headlines to emerge from Auction 73 were the FCC's failure to sell the D Block despite the *Order* (relief that proved to be too little, too late), a failure which continues to bedevil first responders and the public safety community to this day, and the auction's solidifying the dominant competitive positions of AT&T and Verizon rather than introducing any meaningful new competition to those largest of incumbents. *See id.*; W. David Gardner, *700 MHz Auction Keeps U.S. Public Safety Network In Limbo*, Information Week, Apr. 16, 2008, *available at* http://www.informationweek.com/news/mobility/business/207400019; Brad Reed; *700-MHz Auction Draws Mixed Reaction*, NetworkWorld, Mar. 21, 2008, *available at* http://www.pcworld.com/article/143705/700mhz_auction_draws_mixed_reaction.html.

means both to promote new entrant/small business participation and competition in spectrum-based businesses and to avoid excessive concentration of licenses.[15]

When Congress granted the FCC authority to auction spectrum in 1997,[16] it incorporated safeguards designed to prevent this system for awarding licenses, so dependent on bidders' wealth, from becoming the privileged feeding ground of the largest and most prosperous, consolidation-prone incumbents.[17] The demonstrable benefits to consumers (*e.g.*, better service, lower pricing, and innovation) that flow from ensuring that spectrum, the essential public resource for any company desiring to compete in the wireless industry, be widely dispersed among multiple owners, were simply too important to leave to chance. Over the years, the safeguards mandated by Section 309(j) had been given various tangible forms by the FCC (*e.g.*, closed DE auctions, installment payment plans) that, by the time of Auction 66, had devolved into a single small business benefit – bidding credits. As Auction 73 approached, the FCC knew full well from its Auction 66 experience that the New DE Rules it had adopted in startling and stark violation of the Administrative Procedure Act had essentially destroyed the value of those bidding credits for DEs, to the direct, "windfall" benefit of the largest incumbent companies. And, yet, the FCC pushed on with Auction 73.

Given the developments outlined above, the Petition, as supplemented herein, now presents a question of first impression for the agency. The FCC, on the record in the *Order*, at the threshold of Auction 73, treated its New DE Rules as lawful, even in the face of, among other

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[15] 47 U.S.C. §§ 309(j)(3)(B), (4)(D); *see also* 47 U.S.C. §§ 157(a) and 332(c)(1)(C), cited in the Petition at 11-12.

[16] Section 3002 of the Balanced Budget Act of 1997, Pub L. No. 105-33 (codified at 47 U.S.C. § 309(j)). Congress was very concerned with the ability of small businesses and new entrants to "effectively compete" in the bidding process. H.R. Rep. No. 105-217, at 572 (1997).

[17] *See, e.g.*, 47 U.S.C. §§ 309(j)(3) and (4).

things: Petitioners' legal challenge; the dismal DE results in Auction 66; and the clearly expressed views of the SBA Office of Advocacy that the New DE Rules should be stayed for Auction 73. Now, the two most critical of those rules have been set aside by a reviewing court as unlawful, and the Petition remains pending.[18] That Petition timely challenged the *Order*, which not only relates *exclusively* to Auction 73, but explicitly applied all of the New DE Rules (with the sole exception of the 50 Percent Retail Rule as to the D Block) to all of the spectrum being sold in Auction 73.[19] The Third Circuit has now conclusively established that the 50 Percent Retail Rule and 10-Year Hold Rule were unlawful. The Commission did not seek further review of the Third Circuit decision, nor has it attempted to reinstate the rules. Petitioners timely challenged the Commission's plans to apply those unlawful rules to Auction 73 in their pending Petition. Accordingly, even setting aside Petitioners' objections to the special treatment afforded some DEs in the *Order*, they are independently entitled to relief based on their claim that the *Order* unlawfully refused to exempt all DEs from the invalid New

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[18] 47 U.S.C. § 405(a) requires the FCC to take action, either grant or denial, with respect to all timely-filed petitions for reconsideration of agency orders.

[19] In *Council Tree*, both the FCC and intervenors supporting the agency argued that the Court lacked jurisdiction to reach Auction 73 in the absence of an agency order on review that related exclusively to Auction 73. *See, e.g.*, Supp. Br. for Respondents (Sept. 15, 2008) 3d. Cir. Case No. 08-2036, at 28 (*citing* Fed. R. App. P. 15(a)(2)(C)). The Court never ruled on whether it held jurisdiction over Auction 73 in light of its equity-based conclusions premised on the record then before it (*Council Tree*, 619 F.3d at 257, n.12), but in any event, *no* similar jurisdictional objections could be made to a judicial appeal of this *Order*. Indeed, Intervenor Cellco Partnership d/b/a Verizon Wireless singled out this *Order* as precisely the type of agency action that would confer jurisdiction over Auction 73 on a reviewing court. Br. of Intervenor Cellco Partnership d/b/a Verizon Wireless in Support of Respondent (Sept. 15, 2008) 3d. Cir. Case No. 08-2036, at 6-7. Because the FCC clearly elected, on its own motion in an order issued outside the confines of any rulemaking proceeding, to reopen the issue of the application of the New DE Rules to Auction 73, the jurisdictional concerns cited by the D.C. Circuit in non-precedential *Council Tree Communications, Inc. v. FCC*, Case No. 07-1454 (Mar. 26, 2009) (unpublished) are irrelevant here, and the freestanding *Order* is necessarily subject to judicial review pursuant to 47 U.S.C. § 402(a).

DE Rules. Accordingly, the FCC must vacate the results of Auction 73.[20] Should the FCC decline for any reason to provide that relief, the FCC should fashion immediate remedies (*e.g.*, bid vouchers, etc.) that redress to the greatest extent possible the problems the FCC has created.[21]

* * *

Time is of the essence, and Petitioners are filing contemporaneously herewith a Request for Expedited Processing and Decision with respect to the Petition. The Petition has languished for nearly three and one-half years and the need for expeditious resolution of the issues it raises, as supplemented herein, is thrown into particularly sharp and immediate focus by the recent announcement by AT&T, America's second largest wireless company, that it has reached an agreement, subject to FCC approval, to acquire for $39 billion the assets of T-Mobile USA, the country's fourth largest wireless company, the consummation of which would leave just two dominant wireless companies in the U.S.[22] The FCC cannot even begin to consider approving

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[20] The plain language of Section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2) is mandatory ("shall" not "may") and leaves a reviewing court no equitable discretion to decline to impose such a remedy. That is, a reviewing court "shall . . . set aside agency action . . . found to be . . . not in accordance with law . . . [or] without observance of procedure required by law." *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (Section 706 requires that "once a [reviewing] court deems agency delay unreasonable, it must compel agency action"). Against this background, the FCC should set aside Auction 73 at the earliest possible time to minimize the harm that continues to flow from the unlawful conduct of that auction by the agency.

[21] *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Qualcomm, Inc. v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999) and *QUALCOMM, Inc.*, 16 F.C.C.R. 4042 (2000) (Discount Auction Voucher provided as an alternative to remedy for FCC's unlawful failure to award a pioneer's preference). *See also Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

[22] *AT&T to Acquire T-Mobile USA from Deutsche Telekom*, AT&T News Release, March 20, 2011; *see also* Marguerite Reardon, *Is AT&T A Wireless Spectrum Hog?*, CNET News, April 29, 2011, *available at* http://news.cnet.com/8301-30686_3-20058494-266.html. A copy of the latter article is submitted as Attachment 6 hereto. These concerns are highlighted here because

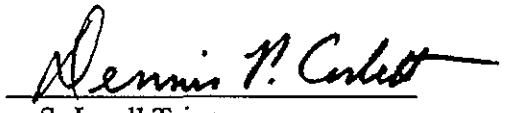
such *further* consolidation of the wireless industry until it *first* resolves the Petition by deciding how to redress the damage it caused by its decision in the *Order*, some three and a half years ago, to conduct Auction 73 with the unlawful 50 Percent Retail Rule and 10-Year Hold Rule essentially in place.[23]

III. Conclusion.

For the reasons set forth above and in the Petition, the *Order* should be reconsidered, with all necessary and appropriate relief relating to the FCC's unlawful conduct of Auction 73 provided forthwith.

Respectfully submitted,

COUNCIL TREE INVESTORS, INC. AND,
BETHEL NATIVE CORPORATION

By: 

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May 18, 2011

Their Attorneys

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approval of the proposed transaction would allow AT&T to expand the massive amount of spectrum it already holds, including the spectrum it obtained by way of its Auction 73 windfall, by adding the spectrum T-Mobile USA obtained as its own windfall in Auction 66, where DE participation was also devastated by the New DE Rules.

[23] By failing to implement the design for Auction 73 that Congress mandated in Section 309(j) (*i.e.*, one *promoting* new entrants and *avoiding* excessive concentration), the Commission denied the public the manifest competitive benefits promised by auctions, and instead allowed AT&T to feast at the Auction 73 "table" unencumbered by any significant competition from DEs, setting the stage for AT&T's conspicuous consumption of T-Mobile USA. In other words, "today's" prospective harms of an AT&T/T-Mobile USA merger are greatly exacerbated by "yesterday's" unlawful conduct of Auction 73.

Attachment 1

RETURN COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
Waiver of Section 1.2110(b)(3)(iv)(A) of the	)
Commission's Rules for the Upper 700 MHz	)
Band D Block License	)
	)

PETITION FOR RECONSIDERATION

COUNCIL TREE COMMUNICATIONS, INC.,
BETHEL NATIVE CORPORATION, AND
THE MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL

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December 7, 2007

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SUMMARY

Over the course of many months leading up to the imminent 700 MHz Auction, the FCC steadfastly refused to rescind two new rules, unlawfully adopted on the eve of Auction 66, which have made it dramatically more difficult for Designated Entities to participate in spectrum auctions conducted by the FCC. Petitioners are seeking the rescission of those two rules in a pending case in the U.S. Court of Appeals for the Third Circuit. Particularly given the "real world laboratory" result of disastrously low DE participation in Auction 66, the agency's continuing refusal to abandon these new rules has already tainted a second auction -- the 700 MHz Auction. By the instant reconsideration petition, Petitioners find it necessary to challenge the FCC's recently released *Order*, FCC 07-197, relating to the 700 MHz Auction. The *Order* echoes the ill-advised, last minute actions taken in advance of Auction 66, and creates new problems of its own.

The *Order* has waived, only for D Block DE bidders in the 700 MHz Auction, the restriction by which a DE forfeits its auction bidding credit if it leases, resells, or wholesales to third parties more than 50 percent of the commercial spectrum capacity it won at auction. With the waiver, a DE which wins the D Block will not have to provide any retail commercial wireless service directly to the public. All other DEs bidding on non-D Block spectrum in the 700 MHz auction remain subject to the 50 Percent Retail Rule.

No party sought on the public record the waiver granted by the *Order*, no particularized public comment process was followed with respect to the proposed merits of such a waiver, and the *Order* was adopted outside any docketed proceeding a scant two business days before the Form 175 application window opened for the 700 MHz auction, only 11 business days before that window's close. Given the massive $1.4 billion minimum bid established by the FCC for

the 10 MHz nationwide D Block, this extremely tight timing eliminated all DEs but an advantaged few from a realistic opportunity to utilize this change in forming a business plan to bid on the D Block. Because the *Order* fundamentally alters an essential bidding rule, one governing DE eligibility, the last minute nature of its adoption, without proper notice, violates not only basic principles of the Administrative Procedure Act but the bedrock requirements of 47 U.S.C. § 309(j)(3)(E) -- namely, the obligations that: (i) the FCC seek public comment *before* adopting bidding rules, and (ii) the FCC provide adequate time for DEs to make business plans *after* bidding rules are adopted

Furthermore, the conclusory justifications offered by the FCC in support of the *Order* do not come close to satisfying the FCC's obligation to explain why the benefits of eliminating the misguided 50 Percent Retail Rule do not extend to *all* DEs participating in *all* aspects of the 700 MHz Auction. The *Order*, after all, relates to the commercial uses of excess spectrum in the D Block and the Public Safety Spectrum Block, not the public safety uses of that spectrum, and under the Communications Act, the Commission must promote a robust *overall* DE program that brings all of the benefits of new entrant competition to the highly concentrated wireless industry. By pursuing the last minute waiver pathway, rather than simply rescinding the 50 Percent Retail Rule for all DEs, the agency continues its transparent effort to avoid judicial review of its adoption of the new DE restrictions just before Auction 66. It is apparent that rescission of the 50 Percent Retail Rule would be viewed as a partial grant of Petitioners' still pending Petition for Reconsideration of the two new DE Rules, and would indisputably vest the Third Circuit with jurisdiction to rule immediately on the merits of the pending Court case.

The *Order* was adopted in violation of statute and precedent, and is arbitrary and capricious. It cannot survive.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
Waiver of Section 1.2110(b)(3)(iv)(A) of the	)
Commission's Rules for the Upper 700 MHz	)
Band D Block License	)
	)

PETITION FOR RECONSIDERATION

Council Tree Communications, Inc. ("Council Tree"), Bethel Native Corporation, and the Minority Media and Telecommunications Council (collectively, "Petitioners"), by their attorneys and pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, hereby petition for reconsideration of the Federal Communications Commission's *Order*, FCC 07-197, released November 15, 2007 ("*Order*") in the above captioned matter.

I. Background.

On November 15, 2007, on the doorstep of the 700 MHz Auction,[1] the Commission on its own motion adopted and released the *Order*, which waived, only for purposes of the 700 MHz Auction, one of the key new restrictions on Designated Entity ("DE") bidder eligibility that Petitioners are currently challenging before the United States Court of Appeals for the Third Circuit in Docket No. 06-2943 (the "Third Circuit Case") (Auction 66) and that Council Tree is currently challenging before the Court of Appeals for the District of Columbia Circuit in Docket

[1] Throughout, "700 MHz Auction" refers to FCC spectrum Auctions 73 and 76. Auction 73 is currently scheduled to commence on January 24, 2008. Auction 76 is the contingent auction the FCC has already announced it will conduct if reserve prices for 700 MHz spectrum are not met in Auction 73. Petitioners understand from Commission Staff that the *Order* will not be published in the Federal Register. This petition is therefore timely filed.

No. 07-1432 (700 MHz Auction).[2] Namely, the *Order* waived the 50 Percent Retail Rule for one large and important swath of spectrum, the so-called "D Block."[3] With this waiver, a DE which wins the D Block license will be able to lease, resell, or wholesale 100 percent of the spectrum not utilized by the public safety community (with no more than 25 percent of that spectrum leased or resold to any one entity) without providing the "retail" service directly to the public that other DEs must provide under the unlawfully adopted rules being challenged in the Third Circuit Case. Indeed, the 50 Percent Retail Rule remains in place for all other present and future

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[2] In the Third Circuit Case, Petitioners have challenged the FCC's adoption, immediately before commencement of Auction 66, of two new restrictive rules related to DE participation in FCC-conducted spectrum auctions. *See generally* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) ("*AWS Second Report and Order*"); 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 (2006). The first new rule doubles the period of time, from five to ten years, during which a DE must hold a spectrum license or face repayment of all or a portion of the bidding credit utilized by that DE at auction (the "10-Year Hold Rule"). 47 C.F.R. § 1.2111(d)(2). The second new rule restricts the flexibility of DE business plans that call for the lease, resale, or wholesale to third parties of spectrum won at auction (the "Lease/Resale Restriction"). 47 C.F.R. § 1.2110(3)(b)(iv). The *Order* explicitly relates to one component of the Lease/Resale Restriction. Namely, if a DE leases or resells (or wholesales) more than 50 percent of its spectrum capacity to third parties in the aggregate, the bidding credit is forfeited (the "50 Percent Retail Rule"). 47 C.F.R. § 1.2110(3)(b)(iv)(A). Under this restriction, with respect to 50 percent of its spectrum capacity, a new entrant DE must compete directly with entrenched wireless incumbents in the retail, direct-to-the-consumer market.

[3] The D Block is nationwide in scope and consists of 10 MHz of prime spectrum, adjacent to another 10 MHz nationwide block of spectrum that has been set aside for a national public safety licensee (the "Public Safety Spectrum Block"). The ultimate D Block licensee must participate in a Public/Private Partnership that will give priority to the needs of an interoperable system of communications to be used by the public safety community, including police and firefighters. Excess D Block capacity and excess Public Safety Spectrum Block capacity not needed by the Public/Private Partnership, however, which is expected to be substantial in amount, can be used by the D Block licensee for commercial, for-profit purposes. The *Order* relates to the for-profit uses, not the public safety uses, of the D Block and Public Safety Spectrum Block.

purposes, meaning that DEs bidding on all other spectrum available in this auction and on all spectrum in future auctions remain subject to it. The 10-Year Hold Rule and Lease/Resale Restriction are otherwise unchanged for the 700 MHz Auction and for future auctions.

Petitioners emphasize their support for what ultimately must be a robust bidding process in the 700 MHz Auction and its D Block license, given its importance to public safety, and their support for complete elimination of the 10-Year Hold Rule and the Lease/Resale Restriction, as they have made clear in their pleadings and argument in the Third Circuit Case. But that support in no way obscures how important it is, in turn, for the Commission to adopt with fair and adequate advance notice even handed bidding rules to govern D Block bidding and, indeed, to govern bidding on all public spectrum, an obligation the Commission has failed to fulfill in advance of both Auction 66 and the 700 MHz Auction. The substantial problems addressed in the Third Circuit Case and herein are of the Commission's, not Petitioners', making.

II. The Commission Adopted The *Order* In Violation Of 47 U.S.C. § 309(j)(3)(E).

As was the case with the 10-Year Hold Rule and the Lease/Resale Restriction adopted immediately prior to Auction 66, the *Order* comes at the last minute before the 700 MHz Auction. The *Order* was not issued in response to any publicly disclosed waiver request, was issued outside any docketed proceeding and was issued without benefit of public notice and comment on its particulars. After *twice* announcing that the 10-Year Hold Rule and Lease/Resale Restriction would apply to all DE bidding activity in the 700 MHz Auction, once on April 27, 2007 and again on August 10, 2007,[4] the FCC has now, many months later, abruptly

[4] *See Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 06-150, et al., FCC 07-72, 22 FCC Rcd 8064, 8167 ¶ 287 (2007) ("In the event that we offered bidding preferences with respect to such an 'E Block' license [which ultimately became the D Block], the existing rule plainly would preclude any licensee that is required to operate only as a wholesale provider from receiving designated entity benefits."); *Second Report and Order* in WT Docket

changed its mind, "on its own motion," in the absence of any waiver "process" at all, much less any public participation.[5] This action came a mere two business days before the FCC Form 175 "short form" window was to open and eleven business days before that window's December 3, 2007 close. Given the extremely tight timetable for participation in the 700 MHz Auction and given the *$1.4 billion minimum bid* for the D Block license, this last minute course reversal occurred far too late in the process to be of any benefit to the overall class of DE bidders contemplating participation in the D Block auction.[6] As in the case of Auction 66, in the 700 MHz Auction, the FCC has unlawfully scrambled the "DE rules of the road" at the very last

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No. 06-150 et al., FCC 07-132, 22 FCC Rcd 15289, 15476 ¶ 545 (2007) ("*700 MHz Second R&O*") ("[W]e decline to restrict the D Block licensee to operating exclusively on a 'wholesale' or 'open access' basis. Instead, we provide the D Block licensee with flexibility to provide wholesale or retail services or other types of access to its network *that comply with our rules* [*e.g.*, 10-Year Hold Rule and Lease/Resale Restriction] and the [network sharing agreement]")(emphasis added)..

[5] It must be emphasized that the FCC's fateful decisions in April 2007 and August 2007 not to rescind or stay the 10-Year Hold Rule and Lease/Resale Restriction for the 700 MHz Auction cast a cloud over the entire 700 MHz Auction. Like Auction 66, the 700 MHz Auction is proceeding under unlawfully adopted, fundamentally flawed DE rules.

[6] One DE, Frontline Wireless, Inc. ("Frontline"), a company headed by former FCC Chairman Reed Hundt and former Administrator of the National Telecommunications Information Administration Janice Obuchowski, has been prominently reported as being in position to benefit from the *Order*. *See* "FCC Makes Frontline-Friendly Change to Auction Rules," John Eggerton, Broadcasting and Cable, November 16, 2007. In a recent report, the Government Accountability Office raised concerns about unequal access to nonpublic information by certain stakeholders and the advantage that such access may provide in the rulemaking process. *See* "FCC Should Take Steps to Ensure Equal Access to Rulemaking Information," U.S. Government Accountability Office, GAO-07-1046, Sept. 2007. In addition, the U. S. House of Representatives Energy and Commerce Subcommittee on Oversight and Investigations has just this week announced an investigation of FCC rulemaking processes, including the lack of adequate public participation therein. *See* "FCC Under Investigation by House Subcommittee," John Eggerton, Broadcasting & Cable.com , Dec. 3, 2007. The U.S. Senate Committee on Commerce, Science and Transportation has scheduled an FCC oversight hearing on December 13, 2007 to address similar rulemaking process issues. http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1920.

minute. Perhaps more importantly, by waiting until the last minute to act, the FCC has skewed auction opportunities in favor of a very limited pool of bidders and deprived the public of a fundamental benefit of a federal spectrum auction -- fair, open, and robust competition.

In issuing a last minute waiver, the FCC seeks comfort in the provisions of 47 C.F.R. § 1.925, which permit the FCC to waive its own rules on its own motion, with or without public comment. But those FCC rules cannot override or diminish the agency's *statutory* obligations. Here, no matter how the FCC tries to "spin" it or characterize it, the "waiver" alters an essential bidding rule for DEs in the 700 MHz Auction D Block, indeed a fundamental bidding eligibility rule. The process by which that waiver was adopted is, however, flatly contrary to 47 U.S.C. § 309(j)(3)(E). That specific *statutory* provision controls the generalized regulatory provisions on which the Commission relies. In particular, 47 U.S.C. §§ 309(j)(3)(E)(i)-(ii) demand that *before* bidding rules are adopted, the FCC must ensure that it solicits and receives public notice and comment, and that *after* bidding rules are adopted, adequate notice of those bidding rules be given to allow for proper business planning.[7] Here, the auction-specific waiver was generated by the FCC outside of any public process after an intense lobbying campaign by one entity.[8] Even

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[7] 47 U.S.C. § 309(j)(3)(E)(i)-(ii) requires the FCC to

> ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed --
>
> (i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and
>
> (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

[8] The FCC's penchant for ignoring APA-mandated procedures to timely seek informed public comment, a failing which is at the heart of the Third Circuit Case, has become an increasing source of contention even among the FCC Commissioners themselves. For example, in criticizing the lack of proper process attending the FCC's very recent adoption of new FCC

more to the point, the so-called "waiver" dramatically changed an essential bidding rule for all DEs a mere two business days before the short-form window opened.[9] The manner and timing of the waiver's adoption left no realistic chance for DEs as a class to make business plans to bid on a block of spectrum that carries a huge $1.4 billion mandatory *opening* bid.

There is simply no scenario under which 11 business days can be considered "adequate" time to make a viable business plan to bid on a 10 MHz spectrum block valued by the government itself at a minimum of $1.4 billion. DEs as a class have not been afforded a meaningful opportunity to devise and implement a business plan allowing then to bid on such spectrum. At two critical junctures in time, in April and August of this year, when meaningful relief on the 10-Year Hold Rule and Lease/Resale Restriction might have been provided, the FCC dismissively announced to the DE community that both rules would remain in place for the

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policies affecting low power FM stations (FCC 07-204 MB Docket No. 99-25, adopted November 27, 2007), Commissioners McDowell and Tate dissented in part. Commissioner McDowell remarked: "[W]e should not make rules through waiver policies or processing policies. Rather, we should abide by our duties under the Administrative Procedure Act to seek and consider public comment before crafting and implementing rules." Commissioner Tate stated: "[T]he further notice...is a more appropriate place for the majority of the action we take in this item today. I believe that we need to have more input and further comment before taking some of these broad and expansive actions regarding the status and protections of both LPFM and primary or licensed full-power stations...." Similarly, Commissioner Adelstein pointedly criticized the FCC's lack of proper process in an ongoing Commission proceeding involving the cable television industry, (MB Docket No. 06-189): "I came here to be part of the expert agency – to follow the facts wherever they lead. We cannot cook the books to pursue a political agenda without dismantling our very institution. We simply must act like the expert agency Congress intended, and not squander our precious legacy."

[9] There can be no more fundamental bidding rule than one that establishes eligibility for a bidding credit. The language of 47 U.S.C. §§ 309(j)(3) and (4) makes clear that those two provisions must be read *together* (*i.e.*, subsection (4) is introduced by the phrase: "In prescribing regulations pursuant to paragraph (3), the Commission shall –") and that the sweep of the statute with respect to "bidding rules" is quite broad, encompassing such diverse areas as build out requirements, unjust enrichment, bidding preferences, and bidder eligibility. *See* 47 U.S.C. §§ 309(j)(4)(A)-(F). Previous efforts by the FCC to narrow the scope of the meaning of "bidding rules" in Section 309(j)(3) are entirely inconsistent with the plain meaning of the statute.

700 MHz auction. These missteps made it impossible as a practical matter for the Commission to alter the rules of the game in mid-November, 2007 in accordance with statutory dictates.[10]

The last minute pirouette is even more confounding in light of the Commission's curt dismissal of a previous proposal to suspend the harmful new DE rules for the 700 MHz Auction. When the Small Business Administration's Office of Advocacy made a timely request in May 2007 to suspend the 10-Year Hold Rule and Lease/Resale Restriction for the 700 MHz Auction, the FCC simply rejected the proposal without discussion. "In connection with Frontline's material relationship arguments, we note the Office of Advocacy of the Small Business Administration's comments urging the Commission to stay the effect of revisions made in 2006 to the Commission's designated entity rules for the 700 MHz auction. SBA *700 MHz Further Notice* Comments at 2. We find nothing persuasive in the Office of Advocacy's pleading as to why the Commission's current rules should not apply to the auction of 700 MHz licenses." *700 MHz Second R&O, supra*, 22 FCC Rcd at 15472 n.1083.

These infirmities necessarily invalidate the *Order*.

III. The *Order* Is Inconsistent With Precedent, Violative of Statute, And Arbitrary and Capricious.

Substantively, the *Order* amounts to nothing less than an explicit concession that the Lease/Resale Restriction is itself an irrational and debilitating obstacle to DEs trying to establish

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[10] As Verizon Wireless has pointed out in a Petition for Reconsideration of the *Order* filed with the Commission on December 3, 2007 (the "Verizon Petition"), the *Order* was issued in violation of the public notice and comment requirements of the Administrative Procedure Act. *Id.* at 5-6 ("the Commission did not support its *Waiver Order* with substantial record evidence because the Commission never opened a record in this proceeding.") (footnote omitted). In the record which the FCC had adduced in advance of the 700 MHz Auction, a record which is not even mentioned in the *Order*, Council Tree made clear its opposition to the grant of unique relief to any DE, including Frontline, to the extent such relief was there being advocated. *See* May 23, 2007 Council Tree Comments in WT Docket No. 06-150 at 8-12 and June 4, 2007 Council Tree Reply Comments in WT Docket No. 06-150 at 7-11.

themselves as viable competitors in a fiercely competitive wireless marketplace, dominated by powerful, entrenched incumbents. But rather than follow through on this obvious conclusion and rescind the rule, the Commission has opted for a selective waiver approach.

The *Order* predicates the waiver of the 50 Percent Retail Rule for DEs bidding on the D Block license on grounds that the unique nature of the D Block license eliminates the concerns which led to adoption of the rule. *Order* at ¶¶ 1 & 10. In particular, the FCC cites the oversight it will exercise over the D Block licensee and the Public/Private Partnership of which that D Block licensee will be a part. *Id.* at ¶ 10. The Commission also relies on the more accelerated build out requirements the D Block licensee must satisfy. *Id.* at ¶ 9. Most importantly, the FCC ultimately finds that by constructing and operating a "'state of the art' broadband technology platform," even without providing any retail wireless service directly to the public, a D Block DE licensee will, "consistent with the Congressional goals underlying [the FCC's] impermissible material relationship rule, ... be required to participate in the provision of facilities-based services for the benefit of the public." *Id.* at ¶ 9. But, as noted above, the FCC never solicited public comment on these rationales or even on the very idea of granting a particularized waiver of the 50 Percent Retail Rule.[11] That lack of public process both taints the Order and forces the parties

[11] In fact, the initial rationales for the 50 Percent Retail Rule, the 10-Year Hold Rule, and the Lease/Resale Restriction were also adopted without public notice and comment and on the eve of Auction 66. Petitioners have made an extensive showing in the Third Circuit Case that the 10-Year Hold Rule and Lease/Resale Restriction were both adopted without proper notice to stakeholders and without informed comment and both have had profoundly deleterious effects on DEs and their business plans. This is therefore the second consecutive major auction for advanced wireless services in which DEs as a class have been disadvantaged and harmed by improper FCC processes.

like Petitioners to bring the flaws in the FCC approach to the Commission's attention in a petition for reconsideration rather than comments.[12]

The factor of the "uniqueness" of the D Block and the regulations which govern it, cited repeatedly in the *Order* as if it were a mantra, relates entirely to the public safety aspects of the Public/Private Partnership. The D Block licensee will have to enter a network sharing agreement ("NSA") with the public safety licensee and the FCC will oversee that NSA. But the *Order* completely fails to acknowledge that the NSA (and the FCC oversight that comes with it) relates solely to *public safety* uses and not at all to the *commercial* uses of excess spectrum to which the *Order* is directed. The NSA will not govern the D Block licensee's commercial operations and those commercial operations will not be subject to any more FCC oversight than will any other DE commercial wireless operations.

Furthermore, like the FCC's arbitrary and capricious adoption of the 50 Percent Retail Rule in 2006, the *Order* makes no attempt to explain why the benefits that will flow to the public from a D Block licensee's construction of new facilities (without provision of *any* retail service directly to the public by that D Block licensee) would not also flow from the construction of new facilities by *any* DE licensee in any spectrum block.[13] In fact, it is that very construction of new

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[12] *See* 47 U.S.C. § 405 ("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 ... relies on questions of fact or law upon which the Commission...has been afforded no opportunity to pass.") (emphasis added).

[13] The Commission based the 50 Percent Retail Rule on a distorted interpretation of the antitrafficking and unjust enrichment provisions under 309(j)(4)(B) and its legislative history. "[W]e seek to improve our ability to achieve Congress's directives with regard to designated entities and to ensure that, in accordance with the intent of Congress, every recipient of our designated entity benefits is an entity that uses its licenses to *directly* provide facilities-based telecommunications services for the benefit of the public." *AWS Second Report and Order*, at 4759-60 ¶ 15 (emphasis added). The Commission explained further that "[i]n the legislative history of Section 309(j), Congress explains that the reason for imposing anti-trafficking

wireless facilities that provides a cornerstone public benefit, bringing new service and competition on line, whether through retailing or wholesaling.[14] The *Order* offers no reason why

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restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter 'participation in the licensing process by those who have no intention of offering service to the public.'" *Id.*, at 4759-60 ¶ 15 n.57 (citing to H.R. Rep. No. 103-111, at 257-58 (1993) ("House Report") and H.R. Conf. Rep. No. 103-213, at 483 (1993) ("House Conference Report")).

However, the antitrafficking and unjust enrichment provisions under 309(j)(4)(B) do not expressly require service *directly* to the public; the word directly is not in the statute nor in the legislative history. More importantly, neither are these antitrafficking and antiwarehousing provisions exclusive to DEs. Congress intended *generally* to deter antitrafficking, unjust enrichment, warehousing and speculators for all licensees. For example, Section 309(j)(4)(B) mandates for *all* licensees and permittees involved in the competitive bidding process that the FCC establish performance requirements, ensure prompt delivery of service to rural areas, and prevent stockpiling or warehousing of spectrum. 47 U.S.C. § 309(j)(4)(B). Section 309(j)(4)(E) likewise generally mandates that the FCC require transfer disclosures, antitrafficking restrictions and payment schedules to prevent unjust enrichment. 47 U.S.C. § 309(j)(4)(E). Unlike Section 309(j)(4)(A), which cites to the DE-specific provision in 309(j)(3)(B) and 309(j)(4)(D), which includes an express mention of various classes of DEs, neither subsections 309(j)(4)(B) or (4)(E) contain a reference to DEs, making clear that those two subsections do *not* apply exclusively to DEs. *See* 47 U.S.C. § 309(j)(4)(E). Congress could easily have added references to DEs in all subsections of Section 309(j)(4). The fact that it did not is a clear indication that Congress intended certain subsections of Section 309(j)(4) to apply generally to all licensees and permittees.

As for the House Report, it stated that "[i]n order to assure that the goal of prompt delivery of services to the public is not frustrated by the Commission's employment of competitive bidding, the Commission's regulations must include performance requirements, and penalties for failure to meet these requirements, to prevent warehousing of frequencies." House Report, at 256 (emphasis added). This statement referred broadly to the FCC's new competitive bidding authority.

Council Tree has consistently argued that a facilities-based DE that provides 100% wholesale services, provides services for the benefit of the public. In fact, the FCC concedes in the *Order* that a D Block DE which leases, resells or wholesales 100% of its capacity will have participated "in the provision of facilities-based services for the benefit of the public." *Order*, at ¶ 9. The importance of a DE's providing service "directly" to the public is nowhere to be found in the *Order*, even though that concept was critical to the FCC's decision to adopt the 10-Year Hold Rule and Lease/Resale Restriction in the first place.

[14] Petitioners have made this very point in the Third Circuit case. *See e.g.*, Petitioners Brief in the Third Circuit case (No. 06-2953) Sept. 6, 2006, at 39.

the important interests of public safety must be served at the expense of the important, statutorily based interests of a robust overall DE program that provides bona fide practical assistance to DEs trying to find a way to viably compete with deep-pocketed, entrenched incumbents. In other words, there is no rational basis for limiting the scope of the relief granted by the *Order* exclusively to the D Block. The relief must logically extend to *all* DE bidding on all spectrum available in the auction. *Cf.* Verizon Petition at 7 n.8. The *Order* is, in that important regard, arbitrary and capricious and it must be overturned.[15]

The disparate treatment of similarly situated DEs is not only arbitrary and capricious, but also discriminatory and anti-competitive under the Communications Act of 1934, as amended ("the Act"). Section 332 of the Act states that in making a determination with respect to the public interest, "the Commission shall consider whether the proposed regulation (or amendment thereof) will promote market conditions, including the extent to which such regulation . . . *will enhance competition amongst providers of commercial mobile services.*" 47 U.S.C. § 332(c)(1)(C) (emphasis added). Similarly, Section 706 of the Telecommunications Act of 1996 requires that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . *measures that promote competition in the local telecommunications market, or other regulating methods that remove*

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[15] *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) ("Whatever action the Commission takes on remand, it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act."); *Telephone and Data Systems, Inc. v. FCC*, 19 F. 3d 655, 657 (D.C. Cir. 1994) (FCC's "piecemeal picking and choosing of 'relevant' control criteria, and its uneven application of those criteria, is not 'reasoned decisionmaking', but the very sort of arbitrariness and capriciousness we are empowered to correct") (citation omitted).

barriers to infrastructure investment. 47 U.S.C. § 157(a) (emphasis added). But rather than promote competition, as these statutory provisions require, the *Order* confers an unfair competitive advantage. That is, with respect to the *commercial* use of the D Block, a D Block licensee who is also a DE will be competing in the undifferentiated commercial wireless market against other DEs. But that same D Block licensee will enjoy the huge advantage of the flexibility afforded by the *Order* to lease, resell, or wholesale 100 percent of its capacity, while other DEs are irrationally saddled with the 50 Percent Retail Rule and forced to compete directly in that most expensive of arenas.

Petitioners note that the Commission's use of the device of a targeted "waiver" of the 50 Percent Retail Rule rather than adoption of a global revision to that rule allows the Commission, at least in theory, to continue to avoid ruling on Petitioners' still pending May 5, 2006 Petition for Expedited Reconsideration of the 10-Year Hold Rule and Lease/Resale Restriction ("Auction 66 Reconsideration Petition"). That petition is currently the subject of a Petition for Mandamus brought by Petitioners in the Third Circuit. *See* Docket No. 07-4124 in that Court. The pending mandamus proceeding is closely tied to the Third Circuit Case. Indeed, that mandamus petition followed the Court's dismissal, purely on jurisdictional grounds, of Petitioners' Petition for Review before the Court. If the Commission had revised the Lease/Resale Restriction in some way prior to the 700 MHz Auction, it could not have done so without effectively acting on the Auction 66 Reconsideration Petition, an action that would have indisputably vested the Court with jurisdiction over the Third Circuit case, a result the Commission is assiduously trying to avoid.[16]

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[16] The Verizon Petition, *supra*, argues that the waiver adopted by the *Order* was in fact a change in the FCC's impermissible material relationship DE rule. *See* Verizon Petition, *supra*, at 5.

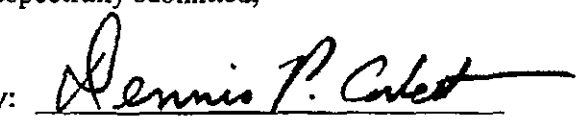
* * *

Petitioners have been challenging the 10-Year Hold Rule and Lease/Resale Restriction since their improvident, hasty adoption by the Commission more than a year and a half ago. Those rules were unlawfully adopted, without legally mandated notice and comment, lack an adequate record foundation, and have had a devastating impact on DE participation in spectrum auctions, the very participation which the FCC is obligated by statute to *promote*. Now, those same rules are infecting yet another spectrum auction because the FCC has refused to do the right thing and rescind them. Instead, the FCC has moved to conduct Auction 73 with those defective rules in place, undermining Auction 73 in the same manner as Auction 66. But the *Order* has created yet a new problem within this very troubled overall context. The FCC has taken the DE community on another odd and improper procedural detour, custom designed to try to fit within the FCC's continuing campaign to avoid judicial review of the underlying new DE rules. Unfortunately, the FCC has succeeded only in conferring a last minute windfall on what will be at most a very narrow pool of advantaged DEs, in a manner clearly violative of, *inter alia*, the statutory provision requiring that relevant rules be established pursuant to proper notice, with enough lead time for all DEs to fairly benefit. The *Order*, as a consequence, like the 10-Year Hold Rule and Lease/Resale Restriction themselves, cannot survive.

CONCLUSION

For all of the above reasons, the *Order* should be reconsidered and rescinded.

Respectfully submitted,

By: 

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December 7, 2007

CERTIFICATE OF SERVICE

I certify that on this 7th day of December, 2007, I served copies of the foregoing Petition for Reconsideration, by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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Rebecca J. Cunningham

Attachment 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License	)
	)
	)
	)

Stamp and Return

Steven Merlis
12 West

PETITION FOR RECONSIDERATION

Verizon Wireless, pursuant to Section 1.106 of the Commission's Rules, hereby requests that the Commission rescind its order waiving the impermissible material relationship rule with respect to the 700 MHz commercial D-Block licensee.[1]

By allowing the D-Block licensee to lease 100% of its spectrum to four or more lessees, the *Waiver Order* may unnecessarily complicate achievement of the Commission's public safety interoperability objectives. In addition, the *Waiver Order* is procedurally infirm in that it was adopted without providing adequate notice and comment in violation of the Administrative Procedures Act, and the Commission failed to satisfy the applicable waiver standard. Finally, the waiver grant creates a loophole that will allow a group of wealthy individuals – including two billionaires on the Forbes 400 list of the wealthiest people in America – to exploit a program created to promote the entry of small businesses into the communications field. Accordingly, the *Waiver Order* should be rescinded.

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[1] *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block Licensee*, Order, FCC 07-197 (rel. Nov. 15, 2007) ("*Waiver Order*").

I. WAIVING THE IMPERMISSIBLE MATERIAL RELATIONSHIP RULE RISKS ACHIEVEMENT OF THE COMMISSION'S PUBLIC SAFETY INTEROPERABILITY GOALS.

Waiver of the impermissible material relationship rule may impair achievement of the key policy objective underlying the public-private partnership concept and the unique D-Block licensing regime: advancing public safety interoperability. Pursuant to the Commission's *Waiver Order*, the commercial D-Block licensee will be under no obligation to build and operate a nationwide interoperable broadband public safety network. Instead, the D-Block auction winner will be at liberty to outsource the network build to four or more lessees, creating precisely the fragmentation the Commission sought to avoid in establishing the D-Block licensing regime. Such fragmentation may impair efforts to achieve interoperability and will needlessly complicate the recapture of spectrum by public safety in an emergency.

Despite Frontline's suggestions that it would operate as a facilities-based wholesaler, nothing in the Commission's *Waiver Order* requires the commercial D-Block winner to construct and operate a nationwide broadband network.[2] The Commission specifically crafted a nationwide D-Block license to eliminate the fragmentation that has too often plagued public safety by ensuring that a single entity had responsibility for network construction and that, should problems arise, that same entity would be accountable. The *Waiver Order* reverses course on that approach. The *Waiver Order* allows the D-Block licensee to lease 100% of its spectrum, though no more than 25% may be leased to any one entity.[3] Accordingly, where the job of

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[2] Though the *Waiver Order* states that "the D-Block license is conditioned upon its commercial licensee constructing and operating a nationwide, interoperable broadband network," *Waiver Order*, ¶ 9 (internal quotations and citation omitted), nothing in the FCC's rules – other than the impermissible material relationship rule – prohibits the outsourcing of these responsibilities, consistent with the Commission's leasing rules.

[3] *See Waiver Order*, ¶ 8, n.21.

network build-out and accountability to public safety formerly resided with a single D-Block auction winner, it may now fall upon, *at a minimum*, four independently operating entities.

Multiple harms may result from the fragmentation of network build-out and operational responsibilities. While the Public Safety Broadband Licensee ("PSBL") and the Network Sharing Agreement will provide network specifications, specifications alone will not likely be sufficient to ensure interoperable networks. If all that was needed were uniform specifications, the Commission would have solved the interoperability problem long ago, as it always possessed the power to impose uniform standards. But specifications quickly run up against reality in the field. Modifications become necessary or improved technologies become available that warrant a trial. Prior to the Commission's *Waiver Order*, the D-Block licensing rules provided for a single licensee to speak with one voice on these issues. Now a cacophony of at least four voices – in addition to the licensee – may weigh in when problems arise, provided that the lessees escalate the problems for redress instead of solving them on their own. Moreover, specifications cannot cover every situation in which judgment is required in the construction and operation of a network. The *Waiver Order* may impair public safety interoperability by creating a process allowing for four or more different and conflicting judgments in such situations instead of just one.

In addition, fragmentation at the lessee-level will complicate public safety's efforts to recapture spectrum in an emergency. Wholesaling creates an additional layer between the D-Block licensee and the PSBL. Even if, as a matter of bureaucracy, the PSBL contacted the D-Block licensee directly to exercise its right of preemption in an emergency, the implementation of that preemption directive would be complicated and slowed where the D-Block licensee is a lessor, rather than a system operator. Instead of being able to implement public safety's request,

the D-Block licensee would be reliant upon other operators and users of the system – a potentially large group of people depending on the market in question and the extent of leasing. In an emergency, such delay may be dangerous. Moreover, it is unnecessary. Prior to adoption of the *Waiver Order*, Commission rules required the D-Block licensee to act as a network operator able to implement a preemption request. The Commission should rescind the waiver grant to ensure that the D-Block licensee can address public safety preemption requests with the expedition they require.

II. THE *WAIVER ORDER* IS UNLAWFUL BECAUSE IT WAS ADOPTED *EX PARTE* AND WITHOUT ANY PUBLIC NOTICE.

The FCC should rescind the *Waiver Order* because the Commission did not adopt the *Waiver Order* in accordance with appropriate procedural requirements. In particular, the FCC adopted the *Waiver Order* in a wholly *ex parte* manner and did not provide any notice that it was considering taking this action. The Commission even took the unusual step of adopting the *Waiver Order* outside any docketed proceeding. This procedural irregularity is particularly problematic for the agency because the FCC was taking public comment on these very issues in a pending rulemaking proceeding. *See* WT Docket No. 06-150. The Commission bypassed it own pending rulemaking and used a waiver proceeding to avoid public comment (and thereby attempt to avoid judicial review). Because the remedy for violation of the notice and comment requirement is automatic vacatur of the underlying decision, *see, e.g., MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1143 (D.C. Cir. 1995) ("Because the Commission's decision . . . was not preceded by adequate notice, we vacate that decision and remand the matter to the agency for such further proceedings as it may wish to conduct in compliance with the requirements of the APA."), it is in the interest of the Commission and all interested parties that the *Waiver Order* be withdrawn on reconsideration.

Indeed, the FCC's decision to adopt the *Waiver Order* in the dark is inconsistent with the notice and comment requirements embodied in the Administrative Procedure Act (the "APA"). The APA requires that the Commission provide notice and an opportunity for comment whenever the agency promulgates, amends, repeals, or rescinds an FCC rule, with certain limited exceptions. *See, e.g.*, 5 U.S.C. §§ 551, 553. And the FCC amends, repeals, or rescinds a rule whenever "a second rule repudiates or is irreconcilable with a prior legislative rule," "work[s] substantive changes in prior regulations," or "create[s] new law, rights, or duties." *SBC Inc. v. Fed. Commc'ns Comm'n*, 414 F.3d 486, 497 (3d Cir. 2005) (quoting *Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992); *Sprint Corp. v. Fed. Commc'ns Comm'n*, 315 F.3d 369, 374 (D.C. Cir. 2003); and *Fertilizer Inst. v. U.S. Envtl. Prot. Agency*, 935 F.2d 1303, 1307-1308 (D.C. Cir. 1991)) (internal quotation marks omitted).

Here, the Commission's *Waiver Order* altered the Commission's impermissible material relationship rule, 47 C.F.R. § 1.2110(b)(3)(iv)(A), in a manner that required prior notice and an opportunity for public comment because it amended, repealed, or rescinded the rule for the 700 MHz D-Block license within the meaning of applicable case law. Agency action with respect to an existing rule that "has a real and substantial effect on the rights of parties . . . [is] precisely the type of regulation[] for which Congress intended notice and opportunity to comment." *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1292 (D.D.C. 1973). Accordingly, the Commission was obligated to give notice and take public comment before changing the rules of the game as to DE status in the auction.

Moreover, it is well-settled that an "agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). However, the Commission did not support its *Waiver*

Order with substantial record evidence because the Commission never opened a record in this proceeding.[4]

III. THE COMMISSION DID NOT SATISFY THE WAIVER STANDARD CONTAINED IN SECTION 1.925 OF THE COMMISSION'S RULES.

The Commission's waiver of the impermissible material relationship rule for the D-Block licensee was not justified under Section 1.925 of the Commission's rules. The Commission may waive a rule under Section 1.925 if it finds that: (1) "The underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest"; or (2) "In view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."[5] Here, the waiver was not justified under either prong of the waiver standard.

To begin with, the Commission failed to demonstrate that the underlying purpose of the impermissible material relationship rule "would not be served or would be frustrated" by its application to the potential D-Block licensee. In fact, the Commission's waiver substantially *increases* the likelihood that the D-Block licensee will subvert the underlying purposes of the impermissible material relationship rule. When adopting the impermissible material relationship rule, the Commission explained that the public interest rationale behind the rule has two components. First, the rule is designed to "ensure that the recipient of [the FCC's] designated

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[4] Nor did the Commission adequately address the comments filed against any alteration of the DE requirements in WT Docket No. 06-150. Failure to address significant legal and policy arguments against agency action is also ground for vacatur and remand under the APA. *See, e.g., Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-3 (1983); *see also Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result, and respond to 'relevant' and 'significant' public comments.").

[5] 47 C.F.R. § 1.925.

entity benefits is an entity that uses its licenses to directly provide facilities based telecommunications services for the benefit of the public."[6] Second, the Commission found the rule necessary to ensure the independence of DE licensees because "certain agreements have the potential to significantly influence a designated entity licensee's decisions regarding its provision of service and, therefore, also, have the potential to be abused, absent the appropriate safeguards."[7]

Here, the Commission failed to explain how the waiver of the impermissible material relationship safeguard was consistent with the underlying purposes of the DE rules and in the public interest,[8] particularly given Frontline's ownership.[9]

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[6] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order, WT Docket No. 05-211, FCC 06-52, ¶ 26 (2006) ("*DE Second Report and Order*").

[7] *Id.*, ¶ 22.

[8] Additionally, the Commission failed to justify its waiver on the grounds that application of the impermissible material relationship rule to the D-Block licensee would be inequitable or unduly burdensome. The Commission has required that AWS DE licensees adhere to the rule. Additionally, the Commission has made clear that the waiver does not extend to other 700 MHz spectrum blocks. Therefore, if anything, the *Waiver Order* creates inequity and unfairness among service providers because a D-Block DE licensee will hold a far broader power to sell wholesale services than other 700 MHz and AWS DE licensees.

[9] Frontline principals Ram Shriram and John Doerr are billionaires appearing on the Forbes 400 list of the wealthiest individuals in America. In 2007, Forbes magazine estimated Mr. Shriram's net worth at $1,800,000,000. *See* FORBES ONLINE, *available at* http://www.forbes.com/lists/2007/54/richlist07_Kavitark-Shriram_PED7.html. Forbes also estimated Mr. Doerr's net worth in 2007 at $1,000,000,000. *See* FORBES ONLINE, *available at* http://www.forbes.com/lists/2007/10/07billionaires_L-John-Doerr_2946.html. In addition, Frontline backer James Barksdale reportedly made $700,000,000 from the $10.2 billion sale of Netscape to AOL. *See* "Jim Barksdale, Internet Angel," BUSINESSWEEK ONLINE (1999), *available at* http://www.businessweek.com/1999/99_19/b3628103.htm. Additionally, Haynes Griffin, the CEO of Frontline, reportedly made more than $30,000,000 from his sale of Vanguard Cellular to AT&T. *See* Justin Catanoso, "Ex-Vanguard Exec Backs Local Web Firm," THE BUSINESS JOURNAL, *available at* http://www.bizjournals.com/triad/stories/1999/12/20/tidbits.html.

IV. CONCLUSION

For the foregoing reasons, the Commission should rescind the *Waiver Order* and re-institute the impermissible material relationship rule with respect to the 700 MHz commercial D-Block licensee.

Respectfully submitted,

VERIZON WIRELESS

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Dated: December 3, 2007

CERTIFICATE OF SERVICE

I, Steven Merlis, do hereby certify that on this 3rd day of December 2007, I caused copies of the foregoing "Petition for Reconsideration" to be delivered to the following via First Class U.S. mail.

Jonathan D. Blake
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1201 Pennsylvania Ave., NW
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Attachment 3

termination of an alien's grant of voluntary departure upon the filing of a motion to reopen was permissible. Therefore, it follows that the automatic termination of an alien's grant of voluntary departure upon the filing of a petition for review, and conditioning the grant of voluntary departure upon the alien's foregoing that right, is similarly unobjectionable.[6]

Furthermore, under 8 C.F.R. § 1240.26(i), an alien does not necessarily lose her right to file a petition for review. If she voluntarily departs within 30 days of filing a petition for review and provides evidence that she remains outside of the United States, she will not be deemed to have departed under an order of removal,[7] and can thus pursue her petition for review.

For the foregoing reasons, we will DISMISS Patel's petition for review for lack of jurisdiction, and DENY her motion for a stay of voluntary departure in light of 8 C.F.R. § 1240.26(i).

tion of the voluntary departure period.'" *Dada*, 128 S.Ct. at 2318. Section 1240.26 thus eliminates one of the *Dada* Court's primary concerns, *i.e.* that an alien who fails to timely depart in order to pursue a motion to reopen would be subject to penalties. By automatically terminating a grant of voluntary departure upon the filing of a motion to reopen or a petition for review, the regulation at issue protects an alien from penalties for failure to depart within the allotted time period.

6. The right to file a petition for review and the right to file a motion to reopen are both provided by statute. 8 U.S.C. § 1252; 8 U.S.C. § 1229a(c)(7).

We previously noted, in dicta, that 8 C.F.R. § 1240.26(i) clarifies:

> that the filing of a petition for review automatically *terminates* the grant of voluntary departure. The new regulation thus reinforces the nature of voluntary departure as an 'agreed-upon exchange of benefits,' and stresses the *choice* an alien must make between the benefits of voluntary departure, with its concomitant obligation to depart promptly, on one hand, or pursuing litigation without agreeing to depart promptly, on the other.

Sandie v. Att'y Gen., 562 F.3d 246, 252 n. 5 (3d Cir.2009).

7. "[A]n alien granted the privilege of voluntary departure under 8 C.F.R. 1240.26(c) will not be deemed to have departed under an order of removal if the alien departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States." 8 C.F.R. § 1240.26(i).

COUNCIL TREE COMMUNICATIONS, INC.; Bethel Native Corporation; The Minority Media and Telecommunications Council, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION; United States of America, Respondents

CTIA–Wireless Association and T–Mobile USA, Inc., Intervenor Respondents (Per Clerk Order of 4/28/08).

Cellco Partnership d/b/a Verizon Wireless, Intervenor Respondent (Per Court Order of 6/30/08).

No. 08–2036.

United States Court of Appeals, Third Circuit.

Argued Dec. 1, 2009.

Filed: Aug. 24, 2010.

Background: Small wireless telephone service provider, trade group representing

minority-owned telecommunications companies, and investor filed petition for review of orders of the Federal Communications Commission (FCC) modifying rules governing participation of small wireless telephone service providers in auctions of electromagnetic spectrum.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

(1) rule requiring designated entity (DE) to add lessee's or purchaser's revenues to its own to determining its continued eligibility for DE credits if it leased or resold more than 25% of its spectrum capacity to any single lessee or purchaser was not arbitrary and capricious;

(2) rule making DEs ineligible for bidding credits if they leased or resold more than 50% of their spectrum capacity did not comply with notice-and-comment requirements;

(3) rule extending from five to ten years period during which licensee had to repay its bidding credits if it lost its DE status did not comply with notice-and-comment requirements; and

(4) proper remedy was vacatur and remand.

Petition granted in part and denied in part.

1. Administrative Law and Procedure ⇐394

Administrative Procedure Act's (APA) notice requirements are designed: (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties opportunity to develop evidence in record to support their objections to rule and thereby enhance quality of judicial review. 5 U.S.C.A. § 553(b)(3).

2. Administrative Law and Procedure ⇐395

While agency may promulgate final rules that differ from proposed rule, final rule is logical outgrowth of proposed rule only if interested parties should have anticipated that change was possible, and thus reasonably should have filed their comments on subject during notice-and-comment period. 5 U.S.C.A. § 553.

3. Administrative Law and Procedure ⇐760, 763

In situations where agency has engaged in line-drawing determinations, judicial review is necessarily deferential to agency expertise, but agency's actions must still not be patently unreasonable or run counter to evidence before agency. 5 U.S.C.A. § 706(2).

4. Telecommunications ⇐1129

Federal Communications Commission's (FCC) enactment of rule providing that, if designated entity (DE) eligible for bidding credits in auctions of electromagnetic spectrum leased or resold more than 25% of its spectrum capacity to any single lessee or purchaser, it had to add that lessee's or purchaser's revenues to its own to determine its continued eligibility for DE credits complied with Administrative Procedure Act's (APA) notice-and-comment requirements, even though rule focused not on related entity's size, but rather on combined size of the DE itself and related entity, where further notice of proposed rulemaking (FNPR) explicitly sought comment on whether FCC's definition of restricted "material relationships" should include spectrum leasing arrangements, asked whether other relationships ought to be considered, and solicited comment on how large entity had to be before its relationships with DEs became problematic. 5 U.S.C.A. § 553; 47 C.F.R. § 1.2110(b)(1)(i), (b)(3)(iv)(B).

5. Telecommunications ⇐1090, 1132

Federal Communications Commission (FCC) rule providing that, if designated entity (DE) eligible for bidding credits in auctions of electromagnetic spectrum leased or resold more than 25% of its spectrum capacity to any single lessee or purchaser, it had to add that lessee's or purchaser's revenues to its own to determine its continued eligibility for DE credits was not arbitrary and capricious, even though FCC made few factual findings on impact of new rules on DE financing, where record reflected FCC's cognizance of capitalization issue, FCC solicited comments from DE and investment communities with respect to effects of rule change on DEs' capitalization, and FCC based its decision on its "experience in administering the designated entity program." 47 C.F.R. § 1.2110(b)(1)(i), (b)(3)(iv)(B).

6. Telecommunications ⇐1129

Federal Communications Commission's (FCC) enactment of rule making designated entities (DEs) ineligible for bidding credits in auctions of electromagnetic spectrum if they leased or resold more than 50% of their spectrum capacity did not comply with Administrative Procedure Act's (APA) notice-and-comment requirements, where 50% rule was not mentioned in further notice of proposed rulemaking (FNPR) and could not be regarded as logical outgrowth of concerns addressed therein, even though FCC had thoroughly addressed issue three years earlier. 5 U.S.C.A. § 553; 47 C.F.R. § 1.2110(b)(3)(iv)(A).

7. Telecommunications ⇐1129

Federal Communications Commission's (FCC) enactment of rule amendment extending from five to ten years period during which licensee had to repay its bidding credits if it lost its status as designated entity (DE) eligible for bidding credits in auctions of electromagnetic spectrum did not comply with Administrative Procedure Act's (APA) notice-and-comment requirements, even though FCC solicited comment on length of bidding-credit repayment schedule attached to any new DE qualifications in further notice of proposed rulemaking (FNPR), and repayment schedule had previously always been uniform across all DE qualifications, where FNPR did not indicate that FCC was considering changing repayment terms attached to then-existing DE qualifications, and no commenter manifested understanding that FCC was considering changing existing repayment schedule. 5 U.S.C.A. § 553; 47 C.F.R. § 1.2111(d)(2)(i).

8. Telecommunications ⇐1144

Proper remedy for Federal Communications Commission's (FCC) failure to comply with Administrative Procedure Act's (APA) notice-and-comment requirements before adopting regulations making designated entities (DEs) ineligible for bidding credits in auctions of electromagnetic spectrum if they leased or resold more than 50% of their spectrum capacity and extending from five to ten years period during which licensee had to repay its bidding credits if it lost its DE status was vacatur and remand to FCC, rather than remand without vacatur or nullification of auctions conducted while rules were in effect, where deficiencies in challenged rulemaking were serious, but nullification would involve unwinding of billions of dollars of transactions and cause massive uncertainty. 5 U.S.C.A. § 553; 47 C.F.R. §§ 1.2110(b)(3)(iv)(A), 1.2111(d)(2)(i).

West Codenotes

Held Invalid

47 C.F.R. §§ 1.2110(b)(3)(iv)(A), 1.2111(d)(2)(i)

Dennis P. Corbett (Argued), S. Jenell Trigg, Lerman Senter PLLC, Washington, DC, for Petitioners.

Robert B. Nicholson, Robert J. Wiggers, United States Department of Justice, Appellate Section, Washington, DC, for Respondents USA.

Joseph R. Palmore (Argued), Laurence N. Bourne, Federal Communications Commission, Office of General Counsel, Washington, DC, for Respondents FCC.

Ian H. Gershengorn, Elaine J. Goldenberg, Jenner & Block, Washington, DC, for Intervenor CTIA Wireless Assn.

Andrew G. McBride, Wiley Rein, Washington, DC, for Intervenor Cellco Partnership.

Jonathan E. Nuechterlein (Argued), Wilmer Cutler Pickering Hale & Dorr, Washington, DC, for Intervenor T Mobile USA.

Thomas Gutierrez Lukas, Nace, Gutierrez & Sachs, McLean, VA, Carl N. Northrop, Carson H. Sullivan, Paul, Hastings, Janofsky & Walker, Washington, DC, for Proposed Amicus Respondents.

Eric L. Bernthal, Latham & Watkins, Carl N. Northrop Paul, Hastings, Janofsky & Walker, Washington, DC, for Proposed Intervenor Respondent.

Jeneba J. Ghatt, The Ghatt Law Group, LLC, Chevy Chase, MD, for Amicus Petitioners.

Before: FISHER, HARDIMAN and STAPLETON, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

This dispute comes to us for the fourth time. At issue is a challenge to some of the rules that governed the participation of small wireless telephone service providers in auctions of electromagnetic spectrum conducted by the Federal Communications Commission (FCC or the Commission).

The FCC is authorized to grant licenses for the use of bands of the electromagnetic spectrum and has done so chiefly through auctions for defined geographic markets. Because the law requires the FCC to promote the participation of small businesses in the use of the spectrum, it has defined a class of designated entities (DEs) which are eligible for bidding credits. These credits are added to the dollar amount of the DEs' bids, to make it easier for them to win spectrum licenses at auction.

The petitioners here are (1) Council Tree Communications, an investor in DEs; (2) Bethel Native Corporation, a small wireless carrier based in Alaska whose stock is owned by Alaskan natives; and (3) the Minority Media and Telecommunications Council (MMTC), a trade group representing minority-owned telecom companies. Petitioners seek review of multiple orders in an FCC rulemaking entitled *In re Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, in which the FCC changed the qualifications for DE status as well as the restitution that must be made by a licensee that loses DE status after taking advantage of bidding credits. Petitioners claim that these rules (1) were enacted without the notice and opportunity for comment required by the Administrative Procedure Act (APA), and (2) are arbitrary and capricious, in violation of the APA. Petitioners ask us to rescind the results of approximately $33 billion worth of auctions held under the challenged rules, and to order the FCC to conduct new auctions under new rules.

I.

A. *Legal Background*

Although the FCC possesses broad authority to auction licenses to use portions

of the electromagnetic spectrum, it must promote "economic opportunity and competition ... by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." 47 U.S.C. § 309(j)(3)(B). The FCC must also "ensure that small businesses [and] rural telephone companies ... are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures." *Id.* § 309(j)(4)(D).

Consistent with these statutory mandates, in conducting spectrum auctions the FCC offers bidding credits that increase the bids of small entities, in an amount measured as a percentage of the entities' initial bids. After a DE submits its bid, this credit is added to the bid for purposes of determining the winner of the auction. If the DE wins the auction, however, it will be required to pay only the amount of its initial bid, not the amount that includes the credit. The credits are available as follows: (1) a 15% credit for entities averaging annual gross revenues of $40 million or less over the last three years; (2) a 25% credit for entities averaging annual gross revenues of $15 million or less over the last three years; and (3) a 35% credit for entities averaging $3 million or less in average revenues over the last three years. 47 C.F.R. § 1.2110(f)(2)(i) to (iii). Although the FCC defines the term "designated entities" to mean "small businesses" generally, *see id.* § 1.2110(a), the term is relevant here only insofar as it refers to bidders who qualify for these credits.

The bidding-credit system could be abused by small companies willing to immediately monetize their bidding credits by selling their spectrum licenses at market prices, or by large companies taking advantage of credits through affiliates or puppet corporations that technically qualify as DEs. To prevent this, the FCC is required to seek the "avoidance of unjust enrichment through the methods employed to award" spectrum licenses, 47 U.S.C. § 309(j)(3)(c), and to establish "such ... antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." *Id.* § 309(j)(4)(E). In the rulemaking at issue here, the FCC adopted three regulations of this type.

First, to prevent subsidiaries or affiliates of large businesses from qualifying for DE credits, 47 C.F.R. § 1.2110(b)(1)(i) provides that:

> [t]he gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business[.]

Insofar as it applies to an applicant's affiliates and controlling interests, and the affiliates of an applicant's controlling interests, this revenue attribution rule is long-standing and is not contested here. Instead, in the challenged rulemaking the FCC imposed revenue attribution for "entities with which [the applicant or licensee] has an attributable material relationship," and defined the phrase "attributable material relationship." That definition appears in 47 C.F.R. § 1.2110(b)(3)(iv)(B) and states:

> [a]n applicant or licensee has an attributable material relationship when it has one or more arrangements with any individual entity for the lease or resale

> (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

The second challenged regulation is 47 C.F.R. § 1.2110(b)(3)(iv)(A), which was promulgated for the first time in the rulemaking at issue here and provides:

> [a]n applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

Thus, unlike an "attributable material relationship," a business that has an *impermissible* material relationship is *ipso facto* disqualified from receiving bidding credits.

Third, the FCC has recognized that unjust enrichment will occur if recipients of bidding credits are permitted to promptly sell their spectrum rights to non-DEs at a premium, or to ally themselves with large entities in such a way as to lose their DE status. To prevent this, 47 C.F.R. § 1.2111(d)(1) states:

> [a] licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest ... as a condition of Commission approval of the assignment or transfer.... If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change or to enter into a material relationship (see § 1.2110) that would result in the licensee losing eligibility for a bidding credit ... the amount of the bidding credit ... plus interest ... must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer....

If a DE licensee takes action that does not render it wholly ineligible for a bidding credit, but leaves it eligible only for a smaller credit than the one it used to acquire a license, the difference in value between the two credits must be repaid. *Id.*

This repayment obligation existed before the rulemaking challenged by Petitioners here. At issue in this petition is the length of time after a DE wins a license using a bidding credit that it is subject to the repayment requirement. Although the most effective method to prevent misuse of bidding credits would be to require that a DE winning a license with such credits both maintain its DE status and hold the license until it expired, it appears that the FCC has long applied a more lenient rule in order to permit DEs to participate in the secondary market for spectrum rights, and to allow DEs to attract investment capital that might be hard to obtain if there were no way for DEs to liquidate such a valuable asset. Accordingly, FCC regulations provide for a reduction in the repayment amount if the DE's offending action does not occur until an appreciable time after it won the license. In the rulemaking at issue here, the FCC extended the time period over which the repayment obligation applies. Before the rulemaking, 47 C.F.R. § 1.2111(d)(2)(i) provided that the required repayment dropped to 75% of the bidding

credit value for license transfers or losses of DE status occurring up to two years after the auction, 50% of the credit for those occurring during the third year after the auction, 25% of the credit during the fourth year, and zero after five years. *Id.* (effective through June 6, 2006). The instant rulemaking amended § 1.2111(d)(2)(i) to require full repayment of the credit if eligibility is lost in the first five years after the auction, 75% repayment if eligibility is lost in the sixth or seventh year, 50% if eligibility is lost in the eighth or ninth year, 25% in the tenth year, and eliminated the penalty only after ten years.

B. *The Rulemaking Proceeding*

1. *The Further Notice of Proposed Rulemaking*

On February 3, 2006, the FCC issued a Further Notice of Proposed Rulemaking *In re Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 F.C.C.R. 1753 (2006) (hereinafter FNPR). The FNPR was a response to an *ex parte* letter from Council Tree Communications (Council Tree), the lead petitioner here. In the FNPR, the FCC agreed with Council Tree's view "that the Commission's current rules do not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses." *Id.* at 1759–60. Therefore, the FNPR sought "comment on the elements of a proposal raised by Council Tree ... that seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a 'material relationship' with a 'large in-region incumbent wireless service provider.'" *Id.* at 1754 (footnotes omitted). The FCC "tentatively conclude[d]" that such regulations were appropriate, *id.* at 1757, and "s[ought] comment on how [it] should define the elements of such a restriction," *id.* at 1755, as well as "on whether [it] should [also] restrict the award of designated entity benefits where an otherwise qualified designated entity has a 'material relationship' with a large entity that has a significant interest in communications services," *id.*

Throughout the FNPR, the FCC reiterated these requests for comments in similar or identical terms. *See id., passim.* It also solicited comments in more specific terms on possible variations on each of the elements proposed by Council Tree. With respect to the definition of "material relationship," the FCC inquired whether its then-current rules requiring attribution of the revenues of an applicant's controlling interests and affiliates were sufficient to prevent improper influence by large businesses over small bidders. *Id.* at 1760–61. The FCC asked whether those attribution rules, or any new definition of "material relationship," should vary according to whether they were applied to "large, in-region, incumbent wireless service providers" or "entit[ies] with significant interests in communications services." *Id.* at 1760. Of particular note here, the FCC

> s[ought] comment on what, if any, standard should be used to determine whether a spectrum leasing arrangement is a 'material relationship' for the purpose of any additional restriction on the availability of designated entity benefits that we might adopt. We also seek comment on whether other arrangements should be taken into account. If so, what arrangements should we consider?

Id. at 1761.

With respect to the definition of "large, in-region, incumbent wireless service provider," the FCC sought comment on how

much geographic overlap between the incumbent's and DE's service areas should be required for the "in-region" criterion to be met, *id.* at 1759, 1762, and whether gross revenues were the appropriate metric for determining whether the incumbent was "large," and, if so, what the proper cutoff would be. *Id.* at 1759, 1761–62. With respect to the phrase "entity with significant interests in communications services," the FCC inquired how "large" status should be determined, *id.* at 1761–62, whether an "in-region" geographical element should also apply, *id.* at 1762, and how broadly the phrase "significant interests in communications services" should be defined, and what kinds of entities it should encompass, *id.* at 1762–63.

The FNPR also sought comment

> on whether, if we adopt a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust enrichment rules such as those proposed by Council Tree, or in some other manner.... If we require reimbursement by licensees that, either through a change of 'material relationships' or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt, over what portion of the license term should such unjust enrichment provisions apply?

Id. at 1763. The FCC also explicitly requested comment on whether the proposed restrictions risked unduly limiting DEs' ability to raise capital. *Id.* at 1761.

Finally, the FCC confirmed in the FNPR that it expected "to complete this proceeding in time so that any modifications to our rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services ('AWS'), which currently is scheduled to begin June 29, 2006," which was less than four months after the release of the FNPR. *Id.* at 1755, 1763. This auction—known as "Auction 66"—was the largest spectrum auction in several years. To achieve this goal, the comment period on the FNPR ran for only 14 days after its publication in the Federal Register, and the reply comment period lasted only one week thereafter. *Id.* at 1753.

2. *Comments on the FNPR*

Despite the brief time frame, a number of comments on the FNPR were submitted. Most commenters supported some changes along the lines suggested by the FNPR. A representative comment in this regard came from the Department of Justice, which reported that it had

> found contractual or other arrangements between DEs and large wireless carriers that created such close ties between the two that the DEs could not be considered to be truly independent competitive actors; in some of these instances, the DE affiliated with a large wireless carrier had not launched commercial services to end-user customers or other wireless carriers but only provided roaming services to its large affiliate.

J.A. 1052–53. In light of this finding, the DOJ recommended that such a relationship disqualify the DE, but suggested that lower-level relationships, such as "arm's-length negotiated agreements for roaming or brand licensing and support," *id.* at 1054, would not necessarily be problematic. In sum, the DOJ maintained that "[a] relationship where the large enterprise dominates the DE is troubling as it suggests that the DE is not within the class of entities (i.e., small businesses) that the FCC's rules are designed to benefit." *Id.*

Several comments addressed the application of the proposed rules to spectrum leases by DEs to non-DEs. Council Tree agreed that the suspect class of arrange-

ments should include leasing arrangements, J.A. 439, arguing that such "agreements ... convey a level of influence over the operations of the designated entity that is inappropriate in the hands of a dominant national wireless service provider," *id.* at 439–40. The NTCH, Inc. proposed that DEs should be able to lease spectrum freely, so long as substantial portions of spectrum in the same geographic area remained in use by DEs. J.A. 663–64. Wirefree Partners argued against any further restrictions on leasing by DEs, J.A. 759–60, but Council Tree disagreed, J.A. 873–74.

Several commenters also argued that the proposed categories of "large, in-region, incumbent wireless service providers" or "large entities with significant interests in communications services" were too narrow. These commenters argued repeatedly that the statutory objective of assisting small businesses would be frustrated by a bidder's material relationship with a large business of *any* kind, regardless of whether the large business was involved in the communications industry. *See* Comments of CTIA—The Wireless Association, J.A. 510, 518 ("the *Notice* makes no attempt to justify a distinction between large incumbent carriers and any other class of non-attributable investor," such as AOL, Google, or Microsoft, but the problems arising from large investors' dominance of DEs "would presumably run to all potential investors, not just large carrier partners"); Comments of Dobson Comm'ns Corp., J.A. 526 (urging the FCC to apply any changes to "any large, well-funded investor with a strategic interest in the use of the spectrum"); Comments of T–Mobile USA, Inc., J.A. 697 ("[t]here does not appear to be a justification for permitting Microsoft or Wal–Mart to participate in a DE joint venture while precluding T–Mobile from doing so."); *see also* Comments of Verizon Wireless, J.A. 745; Comments of Wirefree Partners III, LLC, J.A. 760; Reply Comments of T–Mobile USA, Inc., J.A. 812; Reply Comments of Cingular Wireless LLC, J.A. 833–34.

3. *The Second Report and Order and Second Further Notice of Proposed Rulemaking*

After receipt of the aforementioned comments, on April 25, 2006, the FCC adopted and released its Second Report and Order and Second Further Notice of Proposed Rulemaking (Second R & O), 21 F.C.C.R. 4753 (2006).[1] Therein, the FCC stated its "particular intention ... to ensure that entities ineligible for designated entity incentives cannot circumvent our rules by obtaining those benefits indirectly, through their relationships with eligible entities." *Id.* at 4754. The FCC acknowledged that

> [t]he challenge for the Commission in carrying out Congress's plan has always been to find a reasonable balance between the competing goals of, first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses.

Id. at 4756 (footnote omitted). To this end, the FCC "agree[d] with commenters that certain agreements have the potential to significantly influence a designated entity licensee's decisions regarding its provision of service and, therefore, also have the potential to be abused, absent the appropriate safeguards." *Id.* at 4762. In an

1. The first Report and Order is not directly relevant here.

attempt to create such safeguards, and as we described herein, the Second R & O established revenue attribution for "attributable material relationships," defined as the lease of more than 25% of the DE's spectrum capacity by any single lessee, and mandated the loss of DE status by any licensee that acquires an "impermissible material relationship," by leasing an aggregate of more than 50% of its spectrum capacity. *Id.* at 4763–64.

Notably, neither the 25% rule nor the 50% rule applied only to relationships with large entities. This, said the Second R & O, was because the FCC had

> conclude[d] that certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent. In this regard, where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress.

Id. at 4762.

The legislative intent referenced is that behind 47 U.S.C. § 309(j)(4)(c), the authorization for the FCC's promulgation of antitrafficking and anti-unjust enrichment provisions. The House of Representatives Budget Committee's report on this provision explicitly contemplated its use in connection with the promotion of small-business licenses, and stated that "[t]he Committee anticipates that the Commission will use this authority to deter speculation and participation in the licensing process by those who have no intention of offering service to the public." H.R.Rep. No. 103–111, at 257–58, *reprinted in* 1993 U.S.C.C.A.N. 378, 584–85. The Second R & O reiterated its reliance on this congressional intent several times. 21 F.C.C.R. at 4755, 4760, 4762–64, 4766.

The Second R & O also extended the bidding-credit-repayment schedule to 10 years. The extended obligation applies "if a designated entity loses its eligibility for a bidding credit for any reason, including but not limited to[ ] entering into an 'impermissible material relationship' or an 'attributable material relationship.'" *Id.* at 4766. The FCC again stated that "[b]y extending the unjust enrichment period to ten years, we increase the probability that the designated entity will develop to be a competitive facilities-based service provider." *Id.*

The Second R & O also included a Second Further Notice of Proposed Rulemaking, which sought additional comment on the elements of Council Tree's initial proposal, namely, whether the FCC should impose further restrictions on grants of DE status to applicants having other sorts of "material relationships" with large in-region incumbent wireless providers. *Id.* at 4773–74 (seeking comment on the definition of "large" and whether relationships with non-wireless businesses should also be regulated); 4776–78 (seeking comment on propriety and definition of "in-region" criterion); 4779–84 (same, on definition of "material relationship"). The FCC noted its "concern[ ] that additional types of relationships could ... allow[ ] an ineligible entity the ability to gain undue advantages in the communications marketplace through the benefits offered to a designated entity applicant," and asked, "[a]re the new rules we adopt today sufficient to safeguard against many of these concerns?" *Id.* at 4780.

The Commission further stated, however, that

> [w]e generally do not have the same concerns regarding relationships between designated entity applicants and those who do not have interests in spectrum capacity or the provision of service, such as financial institutions or venture capital firms, provided that such entities do not have a controlling interest relationship with the applicant.

Id. This, said the FCC, was because cross-industry investments did not present the investor an "opportunity for it to bundle existing communications services with a strategic wireless partner, and there is less potential for those entities to exert undue influence over a designated entity licensee's decision making regarding its service provision or the use of its licensed spectrum." *Id.*

4. *Response to the Second R & O*

The new rules promulgated in the Second R & O provoked criticism from some DEs and their investors. Several petitions for reconsideration were filed with the FCC, including one by the Petitioners here. Two of Petitioners' arguments for reconsideration before the FCC are relevant here. First, Petitioners maintained that "[n]one of the new rules is limited to arrangements involving large, in-region incumbent wireless service providers as contemplated in the *Further Notice of Proposed Rule Making.*" Pet. for Exp. Reconsid'n, J.A. 1281. Second, Petitioners argued that the 10-year credit-repayment schedule "eviscerat[es] a designated entity's access to capital because lenders and investors who are being asked to back untested new entrants want to see that the designated entity has a clear path to exit if the business is not succeeding," *id.* at 1281–82, and that the FCC had failed to take this into account in setting the new rules.

Both of Petitioners' objections were supported by the views of a number of other commenters, most of whom contacted the FCC for the first time in response to the Second R & O. Catalyst Investors, LLC, which had provided capital for several DEs in the past and was planning to do so in connection with Auction 66, stated:

> both the equity and the debt markets will not be comfortable with the '10 Year Hold Rule,' as it is outside the normal hold periods for most sources of capital. Due to a lack of reasonable notice in the proceeding, the rule came as a surprise and was not the subject of any meaningful public input. Had such input been received, we strongly believe the Commission would have realized that the 10 year period is just too long.

Id. at 1243; *cf. Ex Parte* Presentation of The Eezinet Corp., et al., S.J.A. 91 (same arguments, by a group of DE financiers and DEs); Notice of *Ex Parte* Presentation of Cook Inlet Region, Inc., J.A. 1437 (small carrier allied with T-Mobile commenting that "[n]o significant investor will be willing to risk its return on investment over a ten year horizon"); Letter from the Nat'l Telecomm'ns Coop. Ass'n, J.A. 1508–09 (industry group representing rural telecoms, complaining of a lack of public notice and the short time between the promulgation of the rules and Auction 66); *Ex Parte* Letter from Coral Wireless Licenses, LLC, et al., J.A. 1547–48 (another group of small businesses and their investors, commenting that "[a] business transaction where there is no clear path to liquidity for 10 years is a very unattractive investment for the financial institutions and venture capital firms that traditionally have supported wireless start-up ventures," and that they "did not understand from the *Further Notice* that changes of this nature were under consideration by the Commission or they would have commented on this issue"); Notice of Oral *Ex*

Parte Presentation of Doyon, Ltd., J.A. 1550 (investor in small telecoms commenting that "the new ten year unjust enrichment schedule ... makes it more difficult for designated entities to secure financing and find strategic partners because it is less likely that they can easily exit the business in the event of significant changes in the industry"); Letter from Royal Street Comm'ns, LLC, J.A. 1557 ("[A] transaction where there is no clear path to liquidity, without penalty, for 10 years is a very unattractive investment for the types of financial institutions and venture capital firms that traditionally have supported wireless start-up ventures.").

Royal Street Communications LLC, a DE engaged in wireless wholesaling, objected that the new rules impacted arrangements by DEs with other small entities, as well as large ones. Letter from Royal Street Comm'ns, LLC, J.A. 1557. Royal Street claimed the new rules placed restrictions on wireless wholesaling

> without affording ... DEs notice and the opportunity to comment.... [T]hese restrictions will also contribute to investor and financier reluctance to back wireless licenses that are effectively limited to a retail business model, a model decidedly more expensive and administratively burdensome. The Order's restrictions ignore the fact that wholesale services are a wireless product increasingly in demand ... which can add to the competitive options in the wireless marketplace.

Id. at 1558. The Rural Telecommunications Group., Inc., also contended that "[t]he new material relationship rules are overbroad and unduly restrictive," because, "current DE licensees will be unable to ... lease existing spectrum ... to another DE without becoming ineligible for DE benefits in the AWS auction." *Ex Parte* Letter from the Rural Telecomm'ns Group, Inc., J.A. 1542.

5. *The Order on Reconsideration of the Second R & O*

On June 2, 2006, the FCC released an *Order on Reconsideration of the Second Report and Order*, 21 F.C.C.R. 6703 (hereinafter the Order on Reconsideration).[2] Although it addressed the issues raised in Petitioners' petition for reconsideration, the Order on Reconsideration did not formally grant or deny the petition, but instead was raised by the FCC "on [its] own motion." *Id.* at 6703.

Defending the regulations against the charge that they would unduly restrict DEs to a retail-only business model, the FCC restated and clarified its position that active use of a spectrum license was required to maintain DE status:

> [s]ection 309(j)(4)(D) directs the Commission to issue regulations to 'ensure' that designated entities 'are given the opportunity to participate in the provision of spectrum-based services.' We believe that the word 'participate' in this directive contemplates significant involvement in the provision of services to the public, not merely passive ownership of a license to spectrum used by others to provide service.

Id. at 6705 n. 8 (internal citation omitted). In response to Petitioners' arguments that the material-relationship rules had not been properly noticed, the FCC noted that the FNPR had asked whether DE relationships with entities other than large in-region incumbents or entities with interests in communications services should be

2. Many of the comments just described were submitted after the Order on Reconsideration was released.

restricted as well. *Id.* at 6711. The FCC also noted that the FNPR had included an open-ended inquiry into what types of relationships should be regulated, and had specifically contemplated the inclusion of lease arrangements among those relationships. *Id.* The FCC concluded that the changes embodied in the final rulemaking were all contained in, or logical outgrowths of, the proposal in the FNPR. *Id.* at 6712.

With respect to the 10–year credit-repayment period, the FCC stated that its decision to apply the new schedule to the preexisting DE qualifications as well as the new ones was also within the scope of its original proposal. The Commission stated that "had we only revised the five-year unjust enrichment schedule for certain types of transactions but not for others, we would have risked creating an illogical scheme that would have created an incentive for designated entities to prioritize certain types of transactions over others." *Id.* at 6716. Turning to the contentions that the 10–year rule would cause DEs' funding to dry up, the FCC was

> not convinced that three to seven years is a reasonable timeframe for investors to expect to recover their capital investments in facilities to provide spectrum-based services. In a recently concluded proceeding addressing the leasing of Educational Broadcast Service spectrum, a broad cross-section of commenters, including a private equity investment firm, submitted evidence that insufficient capital would flow to businesses that want to develop that spectrum if the length of spectrum lease terms was limited to fifteen years. These parties argued that lessees needed access to the spectrum for thirty years or more in order to provide the necessary certainty to justify capital investment in the band. The Commission was 'persuaded by [this argument].'

Id. at 6717 (footnotes omitted). Finally, the FCC concluded that even if the new rules did hamper DE capitalization somewhat, this was an acceptable balancing of the statutory goals of encouraging DE participation on the one hand while ensuring that DEs provide "facilities-based service to the public." *Id.* at 6718.

C. *The First Petition for Review and the Mandamus Petition*

On June 7, 2006—two days before the Order on Reconsideration was published in the *Federal Register*—Petitioners filed their first petition in this Court for review of the Second R & O, the Order on Reconsideration, and the public notice that had announced the start dates for Auction 66, *Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006*, 21 F.C.C.R. 5598 (2006) (hereinafter the Public Notice). Petitioners moved for an emergency stay of Auction 66, which was denied by a motions panel of this Court on June 29, 2006. After briefing and argument on the merits, in September 2007 we held that we lacked jurisdiction to entertain the petition because it was incurably premature. *Council Tree Comm'ns v. FCC*, 503 F.3d 284, 293 (3d Cir.2007). We noted that by statute, petitions for judicial review of FCC actions can be filed only in the 60 days following "the entry of a final order." *Id.* at 287 (quoting 28 U.S.C. § 2344, citing 47 U.S.C. § 402(a)). We also noted that because the FCC had not formally disposed of Petitioners' motion for reconsideration of the Second R & O, that order was non-final and therefore the petition for its review was premature. *Id.* We further concluded that the Order on Reconsideration was "entered," within the meaning of the statute, only when it was published in the Federal Register, and that we had no jurisdiction to entertain a

petition filed *before* this publication. *Id.* at 291–93.

After we issued our opinion, Petitioners sought a writ of mandamus ordering the FCC to act on the petition for reconsideration, to facilitate jurisdiction in this Court. Although we declined to issue a writ of mandamus, on February 15, 2008 we directed the FCC to inform us when it would grant or deny the petition. On March 26, 2008 the FCC formally denied the petition in a brief Second Order on Reconsideration, noting that "we already decided the merits of the Petition in the *Order on Reconsideration*." 23 F.C.C.R. 5425, 5426. Within 60 days of that denial, on April 8, 2008, Petitioners filed this petition for review of the Second R & O, Order on Reconsideration, Second Order on Reconsideration, and the Public Notice.[3]

D. *The Results of Auctions 66 and 73*

While Petitioners' first petition for review was pending in 2006, the FCC conducted Auction 66 subject to the rules challenged here. The deadline for applications to bid fell on June 19, 2006; DEs accounted for 166 of 252 applications and 100 out of 168 qualified bidders permitted to participate. Bidding commenced on August 9, 2006, and the auction generated nearly $14 billion in winning bids. DEs were 57 of the 104 winning bidders, winning 20% of the individual licenses auctioned. Measured in terms of dollar value, however, DEs won only 4% of the spectrum licenses, although two DEs were among the top ten winners in terms of dollar amounts. By comparison, in auctions held prior to the new rules, DEs had won, on average, 70% of the licenses by dollar value.[4]

In late 2007 and early 2008, during and just after the pendency before the FCC of Petitioners' petition for reconsideration, the FCC held another, even larger spectrum auction, known as "Auction 73." Auction 73 generated about $19 billion in winning bids, and was also conducted under the rules challenged here. In Auction 73, DEs comprised 119 of 214 qualified bidders and 56 of 101 winners, and won 35% of the individual licenses. They won only 2.6% of the total dollar value of the licenses, however.

II.

Petitioners now petition for review of the Second R & O, the two reconsideration orders, and the Public Notice. Several interested parties, many of them winners at Auctions 66 and 73, have intervened or filed *amicus curiae* briefs in support of the FCC. We have jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).[5]

3. It does not appear that the FCC has formally acted on the petitions for reconsideration of the Second R & O that were filed by parties other than Petitioners. This is no barrier to our jurisdiction, however. In *Council Tree* we held only that "[a]n agency order is non-final as to an aggrieved party whose petition for reconsideration remains pending before the agency." 503 F.3d at 287. And indeed, "[i]t is well established ... that when two parties are adversely affected by an agency's action, one can petition for reconsideration before the agency at the same time that the other seeks judicial redetermination." *W. Penn Power Co. v. EPA*, 860 F.2d 581, 586 (3d Cir.1988) (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 541, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970)).

4. These data must be considered in light of the absence from Auctions 66 and 73 of the set-asides by which, in prior auctions, only DEs had been permitted to purchase certain spectrum blocks. Also, the purpose of the instant rulemaking from its inception was to disqualify sham DEs, which would be expected to reduce the number of qualifying DEs.

5. The FCC, along with its intervenors and *amici*, attacks our jurisdiction to review the Public Notice. Because this dispute bears on

Petitioners claim the new regulations are invalid for several reasons. First, they claim that because the new rules were not sufficiently foreshadowed by the FNPR, they were adopted without the public notice and opportunity for comment required by the Administrative Procedure Act.[6] Petitioners also argue that the new rules are arbitrary and capricious, because the FCC made no findings as to their impact on the ability of small businesses to procure financing, and because they ignore the viability of wholesaling as a facilities-based business model for DEs.[7] These challenges differ slightly with respect to the three provisions challenged here: (1) the 25% attribution rule, (2) the 50% impermissible-relationship rule, and (3) the 10-year credit-repayment schedule.

A. *Legal Standard: The Administrative Procedure Act*

1. *The Notice-and-Comment Requirement*

[1, 2] Under the APA, federal agencies must publish "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The APA further requires that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c). In interpreting these provisions, courts have held that if the substance of an agency's final rule strays too far from the description contained in the initial notice, the agency may have deprived interested persons of their statutory right to an opportunity to participate in the rulemaking. *E.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a logical outgrowth' of the rule proposed. The object, in short, is one of fair notice.") (quoting *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir.1986); citing *United Steelworkers, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir.1980) and *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir.1974)). The principles governing

the remedy for any defects in the rules under review, rather than on the validity of the rules themselves, we consider it after our analysis of the latter issue. *See infra*, Part III.

6. Petitioners also argue that the rulemaking violated the Regulatory Flexibility Act (RFA), as codified at 5 U.S.C. §§ 603-04. We need not address this theory of recovery further because, on the facts of this case, we regard it as duplicative of the APA notice-and-comment claim: to the extent that the FCC failed to give notice of the new rules for RFA purposes, it also gave inadequate notice for APA purposes, necessitating a remand on the latter basis alone. On remand, of course, the FCC must comply with all RFA requirements.

7. Petitioners make another subsidiary argument: they claim that the new rules present such obstacles to small businesses' participation in FCC auctions that they violate 47 U.S.C. § 309(j)(3)(B)'s requirement that the Commission "seek to promote" the objective of "economic opportunity and competition ... by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." But the statute also requires the FCC to promote the development and deployment of new technologies and services, *id.* § 309(j)(3)(A), recover a portion of the value of the spectrum and prevent unjust enrichment, *id.* § 309(j)(3)(c), and ensure "efficient and intensive use" of the spectrum, *id.* § 309(j)(3)(D). Given the general agreement that the DE program can be abused, as well as the continuing participation by DEs in auctions held under the new rules, we cannot conclude that the FCC has failed to promote small-business participation at all.

judicial review of notice-and-comment rulemaking are well established. As the Court of Appeals for the District of Columbia Circuit has put it:

> [n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. While an agency may promulgate final rules that differ from the proposed rule, a final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period[.] The 'logical outgrowth' doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would have had to divine the Agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule[.]

Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 407 F.3d 1250, 1259–60 (D.C.Cir.2005) (internal quotation marks, brackets, and citations omitted).

2. *The Arbitrary–and–Capricious Standard*

[3] Another portion of the APA, codified at 5 U.S.C. § 706(2), provides that on a petition for review of an agency action,

> the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

The Supreme Court has stated that

> [t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: [w]e may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks and citations omitted). In situations where "an agency has engaged in line-drawing determinations[,]

. . . our review is necessarily deferential to agency expertise," but the agency's actions must still "not be 'patently unreasonable' or run counter to the evidence before the agency." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir.2004) (citations omitted).

B. *Validity of the 25% Attribution Rule*

1. *Notice and Comment Compliance*

[4] With the foregoing legal principles in mind, we now consider the rulemaking at issue, beginning with the 25% attributable relationship rule. As noted previously, 47 C.F.R. § 1.2110(b)(1)(i) and (b)(3)(iv)(B) provide that, if a DE leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee's or purchaser's revenues to its own to determine its continued eligibility for DE credits. Petitioners claim this rule was not adequately noticed in the FNPR, because the FNPR was focused on avoiding domination of DEs by large communications companies, and made no mention of placing limits on all leases to any lessee. We disagree.

As we described previously, the FNPR explicitly sought comment on whether the FCC's definition of restricted "material relationships" should include spectrum leasing arrangements, and also asked whether other relationships should be considered. Moreover, the FNPR solicited comment on how large an entity must be before its relationships with DEs become problematic. In our view, by limiting the permissible combined size of a DE and entities to which it leases one-quarter or more of its spectrum, the final rule squarely addresses these concerns. It is true that, by adopting the attribution approach, the rule focuses not on the size of the related entity, but rather on the *combined* size of the DE itself and the related entity. But we regard this as a logical outgrowth of the original rule's focus on ensuring that the Commission's "small business provisions . . . be available only to bona fide small businesses." *FNPR*, 21 F.C.C.R. at 1757, 1767. Therefore, we find no defect of notice in the FCC's enactment of the 25% attribution rule.

2. *Arbitrary and Capricious Review*

Petitioners also argue that the 25% rule is arbitrary and capricious, because the FCC made no findings on the impact it would have on the ability of DEs to procure financing. According to Petitioners, the FCC could not have articulated a rational connection between the conclusion reached and the facts found, because it found no facts at all.

This question is a close one. Petitioners are correct that the FCC made few factual findings on the impact of the new rules on DE financing. The Commission did observe that "a growing number" of relationships required regulation in order to prevent unjust enrichment. *Second R & O*, 21 F.C.C.R. at 4762. It also relied on its "experience in administering the designated entity program" in determining that further rules were required. *Id.* at 4762, 4763. The Second R & O acknowledged the concerns of several commenters about the impact any new rules would have on their capitalization arrangements, *see id.* at 4761 & n. 65, but the only statement in the Second R & O even approaching a finding in this regard was a recital that the new rules would protect the ability of DEs to raise funds, *id.* at 4764 ("we . . . ensure that [DEs will retain] flexibility to engage in agreements that are intended to provide [them] with access to valuable capital").

On the other hand, the record reflects the FCC's cognizance of the capitalization issue, and that it engaged in a line-drawing

exercise in an attempt to prevent unjust enrichment without unduly impairing DEs' capital access. In the FNPR, the FCC explicitly "recognize[d] that we must strike a delicate balance between encouraging the participation of [genuinely] small businesses ... and ensuring that those small businesses who do participate ... have sufficient capital and flexibility," *FNPR*, 21 F.C.C.R. at 1757, and solicited comment on this issue, *id.* at 1767.

Moreover, although the FCC solicited comments from the DE and investment communities with respect to the effects of a rule change on DEs' capitalization, this sort of prediction is inherently speculative. In this regard, we find this case similar to *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978) (hereinafter *NCCB*). In *NCCB*, the Supreme Court reviewed an FCC rule prohibiting common ownership of newspapers and TV stations where only one of each existed in the relevant geographic market. *Id.* at 796–97, 98 S.Ct. 2096. Although the Court found it "inconclusive" whether the rule would actually achieve its stated goal of increasing the diversity of broadcast programming, *id.*, it declared that "[i]n these circumstances, the Commission was entitled to rely on its judgment, based on experience, that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." *Id.* at 797, 98 S.Ct. 2096 (internal quotation marks and citation omitted).

Also at issue in *NCCB* was the FCC's decision not to give the new rules retroactive application with respect to some markets. This was based on the FCC's concern that retroactive application might result in a loss of local ownership of some broadcast stations, require the replacement of incumbent station owners who had performed exceptionally well, or force existing owners to sell their stations at a loss and thus discourage future investment in quality programming. *Id.* at 813, 98 S.Ct. 2096. The Court of Appeals found this decision arbitrary, because the record did not indicate the extent to which these problems would actually arise if the divestiture requirement were applied across the board. The Supreme Court reversed, explaining that

> to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature—*e.g.*, whether a divestiture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing cross-owners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming. In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.

Id. (internal quotation marks and citation omitted).

[5] Like in *NCCB*, here the FCC's attempts at factfinding relevant to the impact of its proposed rules on DE financing were thin, perhaps because of its haste in promulgating rules before Auction 66. As a result, the Commission's consideration of the matter is neither as clear nor as thor-

ough as would be ideal. Nonetheless, in light of the great deference to agency experience that we owe "where the issues involve 'elusive' and 'not easily defined' areas" such as this, *Prometheus Radio Project*, 373 F.3d. at 390 (quoting *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C.Cir.2002)), we conclude that the FCC offered enough consideration of DE capitalization to pass the arbitrary and capricious threshold with respect to the 25% attribution rule.

For these reasons, we will deny the petition insofar as it challenges the 25% attribution rule, and uphold the validity of 47 C.F.R. § 1.2110(b)(1)(i) and (b)(3)(iv)(B).

C. *The 50% Impermissible-Relationship Rule*

1. *Notice and Comment Compliance*

We next consider 47 C.F.R. § 1.2110(b)(3)(iv)(A), which makes license applicants or holders ineligible for DE benefits if they lease or resell (including at wholesale) more than 50% of their spectrum capacity. Aside from the difference in percentages, this rule diverges from the 25% attribution rule in two crucial ways. First, the 50% impermissible-relationship rule considers the *aggregate* portion of spectrum capacity that a licensee has leased or resold, rather than the portion of capacity leased to an individual lessee as does the 25% rule. Second, the 50% rule is a *per se* disqualification from DE status, rather than a mere attribution requirement. These two characteristics are the essential elements of the rule.

[6] The aggregation element of the 50% rule was not mentioned in the FNPR, nor, in our view, can it be regarded as a logical outgrowth of the concerns addressed therein. The FNPR was focused on ensuring that a DE remains a genuinely small business, rather than a front entity controlled or heavily influenced by a large entity that is not eligible for bidding credits. As we noted, the 25% attribution rule addresses this concern directly by limiting the allowable combined size of groups of related license holders or users which include DEs. By contrast, because the 50% rule involves aggregation of all of a DE's lease or resale agreements, it would deny DE status to a small company that leases or resells 5.1% of its spectrum capacity to each of ten other companies, regardless of how small those lessees or buyers, or all of them combined, might be. It is true, of course, that this aggregation rule also strips DE status from small businesses that lease or resell almost all of their spectrum to several large carriers, in chunks of just under 25%. But we find no basis in the record to conclude that either type of arrangement would threaten to give any single large buyer or lessee—or DE-buyer-lessee grouping—undue influence over a DE in the manner the FNPR sought to address. Instead, DEs that run afoul of the 50% rule may often employ a business model relying on a large number of relatively small-scale transactions with a group of third parties who compete against each other in the wireless services market. We regard this as exactly of the kind of DE independence that the FNPR was concerned with preserving, and the record contains no indication to the contrary.

Indeed, as we described above, the Second Report and Order makes clear that the FCC's real concern in promulgating the 50% impermissible-relationship rule was not to prevent DEs from being unduly influenced by large entities or groups of entities, but rather was to ensure that DEs are primarily engaged in offering wireless services to the public. But the FNPR had not so much as hinted that this was the objective of the rulemaking: it mentioned "service to the public" only twice, both

times in the course of describing the FCC's obligation to ensure that DEs have access to capital to help them provide such service. *See FNPR*, 21 F.C.C.R. 1753 at 1757, 1767. Instead, as we have explained, the FNPR was focused on maintaining the independence of DEs from larger entities.

We also find it instructive that the FCC had previously solicited broader comment on the permissibility of leasing arrangements involving DEs, and in much more specific terms than it did here. In 2003 the FCC issued a Report and Order and Further Notice of Proposed Rulemaking in *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 F.C.C.R. 20,604 (October 6, 2003), in which it significantly relaxed previous restrictions—which had applied to DEs and non-DEs alike—on the leasing or reselling of spectrum licenses. In promulgating this change, the FCC stated it had "sought to ensure that its approach would not invite circumvention of the underlying purposes of these designated entity-related policies and rules," *id.* at 20,627, and summarized the extensive comments it had received directly addressing both sides of the issue, *id.* at 20,629, before concluding that

> [a] designated entity and/or entrepreneur licensee may lease to any spectrum lessee and avoid the application of our unjust enrichment rules and/or transfer restrictions so long as the lease does not result in the lessee becoming a 'controlling interest' or affiliate that would cause the licensee to lose its designated entity or entrepreneur status.

Id. at 20,654–55. The Commission also sought comment on possible further rulemaking, asking:

> [s]hould we require a lessee to be eligible for the same level of competitive bidding benefits, such as bidding credits, as the licensee from which it is leasing? Should we require only that the lessee be qualified to hold the license? If so, do we impose unjust enrichment obligations on a lessee that is qualified for a lesser level of competitive bidding benefits?

Id. at 20,698. In the final rule that emerged from this additional process, the FCC reiterated that DEs were free to lease their spectrum so long as they met the requirements applicable to all licensees. Second Report and Order *In re Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, 19 F.C.C.R. 17,503, 17,543–44 (2004) ("[W]e will ... amend the language of our rules to clarify that, subject to the other eligibility restrictions ... a designated entity or entrepreneur licensee may enter into a spectrum manager leasing arrangement with any spectrum lessee, regardless of the lessee's eligibility for designated entity or entrepreneur benefits.").

The contrast could not be more stark between the transparent discussion of DE leasing rights from 2003–04 on the one hand, and the run up to the rules promulgated in 2006 by the Second R & O on the other. The FNPR here gave no indication that the FCC intended to revisit an issue it had thoroughly addressed only three years before. Commenters could not reasonably have anticipated that, in inquiring in the FNPR whether leasing arrangements between DEs and large wireless carriers impaired the DEs' bona fide small business status, the FCC was proposing to revise the general limits on DEs' ability to lease their spectrum to anyone at all. Even if this *was* the FCC's intent, "an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C.Cir. 1991). Accordingly, we hold that the 50%

impermissible-relationship rule, as codified at 47 C.F.R. § 1.2110(b)(3)(iv)(A), was promulgated without the notice and comment required by the APA.[8]

D. *The Ten Year Repayment Schedule*

1. *Notice and Comment Compliance*

We last turn to Petitioners' challenges to the changes to 47 C.F.R. § 1.2111(d)(2)(i) that extended from five to ten years the period during which a licensee must repay its bidding credits, in whole or in part, if it loses its DE status. The FNPR plainly offered notice that the FCC was trying to determine the proper length of the repayment period attached to any *new* DE qualifications that it might adopt. Petitioners argue, however, that the FNPR did not indicate that the FCC was considering changing the repayment terms attached to then-existing DE qualifications. As we noted previously, much of the protest that greeted the new rules was directed toward this extension of the repayment term, and the alleged lack of notice of this change.

[7] The FCC responds by noting that it has never attached differing bidding-credit repayment schedules to different qualifications for DE status, because this would permit DEs looking to enter into suspect relationships to structure their arrangements to minimize the penalty involved. Thus, the Commission maintains that by soliciting comment on the repayment period attached to new regulations in the FNPR, it implicitly proposed changing the corresponding period for existing rules. We disagree.

Noting our decision in *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir.1972), Petitioners argue persuasively that this sort of implied notice is insufficient unless all interested persons would reasonably be expected to perceive the implication. In *Wagner*, the National Highway Traffic Safety Administration (NHTSA) had published a notice of proposed rulemaking in which it proposed to eliminate the permissible failure rate for automobile turn signals and warning flashers. The effect of this change would have been to require that 100% of those products meet the NHTSA's standards for regularity of flashing, durability, and other features. After comments, however, the NHTSA concluded that 100% compliance with its current regulations was technologically infeasible. In the final rule, it nevertheless enacted the 100% compliance requirement, but dealt with the infeasibility problem by significantly relaxing the substance of the

8. Because we find the notice invalid under the APA, we do not reach the question of whether the rule was arbitrary or capricious. Nevertheless, we note the Commission's inattention to the nature of the wireless wholesaling business. Both the 25% and 50% rules apply to wholesaling of wireless services by DEs. The record discloses that to engage in wireless wholesaling, a licensee must do considerably more than obtain and then lease or resell the spectrum license itself. Instead, the wholesaler must build and operate the physical facilities required to transmit and receive wireless signals, and to transfer those signals to or from other networks or end users. It is *this* service that is sold at wholesale. This raises a separate set of questions and concerns from those raised when a DE merely monetizes its credits or partners with a large carrier, thus rendering the DE's separate existence a mere formality.

Given the extensive provision of services entailed in wireless wholesaling, it is not at all obvious that the FCC's rationale for the 50% impermissible-relationship rule—ensuring that DEs offer service to the public, rather than simply handing their spectrum over to larger carriers—should necessarily require prohibiting DEs from engaging primarily in the wholesale business, so long as they do not sell or lease overly large quantities of their capacity to any single lessee or buyer. The FCC appears to have failed to even acknowledge this issue. We commend it to the Commission's attention on remand.

standards. On review, faced with the argument that its notice of proposed rulemaking had not presaged this change, the NHTSA argued that relaxing the substantive standards was a logical means of increasing the compliance rate, and noted that some of the commenters had actually suggested as much. *Id.* at 1018–19. We rejected this argument, holding that even if some sophisticated observers would have seen the connection between the stricter compliance that had been noticed and the lower standards eventually announced, the proper question under the APA was whether the agency had provided notice to all "interested parties." *Id.* at 1019. We held that the inferential notice purportedly provided by the NHTSA did not satisfy that standard. *Id.* at 1020–21.

Here, the FNPR solicited comment on the length of the bidding-credit repayment schedule attached to any *new* DE qualifications. From this—and from the fact that the repayment schedule had previously always been uniform across all DE qualifications—the FCC argues that interested parties should have inferred that the repayment schedule for all qualifications was under review. As in *Wagner*, this purported inferential notice was insufficient to satisfy the APA.

Even if the kind of inferential notice the FCC advances were sufficient under the APA, we do not find the FNPR to provide such notice. Nothing in the record forecloses the commonsense conclusion that because some violations of DE status are more serious than others, it would make sense to attach more stringent penalties to them, including more severe bidding-credit repayment requirements. Thus, far from communicating the need for an across-the-board repayment period, to many interested parties, the FNPR's solicitation of comments only on the repayment schedule for the *proposed* qualifications could well have appeared to be an attempt to calibrate the penalties for violations of the new rules with those for violations of existing rules. Indeed, no commenter manifested an understanding that the FCC was considering changing the existing repayment schedule. The only commenter to suggest adopting a 10–year repayment period—MMTC, a petitioner here—specifically suggested that the FCC "*consider initiating an inquiry*" into doing so, apparently in an entirely separate rulemaking. Comments of the Minority Media and Telecomm'ns Council, J.A. at 586 (emphasis added).[9] Accordingly, we hold that the 10–year repayment schedule, to the extent it applies to qualifications for DE status that were in effect before its enactment, was adopted without the notice and comment required by the APA.[10]

9. The FCC also points to Council Tree's own request that the preexisting repayment schedule be applied to any new DE qualifications that might be adopted. *See* Comments of Council Tree Comm'ns, Inc., J.A. 497–99. But this does not even begin to manifest an understanding by Council Tree that the preexisting schedule might be *changed*.

10. As we stated above, there was more than adequate notice that the new repayment schedule would apply to any *new* rules adopted by the FCC. Because we leave intact the 25% rule, there is therefore no notice-or-comment barrier to the 10–year schedule's application to that rule. Nonetheless, we find it necessary to vacate the 10–year schedule in whole, because we see no way to sever the FCC's legitimate adoption of the 10–year schedule with respect to the 25% rule from its unlawful application of the rule to other situations. The Second R & O set forth a single repayment schedule to govern all DE qualifications, both those created in the Second R & O and those that preexisted it. *See* 21 F.C.C.R. at 4794; 47 C.F.R. § 1.2111(d)(1). Thus, we can strike down the regulation as it applies to the preexisting qualifications only by invalidating it across the board.

Although we do not reach Petitioners' contention that the extended repayment schedule

III.

The proper remedy remains to be considered. The FCC suggests that, to the extent we find the rules defective, we remand the matter without vacatur to permit it to correct the defects. Petitioners, by contrast, urge not only that we vacate the rules before remand, but also that we exercise our equitable authority to rescind Auctions 66 and 73.[11]

Petitioners' proposal is vigorously opposed by the FCC and by several intervenors and *amici*, including some winners of Auctions 66 and 73.[12] The record gives no indication that these intervenors and *amici*, or other winners of Auctions 66 and 73, were anything but innocent third parties in relation to the FCC's improper rulemaking. We are thus loath to rescind the results of the auctions, since it would involve unwinding transactions worth more than $30 billion, upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers. Moreover, the possibility of such large-scale disruption in wireless communications would have broad negative implications for the public interest in general.

In an attempt to address these concerns, Petitioners suggest that we nullify the auction results, but permit the winning bidders to keep their licenses unless and until they are won by another bidder at re-auction. This might mitigate the chaos of a rescission, but it could not eliminate the massive uncertainty, waste, and frozen development that would occur from the time of the rescission until the re-auction which, as the FCC might wish to adopt additional rules before the re-auction to replace the ones at issue here, could be a significant period of time. Additionally, some of the intervenors, who were winners in Auction 66 in 2006, note that the state of the economy and the credit markets has changed dramatically since the auction; consequently, their participation in any re-auction might be impractical or impossible.

is arbitrary and capricious, we also note that the FCC does not appear to have thoroughly considered the impact of the extended repayment schedule on DEs' ability to retain financing. In the Reconsideration Order, the FCC concluded that a shorter time to liquidity of a DE's spectrum licenses was not necessary, because

> [i]n a recently concluded proceeding addressing the leasing of Education Broadcast Service spectrum, a broad cross-section of commenters, including a private equity investment firm, submitted evidence that insufficient capital would flow to businesses that want to develop that spectrum if the length of spectrum lease terms was limited to fifteen years. These parties argued that lessees needed access to the spectrum for thirty years or more in order to provide the necessary certainty to justify capital investment in the band. The Commission was 'persuaded by [this argument]. [Therefore,] we are not convinced that the appropriate investment horizon for designated entity status should be only three to seven years.

21 F.C.C.R. at 6717–18. From this comment, it seems that the FCC has confused the maximum period for which investors are willing to lock up their capital (before being able to liquidate the spectrum license, in the event the DE proves unprofitable) with the *minimum* period necessary for financiers to turn a profit on a successful investment in educational broadcast services. We commend this issue as well to the FCC's attention on remand.

11. Petitioners acknowledge that several other much smaller auctions have been conducted under the new rules, and that the logic of their position would also support rescission of those results as well. Nevertheless, they request nullification only of Auctions 66 and 73.

12. The FCC, intervenors and *amici* also contest our jurisdiction to overturn the auction results. As we will explain, we would decline to exercise any jurisdiction we may have to rescind the auction results. Accordingly, we will not address this matter further.

A re-auction thus would unfairly require these intervenors to pay sums that they may not have in order to protect investments they have already made, and perhaps cannot recoup without the relevant spectrum licenses. Under these circumstances, we conclude that it would be imprudent and unfair to order rescission of the auction results.

[8] But we are also unreceptive to the FCC's suggestion that we remand the matter without vacating the challenged rules. The FCC argues we are authorized to do so based on a balancing of "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 of U.S. v. SEC*, 443 F.3d 890, 908 (D.C.Cir.2006) (quoting *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C.Cir.1993)).[13] We find the deficiencies in the challenged rulemaking to be serious. On the other hand, vacating the 50% impermissible relationship rule will mean that DEs will be free to lease or wholesale as much of their spectrum as they wish, subject to revenue attribution should they lease or wholesale more than 25% of their spectrum to a single entity. Vacating the 10–year–hold rule will simply mean that DEs' repayment obligations will once again be governed by the previous 5–year schedule.[14] *See Abington Mem. Hosp. v. Heckler*, 750 F.2d 242, 244 (3d Cir.1984) (citing *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C.Cir.1983), for the proposition that "vacating or rescinding invalidly promulgated regulations has the effect of reinstating prior regulations"); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir.2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). We do not regard either of these situations as likely to create any serious disruption. Accordingly, even assuming we have the authority to remand the matter without vacatur, we would decline to do so here. Instead, we will vacate the 50% and 10–year rules and remand the matter to the FCC.

IV.

In sum, the FCC's 25% attribution rule was promulgated after the public notice and opportunity to comment required by the APA, and is not arbitrary and capricious. The 50% impermissible-relationship rule, however, was promulgated without the requisite notice and opportunity to comment. The 10–year bidding-credit repayment schedule likewise was promulgated in substantial and inseverable part without notice or comment. Accordingly, we will deny the petition with respect to the attributable-material-relationship rule articulated in 47 C.F.R. § 1.2110(b)(1) and (b)(3)(iv)(B). We will grant the petition with respect to the impermissible material relationship rule contained in 47 C.F.R. § 1.2110(b)(3)(iv)(A) and the 10–year–hold rule contained in 47 C.F.R.

13. Petitioners argue that we are required to vacate any rules we find in violation of the APA, pointing out that the APA requires us to "hold unlawful *and set aside*" any such agency action. 5 U.S.C. § 706(2) (emphasis added). The FCC, however, cites to a case in which we remanded without vacatur, albeit without commenting on the issue. See *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 310 (3d Cir.1977). Because we find remand without vacatur to be inappropriate on the facts of this case, we express no view as to whether we are authorized to order this remedy.

14. Because we will leave in place 47 C.F.R. § 1.2111(d)(1), which makes the repayment schedule of § 1.2111(d)(2)(i) applicable to violations of the new 25% attribution rule which we also leave in place, violations of the 25% rule will also be governed by the preexisting five-year schedule.

§ 1.2111(d)(2)(i). We will vacate the impermissible material relationship rule and the 10–year–hold rule, order the reinstatement of the previous version of 47 C.F.R. § 1.2111(d)(2), and remand the matter to the FCC for further proceedings.

Marina KARPENKO, Appellee/Cross–Appellant

v.

Paul LEENDERTZ, Appellant/Cross–Appellee.

Nos. 10–1678, 10–1825.

United States Court of Appeals, Third Circuit.

Argued July 12, 2010.

Opinion Filed: Aug. 24, 2010.

Background: Mother of minor child who was removed from the Netherlands by her father petitioned for return of her child under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The United States District Court for the Eastern District of Pennsylvania, Thomas M. Golden, J., 2010 WL 831269, granted petition, and subsequently, 2010 WL 996465, granted father's motion for stay pending appeal. Father appealed order, and mother cross-appealed the stay.

Holdings: The Court of Appeals, Roth, Circuit Judge, held that:

(1) preponderance of evidence was sufficient to establish that father violated Hague Convention;

(2) state court did not have jurisdiction to authorize father's removal of child from the Netherlands; and

(3) unclean hands doctrine did not apply to bar mother's petition for relief under the Hague Convention.

Order affirmed and cross-appeal dismissed as moot.

Aldisert, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇐850.1

Court of Appeals reviews the District Court's factual findings for clear error.

2. Federal Courts ⇐848

District court's factual findings will be upheld so long as the court's account of the evidence is plausible in light of the record, even if Court of Appeals would have weighed the evidence differently.

3. Federal Courts ⇐776

District court's conclusions of law are reviewed de novo by Court of Appeals.

4. Child Custody ⇐802
Treaties ⇐8

The Hague Convention on the Civil Aspects of International Child Abduction, as implemented by ICARA, does not provide a forum to resolve international custody disputes, but rather it provides a legal process to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases. International Child Abduction Remedies Act, § 2 et seq., 42 U.S.C.A. § 11601 et seq.

5. Child Custody ⇐823
Treaties ⇐8

Under the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by ICARA, the peti-

Attachment 4

Attachment 4

Auction 66 and 73 Results: DE Performance with the Most Valuable Licenses

($ in Millions)			DE Performance by: Dollar Value of Licenses Won			DE Performance by: Number of Licenses Won		
License Grouping	**License Cost**	**# of Licenses**	**DEs**	**Total**	**DE %**	**DEs**	**Total**	**DE %**
Snapshot 1: Most Valuable Licenses[1] Totaling 80% of Auction Value								
Auction 66	$ 10,981	40	$ 353	$ 10,981	3.2%	2	40	5.0%
% of Auction Total	*80%*	*4%*						
Auction 73	15,186	70	-	$ 15,186	0.0%	0	70	0.0%
% of Auction Total	*80%*	*6%*						
Snapshot 2: Most Valuable Licenses[1] Totaling 95% of Auction Value								
Auction 66	13,010	176	449	13,010	3.5%	10	176	5.7%
% of Auction Total	*95%*	*16%*						
Auction 73	18,002	250	176	18,002	1.0%	13	250	5.2%
% of Auction Total	*95%*	*23%*						
Snapshot 3: 100% of Licenses (i.e., the Entire Auction)								
Auction 66	13,700	1,087	551	13,700	4.0%	215	1,087	19.8%
% of Auction Total	*100%*	*100%*						
Auction 73	18,958	1,090	501	18,958	2.6%	379	1,090	34.8%
% of Auction Total	*100%*	*100%*						

[1] For purposes of this table "Most Valuable Licenses" include the Licenses in rank order from the Highest Net License Cost per License until and including the license that reaches 80% (Snapshot 1) or 95% (Snapshot 2) of total auction net proceeds.

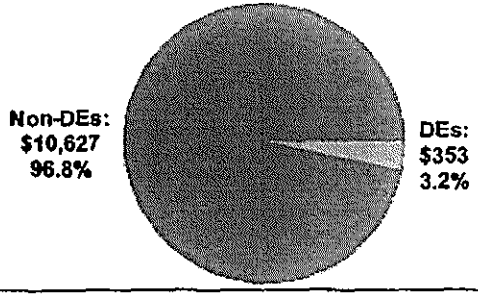
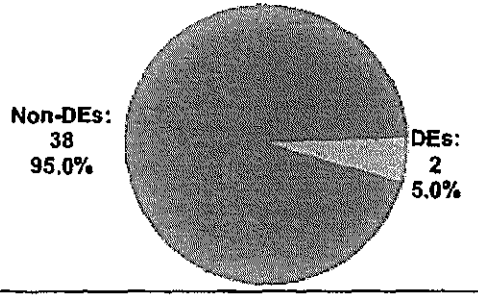
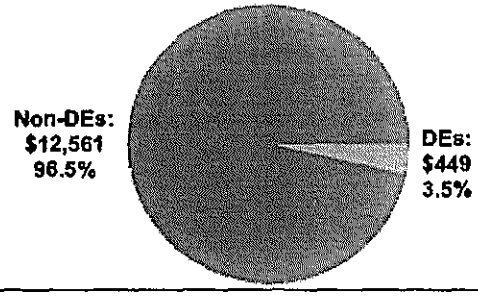
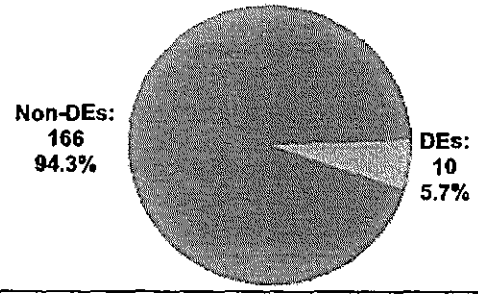
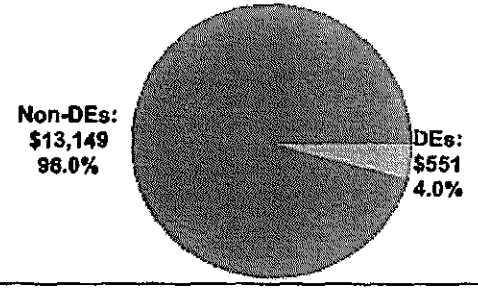
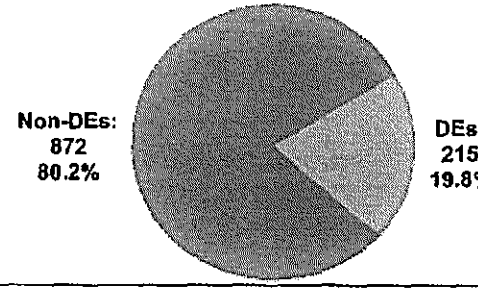
Auction 73 Results: DE Performance with the Most Valuable Licenses

($ in millions)

	Dollar Value of Licenses Won	Number of Licenses Won
Snapshot 1: Most Valuable Licenses Totaling **80**% of Auction Value	$15,186 Segment Total Non-DEs: $15,186 100.0% DEs: $0 0.0%	70 Licenses Segment Total Non-DEs: 70 100.0% DEs: 0 0.0%
Snapshot 2: Most Valuable Licenses Totaling **95**% of Auction Value	$18,002 Segment Total Non-DEs: $17,827 99.0% DEs: $176 1.0%	250 Licenses Segment Total Non-DEs: 237 94.8% DEs: 13 5.2%
Snapshot 3: **100**% of Licenses (i.e. "the Entire Auction")	$18,958 Segment Total Non-DEs: $18,457 97.4% DEs: $501 2.6%	1,090 Licenses Segment Total Non-DEs: 711 65.2% DEs: 379 34.8%

Auction 66 Results: DE Performance with the Most Valuable Licenses

($ in millions)

	Dollar Value of Licenses Won	Number of Licenses Won
Snapshot 1: Most Valuable Licenses Totaling **80**% of Auction Value	$10,981 Segment Total	40 Licenses Segment Total
		
Snapshot 2: Most Valuable Licenses Totaling **95**% of Auction Value	$13,010 Segment Total	176 Licenses Segment Total
		
Snapshot 3: **100**% of Licenses (i.e. "the Entire Auction")	$13,700 Segment Total	1,087 Licenses Segment Total
		

Sources for Attachment 4:

http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66, Spreadsheet -- "All Markets"
http://wireless.fcc.gov/auctions/auction_results_files.htm?id=73&type=full&setSize=0, File--"73_261_pwb.txt" found within "73_261_all_files.zip"
http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-4171A2.pdf

Attachment 5

DECLARATION OF GEORGE T. LAUB
COUNCIL TREE INVESTORS, INC.

I, George T. Laub, hereby declare, under penalty of perjury, that the following is true and correct:

1. I am Managing Director of Council Tree Investors, Inc. ("Council Tree"), incorporated in the State of Delaware. Council Tree's business is identifying and developing opportunities in the communications sector, focused principally on wireless, where Council Tree acts as a manager/operator, investor, and/or investment advisor. Specifically, Council Tree develops and builds profitable new wireless businesses, providing innovative, highly competitive new service offerings to consumers. Council Tree also seeks to foster diversity of ownership within the increasingly concentrated wireless industry. Council Tree and its principals have a substantial track record and body of experience associated with successful wireless businesses.

2. During the period leading up to Auction 73, the restrictive provisions of the 50 Percent Retail Rule (47 C.F.R. § 1.2110(b)(3)(iv)(A)) and the Ten-Year Hold Rule (47 C.F.R. § 1.2111(d)) remained in place. The 50 Percent Retail Rule precluded Council Tree from deploying its predominantly wholesale services business model (a model similar to the wholesale business models today being deployed by Clearwire Corporation (NASDAQ: CLWR) and LightSquared Subsidiary LLC, each on a nationwide basis). Further, the Ten-Year Hold Rule dramatically increased the risk profile for Council Tree and its investors by doubling from five to ten years the period during which a designated entity ("DE") was subject to unjust enrichment penalties for the sale to a non-DE of spectrum won at auction.

3. In anticipation of a court decision declaring the Ten-Year Hold Rule and the 50 Percent Retail Rule (collectively, "the Rules") to be unlawful, or the FCC itself invalidating the Rules, Council Tree invested considerable time, effort and resources to develop a well-positioned DE business for Auction 73. Council Tree's business was designed to acquire a 700 MHz wireless license footprint covering the United States and build a competitive new national wireless carrier (the "New Entrant"). The New Entrant would build out and operate a new wireless network, providing state-of-the-art wireless voice and data services on a wholesale basis, thereby enabling enhanced competition with incumbent national wireless carriers T-Mobile, Verizon, AT&T and Sprint. In order to fund this well-structured business plan, which enjoyed the benefit of Council Tree's extensive efforts and its relationships with prominent prospective financing partners, Council Tree needed the FCC or the Courts to invalidate the Rules.

4. The DE bidding credit (without the Rules in place) was vital to provide the prospective New Entrant with the extra bidding capacity necessary for the New Entrant to successfully bid for and win a national footprint license, particularly in the face of what was expected to be intense competition from the incumbent national wireless carriers (including national carriers' willingness to bid incremental "foreclosure" premiums reflecting the economic value associated with forestalling prospective new entrant competition). However, due to the Commission's failure to timely rule on this petition for reconsideration, it was not until August 24, 2010, some 30 months after Auction 73 ended, that the Third Circuit Court of

Appeals in fact vacated the Rules, finding them in serious violation of the APA and therefore unlawful. Accordingly, without timely relief from the Rules, Council Tree was unable to execute on its Auction 73 business plan.

Executed May 18, 2011

George T. Laub
Managing Director
Council Tree Investors, Inc.

Attachment 6

APRIL 29, 2011 4:00 AM PDT

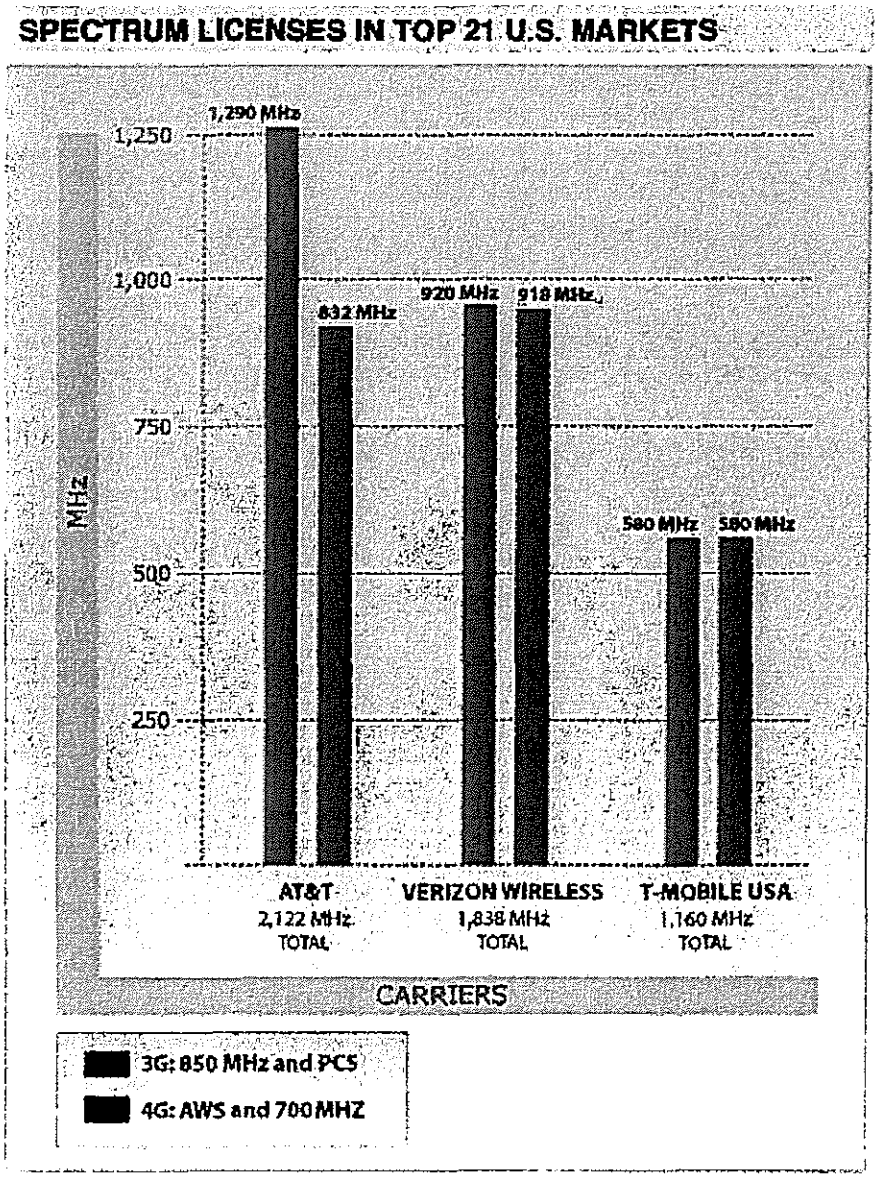
Is AT&T a wireless spectrum hog?

by Marguerite Reardon

AT&T is pinning its future on getting its hands on more wireless spectrum. But should regulators allow AT&T, which owns more wireless spectrum than any other wireless operator across the nation, to gobble up even more of this scarce resource?

That's the big question that the Federal Communications Commission is grappling with as it scrutinizes the planned merger between AT&T and T-Mobile, which will transfer all of T-Mobile's spectrum to AT&T. The FCC is also in the middle of considering AT&T's plan to buy spectrum in the lower part of the 700MHz band of spectrum from Qualcomm.

Wireless spectrum is like valuable real estate, and what's going on right now in the wireless market is akin to a good old fashioned land grab. The last major wireless auction for the 700MHz band of spectrum, which was considered beachfront property, was only a few years ago. Unfortunately, for wireless operators all the good "property" has already been bought. And until the FCC can free up more spectrum for auction, the only way for operators to get their hands on new spectrum is to buy it.



SOURCE: Verizon Wireless

It's this desire for wireless "property" that is driving AT&T's $39 billion acquisition of the struggling wireless operator T-Mobile USA. It's also why AT&T plans to spend nearly $2 billion to acquire spectrum from Qualcomm, which the chipmaker used to build its failed mobile TV business called MediaFlo.

In its 381-page executive summary filed to the FCC last week (PDF) explaining why this megamerger, which will eliminate one of four nationwide U.S. carriers, is in the public interest, AT&T claims that without additional spectrum from T-Mobile, the carrier will not be able to fulfill short term needs for wireless broadband.

This is in spite of the fact that AT&T is today sitting on more spectrum than any other wireless operator in the top 21 markets in the U.S., and about a third of that spectrum is still being unused.

"It's hard to reach the conclusion that the wireless carrier with the most spectrum and best spectrum isn't able to serve its customers with what it already has," said Larry Krevor, a vice president of government affairs for Sprint. "Every carrier has to use its spectrum resources as efficiently as it can."

AT&T's spectrum holdings

In the top 21 markets in the U.S., AT&T has about 284 MHz more spectrum than its closest competitor, Verizon Wireless, according to data provided by Verizon. To put this in context, the FCC's National Broadband Report calls for an additional 500 MHz of spectrum to be made available for auction in the next decade to fulfill the needs of all wireless broadband providers. The FCC has proposed TV broadcasters to give up about 120 MHz in incentive auctions for wireless broadband within the next five years.

In San Francisco, where it's been well-publicized that AT&T has struggled to keep up with mobile data demand for its smartphones, particularly the iPhone, AT&T has about 30 MHz more 3G spectrum than Verizon Wireless. This 3G spectrum consists of spectrum in both the 850MHz band as well as the PCS band of spectrum.

In other markets, the difference in spectrum holdings is not that great. For example, in Washington, D.C., another major city where AT&T customers have complained about dropped calls and slow data speeds on their 3G wireless devices, AT&T only has about 10 MHz more of 3G spectrum than Verizon Wireless. In New York City, the second largest wireless market, where AT&T customers probably suffer the most from dropped calls and slow connections, AT&T has a deficit of about 10 MHz less than Verizon Wireless.

And this is just the spectrum that AT&T is already using to provide its 2G and 3G wireless services. The company hasn't even touched about 832 MHz of new wireless spectrum in the top 21 markets. This spectrum, which sits in the AWS and 700MHz bands, will be used to build AT&T's 4G LTE network. The company is building the network and has plans to launch it commercially this summer with a target of reaching 70 million to 75 million potential subscribers by the end of this year.

Verizon Wireless, which is also building a 4G LTE network using the AWS and 700 MHz spectrum, has about 918 MHz of this spectrum in the top 21 markets. Verizon launched its 4G wireless service in December, and it expects to serve 200 million people with the service this year. And by the end of 2013 it will be available to more than 285 million potential customers.

The 700MHz spectrum that AT&T and Verizon Wireless are using to build their LTE networks was the last bit of spectrum to become available. It had originally been allocated as analog TV spectrum. It was given back to the government after TV broadcasters were forced to start transmitting signals digitally to make their spectrum use more efficient. It's considered prime real estate in terms of wireless spectrum because the low frequency means that it can send data longer distances and penetrate buildings more easily than spectrum at higher frequencies.

AT&T and Verizon currently own more than 90 percent of the licenses for this spectrum in major cities throughout the U.S. And AT&T is hoping to add to its 700MHz coffers by buying an additional 12 MHz of 700 MHz spectrum that Qualcomm is selling. Qualcomm had used the spectrum to build a nationwide mobile TV network called MediaFlo.

Earlier this week, consumer groups, rural operators, and Sprint Nextel, wrote letters to the FCC asking the agency to reject Qualcomm's request to transfer the licenses to AT&T. They also said that if the FCC doesn't reject the proposal,

they would at least like the agency to consider this spectrum license transfer along with the T-Mobile acquisition, since both transactions are fundamentally about increasing AT&T's spectrum holdings.

"Licenses for beachfront spectrum below 1 GHz are disproportionately held by two companies, AT&T and Verizon Wireless," representatives from Free Press, Media Access Project, Public Knowledge, Consumers Union, said in a letter to the FCC (PDF). "The proposed Qualcomm license transfer would only further this competitive disparity."

Spectrum is the 'lifeblood' of the wireless industry

There's no question that more spectrum means that wireless operators can serve more customers with faster, richer Internet services. In a recent speech to strum up support for incentive spectrum auctions that would bring more wireless spectrum to the market, FCC Chairman Julius Genachowski called it the "lifeblood of the wireless ecosystem."

He also said that "mobile broadband is being adopted faster than any computing platform in history, and could surpass all prior platforms in their potential to drive economic growth and opportunity."

Indeed, smartphones have become more popular and consumers are using more data intensive applications, such as video streaming. Computing services are moving toward the "cloud," which is also increasing demand for wireless broadband. And it's true that wireless networks are starting to feel the strain.

But AT&T claims that it is feeling the wireless spectrum even more than its competitors.

In its filing last week to the FCC, AT&T says its network has more smartphones on it than any other wireless provider with a total of 31 million smartphone subscribers. The company highlighted that smartphones consume "24 times as much data as traditional cell phones."

AT&T says that as a result of the growth in smartphones and other connected devices, such as tablets, it has seen its data traffic grow 8,000 percent from 2007 to 2010. And that growth is expected to continue.

By 2015, AT&T estimates that mobile data traffic on its network will reach eight to ten times what it was in 2010. To put it another way, the company says that in just the first five to seven weeks of 2015, AT&T expects to carry all of the mobile traffic volume it carried during 2010.

"[The] spectrum crunch is hitting AT&T harder and sooner than the industry at large," it said in the filing. "And because AT&T plays a key role in supporting the cycle of mobile broadband innovation in the United States, its capacity problems could have ripple effects throughout the broadband ecosystem."

The loaded network is likely what's caused AT&T customers to already experience dropped calls and slow data service in certain markets, such as New York City and San Francisco. AT&T has admitted that it has struggled to keep up with demand in these cities, as well as certain other markets.

And it said that it's burning through spectrum at an accelerated rate trying to keep up with demand in certain markets.

"Whereas in 2004 it took 24 months in major markets to exhaust 10 MHz of spectrum," the company said. "From 2008-2010 growing UMTS demand caused AT&T to burn through 10 MHz in half that time or less in some major markets."

Without additional spectrum, AT&T says that service problems will get worse in certain markets. The company says that it has tried to deal with the capacity crunch by adding more cell sites and using offload technologies such as Wi-Fi and femto cells, which create mini cell sites within people's offices or homes. But it says that these solutions are merely band-aids that don't address the real problem.

The solution, according to AT&T is getting additional spectrum through its merger with T-Mobile USA. T-Mobile doesn't have any of the 700 MHz that AT&T may need to build its new LTE network, but it does have about 580 MHz of 3G spectrum in the top 21 markets, which AT&T could use to help alleviate some of its congestion on the existing 3G network in those markets. And it also has 580 MHz of AWS spectrum in these top markets, which AT&T could

eventually use to expand its 4G LTE build out. In fact, AT&T claims that with the T-Mobile spectrum it could reach 97 percent of the population with its 4G network.

AT&T argues that T-Mobile is also capacity constrained when it comes to spectrum and can't afford to acquire new spectrum to sustain future growth. Therefore it makes sense for the two companies to combine "real estate."

"This transaction provides the most effective, efficient, and timely resolution of the capacity constraints facing AT&T and T-Mobile USA," AT&T writes.

Competitors say hold on a second

AT&T's competitors say the carrier is facing the same issues they each face. And they argue that if AT&T is truly struggling to keep up with demand, it may be because the company has not managed its resources well or invested enough in its network.

Look at Verizon Wireless as an example. Verizon, which has 104 million wireless connections on its network as of the end of the first quarter of 2011 compared with 97.5 million total wireless subscribers on AT&T's network, has on average about 10 MHz less spectrum in the top 21 U.S. markets than AT&T. And yet its service is often praised for its reliability.

"We have been building capacity into our network and investing in our network for several years," said Molly Feldman, vice president of business development for Verizon Wireless. "That's why we are in a strong position today."

Some critics question whether AT&T has invested enough in its network. Between 2008 and 2010, AT&T spent $21.1 billion to upgrade its wireless network, according to an FCC filing. During that same period, Verizon spent about $22.1 billion.

Martin Peers points out in a blog for The Wall Street Journal that even though AT&T already knew that it had congestion problems on its network after the introduction of the iPhone in 2007, it still only increased wireless capital expenditures by 1 percent in 2009 compared with an increase in capital spending from Verizon Wireless by about 10 percent.

Meanwhile, Verizon executives say the company has enough spectrum until at least 2015 to keep up with demands on its network. And like AT&T, Verizon now offers the data hungry Apple iPhone and iPad 2 along with several models of Google Android smartphones.

"The bottom line here is that this is about managing the network," Sprint's Krevor said. "I've got to give Verizon credit. They have a little bit less spectrum in some markets than AT&T and more subscribers than AT&T overall. And they don't have these same issues. They've done a better job of managing their network."

Krevor went on to say that AT&T has no one else to blame but itself for the dilemma it faces now.

"If AT&T has a spectrum use issue, it's one of its own making," he said. "They haven't managed their network effectively, so they think the solution is to simply acquire the nearest competitor."

Krevor said that every wireless operator would love to add more spectrum to its network to increase network capacity as it grows. But he said that isn't always possible given the that spectrum is a finite resources. And instead of allowing AT&T to eliminate a competitor, he believes the market will force AT&T and other wireless operators to use their spectrum more efficiently.

"Competition forces you to improve and invest in the network to make the services as good as they can be," he said. "We (Sprint Nextel) didn't do a great job of integrating the Nextel spectrum into our network, and the market punished us. We responded by fixing those issues. Why shouldn't AT&T do the same?"

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, certify that on this 18th day of May, 2011, I served copies of the foregoing Supplement to Petition for Reconsideration, by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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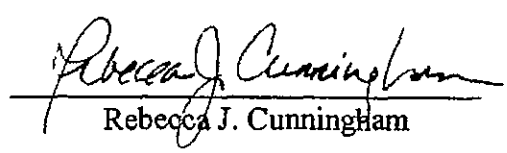

Rebecca J. Cunningham

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules for the Upper 700 MHz Band D Block License	)))))	FILED/ACCEPTED MAY 18 2011 Federal Communications Commission Office of the Secretary

To: The Commission

REQUEST FOR EXPEDITED PROCESSING AND DECISION

Council Tree Investors, Inc.[1] ("Council Tree") and Bethel Native Corporation (collectively, "Petitioners"), by their attorneys, hereby request that the Federal Communications Commission process and resolve on an expedited basis, at the earliest possible time, their pending December 7, 2007 Petition for Reconsideration ("Petition"), as supplemented on this day, of the Federal Communications Commission's *Order*, 22 FCC Rcd 20354 (2007) ("*Order*") in the above-captioned matter.[2]

Expedition is warranted in this matter for multiple reasons. Despite the fact that the *Order* and Petition relate to issues of substantial importance to the structure of the telecommunications industry in the United States, concerns that arise anew in connection with AT&T's recent announced plan to acquire the assets of T-Mobile USA,[3] the Petition has languished *for nearly three and one-half years without even being put on public notice.* By any

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[1] The company's name (previously Council Tree Communications, Inc.) was changed to Council Tree Investors, Inc., effective October 13, 2009.

[2] A date-stamped copy of the Petition as filed with the Commission comprises Attachment 1 to the Supplement to the Petition filed contemporaneously herewith (the "Supplement").

[3] See note 22 to the Supplement. *See also Telecom deal scrambles Hill reactions*, Politico, May 9, 2011, at 1.

measure, this delay is egregious and must be remedied as promptly as possible. This is particularly true in the context of spectrum auctions, where timing is of the utmost importance. The Commission cannot even begin to consider the acquisition by the United States' second largest wireless company of the country's fourth largest wireless company until the agency has addressed its own unlawful conduct of Auction 73 pursuant to rules that have now been vacated by the United States Court of Appeals for the Third Circuit in *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert denied sub nom. Council Tree Investors, Inc. v. FCC*, 2011 U.S. LEXIS 2468 (U.S. Mar. 28, 2011). The Third Circuit found that the restrictive new rules made applicable to qualifying small businesses ("DEs") on the threshold of Advanced Wireless Services Auction 66 were adopted in "serious" violation of the Administrative Procedure Act. *Id.* at 258. Those rules later allowed AT&T and Verizon Wireless to utterly dominate Auction 73 to the detriment of small businesses, innovation, prices and consumer choice.[4]

Furthermore, continued inaction by the agency would contravene 47 U.S.C. § 405(a), which requires the FCC to grant or deny timely filed petitions for reconsideration, like the Petition, of FCC orders.[5]

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[4] AT&T and Verizon won 84 percent of the total dollar value of the spectrum sold in Auction 73, whereas qualified small businesses won just 2.6 percent of the spectrum's total dollar value, a massive drop from their historic averaged percentage of approximately 70 percent. *See Council Tree*, 619 F.3d at 248; *see also* Matthew Lasar, *Verizon, AT&T Rule 700MHz Auction; Block D Fate Unsettled*, ARS Technica, 2008, *available at* http://arstechnica.com/old/content/2008/03/verizon-att-rule-700mhz-auction-block-d-fate-unsettled.ars.

[5] *See Order*, No. 07-4124 (3d Cir. Feb. 15, 2008) (ordering the FCC to provide the Court with a timetable for action on a petition for reconsideration that had been pending at the agency for less than two years) (copy appended hereto as Attachment 1).

In addition, the *Order* provides the Commission with the perfect procedural vehicle to address in the immediate term unresolved issues of overarching importance relating to Auction 73, also known as the 700 MHz auction, in a discrete, well-defined context. As the Supplement makes clear, the *Order* relates uniquely to Auction 73, which both the FCC and Intervenor Cellco Partnership d/b/a Verizon Wireless acknowledged in briefs to the Court in *Council Tree* makes it the type of agency order which indisputably would confer jurisdiction over Auction 73 on a reviewing court. *See* Supplement at n.18. Likewise, as also explained in the Supplement, the *Order* expressly elected to continue to apply (with but one limited waiver exception) 47 C.F.R. §§ 1.2110(3)(b)(iv)(A) (2006) (now vacated) (the "50 Percent Retail Rule") and 1.2111(d)(2) (2006) (now vacated) (the "10-Year Hold Rule"), both of which were vacated by the Court in *Council Tree.* This case therefore now squarely presents a simple and critically important question on which the FCC has never ruled: whether an auction it conducts pursuant to unlawful rules can itself survive.

It should also be noted that very recently, the Commission reaffirmed the vital importance of integrity in the auction process. *See Maritime Communications/Land Mobile, LLC*, FCC 11-64 (redacted), released Apr. 19, 2011, ¶ 7 ("[t]he integrity of our auctions program is of paramount importance, and we take allegations and evidence of auction misconduct very seriously."). Prompt action on the Petition, given the ever-escalating stakes for the public interest, is necessary to preserve that integrity.

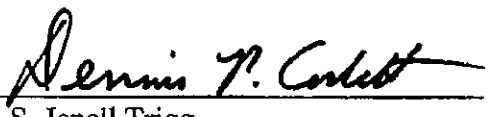
Finally, the issues raised in the Petition and Supplement are well known to the FCC, and lend themselves to rapid resolution.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their Petition, as supplemented, be placed on public notice and resolved at the earliest possible time, in any event before the Commission even considers taking action on the recently filed AT&T/T-Mobile USA acquisition application.

Respectfully submitted,

COUNCIL TREE INVESTORS, INC. AND
BETHEL NATIVE CORPORATION

By: 

S. Jenell Trigg
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May 18, 2011

Their Attorneys

Attachment 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 20, 2007
ECO-15

No. 07-4124

IN RE: COUNCIL TREE COMMUNICATIONS, INC.; BETHEL NATIVE CORPORATION; THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,

Petitioners

(FCC Nos. 06-52, 06-71 & 06-78)

Present: AMBRO, CHAGARES, and HARDIMAN, Circuit Judges.

1. Petition by Petitioners for Writ of Mandamus.

2. Opposition by FCC to Petition for Writ of Mandamus.

3. Reply by Petitioners to Opposition to Petition for Writ of Mandamus.

/s/ Chiquita Dyer
Chiquita Dyer (267-299-4919)
Legal Assistant

Related to Case No. 06-2943
Council Tree Comm. v. FCC

ORDER

The foregoing Petition for Writ of Mandamus is DENIED. However, Council Tree's petition for reconsideration remains pending with the Federal Communications Commission. Under 5 U.S.C. § 706(1), the Federal Communications Commission is hereby ORDERED to file within 30 days an estimate of when it plans to grant or deny Council Tree's petition for reconsideration. This Court retains jurisdiction over the case under 28 U.S.C. § 1651(a) to ensure FCC compliance. *See Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

By the Court,

/s/ Thomas M. Hardiman
Circuit Judge

Dated: February 15, 2008
CMD/cc:Laurence N. Bourne, Esq.
Secretary FCC
Samuel L. Feder, Esq.

Joseph R. Palmore, Esq.
Robert J. Wiggers, Esq.
Robert B. Nicholson, Esq.
Lawrence J. Movshin, Esq.
Jonathan V. Cohen, Esq.
S. Jenell Trigg, Esq.
Dennis P. Corbett, Esq.
David S. Keir, Esq.
Rebecca L. Murphy, Esq.
Attorney General of the United States
Thomas Gutierrez, Esq.
Donald L. Herman, Esq.
Gregory W. Whiteaker, Esq
William T. Lake, Esq.
L. Andrew Tollin, Esq.
Ian H. Gershengorn, Esq.

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, certify that on this 18th day of May, 2011, I served copies of the foregoing Request for Expedited Processing and Decision, by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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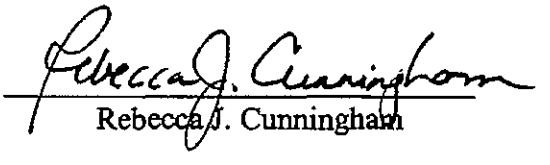

Rebecca J. Cunningham

Attachment 2

Opposition to the Proposed AT&T/T-Mobile Merger

Statements from Competitors and Elected Officials

1. Press Release, Sprint, Sprint Opposes Proposed AT&T Acquisition of T-Mobile USA (Mar. 28, 2011), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=1842 (quoting Vonya McCann, senior vice president, Government Affairs, as saying "Sprint urges the United States government to block this anti-competitive acquisition. This transaction will harm consumers and harm competition at a time when this country can least afford it.").

2. *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?* Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Sen. Comm. on the Judiciary, 112th Cong. (2011) (statement of Dan Hesse, CEO, Sprint) ("If AT&T is permitted to devour one of the two remaining independent national wireless carriers, while the rest of the world achieves advances in technology and innovation for the 21st century, the U.S. will go backwards – toward last century's Ma Bell.").

3. Press Release, Leap Wireless, Leap Opposes Proposed AT&T Acquisition of T-Mobile USA (May 24, 2011), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1567098 (quoting Doug Hutcheson, President and CEO of Leap and Cricket, as saying the proposed merger "raises problems of spectrum concentration and impaired access to spectrum by competitive carriers; undercuts access to wholesale voice and data roaming services; and threatens to foster reduced device availability and reduced interoperability of wireless networks and devices . . . .").

4. Gary Bensinger, *MetroPCS 'Concerned' About Spectrum Concentration in AT&T Deal*, Bloomberg Bus. Week, May 17, 2011, *available at* http://www.businessweek.com/news/2011-05-17/metropcs-concerned-about-spectrum-concentration-in-at-t-deal.html (noting that MetroPCS feels the proposed merger "risks putting too much spectrum into the hands of one carrier . . . .").

5. Press Release, Rep. Ed Markey, Markey, Conyers Raise Concerns Surrounding AT&T/T-Mobile Merger's Impact on Consumers, May 25, 2011, *available at* http://markey.house.gov/index.php?option=content&task=view&id=4363&Itemid=125 (quoting Rep. Markey as saying approving the proposed merger would be an "historic mistake. Consumers will be tipped upside down, with the money shaken out of their pockets as the lack of competition leads to higher prices.").

Editorials

6. Editorial, *Looks Like a Duopoly*, N.Y. TIMES, Mar. 28, 2011, *available at* http://www.nytimes.com/2011/03/29/opinion/29tue2.html ("It is uncertain whether regulators could write conditions that would ensure strong enough rivals emerged to stand up as competitors to the two wireless giants. If they can't, they should not let the deal go through.").

7. Editorial, *Not So Fast, Ma Bell*, The Economist, Mar. 24, 2011, *available at* http://www.economist.com/node/18440809 ("All the same, it would be far better if the Federal Communications Commission (FCC) and the Department of Justice blocked the T-Mobile merger—and tried to reform the market instead.").

8. Editorial, *Our View: AT&T, T-mobile Pose Problems*, USA TODAY, *available at* http://www.usatoday.com/news/opinion/editorials/2011-05-19-ATampT-T-mobile-merger-would-hurt-you_n.htm (calling the proposed merger "troubling").

News Articles

9. Brad Reed, *AT&T-T-Mobile Merger Widely Panned*, Network World (Mar. 25, 2011), http://www.networkworld.com/news/2011/032511-att-tmobile-panned.html ("The proposed AT&T-T-Mobile merger has many different groups standing athwart recent telecom history and yelling, [']Stop![']").

10. Ian Shapira and Jia Lynn Yang, *AT&T, T-Mobile Merger Blasted*, WASH. POST, Mar. 21, 2011, http://www.washingtonpost.com/business/economy/atandt-t-mobile-merger-blasted/2011/03/21/ABHs3Y9_story.html (noting that after the merger proposal was announced "consumer advocates and some members of Congress blasted the deal.").

11. Edward Wyatt, *Sharp Scrutiny for Merger of AT&T and T-Mobile*, N.Y. TIMES, Mar. 21, 2011, http://www.nytimes.com/2011/03/22/technology/22regulate.html (noting the proposed merger "is likely to face intense scrutiny by regulators, lawmakers and consumer advocates.").

Commentary

12. Brett Arends, Column, *Why AT&T's Deal for T-Mobile Must be Blocked*, MarketWatch.com (Mar. 21, 2011), http://www.marketwatch.com/story/why-atts-deal-for-t-mobile-must-be-blocked-2011-03-21?link=MW_story_popular ("Tell [government officials] this takeover must not be allowed. No, not with conditions. Not with asset disposals. Not with commitments.").

13. Dan Gilmor, Column, *Why the AT&T-T-Mobile Merger Must be Stopped*, Salon.com (Mar. 21, 2011), http://www.salon.com/technology/dan_gillmor/2011/03/21/gillmor_on_att_tmobile ("If the Obama administration fails to block this deal, it will be setting the lowest possible bar in approving mergers and buyouts. This buyout could not be more obviously bad for competition -- and therefore bad for customers . . . .").

14. Tom Krazit, Column, *Why the AT&T/T-Mobile Merger Should Not Come to Pass*, PaidContent.org (May 14, 2011), http://paidcontent.org/article/419-why-the-attt-mobile-merger-should-not-come-to-pass ("The simple truth is that the proposed AT&T/T-Mobile merger would place far too many mobile computing customers under the control of a single corporation that has not shown particular strength in network performance or customer service . . . .").

15. Om Malik, Column, *In AT&T & T-Mobile Merger, Everybody Loses*, GigaOM (Mar. 20, 2011), http://gigaom.com/2011/03/20/in-att-t-mobile-merger-everybody-loses ("It doesn't matter how you look at it; this is just bad for wireless innovation, which means bad news for consumers.").

16. Sascha Segan, Column, *AT&T Buys T-Mobile: Great for Them, Bad for You*, PCMag.com (Mar. 20, 2011), http://www.pcmag.com/article2/0,2817,2382267,00.asp ("Short of killing this merger entirely, I'm not sure what the government could do to maintain competition here.").

Interest Group Statements

17. Press Release, Consumers Union, Bigger AT&T = Less Choice, Higher Prices, *available at* https://secure.consumersunion.org/site/Advocacy?cmd=display&page=UserAction&id=2479 (encouraging readers protest the merger because it "will inevitably lead to higher prices, worse service and less innovation.").

18. Letter from Albert A. Foer, President of The Am. Antitrust Inst., & Richard M. Brunell, Dir. of Legal Advocacy for The Am. Antitrust Inst., to Sen. Herb Kohl, Chairman, S. Subcomm. on Antitrust, Competition Policy, and Consumer Rights (May 10, 2011), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI%20Letter%20on%20ATTTMobile.pdf ("We intend to urge the Department of Justice and the Federal Communications to block this merger.").

19. PUBLIC KNOWLEDGE, *AT&T/T-Mobile Merger*, http://www.publicknowledge.org/attt-mobile ("A merger of this scale is simply unthinkable. We know the result of arrangements like this: higher prices and fewer choices, less innovation, and the loss of American jobs.").

20. Letter from Derek Turner, Research Dir., Free Press, to Sen. Herb Kohl, Chairman, S. Subcomm. on Antitrust, Competition Policy, and Consumer Rights & Mike Lee, Ranking Member, S. Subcomm. on Antitrust, Competition Policy, and Consumer Rights (May 10, 2011), *available at* http://www.freepress.net/files/Free_Press_May_2011_Antitrust_Letter_ATT_TMobile.pdf ("This merger would result in substantial unilateral harms to consumers and competition.").

DECLARATION

George T. Laub hereby declares under penalty of perjury as follows:

1. I am Managing Director of Council Tree Investors, Inc. ("Council Tree").

2. I have reviewed the facts set forth in the foregoing May 31, 2011 "Petition to Deny Or, In The Alternative, To Defer Processing" of Council Tree and Bethel Native Corporation in WT Docket No. 11-65 and those facts, except those of which official notice may be taken, are true and correct.

George T. Laub
Managing Director of Council Tree Investors, Inc.

May 31, 2011
Date

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, certify that on this 31st day of May, 2011, I served copies of the foregoing Petition to Deny, Or In The Alternative, To Defer Processing, by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

Austin Schlick, Esq.
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

William R. Drexel
Senior Vice President and
Assistant General Counsel
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208 S. Akard Street, Room 3305
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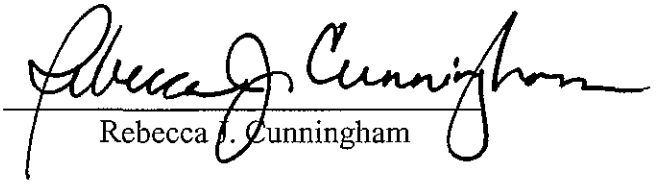
Counsel to T-Mobile USA



Rebecca J. Cunningham