

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

Broadband PCS Spectrum Auction	)	
Scheduled for January 12, 2005	)	DA 04-1639
	)	
Comment Sought on Reserve Prices Or	)	Report No. AUC-03-58-A (Auction No. 58)
Minimum Opening Bids And Other	)	
Auction Procedures	)	

**REPLY COMMENTS OF COUNCIL TREE COMMUNICATIONS, INC.**

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July 15, 2004

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**I. THE OVERWHELMING NUMBER OF COMMENTING PARTIES, REPRESENTING A BREADTH OF INTERESTS, URGE THE COMMISSION TO MAINTAIN THE CURRENT DE RULES FOR AUCTION NO. 58**

Of the 19 parties that submitted comments in response to the *Public Notice*, 15 strongly endorsed the Commission’s decision to maintain the DE rules without modification. 2/ It is also significant that the Commission received comments on this issue from a broad cross-section of interested parties in addition to Council Tree – including individual DEs, 3/ DE carrier companies, 4/ investors, 5/ rural carriers, 6/ Alaska Native entities, 7/ and from the Designated Entity Program Supporters (“DE Supporters”) and the American Women in Radio and Television, Inc. (“AWRT”). In sum, the Commission has received a very positive reaction to its continued enforcement of the current DE rules for this auction, including the Closed licenses or set-asides.

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2/ One party, Northstar Technology, submitted a brief comment asking the Commission to remove two licenses from the auction pool. Dobson Communications Corp. (“Dobson”) submitted comments requesting a waiver of Section 24.709(a)(5)(i) of the Commission’s rules. Council Tree urges the Commission to deny the Dobson request *infra*.

3/ Vincent McBride and Scott Reiter (“McBride and Reiter”).

4/ 3G PCS (“3G PCS”), Coloma Spectrum, LLC (“Coloma”), and Highland Cellular (“Highland”).

5/ Alta Communications (“Alta”), Catalyst Investors (“Catalyst”), Madison Dearborn Partners, LLC (“MDP”), Maxicom PCS, LLC (“Maxicom”), and Media Venture Partners (“MVP”).

6/ Rural Telecommunications Group, Inc. (“RTG”) and Highland.

7/ Arctic Slope Regional Corp. (“Arctic Slope”) and Doyon, Ltd. (“Doyon”).

The comments highlight the Commission’s statutory obligation to offer and preserve opportunities for a diverse set of businesses, and stress that the DE rules, as written, satisfy Congress’s directives. 8/ Indeed, the DE Supporters and AWRT present compelling reminders of the Commission’s obligation to offer and preserve opportunities for small businesses, including those controlled by minority groups and women. As discussed by the DE Supporters and AWRT, 9/ the DE program fulfills the Commission’s mandates under Sections 257, 151, and 309(j)(4)(D) of the Communications Act. 10/ In addition, Maxicom reminds the Commission that “Congress conditioned the Commission’s authority to award spectrum by auction on the creation of rules that would not close the auction door to small businesses, rural telephone companies and businesses owned by minorities and women. The Commission should keep the door of opportunity open in Auction 58.” 11/

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8/ Council Tree at 5.

9/ DE Supporters at 2-3; AWRT at 3.

10/ Section 257 mandates the Commission to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.” 47 U.S.C. § 257. Section 151 requires the Commission to ensure nondiscrimination in its administration of the spectrum. 47 U.S.C. § 151. Section 309(j)(4)(D) requires the Commission to “consider the use of tax certificates, bidding preferences, and other procedures [to] ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.” 47 U.S.C. § 309(j)(4)(D).

11/ Maxicom at 3 (citations omitted).

Similarly, Arctic Slope and Doyon explain that the current DE rules are wholly consistent with the Indian Telecommunications Training Initiative and the tribal lands bidding credit program, each of which evidence the Commission's longstanding commitment to provide all people living on tribal lands with access to a broad array of telecommunications services. <sup>12/</sup> Likewise, RTG stresses that enforcement of the DE rules is "entirely consistent with [the Commission's] ongoing effort to promote the rapid growth and efficient deployment of quality spectrum-based services in rural areas." <sup>13/</sup>

While minorities continue to make up increasingly larger percentages of the U.S. population, they remain significantly underrepresented in the communications industry, as the Commission itself has recognized in forming the Federal Advisory Committee on Diversity for Communications in the Digital Age. <sup>14/</sup> The DE Supporters similarly note that, "[i]n the wireless industry, minority talent is often unable to attain its full potential through deployment in ownership and senior management. Inevitably, this underutilization of minority talent diminishes the competitiveness of the wireless industry and increases costs to

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<sup>12/</sup> Arctic Slope at 2; Doyon at 2.

<sup>13/</sup> RTG at 2. *See also* Highland ("As a rural carrier serving rural, underserved markets, the designated entity rules and policies have given Highland the ability to purchase additional PCS spectrum in several of the prior auctions.").

<sup>14/</sup> *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2000, Resident Population by Race* at 17 (indicating a rise in minority population from 20% to 29% from 1980 to 2000, and projecting a rise to almost 35% by 2015); Advisory Committee on Diversity in the Digital Age Holds Inaugural Meeting: Defines Mission, *FCC News Release* (Sept. 30, 2003).

consumers.” 15/ These facts demonstrate that the Commission must vigilantly continue to ensure that its auction rules provide realistic opportunities for minority participation in spectrum auctions, 16/ and provide further support for maintaining the current DE rules.

In light of the strong arguments put forth by the commenting parties, representing a breadth of interests, the Commission must maintain the current DE rules for Auction No. 58, including the Closed licenses or set-asides.

## **II. THERE IS NO JUSTIFICATION FOR ELIMINATING THE DE SET-ASIDE RULES**

The Commission must reject the comments from CTIA and Verizon Wireless because, as a preliminary matter, the *Public Notice* is an improper vehicle for seeking these wholesale changes to the rules governing this action, given its express limitations. Indeed, contrary to Verizon Wireless’s claim, 17/ the *Public Notice* is not an order or action of the Commission (or the Bureau), and does not establish or deny rights to any entity. Rather, the *Public Notice* solicits comments on a narrow range of auction procedural issues rather than on comprehensive

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15/ DE Supporters at 5-6.

16/ AWRT at 4-5.

17/ Verizon Wireless at 2 (stating that the Commission “must reconsider the action in the Public Notice”).

modification of the Commission's DE rules. 18/ Nevertheless, Council Tree will address some of the substantive claims presented by CTIA and Verizon Wireless.

As a starting point, Council Tree notes that the Commission widely communicated its decision to apply the current DE rules to "any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future."19/ Therefore, the Commission has already determined that any reclaimed NextWave licenses should be subject to the current DE rules, including set-asides, regardless of whether any preliminary build-out criteria were met. 20/ Further, Council Tree agrees with Maxicom and RTG, who note that small businesses in particular have a need to rely on the Commission's pronouncements indicating that the broadband PCS set-asides would be maintained. 21/

Furthermore, CTIA and Verizon Wireless have presented no new developments that justify altering the Commission's original conclusions. In fact, as

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18/ *Public Notice* at 3 (specifying the Bureau's request for comment on "auction-specific procedures" only). We note that Verizon Wireless also acknowledges that wholesale modification of the current rules would require action by the full Commission. *See* Verizon Wireless at 4-5.

19/ *Sixth Report & Order*, 15 FCC Rcd 16266 ¶ 1; FCC Revises Rules For Upcoming C and F Block Auction: The Rapid Deployment of Wireless Services, *FCC News Release* (rel. Aug. 25, 2000). *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS), *Order on Reconsideration*, 16 FCC Rcd 1343, 1345 ¶ 6 (2001); 47 C.F.R. §§ 24.229(b), 24.709(a).

20/ CTIA at 2; Verizon Wireless at 9-10.

21/ *See* Maxicom at 3; RTG at 2.

noted by RTG, the “changed circumstances” that allegedly warrant elimination of Closed bidding actually demonstrate the need to maintain the set-asides. 22/ Council Tree submits that the Commission’s original analysis and conclusions regarding the DE rules remains valid today, and any changed circumstances actually favor maintaining, if not bolstering, them. For this reason, Council Tree has appended its February 22, 2000 comments opposing the efforts of SBC Communications and Nextel to alter or waive the DE rules for Auction No. 35. 23/

At that time, when the Commission was considering almost identical arguments as those presented today, Council Tree reminded the Commission that the entrepreneur block rules were initially developed to encourage the diversification of broadband PCS license ownership based on the recognition – by Congress and the Commission – that smaller entities could not otherwise compete with entrenched telecommunications service companies. 24/ In addition, Council Tree warned the Commission that erosion of the DE rules would lead to “the kind of license concentration that the rules were designed to prevent.” 25/ Council Tree’s previous comments are even more applicable in today’s environment of wireless consolidation and the resulting license concentration.

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22/ RTG at 3.

23/ The “Council Tree 2000 Comments” are appended at Exhibit A.

24/ Council Tree 2000 Comments at 4-8.

25/ *Id.* at ii, 7-8.

Indeed, the circumstances described by CTIA and Verizon Wireless – the increased consumer demand for broadband services and the acute shortage of suitable wireless spectrum – are precisely why the Commission must *maintain* the current DE rules for this auction. CTIA and Verizon Wireless seem oblivious to the fact that smaller carriers are also struggling to satisfy their coverage and capacity needs, and are experiencing the effects of increased consumer demand combined with an extremely limited ability to acquire additional spectrum. New entrants, for whom the DE program is designed, face an even higher hurdle.

In fact, these challenges for small carriers and new entrants have themselves contributed to widespread industry consolidation, 26/ which further minimizes the opportunities for small business DEs to enter the wireless marketplace. Therefore, if this auction were to proceed without closed bidding, DE bidders would have a minimal – if any – opportunity to acquire these licenses when competing against major carriers with deep pockets. As the Commission has long recognized, bidding credits alone are insufficient in this environment. 27/ The

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26/ See Alta at 1; Catalyst at 1; Highland; MDP at 2; MVP at 2; and RTG at 3.

27/ “[I]n our judgment we do not anticipate [that] designated entities [will] realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will be against.” Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 414-15 ¶16 (1994).

current rules “provide a true opportunity for DEs to acquire PCS spectrum through the *critical combination of set-asides and bidding credits.*” 28/

On the other hand, the offering of additional licenses pursuant to closed bidding ensures that DE participants have a meaningful opportunity to acquire broadband PCS spectrum at the auction, 29/ minimizes the regulatory uncertainty inherent in an auction by providing an equitable opportunity to secure financing at reasonable cost, 30/ and expedites the deployment of additional innovative services. 31/ If anything, the Commission should offer DEs additional incentives to stimulate DE participation as a thoughtful response to ongoing industry consolidation. 32/

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28/ See, e.g., 3G PCS at 1 (emphasis added). See also Alta at 1; Catalyst at 1; MDP at 1; MVP at 2 (each explaining that the “critical blending of DE bid credits and set-asides” are the key to leveling the playing field between DEs and the large national carriers).

29/ Maxicom at 2 (“Maxicom has learned that the opportunity to bid in an auction against small businesses does not guarantee success; however, the opportunity to bid successfully is only realistic if the auction is closed to small businesses or includes bidding credits that help level the playing field.”).

30/ See Arctic Slope at 1, 2; Alta at 1, 2; Catalyst at 1, 2; Doyon at 1, 2; MDP at 1, 2; and MVP at 1. See also Maxicom at 2 (“Without these incentives for small business participation, capital will not be available for small businesses to participate in broadband PCS auctions.”).

31/ Council Tree at 12 (“the DE rules were designed to provide greater market access for new technologies and services, which are, very often, the province of entrepreneurs and small businesses”).

32/ See Alta at 2; Catalyst at 1-2; MDP at 2; MVP at 2; and RTG at 3.

### III. THE COMMISSION MUST OFFER ADDITIONAL CLOSED LICENSES, ADOPT A PERSONAL NET WORTH LIMITATION, AND REDUCE THE MINIMUM OPENING BIDS

By offering additional Closed licenses, adopting a personal net worth limitation, and lowering the minimum opening bids, the Commission will fulfill its congressional mandate to make Auction No. 58 a meaningful opportunity for small business DEs to enter the wireless marketplace.

In its Comments, Council Tree provides a compelling justification for the offering of additional Closed licenses. 33/ Accordingly, the Commission should re-designate sufficient Open licenses as Closed in order to increase the Closed licenses to the same level as in Auction No. 35 – 1.71 billion MHz POPs – in order to maintain a comparable opportunity for DEs. Failing that, then the Commission must, at a minimum, re-designate licenses in the 17 markets highlighted by Council Tree from Open to Closed in order to remedy the fact that NextWave assigned to Cingular, or retained for itself, Closed instead of Open licenses, and in doing so returned far fewer Closed licenses to the Commission to the detriment of the DE program.

Likewise, the Commission should adopt Council Tree's pending proposal for a personal net worth limitation in conjunction with this auction. As noted earlier, the comments in the instant proceeding demonstrate that the Commission's DE program was designed to secure opportunities to participate in the provision of spectrum-based services for small businesses and businesses owned

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33/ Council Tree at 8.

by members of minority groups and women, in fulfillment of Congress's directive. Indeed, review of the comments strengthens Council Tree's view that this auction may be one of the few remaining opportunities for DEs to secure PCS licenses, and that the DE rules must therefore ensure that only those bidders truly deserving DE status are eligible. High net worth individuals, masquerading as DEs, must not be allowed to usurp opportunities from legitimate DEs. Therefore, Council Tree urges the Commission to amend Part 1 of its rules to include a personal net worth restriction. For the Commission's convenience, as well as that of all interested parties, Council Tree has appended its pending Petition for Rulemaking (designated RM-10956) at Exhibit B.

Finally, in addition to Council Tree, 34/ DEs 3G PCS, Coloma, and McBride and Reiter encourage the Commission to reduce the minimum opening bids proposed in the *Public Notice*. 35/ In this regard, 3G PCS explains, “[m]inimum bids beyond nominal levels serve no purpose other than increasing the probability that the Commission will have to hold a re-auction to sell those licenses that may go unsold in Auction 58 due to artificially imposed pricing floors.” 36/ To avoid this situation, and to avoid the appearance of an improper focus on financial results, the Commission must reduce the minimum opening bids proposed for

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34/ Council Tree at 11-12.

35/ 3G PCS at 2; Coloma at 2; and McBride and Reiter at 2.

36/ 3G PCS at 2.

Auction No. 58. By doing so, the Commission will stimulate, rather than obstruct, the ability of DE participants to enter the wireless marketplace.

#### IV. DOBSON HAS FAILED TO JUSTIFY GRANT OF A WAIVER

Dobson has asked the Commission to waive the sunset set forth in the grandfathering provision of Section 24.709(a)(5)(i) of the Commission's rules. <sup>37/</sup> In sum, Dobson argues that because Auction No. 58 is essentially a "do-over" of Auction No. 35 with respect to the NextWave spectrum, the Commission should ensure that entities that met the grandfather exception requirements for Auction No. 35 retain this status for Auction No. 58 with respect to the NextWave spectrum. <sup>38/</sup> Dobson has failed to justify grant of a waiver, and therefore the Commission must deny its request.

First, Dobson has not demonstrated that the underlying purpose of Section 24.709(a)(5)(i) of the Commission's rules would be frustrated by application to Auction No. 58, the instant case. The fact is that the underlying purpose of the grandfather exception has already been met, and the rule expired more than three years ago.

The two-year grandfather exception to the entrepreneur eligibility requirement was originally established as part of a package of financial restructuring options offered by the Commission to C block licensees experiencing

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<sup>37/</sup> Dobson Comments and Request for Waiver at 4.

<sup>38/</sup> *Id.*

financial difficulties in the wake of the first two C block auctions. 39/ “When making these options available, the Commission explained that they were intended to provide ‘limited relief,’ limited in both scope and time.”40/ At that time, the Commission stated, “we believe that fairness to other future bidders prevents our providing an open eligibility standard indefinitely.” 41/ Thus, the Commission long ago achieved the underlying purpose of the grandfather exception (by providing the relief sought by Dobson and other C block licensees). At this point, many C block licensees that participated in the original two C block auctions are no longer experiencing financial difficulty, and no longer need additional assistance. 42/

Second, Dobson has not met the waiver standard by showing that the circumstances surrounding Auction No. 58 are so unique or unusual that application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that Dobson has no reasonable alternative. Council Tree submits that waiving the long-expired grandfather exception will not serve the public

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39/ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Fourth Report & Order*, 15 FCC Rcd 4740, 4743 ¶ 8 (2000).

40/ *Id.*

41/ Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report & Order*, 13 FCC Rcd 15743, 15752 ¶ 15 (1998).

42/ As of March 31, 2004, Dobson has nearly 1.6 million subscribers – a nearly 70 percent increase over its subscriber levels in 2000. Thus, Dobson has grown significantly larger since that time, and qualifies even less today than when it received grandfathered DE eligibility in Auction No. 35.

interest. Rather, fairness to other bidders prevents the Commission from providing an indefinite eligibility exception.

As the Commission has recognized, “the rule codifying the grandfather exception is clear on its face.” 43/ Indeed, Dobson supported the Commission’s proposal to clarify the rule prior to Auction No. 35, and was actively engaged in the extensive dialogue surrounding the matter at that time. 44/ As a result, the Commission adopted Dobson’s suggested clarification of the grandfather exception. 45/ At the same time, the Commission reminded Dobson and all interested parties that, “[o]ther than to make these clarifications, we see no need to modify the grandfather exception, which will apply to auctions of C block licenses that begin on or before March 23, 2001.” 46/ Moreover, the fact that the grandfather exception has expired does not prevent or hamper Dobson’s participation in Auction No. 58. Thus, Dobson cannot argue that it is without a “reasonable alternative.”

Finally, the fact that Dobson has outgrown the DE program and is seeking a waiver evidences its profitable deployment of services with the broadband PCS licenses it secured pursuant to the Commission’s DE program.

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43/ *Sixth Report & Order*, 15 FCC Rcd 16286 ¶ 40.

44/ *Id.* at 16286-87 ¶ 41.

45/ *Id.* at 16287 ¶ 41-42.

46/ *Id.* at ¶ 42.

**Conclusion.** As discussed above, the overwhelming majority of commenting parties support the Commission's decision to enforce the current DE rules, and demonstrate that the Commission's policy rationale from Auction No. 35 remains valid in today's environment. For this reason, Council Tree urges the Commission to continue to enforce the current DE rules for Auction No. 58, and to offer additional Closed licenses, add a personal net worth limitation, and reduce the minimum opening bids set forth in the *Public Notice*. Finally, Council Tree urges the Commission to deny Dobson's waiver request because the company has failed to justify grant of a waiver.

Respectfully submitted,

*/s/ Steve C. Hillard*

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July 15, 2004

# **Exhibit A**

Council Tree 2000 Comments

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

In the Matter of )  
)  
Petition of SBC Communications Inc. )  
For a Waiver of the Eligibility )  
Requirements of 47 C.F.R. § 24.709 )  
For the PCS Frequency Blocks C and F )  
Auction to Begin on July 26, 2000 )  
)  
Reauction of Certain C and F Block )  
Broadband PCS Licenses )

DA 00-191

RECEIVED  
FEB 22 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: Chief, Wireless Telecommunications  
Bureau

COMMENTS OF  
COUNCIL TREE COMMUNICATIONS, LLC

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Dated: February 22, 2000

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## SUMMARY

Council Tree Communications, LLC (“Council Tree”) opposes the petitions of SBC Communications, Inc. (“SBC”) and Nextel Communications, Inc. (“Nextel”) to waive or alter the Commission’s entrepreneurs’ block rules for the purposes of the forthcoming July reauction of broadband personal communications service (“PCS”) spectrum. The entrepreneurs’ block rules were developed to encourage the diversification of broadband PCS license ownership based on the recognition that smaller entities could not otherwise compete with entrenched telecommunications service companies. Indeed, the record reflects that the Commission was particularly concerned about the influence of “large telephone, cellular, and cable television companies” in that regard, noting that “[i]f one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.” The Bureau must now enforce the Commission’s entrepreneurs’ block rules to avoid precisely the kind of license concentration that the rules were designed to prevent.

It should be noted that the Commission anticipated the challenges that would face smaller businesses in a capital-intensive service such as broadband PCS, and it specifically created opportunities in Section 24.709 of its rules for SBC and Nextel to partner with these smaller licensees. SBC and Nextel may also enter into management and joint marketing agreements with these smaller businesses, permitting the entrepreneurs’ block licensees to draw on the resources and experience of the larger companies. Rather than permit SBC and Nextel to bid for licenses in competition with smaller businesses, the Bureau should encourage SBC and Nextel to pursue the types of strategic partnerships that are expressly contemplated in the rules.

Council Tree disagrees with the contentions of SBC and Nextel that enforcement of the Commission’s entrepreneurs’ block eligibility rules is a “prescription for more failures,” for the

“failures” from the original C block auction cannot be blamed on the entrepreneurs’ block eligibility rules. The availability of free credit (i.e., financing available without a determination of the debtor’s credit-worthiness) fueled speculation in the original C block auction by a number of highly sophisticated bidders who disregarded the risks associated with their enormous bids. Today, however, venture capital has never been more abundant in the United States, and the Commission has refined the entrepreneurs’ block rules to combat speculative bidding. Far from being a recipe for failure, the entrepreneurs’ block finally is poised for success.

Separately, Council Tree notes that Nextel has asked the Commission to waive or alter the entrepreneurs’ block eligibility rules for C block reauction on at least two occasions before now. Each time, the Commission expressly denied Nextel’s request, confirming that it will enforce the eligibility rules for all future C block auction events. The Bureau will upset settled expectations and undermine marketplace certainty for entrepreneurs if it signals its willingness to depart from these Commission pronouncements, and the public will certainly not benefit if the matter is entangled in litigation. The Bureau should undertake to avoid these litigation-related delays by enforcing the Commission’s well-grounded rules.

Finally, the Bureau should not upset the long-established broadband PCS C block bandplan as requested by Nextel. The Commission originally reallocated a 20 MHz PCS block into the current 30 MHz C block for the benefit of small businesses, and time and again the Commission has discussed the interrelated nature of that 30 MHz C block and the contiguous 10 MHz F block. The Bureau should not undermine business plans predicated on these existing spectrum allocations. At bottom, far from being a case where the underlying purpose of the entrepreneurs’ block rules would not be served, this may well be the model case for which the terms of the rule were created. Council Tree urges the Bureau to make this clear.

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Reauction of Certain C and F Block )  
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To: Chief, Wireless Telecommunications  
Bureau

**COMMENTS OF  
COUNCIL TREE COMMUNICATIONS, LLC**

Council Tree Communications, LLC (“Council Tree”), by its attorneys and pursuant to the Wireless Telecommunications Bureau’s February 3, 2000 Public Notice, DA 00-191, submits these Comments in the captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

Council Tree is an affiliate of Arctic Slope Regional Corporation (“Arctic Slope”), an Alaska Native Corporation formed in 1972 under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*, and owned by approximately 8,000 Native American shareholders. Council Tree is also affiliated with Bethel Native Corporation, the Kuskokwim Corporation, and St. George Tanaq Corporation, which are Alaska Native Corporations owned by more than 2,000 Alaska Natives living in 14 remote villages in disadvantaged portions of

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<sup>1</sup> By Public Notice dated February 11, 2000, the Bureau extended the time for filing Comments in this matter until February 22, 2000. DA 00-271.

Western Alaska and St. George (Pribilof) Island. The majority of these 10,000 Native American shareholders are women. Council Tree was organized to foster telecommunications industry partnerships for the benefit of minority-owned and women-owned investors, recognizing the opportunities for business success predicated on the meaningful diversification of telecommunications facilities ownership.

As part of this mission, Council Tree supports the Commission's efforts to develop and maintain opportunities for responsibly-managed minority and small businesses in the telecommunications industry, principal among which is the broadband personal communications ("PCS") entrepreneurs' block created by the Commission in 1994. The Commission developed the entrepreneurs' block to give new entities an opportunity to participate in the provision of spectrum-based services, consistent with the mandate of Congress and motivated by the need to disseminate licenses among a wide variety of applicants.<sup>2</sup> Since 1994, the Commission has dedicated considerable resources to refining, enforcing, and defending the entrepreneurs' block rules in a continuing effort to fulfill that promise, and — as a result of that work — the Commission is now able to reacquire many of the most prominent entrepreneurs' block licenses that have gone unused since 1996. Though few would dispute that the legacy of the original broadband PCS C block auction is mixed, the forthcoming July, 2000 reacquire gives the

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<sup>2</sup> Section 309(j)(3)(B) of the Communications Act directs the Commission to "promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Similarly, Section 309(j)(4)(C) requires the Commission, in promulgating its regulations, to "prescribe area designations and bandwidth assignments that promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(4)(C). Most significantly, Section 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . ." 47 U.S.C. § 309(j)(4)(D).

Commission a new chance to award these licenses to responsible small, minority-owned, and women-owned applicants with sound business plans. Plainly, this is an important opportunity for potential bidders and the Commission alike.

Against this background, Council Tree strongly opposes the proposals of SBC Communications, Inc. (“SBC”) and Nextel Communications, Inc. (“Nextel”) to waive or alter the Commission’s entrepreneurs’ block rules for the purposes of the forthcoming July reauction. In apparent efforts to advance their corporate wireless service business plans at the expense of designated entities, SBC and Nextel have asked the Commission fundamentally to alter the terms of the reauction. In the case of SBC, the request is in the form of a traditional petition for waiver in which the telecommunications giant asks to be admitted to the competitive bidding event otherwise reserved for small businesses. In the case of Nextel, the request is far more dramatic, urging the Commission to reallocate the available 30 MHz C block licenses into separate 20 MHz and 10 MHz licenses, and to make the new 20 MHz authorizations available only on a nationwide “bulk bid” basis with a \$2 billion upfront payment/minimum opening bid. Nextel also proposes the elimination of the entrepreneurs’ block eligibility limitations for each of its contemplated reauctions.

Council Tree urges the Bureau to deny the petitions of SBC and Nextel. At the core of each of the petitions is the abandonment of the Commission’s entrepreneurs’ block rules on the theory that smaller businesses cannot compete with established telecommunications companies in the provision of spectrum-based services, and that the Commission should allow those more established companies to acquire and utilize the entrepreneurs’ block spectrum for their wireless service networks. The circularity of these arguments should not be lost on the Commission. Indeed, the entrepreneurs’ block rules were developed in the first instance to encourage the

diversification of license ownership precisely because it was expected that smaller businesses would have difficulty competing against established telecommunications companies for spectrum rights and in the provision of service. The entrepreneurs' block rules also specifically provide opportunities for smaller businesses to partner with established telecommunications companies in order to remain competitive. In crafting the entrepreneurs' block rules, therefore, the Commission expressly contemplated the circumstances now invoked by SBC and Nextel in support of their elimination. For these reasons, and for the reasons discussed more fully below, Council Tree urges the Bureau to deny the petitions of SBC and Nextel.

## **II. THE BUREAU SHOULD NOT ABANDON THE ENTREPRENEURS' BLOCK RULES**

### **A. The Entrepreneurs' Block Rules Were Developed to Encourage the Diversification of Broadband PCS License Ownership**

First, SBC and Nextel ask the Commission to waive or eliminate the entrepreneurs' block eligibility requirements on the theory that current market conditions favor only large-scale wireless operators with substantial resources. According to SBC:

The existing carriers are well established, with facilities in place, substantial name brand recognition and sizeable customer bases — and many major carriers, like SBC, are seeking to assemble essentially national, facilities-based footprints which are very attractive to wireless customers because they facilitate both broad calling scopes and the efficiencies allowed by integrated networks. . . . The consolidations among these wireless carriers and the creation of these wide area systems clearly benefit wireless consumers, while at the same time presenting a daunting competitive challenge for small, new entrants in any wireless markets.<sup>3</sup>

Similarly, Nextel argues that “[t]he trend in the CMRS industry towards larger geographic footprints has become more apparent since the conclusion of the C Block auction,”<sup>4</sup> and that

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<sup>3</sup> SBC Petition at 11.

<sup>4</sup> Nextel Petition at 6.

“small businesses with limited resources face daunting obstacles in obtaining financing, building out their systems and competing successfully with entrenched incumbents.”<sup>5</sup> On this basis, Nextel declares that “small, start-up entities with hundreds of millions of dollars in debt are doomed to fail in competitive markets in which some of the nation’s largest communications firms operate.”<sup>6</sup>

Far from offering reasons to eliminate the entrepreneurs’ block rules, however, these arguments are some of the best evidence of the utility of the rules in the first instance. Indeed, the entrepreneurs’ block rules were developed to encourage the diversification of broadband PCS license ownership based on the recognition that smaller entities could not otherwise compete with entrenched telecommunications service companies. This much was apparent even before the advent of the Commission’s competitive bidding authority, as evidenced by a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.<sup>7</sup>

According to the Report:

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with “deep pockets”, and therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. The Committee has given the

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<sup>5</sup> Id. at 13.

<sup>6</sup> Id. at 6 n.9.

<sup>7</sup> H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

Commission the flexibility to design alternative payment schedules in order that this not occur.<sup>8</sup>

On that basis, as part of the grant of auction authority under Section 309(j), the Commission was directed to promote the dissemination of “licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,”<sup>9</sup> and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . .”<sup>10</sup>

Thereafter, in implementing its competitive bidding authority in the 1994 Competitive Bidding Fifth Report and Order, the Commission explained:

We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.<sup>11</sup>

Against this background, the Commission expressly set aside broadband PCS blocks C and F for bidding only by “entrepreneurial” companies, defined as those with gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million.<sup>12</sup> As the

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<sup>8</sup> Id. at 255.

<sup>9</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>10</sup> Id., § 309(j)(4)(D).

<sup>11</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5585 (1994) (emphasis added) (“Competitive Bidding Fifth Report and Order”).

<sup>12</sup> Id. The Commission supplemented the creation of the entrepreneurs’ block with additional benefits available to entrepreneurs who fell within specific “designated entity” categories.

Commission later made clear, it created these set-aside blocks on the expectation that bidding credits and installment payment terms alone would not be enough for smaller businesses to overcome the substantial advantage held by these “large telephone, cellular and cable television companies:”

[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without insulation of the entrepreneurs’ block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.<sup>13</sup>

Thus, it was the Commission’s judgment that “meaningful opportunities” for smaller businesses could be had only by enforcing the entrepreneurs’ block eligibility criteria for broadband PCS.

Today, the need for these “meaningful opportunities” is greater than ever. As noted by SBC, “the competitive landscape that new entrants will face” has “changed dramatically,”<sup>14</sup> and large carriers have an increasingly concentrated share of the commercial mobile radio service market. Rather than abandon the entrepreneurs’ block rules in these circumstances, therefore, the Bureau must see to the strict enforcement of these eligibility restrictions to avoid the “excessive concentration of licenses” to which Congress referred in Section 309(j)(3)(B). Note, for example, that SBC does not seem troubled by the prospect of having to bid for the C block spectrum at issue, arguing that “[g]ranting this waiver will enable SBC quickly to bring new services to the public in market areas where SBC does not currently have wireless facilities . . .

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<sup>13</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 414-15 (1994) (“Competitive Bidding Fifth MO&O”).

<sup>14</sup> SBC Petition at 10.

.”<sup>15</sup> The fact that SBC comfortably assumes — as it apparently does — that it will win the licenses it desires in the forthcoming reauction illustrates the truth of the Commission’s 1994 observation that “[i]f one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.”<sup>16</sup> The Commission was correct in 1994, and it developed its entrepreneurs’ block rules to avoid the very situation contemplated here.

**B. The Entrepreneurs’ Block Rules Specifically Permit Established Companies to Partner with Entrepreneurial Entities**

While they predict that entrepreneurial entities will be unable to compete with large telecommunications carriers in increasingly consolidated markets, SBC and Nextel each contend that it is prepared to deploy the broadband PCS C and F block spectrum that is the subject of the forthcoming reauction. According to SBC, “Given SBC’s ability to provide services promptly and to engage in robust competition in the markets it enters, the Commission should not give only smaller companies, who likely cannot compete as effectively, a lock over spectrum that SBC desires to provide facilities-based competition in additional market areas.”<sup>17</sup> For its part, Nextel writes, “access to additional spectrum could allow Nextel to compete more effectively with large commercial mobile radio service (‘CMRS’) operators that have substantially more spectrum.”<sup>18</sup> In each case, the Petitioner argues the Bureau must waive the entrepreneurs’ block eligibility rules to permit it to have “access” to the C block spectrum at issue.

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<sup>15</sup> SBC Petition at 12.

<sup>16</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5585.

<sup>17</sup> SBC Petition at 15.

<sup>18</sup> Nextel Petition at 3.

In fact, the Commission's entrepreneurs' block rules contemplate the types of situations described by SBC and Nextel, and the rules specifically permit established companies such as these to partner with entrepreneurial entities. Among other things, Section 24.709 of the Commission's Rules permits passive investors to own up to 49.9 percent of the equity of a C or F block licensee without having its assets and gross revenues attributed to the licensee for the purposes of determining entrepreneurs' block eligibility or eligibility for small business preferences.<sup>19</sup> As the Commission explained in the course of refining those rules in 1994:

[T]he [amended control group] rules will: (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.<sup>20</sup>

Indeed, it is one of the central purposes of the entrepreneurs' block rules to allow new entrants to draw on the resources and expertise of established, experienced firms as a way to increase their odds of success. Thus, the Commission's Rules also permit designated entities to enter into management or joint marketing agreements with experienced firms without contravening the attribution thresholds in the entrepreneurs' blocks,<sup>21</sup> and the Commission has raised to 40 percent the CMRS spectrum attribution threshold for interests held in small business CMRS licensees.<sup>22</sup>

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<sup>19</sup> See 47 C.F.R. § 24.709(b)(4) & (b)(6).

<sup>20</sup> Competitive Bidding Fifth MO&O, 10 FCC Rcd at 441.

<sup>21</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order, 9 FCC Rcd 7123, 7124 (1994) ("CMRS Fourth Report and Order") ("We expect that investor/manager agreements are one of the many alternatives available to designated entities . . . . This does not mean, however, that these management agreements will be deemed 'attributable' for purposes of the revenue thresholds in the entrepreneur's blocks"); Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5601 n.135 ("So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants").

<sup>22</sup> See 47 C.F.R. § 20.6(d)(2).

As the Commission explained in the Broadband PCS Reconsideration Order, “Investments by cellular providers in these designated entities should increase the entities chances for success in the auctions and later in service competition by providing access to capital and valuable industry experience.”<sup>23</sup>

Thus, it seems apparent that the stated goals of SBC and Nextel may be achieved in this context not by eliminating the entrepreneurs’ block rules, but by utilizing the opportunities for investment and management included in the rules themselves. SBC and Nextel each claim to “desire” access to the spectrum at issue to complete their national footprints, particularly in service areas where they currently are not licensed to operate. If that is so, these entities should explore the possibility of investing in an entrepreneurial licensee, serving as the manager for an entrepreneurial licensee, or jointly marketing service with an entrepreneurial licensee, all as contemplated by the rules that exist today. Though SBC or Nextel may argue that participating in these fashions would deprive them of control of the licenses to which they seek access, such an argument should only serve to confirm the continuing import and relevance of the entrepreneurs’ block rules. With the backing and assistance of established telecommunications companies, responsible small businesses may succeed in the current CMRS market, and the Bureau should encourage the likes of SBC and Nextel to pursue these strategic partnership opportunities.

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<sup>23</sup> Amendment of the Commission’s Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 4957, 5008-09 (1994) (“Broadband PCS Reconsideration Order”).

**C. Enforcement of the Entrepreneurs' Block Rules is Not a "Prescription for More Failures"**

At the core of the arguments of SBC and Nextel in this context is the contention that the entrepreneurs' block has failed to produce successful licensees and competitive service providers. Arguing that "the vast majority of C and F block licensees have not succeeded in the market,"<sup>24</sup> for example, SBC states:

Given the problems these designated entities encountered several years ago, when conditions appeared to be more favorable, it is likely that they will face even greater difficulty in obtaining financing, building out their networks, and competing successfully in the future.<sup>25</sup>

On this basis, SBC concludes that "restricting participation in the up-coming auction to designated entities is a prescription for more failures."<sup>26</sup> For its part, Nextel argues that "[w]hile dramatic structural changes were taking place in the CMRS industry since 1994, many C block licensees found themselves unable, or unwilling, to pay the large sums owed for their licenses,"<sup>27</sup> for which reason Nextel contends that the Commission has "the obligation to revise its competitive bidding rules in the structuring the upcoming PCS reauction."<sup>28</sup>

Contrary to the arguments of SBC and Nextel, however, the previous failures of certain broadband PCS C and F block licensees does not mean that all future entrepreneurial entities are "doomed to fail." The Commission long ago recognized that the lack of access to capital

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<sup>24</sup> SBC Petition at 7.

<sup>25</sup> Id. at 11.

<sup>26</sup> Id. at 13. See also id. at 5-6 ("[E]ach of these factors requires the Commission to open up the auction process if it wishes to avoid a new generation of NextWaves").

<sup>27</sup> Nextel Petition at 8.

<sup>28</sup> Id. at 12.

frequently limits the ability of smaller businesses to compete with established telecommunications companies,<sup>29</sup> and the entrepreneurs' block installment payment plans were designed to help to overcome that limitation. However, the availability of free credit (i.e., financing available without a determination of the debtor's credit-worthiness) fueled speculation in the broadband PCS C block auction by a number of highly sophisticated bidders.

In turn, as the Commission acknowledged in its C Block Second Report and Order, those bidders and their investors placed high risk bets during the auction itself:

While many C block licenses were purchased for prices below or comparable to those for the A or B blocks, a handful of large bidders bid extremely high prices per pop for major markets, even adjusted for the value of the government financing we provide. The aggregate results of the C block auction, when measured in average price per pop paid, are markedly higher than the other PCS bands, even after adjusting for financing, and even though many individual small licensees bid prices comparable to those paid for the A and B block licenses.<sup>30</sup>

Notably, some of those same entities continued to borrow in the face of mounting financial difficulty. For example, as part of its effort to avoid making good on its broadband PCS C block installment payment obligations, NextWave Telecom, Inc. ("NextWave") argued in 1997 that:

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<sup>29</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2389-90 (1994).

<sup>30</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436, 16442 (1997) (footnote omitted) ("C Block Second Report and Order"). Then-Chairman Hundt concluded in his separate statement that:

a handful of bidders submitted bids that cannot be explained other than by assuming they made their decisions according to erroneous market predictions, bad financial advice, or a triumph of hope over thought. Regrettably, these bidders — irrationally exuberant in hindsight and, according to many, even at the time of bidding — won nearly three quarters of the United States market measured by population.

Id. at 16503 (Affirming and Dissenting Separate Statement of Chairman Reed E. Hundt re: C Block Financing Issues, Sept. 25, 1997).

The public equity market for wireless telecommunications was very strong throughout 1995 and through the first half of 1996, only to erode in late 1996 and in 1997.<sup>31</sup>

Moreover, according to NextWave:

Since the close of the [C block] auction, virtually all that could have gone wrong in spectrum financing markets, particularly for high risk new entrants, has gone wrong.<sup>32</sup>

Yet, during the same period in which financing allegedly had become scarce, NextWave voluntarily entered net high bids totaling \$128,971,750 for F block licenses<sup>33</sup> and accepted government financing on the balance due. Those F block licenses had not even been granted when NextWave asked the Commission to postpone the repayment of its C block debts.<sup>34</sup>

Simply put, the failures resulting from previous C block auction should not be blamed on the entrepreneurs' block eligibility parameters. As the Commission later explained in deciding not to extend post-auction debt relief to broadband PCS F block licensees:

The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. [T]he C block situation was the result of a unique set of almost unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.<sup>35</sup>

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<sup>31</sup> Comments of NextWave Telecom, Inc., WT Docket No. 97-82, at 12 (June 23, 1997).

<sup>32</sup> Reply Comments of NextWave Telecom, Inc., WT Docket No. 97-82, at 9 (July 8, 1997).

<sup>33</sup> See Public Notice: D, E, and F Block Auction Closes, DA 97-81, Attachment B (rel. Jan. 15, 1997).

<sup>34</sup> See Letter from Thomas Gutierrez, Esq., et al. to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau 3 (Mar. 13, 1997).

<sup>35</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345, 8377 (1998) (footnote omitted) ("C Block Reconsideration Order").

At bottom, the C block failures to which SBC and Nextel point today they were the result of poor financial planning and an easily-abused, all-too-forgiving credit policy. These problems did not then — and do not now — implicate the purpose or effectiveness of the entrepreneurs' block eligibility rules with which they are so casually associated.<sup>36</sup>

In should be noted, of course, that the Commission has taken steps to ensure financial accountability from entrepreneurial entities since 1996. In its D, E, and F Block Order released soon after the conclusion of the original C block auction, the Commission raised the broadband PCS F Block auction upfront payment and downpayment requirements in part “to guard against default”<sup>37</sup> and in part to “increase the likelihood that licenses are awarded to parties who are best able to serve the public.”<sup>38</sup> The Commission recognized that greater financial accountability was necessary “to deter insincere and speculative bidding and to ensure that bidders have the financial capability to build out their systems.”<sup>39</sup> More recently, in the C Block Fourth Report and Order, the Commission eliminated the availability of installment payment financing for broadband PCS C block licenses altogether<sup>40</sup> and directed the Bureau to employ substantial

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<sup>36</sup> Council Tree notes that “big companies” are not immune to poor planning. Consider the recent plight of Iridium, LLC: despite the size of the venture, Iridium’s spectrum is woefully underutilized and its business plan is in shambles.

<sup>37</sup> Amendment of Parts 20 and 24 of the Commission’s Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7860 (1996) (“D, E, and F Block Order”).

<sup>38</sup> Id. at 7861 (footnote omitted).

<sup>39</sup> Id. at 7860 (footnote omitted).

<sup>40</sup> Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Fourth Report and Order, 13 FCC Rcd 15743, 15769-70 (1998) (“C Block Fourth Report and Order”).

down payment requirements to ensure that entrepreneurial licensees have the “capability to attract capital to build out and operate systems.”<sup>41</sup> The result of these measures was the successful reauction of C and F block spectrum that ended on April 15, 1999.

Now, one year later, venture capital has never been more abundant in the United States, and responsible designated entities with sensible business plans will have little trouble acquiring legitimate and verifiable financial support for their reauction bids. The Commission has made clear its intent strictly to enforce competitive bidding payment rules, and the courts have cast serious doubt on the ability of licensees to seek bankruptcy protection to the detriment of service to the public. Rather than suggesting that enforcement of the entrepreneurs’ block rules is “a prescription for more failures,” these developments confirm that the Commission’s entrepreneurs’ block program is poised for success. After dedicating so many resources to refining, enforcing, and defending these rules, it is time for the Commission to enforce those rules, not to abandon them at the request of SBC and Nextel.

**D. The Commission Has Already Declared that the Entrepreneurs’ Block Rules will Apply in the Forthcoming Reauction**

Finally, Council Tree notes that this is not the first time that Nextel has asked the Commission to abandon the entrepreneurs’ block rules for a C block reauction. In the C Block Reconsideration Order, the Commission observed that Nextel had “challenge[d] the Commission’s ruling in the Second Report and Order that participation in the C block reauction is limited to qualified entrepreneurs,”<sup>42</sup> and the Commission expressly rejected Nextel’s

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<sup>41</sup> Id. at 15763.

<sup>42</sup> C Block Reconsideration Order, 13 FCC Rcd at 8375 (footnote omitted).

request.<sup>43</sup> Thereafter, in the C Block Fourth Report and Order, the Commission again noted that Nextel had urged the Commission to open C block reactions to all interested parties:

Nextel argues that a restricted auction skews the marketplace and that the increasing level of competition in the wireless arena makes it less likely that small business entrepreneurs can survive. According to Nextel, the Commission could enable small businesses to bid competitively by providing them bidding credits and permitting them to partition and disaggregate 30 MHz licenses after the auction.<sup>44</sup>

Once again, however, the Commission denied Nextel's request,<sup>45</sup> ruling unequivocally that only entities qualifying as entrepreneurs under Section 24.709 of the Commission's rules "will be eligible for C block reactions . . . ."<sup>46</sup> Indeed, when announcing the general eligibility parameters for C block reactions in its C Block Second Report and Order, the Commission stated that the statutorily mandated public interest considerations set forth in Section 309(j) of the Communications Act would be "furthered by generally applying the same rules regarding eligibility that were used in the C block auction to the reaction of C block licenses."<sup>47</sup>

Against this background, the Bureau must adhere to these pronouncements to avoid creating even further regulatory uncertainty for entrepreneurs' block applicants. The Commission has frequently undertaken to preserve settled regulatory expectations and existing

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<sup>43</sup> Id.

<sup>44</sup> C Block Fourth Report and Order, 13 FCC Rcd at 15752 (footnotes omitted) (emphasis added).

<sup>45</sup> Id. at 15753.

<sup>46</sup> Id. at 15751.

<sup>47</sup> C Block Second Report and Order, 12 FCC Rcd at 16448.

business relationships as a way to promote investment in designated entity auction applicants,<sup>48</sup> and the reauction itself is part of the Commission's effort to "restore certainty to the marketplace" after some C block licensees asked for installment payment relief.<sup>49</sup> If the Bureau were to signal its willingness to change the eligibility parameters for the C block reauction after the Commission's many statements to the contrary, the Bureau would "frustrate business plans and auction strategies made in reliance on [its] previous statements,"<sup>50</sup> undermining the very marketplace certainty that it now seeks to restore.

In that regard, Council Tree notes that no party will be able to put the C block spectrum at issue to use if the forthcoming reauction is delayed by litigation over enforcement of the Commission's entrepreneurs' block rules. Indeed, the Commission observed in 1998 that "the C block situation was the result of a unique set of almost unpredictable events, including litigation and resulting licensing delays,"<sup>51</sup> and much of the litigation at issue surrounded the Commission's efforts to modify the entrepreneurs' block rules in the wake of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena. There, the Commission had expressly undertaken to preserve settled expectations in an effort to avoid litigation-related delays:

All C block applicants, as well as the public, will be better served if we proceed expeditiously in a manner which both reduces the likelihood of legal challenges

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<sup>48</sup> See, e.g., id. at 16448 (applying existing C block eligibility rules to the C block reauction); D, E, and F Block Order, 11 FCC Rcd at 7837-39 (applying existing C block eligibility rules to the F block auction). See also Omnipoint Corp. v. FCC, 78 F.3d 620, 629-30, 634 (D.C. Cir. 1996) (noting the Commission's efforts to preserve existing C block auction business relationships following the Supreme Court's decision in Adarand Constructors, Inc. v. Pena).

<sup>49</sup> C Block Second Report and Order, 12 FCC Rcd at 16448.

<sup>50</sup> D, E, and F Block Order, 11 FCC Rcd at 7838-39 (footnote omitted).

<sup>51</sup> C Block Reconsideration Order, 13 FCC Rcd at 8377 (footnote omitted).

and enhances the opportunities for a wide variety of applicants, including designated entities, to obtain licenses and rapidly deploy broadband PCS service.<sup>52</sup>

Now, the Commission faces no such legal uncertainty because the legal basis for and scope of the entrepreneurs' block rules are well-settled. Thus, the Bureau may easily avoid litigation related delays in this instance by adhering to its many pronouncements on the issue and enforcing its well-grounded entrepreneurs' block rules.

### **III. THE BUREAU SHOULD NOT UPSET THE BROADBAND PCS C BLOCK BANDPLAN**

In addition to enforcing the Commission's entrepreneurs' block eligibility rules for the upcoming reauction of broadband PCS C block spectrum, the Bureau also should not upset the long-established C block bandplan. As noted above, as part of its proposal to gain access to broadband PCS C block spectrum, Nextel urges the Commission to reallocate the available 30 MHz C block licenses into separate 20 MHz and 10 MHz licenses, and to make the new 20 MHz authorizations available only on a nationwide "bulk bid" basis with a \$2 billion upfront payment/minimum opening bid. According to Nextel, "Offering new 20 MHz PCS licenses, together with available 15 MHz licenses, exclusively on a bulk bid basis would provide sufficient spectrum and geographic coverage to support the entry of a new or spectrum constrained facilities-based PCS provider . . . ."<sup>53</sup> What Nextel's plan will not do, however, is present meaningful opportunities for smaller businesses.

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<sup>52</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 146 (1995) (footnote omitted) ("Competitive Bidding Sixth Report and Order").

<sup>53</sup> Nextel Petition at 19.

By way of background, Council Tree notes that the Commission's original broadband PCS bandplan featured a 20 MHz block to be dedicated to smaller businesses. In 1994, however, the Commission reallocated that 20 MHz block into a 30 MHz spectrum block expressly for the purpose of facilitating the competitive success of smaller businesses:

[T]he investment community has stated that financing would be much more difficult to obtain for licenses on the 20 MHz block than on the other blocks. These handicaps are of particular concern to use because the 20 MHz block was proposed to be reserved for designated entities. The competitive handicaps of a 20 MHz block relative to 30 MHz blocks would not have served our goal of providing a viable competitive opportunity for designated entities.<sup>54</sup>

Thereafter, in the Competitive Bidding Fifth Report and Order, the Commission discussed the utility of including both the 30 MHz C block and the 10 MHz F block in the entrepreneurs' block structure:

Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of bandwidth to compete effectively. The 10 MHz F block license, on the other hand, fulfills the needs of other designated entities who argue in favor of smaller blocks. Moreover, since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees.<sup>55</sup>

Since then, the Commission has discussed the close interrelationship of the broadband PCS C and F blocks on several occasions, and the Commission has undertaken to foster and preserve business plans predicated on the availability of these contiguous spectrum allocations.<sup>56</sup>

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<sup>54</sup> Broadband PCS Reconsideration Order, 9 FCC Rcd at 4980 (footnotes omitted).

<sup>55</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5587-88.

<sup>56</sup> See, e.g., D, E, and F Block Order, 11 FCC Rcd at 783 ("making the same equity structures available to both C and F block applicants is necessary so that C block participants will not be required to structure themselves differently in order to participate in the F block auction"); id. at 7838 ("we have stated that the C and F blocks occupy contiguous spectrum that offers the opportunity for entrepreneurs to efficiently aggregate the spectrum"); C Block Second Report and Order, 12 FCC Rcd at 16456 ("Licensees electing [disaggregation] will be required to return half of their spectrum [that is] contiguous to the PCS F block. The surrender of

Against this background, the Bureau should not now ignore those same business plans on the basis of Nextel's request. Time and again since the development of the entrepreneurs' block, the Commission has made clear that the 30 MHz C block and the 10 MHz F block were reserved for entrepreneurial entities as part of the Commission's efforts to foster "meaningful opportunities" for smaller bidders to participate in the provision of spectrum based services. Indeed, the Commission has even made clear that "we will not consider C block licenses as assets for purposes of F block eligibility,"<sup>57</sup> opening the way for smaller businesses to build commercially-viable wireless service operations with combined C and F block spectrum. Today, Nextel urges the Commission to break up the C block spectrum for the purpose of creating a \$2 billion (minimum) national license on the expectation that entrepreneurial entities cannot compete in the current CMRS market.<sup>58</sup> By granting the Nextel's request to upset the long-established C block bandplan, the Bureau will virtually ensure that Nextel's expectation comes true.

#### **IV. THE REQUIREMENTS FOR A WAIVER ARE NOT MET HERE**

Finally, Council Tree urges the Bureau to deny the Petitions of SBC and Nextel because the Commission's standards for waiver are not met here. Section 1.3 of the Commission's Rules

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spectrum adjacent to the F block will provide sufficient contiguous spectrum for both the incumbent and new licensees to offer competitive PCS services").

<sup>57</sup> D, E, and F Block Order, 11 FCC Rcd at 7839.

<sup>58</sup> It should be noted that Nextel asserts that its proposal will "enhance competition" in the broadband PCS market, Nextel Petition at 14, actually arguing that "nothing [in its proposal] would preclude any qualified entity from acquiring the national 20 MHz/15MHz bulk bid package of licenses." Id. at 17. In the same pleading, however, Nextel contends that "an entity that believes itself capable of bidding and timely making license payments totaling billions of dollars is not a small business by any stretch of the definition." Id. at 6 n.9. Nextel cannot reasonably have it both ways.

provides that any provision of the Commission's Rules may be waived "if good cause therefor is shown,"<sup>59</sup> and Section 1.925(b)(3) of the Commission's Rules provides that the Commission may grant a request for waiver of a rule if it is shown that:

(i) The underlying purpose of the rule(s) 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

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>60</sup>

Pursuant to the "good cause" standard, the Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.<sup>61</sup>

In addition, the Commission must explain why deviation from the established rule better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.<sup>62</sup>

Applying these factors to this case, it is hard to understand how the underlying purpose of the entrepreneurs' block eligibility rules "would not be served or would be frustrated by application to the instant case." As noted above, the Commission developed the eligibility limitations at issue on the expectation that on the expectation that bidding credits and installment payment terms alone would not be enough for smaller businesses to overcome the substantial advantage held by "large telephone, cellular and cable television companies:"

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<sup>59</sup> 47 C.F.R. § 1.3.

<sup>60</sup> 47 C.F.R. § 1.925(b)(3).

<sup>61</sup> Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

<sup>62</sup> Northeast Cellular Telephone, 897 F.2d at 1166.

[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.<sup>63</sup>

Thus, it was the Commission's judgment that "meaningful opportunities" for smaller businesses could be had only by enforcing the entrepreneurs' block eligibility criteria for broadband PCS. Choosing not to enforce those same eligibility rules so that SBC and Nextel to bid in the forthcoming C block reauction would specifically defeat the point of the entrepreneurs' block "insulation" in the first instance, for, as the Commission wrote in 1994, "[i]f one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business."<sup>64</sup> Far from being a case where "[t]he underlying purpose of the rule(s) would not be served," therefore, this may well be the model case for which the terms of the rule were created.

In that regard, as noted above, the Commission's rules expressly permit established companies such as SBC and Nextel to partner with entrepreneurial entities in the provision of broadband PCS C and F block services. As the Commission has explained on several occasions, these rules were intended to encourage investment in smaller businesses and to permit these smaller businesses to draw on the resources and expertise of large telecommunications service providers. Rather than waive these rules to permit the likes of SBC and Nextel to bid for C and F block spectrum in competition with entrepreneurial entities, the Bureau should enforce the very rules that will encourage the formation of jointly-successful broadband PCS systems. In doing

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<sup>63</sup> Competitive Bidding Fifth MO&O, 10 FCC Rcd at 414-15.

<sup>64</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5585.

so, the Bureau will promote both the letter and the spirit of the policy that has yet to be fully-realized.

Finally, Council Tree notes that SBC and Nextel each contend that permitting established companies to bid alongside smaller businesses in the forthcoming reauction will promote the public interest by generating more money for the treasury. According to SBC:

increasing the number of bidders, including bidders with substantial resources, will also maximize the recovery for the treasury. While this is not a primary concern, it is not an inconsequential one for the FCC or for Congress.<sup>65</sup>

Nextel, meanwhile, argues that “[a]llowing all qualified entities, regardless of their size, to participate in the reauction will ensure that the auction process works rationally and maximizes the value of the spectrum, thereby providing that the public receive full value for this spectrum.”<sup>66</sup> Rather than serving as a basis for granting a waiver, however, these arguments only highlight why the Bureau should reject the SBC and Nextel petitions.

Among the mandates in Section 309(j)(4)(C) of the Communications Act is that the Commission must promote “economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by member of minority groups and women . . . .”<sup>67</sup> In turn, Section 309(j)(7)(A) provides:

[I]n prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.<sup>68</sup>

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<sup>65</sup> SBC Petition at 14 n.23.

<sup>66</sup> Nextel Petition at 16.

<sup>67</sup> 47 U.S.C. § 309(j)(4)(C).

<sup>68</sup> Id., § 309(j)(7)(A) (emphasis added).

In 1993, the House Budget Committee explained the purpose of this limitation:

This paragraph is designed to insulate the FCC's communications policy decisions from budgetary pressures, and clarifies that important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions.<sup>69</sup>

In this case, it may be true that the Commission could increase the revenue from the forthcoming C block reauction by permitting SBC and Nextel to bid in the midst of eligible smaller businesses, but that is not the point of the broadband PCS entrepreneurs' block rules. Rather, consistent with the mandate of Congress, the Commission determined that the success of the entrepreneurs' block rules depended on the "insulation" of smaller businesses from the very companies whose participation likely would maximize auction revenue. That is the public interest to be served by compliance with the Commission's rules in this case.

At bottom, the Commission established the entrepreneurs' block rules to combat the further concentration of spectrum resources in the hands of established telecommunications companies such as SBC and Nextel, and the Commission has dedicated substantial resources to refining, enforcing, and defending those rules ever since. The Commission is now presented with the opportunity to reauction many of the broadband PCS C block licenses that have gone unused since 1996, which is an important prospect for the Commission and potential bidders alike. Instead of abandoning the entrepreneurs' block rules as requested by telecommunications giants such as SBC and Nextel, therefore, the Bureau must make clear that the Commission's entrepreneurs' block eligibility rules will be strictly enforced in the forthcoming reauction of broadband PCS C and F block licenses. With this kind of regulatory certainty, the Commission will be that much closer to realizing the original promise of the entrepreneurs' block rules.

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<sup>69</sup> H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993).

V. CONCLUSION

For these reasons, Council Tree urges the Bureau to deny the SBC and Nextel petitions and to confirm unequivocally that the Commission's entrepreneur's block rules will be enforced in the forthcoming C block reauction.

Respectfully submitted,

COUNCIL TREE COMMUNICATIONS, LLC

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Its Attorneys

February 22, 2000

# **Exhibit B**

Council Tree Petition for Rulemaking (RM-10956)

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# PUBLIC NOTICE

Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

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Report No. 2654

April 2, 2004

CONSUMER & GOVERNMENTAL AFFAIRS BUREAU  
REFERENCE INFORMATION CENTER  
PETITION FOR RULEMAKING FILED

Interested persons may file statements opposing or supporting the Petitions for Rulemaking listed herein within 30 days, or as noted. See Sections 1.4 and 1.405 of the Commission's rules for further information.

**RM NO.      RULES SEC.      PETITIONER      DATE RECEIVED      NATURE OF PETITION**

10956	Part 1	Council Tree Communications, Inc. (Filed By: Steve C. Hillard, 110 North Rubey Drive Suite 201 Golden, CO 80403-2453)	03/08/04	In the Matter of the Commission's Rules to Include a Personal Net Worth Limitation for Competitive Bidding Small Business Preference Eligibility
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FCC

**STAMP AND RETURN**

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

In the Matter of )  
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COUNCIL TREE COMMUNICATIONS, INC. )  
 )  
Petition for Amendment of Part 1 of the )  
Commission's Rules to Include a Personal Net )  
Worth Limitation for Competitive Bidding )  
Small Business Preference Eligibility )

RM-\_\_\_\_\_

**RECEIVED**

**MAR - 8 2004**

To: The Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PETITION FOR RULEMAKING**

Steve C. Hillard  
George T. Laub  
COUNCIL TREE COMMUNICATIONS, INC.  
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Dated: March 8, 2004

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## SUMMARY

Council Tree Communications, Inc. (“Council Tree”) urges the Commission to amend Part 1 of its Rules to include a personal net worth limitation for competitive bidding small business preference eligibility. The Commission’s designated entity program was designed to secure opportunities to participate in the provision of spectrum-based services for smaller businesses and businesses owned by members of minority groups and women, consistent with the intent of Congress to promote economic opportunity where it might not otherwise exist. When it enacted Section 309(j) of the Communications Act to give the Commission auction authority, Congress was concerned that a system of competitive bidding would tend to favor only those with deep pockets. To address this concern, the Commission has undertaken to see that the designated entity benefits to be offered in competitive bidding are reserved for those that legitimately need government assistance to join the information economy.

Today, however, high net worth individuals have recognized that the Commission does not count personal wealth in assessing the size of a business that applies for auction-related bidding credits or set-asides. If a high net worth individual does not have his or her wealth tied to ownership of other businesses — or if such other businesses have few or no gross revenues — the Commission’s approach leaves the door open for that individual to receive the government benefits meant for disadvantaged enterprises. This type of flaw threatens the very availability of competitive bidding preferences for true designated entities. In 1995, Congress eliminated the availability of tax certificates for members of minority groups in part because the program had ceased to serve the ends envisioned by Congress. The Commission must ensure that its designated entity program is administered in a manner consistent with the goals of Congress to avoid a similar result here.

To address this problem, the Commission should look to the Small Business Administration's ("SBA's") small disadvantaged business program, where a concern is not eligible to participate if any attributable investor in the applicant has personal net worth valued at \$750,000 or more. Specifically, in addition to applying such other limitations as it uses to establish small business preference eligibility (*e.g.*, gross revenues tests), the Commission should provide that no competitive bidding preference made available based on business size shall be awarded to an applicant if the personal net worth of any attributable individual investor in the applicant exceeds the SBA's cap. This limitation should be applied by the Commission only to an individual with both a controlling interest in the applicant under the Commission's rules *and* an appreciable equity interest in the applicant. The limitation also should be applied to affiliates of a controlling interest holder with an appreciable equity stake.

Under this approach, officers and directors with no meaningful equity stake in an applicant will not be affected. Similarly, wealthy individuals without a controlling interest in an applicant will still be free to invest. It will be wealthy individuals masquerading as designated entities who will — and should — be denied government assistance. Establishing and enforcing this rule will help to ensure that the benefits to be offered in the competitive bidding process will be reserved for those that need government assistance to participate in the provision of spectrum-based services. It will also help to preserve the designated entity program by adhering strictly to the intent of Congress, not promoting the interests of deep pockets. For these reasons, and for the reasons set forth more fully in this Petition, Council Tree urges the Commission to amend Part 1 of its Rules to include a personal net worth limitation for competitive bidding small business preference eligibility.

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

In the Matter of )  
 )  
COUNCIL TREE COMMUNICATIONS, INC. ) RM- \_\_\_\_\_  
 )  
Petition for Amendment of Part 1 of the )  
Commission's Rules to Include a Personal Net )  
Worth Limitation for Competitive Bidding )  
Small Business Preference Eligibility )

To: The Commission

**PETITION FOR RULEMAKING**

Council Tree Communications, Inc. ("Council Tree"), pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401, hereby petitions the Commission to amend Part 1 of its Rules to include a personal net worth limitation for competitive bidding small business preference eligibility.

**I. INTRODUCTION**

Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that business success can accompany the meaningful diversification of communications facilities ownership. As part of this work, Council Tree has long been an active supporter of responsibly-managed government efforts to encourage the participation of new entrants in the communications industry. In 2003, Council Tree president Steve C. Hillard was appointed to the Commission's Advisory Committee on Diversity in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

Among other groups, Council Tree works with Alaska Native Regional Corporations organized by Congress under the terms of the Alaska Native Claims Settlement Act (“ANCSA”).<sup>1</sup> Enacted in 1971, ANCSA represents a novel approach to U.S.-Native American relations. Rather than create a system of reservations, Congress directed that thirteen regional corporations be established, that Alaska Natives be enrolled to these corporations, and that the corporations issue to their members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were ushered into the world of corporate shareholder status. They became the owners of corporations that hold the collective results of their settlements with the federal government. In turn, the corporations are assigned the challenge of earning profits for those shareholders and attending to the shareholders’ real social and economic needs.

Cognizant of their special status, the nature of their shareholder bases, and the broad mission bestowed on them by Congress, some Alaska Native Corporations have moved in recent years to diversify the economic base from which they serve their shareholders by entering the telecommunications field. However, telecommunications operations are highly capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult. Those providers frequently have markedly greater resources than less established enterprises, and they are able to link those resources with their industry expertise to dominate a particular market or service.

Congress recognized this when, as part of the Omnibus Budget Reconciliation Act of 1993, it directed the Commission to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups

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<sup>1</sup> See 43 U.S.C. § 1601 *et seq.* (2004).

and women are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. The Commission, in turn, developed policies to help ensure that these designated entities have the chance to enter the wireless industry for the first time through license ownership. This is an important opportunity for the intended beneficiaries as they undertake to become part of this complex field.

Recently, however, it has become increasingly clear that many disadvantaged businesses will be crowded out of meaningful participation in the Commission's designated entity program by those who need no government assistance to join the information economy. High net worth individuals have recognized that the Commission does not count personal wealth in assessing the size of a business that applies for auction-related bidding credits or set-asides. These individuals — many of whom made fortunes in the wireless industry — parlay their assets and contacts into sweetheart deals with key strategic investors. For their part, investors prefer to work only with associates and former colleagues, particularly if these wealthy individuals qualify for the *same* auction-related preferences as persons with little or no experience in the provision of wireless services. As a result, legitimate designated entities are increasingly excluded from critical strategic relationships. Without the backing and expertise of experienced wireless service providers, would-be new entrants cannot meaningfully enter this complex business at all.

To address this growing problem, the Commission should limit the availability of scarce federal assistance to those facing the barriers that the designated entity rules were meant to overcome. The Small Business Administration ("SBA") excludes individuals with high personal net worth from its small business programs, and the Commission itself created personal net worth limitations in 1994 as part of its original broadband personal communications service ("PCS") rules. The Commission abandoned those limitations later that year after wealthy

individuals complained that the rule would prevent them from investing in designated entities. Now, however, the same wealthy individuals may qualify as designated entities *themselves* under the Commission's standards for small business eligibility. That cannot have been what Congress intended. For these reasons, and for the reasons set forth more fully below, Council Tree urges the Commission to amend Part 1 of its Rules, as set forth in ATTACHMENT 1 hereto, to include a personal net worth limitation for competitive bidding small business preference eligibility.

**II. THE COMMISSION SHOULD ESTABLISH A PERSONAL NET WORTH LIMITATION FOR COMPETITIVE BIDDING SMALL BUSINESS PREFERENCE ELIGIBILITY**

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**A. The Designated Entity Program was Created for Those Who Need the Government's Help to Participate in the Provision of Spectrum-Based Services**

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The designated entity program was created to secure opportunities to participate in the provision of spectrum-based services for those who would otherwise be excluded under a system of competitive bidding. The need for this approach was apparent even before the advent of the Commission's auctions authority. According to a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.<sup>2</sup>

The Report explained that:

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with "deep pockets", and therefore have the wherewithal to participate in the bidding process.<sup>3</sup>

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<sup>2</sup> H.R. Rep. No. 103-111, at 254 (1993).

<sup>3</sup> *Id.* at 255.

On that basis, as part of the grant of auction authority under Section 309(j), the Commission was directed to promote “economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,”<sup>4</sup> and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . .”<sup>5</sup>

In the service of these directives, the Commission in 1994 considered a series of initiatives calculated to improve the ability of designated entities to become Commission licensees through competitive bidding. According to the Commission, the principle obstacle to be addressed in this regard was the inability of many designated entities to attract the financing needed to win licenses in competitive bidding and to provide service thereafter.<sup>6</sup> This problem was particularly acute in the case of a capital-intensive service such as broadband PCS:

because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress’s mandate that designated entities have the opportunity to participate in the provision of PCS.<sup>7</sup>

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<sup>4</sup> 47 U.S.C. § 309(j)(3)(B) (2004).

<sup>5</sup> *Id.*, § 309(j)(4)(D).

<sup>6</sup> See, e.g., Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5572-73 (1994) (“Competitive Bidding Fifth Report and Order”).

<sup>7</sup> *Id.* at 5572-73.

To promote capital formation for designated entity competitive bidding and system construction in the case of broadband PCS, the Commission resolved (1) to set aside two broadband PCS spectrum blocks for bidding by smaller businesses only; (2) to offer bidding credits to smaller businesses and businesses owned by members of minority groups and women; (3) to permit designated entities to pay for certain licenses in installments; (4) to offer a tax certificate for businesses owned by members of minority groups and women; and (5) to reduce the upfront payment required for designated entities to bid for licenses in the set-aside spectrum blocks.<sup>8</sup>

In addition to improving the ability of designated entities to attract capital, a goal of the designated entity program was to help new entrants draw on the experience of established firms and managers as a way to increase their odds of success. The Commission explained in the course of refining its broadband PCS designated entity provisions in 1994 that its new attribution rules would:

(1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.<sup>9</sup>

The Commission also expressly permitted designated entities to enter into management or joint marketing agreements with experienced firms — even if the firms had invested in the smaller business — without contravening the attribution thresholds in its entrepreneurs’ block rules.<sup>10</sup>

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<sup>8</sup> See *id.* at 5580.

<sup>9</sup> Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 441 (1994) (“Competitive Bidding Fifth MO&O”).

<sup>10</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order, 9 FCC Rcd 7123, 7124 (1994) (“CMRS Fourth Report and Order”) (“We expect that investor/manager agreements are one of the many alternatives available to designated

According to the Commission, “[i]nvestments by cellular providers in . . . designated entities should increase the entities chances for success in the auctions and later in service competition by providing access to capital and valuable industry experience.”<sup>11</sup>

In crafting these provisions, the Commission undertook to see that the benefits to be offered in the competitive bidding process would be reserved for those that needed government assistance to participate in the provision of spectrum-based services. Thus, excluded from eligibility for small business benefits were large firms and very wealthy individuals. In the case of the latter, the Commission established that a business would not be eligible for closed bidding (*i.e.*, the set-aside entrepreneurs’ blocks) if any attributable individual investor in the applicant had personal net worth valued at \$100 million or more.<sup>12</sup> Further, a business would not be eligible for small business treatment if any attributable individual investor in the applicant had personal net worth valued at \$40 million or more.<sup>13</sup> The idea, according to the Commission, was to “prevent a very wealthy individual from leveraging his or her personal assets to allow the

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entities . . . . This does not mean, however, that these management agreements will be deemed ‘attributable’ for purposes of the revenue thresholds in the entrepreneur’s blocks”); Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5601 n.135 (“So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants”).

<sup>11</sup> Amendment of the Commission’s Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 4957, 5008-09 (1994) (“Broadband PCS Reconsideration Order”).

<sup>12</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5585, 5600.

<sup>13</sup> Id. at 5608-09.

applicant to circumvent the [applicable] size limitations . . . .”<sup>14</sup> Such a result, the Commission explained, would not be consistent with the intent of Congress.<sup>15</sup>

The point of the Commission’s designated entity program, therefore, was to secure opportunities to participate in the provision of spectrum-based services for smaller businesses and businesses owned by members of minority groups and women, consistent with the intent of Congress to promote economic opportunity where it might not otherwise exist. In fulfilling that mission, the Commission recognized that the lack of access to capital frequently limits the ability of smaller businesses to compete with established telecommunications companies,<sup>16</sup> and it undertook to develop “preferences [that] will allow designated entities to overcome barriers that have impeded these groups’ participation in the telecommunications arena . . . .”<sup>17</sup> In this way, the Commission worked to heed the warning of Congress that the competitive bidding process should not “inadvertently have the effect of favoring only those with ‘deep pockets’ . . . .”<sup>18</sup>

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<sup>14</sup> Id. at 5586.

<sup>15</sup> See id. at 5606 (“[I]t is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.”).

<sup>16</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2389-90 (1994).

<sup>17</sup> Id. at 2389.

<sup>18</sup> H.R. Rep. No. 103-111, at 255.

**B. In the Absence of a Personal Net Worth Limitation, Wealthy Individuals May Qualify for Government Help**

Now, however, the Commission's competitive bidding rules could have just such an effect. In 1994, the Commission eliminated the personal net worth limitations for broadband PCS entrepreneurs' block and small business eligibility.<sup>19</sup> Separately, in 2000, the Commission adopted the so-called "controlling interest" standard as its general attribution rule in this context.<sup>20</sup> Under the "controlling interest" standard, the Commission attributes to the applicant the gross revenues of those individuals and entities with *de jure* and *de facto* control over the enterprise,<sup>21</sup> but it does not require any such controlling interest individual or entity to hold a particular level of equity in the applicant as part of the control test.<sup>22</sup> According to the Commission, "the *de jure* and *de facto* concepts of control, together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses."<sup>23</sup>

In the absence of a personal net worth limitation, however, little prevents *wealthy individuals* from seeking status as small businesses. When the Commission eliminated the personal net worth tests for broadband PCS, it expressed the view that "the affiliation rules make

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<sup>19</sup> See Competitive Bidding Fifth MO&O, 10 FCC Rcd at 421.

<sup>20</sup> See Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 15293, 15323 (2000) ("Part 1 Fifth Report and Order").

<sup>21</sup> Id. at 15324.

<sup>22</sup> Id. at 15325-26. Cf. 47 C.F.R. § 24.709(b)(1)(v)-(vi) (setting forth the minimum equity requirements for eligibility under the broadband PCS control group attribution scheme).

<sup>23</sup> Part 1 Fifth Report and Order, 15 FCC Rcd at 15325.

the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.”<sup>24</sup> The Commission articulated this view again in 2003 when it clarified that the personal net worth of an applicant’s officers and directors will not be attributed to the applicant under the controlling interest standard.<sup>25</sup> Yet, if a high net worth individual does *not* have his or her wealth tied to ownership of other businesses — or if such other businesses have few or no gross revenues — the Commission’s approach leaves the door open for that individual to receive the government benefits meant for disadvantaged enterprises.

For example, an individual with a personal net worth valued at \$25 million may readily form a new, wholly-owned limited liability company (“LLC”), which would have no gross revenues in any of the previous three years by virtue of being newly-created. The Commission does not test the individual’s personal net worth, so if the individual had no affiliates, the LLC would qualify for a bidding credit as high as 35 percent under the Commission’s Rules.<sup>26</sup> In 1994, the Commission explained that a “bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these [designated] entities.”<sup>27</sup> By virtue of the absence of a

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<sup>24</sup> Competitive Bidding Fifth MO&O, 10 FCC Rcd at 421.

<sup>25</sup> See Amendment of Part 1 of the Commission’s Rules — Competitive Bidding Procedures, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd 10180, 10185 (2003).

<sup>26</sup> See 47 C.F.R. § 1.2110(f)(2)(i) (2004).

<sup>27</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5590.

personal net worth limitation, the Commission now extends that discount to a high net worth individual who may experience no financing obstacles at all.

Consider also that a great deal of affluence has been created in the last decade through the use of corporate stock options, which many exercise when leaving a company in connection with a merger or early retirement. The Commission has indicated that an officer or director who leaves a company and forms — or works for — another is not, by virtue of that fact itself, considered an affiliate of the first.<sup>28</sup> Thus, an individual who has made a fortune in the wireless industry, but who is no longer affiliated with his or her former company, may form a new LLC and use his or her contacts to partner with an existing wireless service provider. Due to the lack of a minimum equity requirement for controlling interests, that wireless service provider could provide the bulk of the equity of the venture, provided that the individual retains *de jure* and *de facto* control of the LLC. The wealthy individual, meanwhile, may pledge his or her personal assets to secure financing for any desired capital contribution to the LLC. Faced with the choice between investing in a true new entrant or partnering with a wealthy industry veteran, the wireless company will almost certainly prefer the latter, particularly if the wealthy individual qualifies for the *same* auction-related benefits as those with little or no experience in the provision of wireless services.

In 1994, the Commission established personal net worth limitations for broadband PCS to prevent very wealthy individuals from leveraging their personal assets to allow the applicant to circumvent designated entity size limitations.<sup>29</sup> Today, however, that is precisely what the

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<sup>28</sup> See AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, Memorandum Opinion and Order, 14 FCC Rcd 11827, 11843 (Com. Wir. Div. 1999).

<sup>29</sup> Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5586.

Commission's Rules permit. If a high net worth individual does *not* have his or her wealth tied to ownership of other businesses — or if such other businesses have few or no gross revenues — the Commission's current approach leaves the door open for that individual to receive the government benefits meant for disadvantaged enterprises. In the process, legitimate designated entities are forced to compete on the same footing with those who need no government help to enter the information economy. True new entrants also risk losing the opportunity to partner with experienced service providers and managers, who can manufacture their own "designated entity" under the Commission's standards. This cannot have been what Congress intended.

**C. Enforcing a Personal Net Worth Limitation Will Help to Preserve the Designated Entity Program**

The ability of high net worth individuals to receive government benefits through the operation of the Commission's rules constitutes a material threat to the competitive bidding designated entity program. In 1995, Congress eliminated the availability of tax certificates for members of minority groups<sup>30</sup> in part because the program had ceased to serve the ends envisioned by Congress. The Commission must ensure that its designated entity program is administered in a manner consistent with the goals of Congress to avoid a similar result here, and the Commission should act soon.

In December, 2000, the Commission published the results of a series of market entry barrier studies that examined the participation of businesses owned by members of minority groups and women in Commission-regulated businesses. Among other things, one study concluded that the ability of members of minority groups to acquire wireless licenses in the

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<sup>30</sup> See Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995) (eliminating the minority tax certificate program).

Commission's spectrum auctions had been enhanced by the availability of post-auction installment payment plans.<sup>31</sup> According to a second study:

It is suggested that a national policy of auctioning spectrum, without remedying discrimination in capital markets, is a national policy of discrimination against minorities and women in the allocation of spectrum licenses. This is because the auctions of the FCC require up-front payments and because spectrum licenses go to the highest bidder. When there is capital market discrimination, minorities will be capital constrained and less likely to qualify for any auction and less likely to win auctions. The data presented suggest that minorities are less likely to win wireless licenses after controlling for relevant variables.<sup>32</sup>

And a third study found that the lack of access to capital reported by businesses owned by members of minority groups and women continues to be the dominant barrier to entry to the capital intensive wireless industry for these entities.<sup>33</sup>

Since 1995, however, the number of incentives available to designated entities in competitive bidding has been declining. As noted above, Congress eliminated the availability of tax certificates for members of minority groups. For its part, the Commission no longer offers the installment payment financing that so enhanced the ability of members of minority groups to acquire licenses in competitive bidding,<sup>34</sup> it no longer permits smaller businesses to qualify for

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<sup>31</sup> See Ernst & Young, LLP, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions 4, 11, 13 (Dec. 5, 2000) (available at [www.fcc.gov/opportunity/meb\\_study/auction\\_utilization\\_study.pdf](http://www.fcc.gov/opportunity/meb_study/auction_utilization_study.pdf)).

<sup>32</sup> William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes 27 (Dec. 5, 2000) (available at [www.fcc.gov/opportunity/meb\\_study/capital\\_market\\_study.pdf](http://www.fcc.gov/opportunity/meb_study/capital_market_study.pdf)).

<sup>33</sup> See Ivy Planning Group LLC, Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 2, 17, 126 (Dec. 2000) (available at [www.fcc.gov/opportunity/meb\\_study/historical\\_study.pdf](http://www.fcc.gov/opportunity/meb_study/historical_study.pdf)).

<sup>34</sup> See, e.g., Part 1 Fifth Report and Order, 15 FCC Rcd at 15322.

an auction with a reduced upfront payment,<sup>35</sup> and it no longer sets aside licenses for bidding only by designated entities.<sup>36</sup> In addition, though it originally permitted designated entities to enter into management or joint marketing agreements with experienced firms without contravening the attribution thresholds in its entrepreneurs' block rules,<sup>37</sup> the Commission *now* treats many management and joint marketing agreements as "attributable" under the controlling interest standard.<sup>38</sup> The threat of such attribution effectively places many strategic relationships with existing service providers — providers that benefit from economies of scale and scope — outside the reach of new entrants.

Thus, at a time when barriers to entry remain great, the resources meant to help designated entities participate in the provision of spectrum-based services are becoming more scarce. The Commission now typically relies on bidding credits as the principal incentive for designated entity participation in competitive bidding. As it reported to Congress last month, "[t]he Commission intends these bidding credits to encourage participation in the competitive

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<sup>35</sup> See, e.g., Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7859-60 (1996). Cf. Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5600.

<sup>36</sup> See, e.g., Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order, FCC 03-251, ¶ 68 (rel. Nov. 25, 2003) (resolving not to set aside any advanced wireless services licenses for bidding only by designated entities).

<sup>37</sup> See CMRS Fourth Report and Order, 9 FCC Rcd at 7124 ("We expect that investor/manager agreements are one of the many alternatives available to designated entities . . . . This does not mean, however, that these management agreements will be deemed 'attributable' for purposes of the revenue thresholds in the entrepreneur's blocks"); Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5601 n.135 ("So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants").

<sup>38</sup> See 47 C.F.R. § 1.2110(c)(2)(ii)(H)-(I) (2004).

bidding process by entities that otherwise might have difficulty gaining access to capital.”<sup>39</sup> In the absence of a personal net worth limitation, however, wealthy individuals with no difficulty gaining access to capital also qualify for this preference. Against the background of the congressional response to abuses in the tax certificate program, the Commission must remedy this situation without delay. Establishing and enforcing a meaningful personal net worth limitation for competitive bidding small business preference eligibility will help to preserve the designated entity program for the benefit of those that legitimately deserve government assistance.

### **III. THE COMMISSION’S PERSONAL NET WORTH LIMITATION SHOULD TRACK THE TEST USED FOR THE SBA’S SMALL DISADVANTAGED BUSINESS PROGRAM**

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To establish a meaningful personal net worth limitation for competitive bidding small business preference eligibility, the Commission should look to the SBA’s small disadvantaged business program.<sup>40</sup> A concern is not eligible for the benefits of the SBA’s program if, *inter alia*, any attributable investor in the applicant has personal net worth valued at \$750,000 or more.<sup>41</sup> In calculating that personal net worth, the SBA excludes the value of the investor’s ownership interest in the applicant and the value of the investor’s equity in his or her primary personal

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<sup>39</sup> Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, Report, FCC 03-335, ¶ 161 (rel. Feb. 12, 2004) (footnote omitted).

<sup>40</sup> See id. at ¶ 134 (“Federal departments and agencies that promulgate regulations that affect small businesses usually use the SBA’s size criteria as they develop the regulations.”) (footnote omitted).

<sup>41</sup> See 13 C.F.R. § 124.1002(c) (2004).

residence.<sup>42</sup> (Under the SBA’s rules, the attributable investor or investors must unconditionally own 51 percent or more of the applicant to qualify for the program.<sup>43</sup>)

Council Tree urges the Commission to utilize this SBA personal net worth limitation for competitive bidding small business preference eligibility. Specifically — in addition to applying such other limitations as it uses to establish small business preference eligibility (*e.g.*, gross revenues tests) — the Commission should provide that no competitive bidding preference (*e.g.*, bidding credits, installment payment financing, eligibility to bid for a set aside license) made available based on business size shall be awarded to an applicant if the personal net worth of any attributable individual investor in the applicant equals \$750,000 or more at the time the applicant’s short-form application is filed.

To address the problem described in this petition, this limitation should be applied only to an individual with both a controlling interest in the applicant under the Commission’s Rules *and* an appreciable equity interest in the applicant (directly or indirectly). The second condition is important because the Commission’s attribution rules provide that the officers and directors of an applicant, and the officers and directors of an entity that controls the applicant, shall be “considered” to have a controlling interest in the applicant.<sup>44</sup> Unless it limits application of the personal net worth test to an individual with an appreciable equity interest in the venture, the Commission would risk excluding legitimate designated entities from preference eligibility due solely to the net worth of an officer or director without actual control. As many officers or

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<sup>42</sup> See id., § 124.104(c)(2).

<sup>43</sup> See id., § 124.1002(b)(2).

<sup>44</sup> See 47 C.F.R. § 1.2110(c)(2)(ii)(F).

directors will purchase shares in their companies without any incident of control, the triggering equity interest level for application of the personal net worth limitation must also be sufficiently high to avoid implicating an officer or director with equity holdings that are *de minimis*.

On the other hand, because the Commission does not have a minimum equity requirement for actual control under the controlling interest standard, the triggering equity interest level must account for the possibility that a high net worth individual could have *de jure* and *de facto* control of the applicant without retaining much of an equity stake. Setting the triggering interest level at 1 percent of the equity of the applicant — whether in the form of corporate stock, partnership interests, or LLC member interests — should balance these competing interests. (To ensure that its attribution rules do not unfairly “magnify” the size of an officer’s or director’s equity stake for these purposes, the Commission must also provide that Section 1.2110(c)(2)(ii)(G) of its rules shall not be applied as part of this calculation to the extent it requires treatment of any link that represents actual control in an ownership chain as if it were a 100 percent interest.)

Finally, attributable individual investors should include individuals who are affiliates<sup>45</sup> of a controlling interest holder with an appreciable equity stake. The financial condition of affiliates of controlling interests are generally attributed to applicants under the Commission’s rules,<sup>46</sup> and including individuals who are affiliates of a controlling interest holder with an appreciable equity stake within the scope of the limitation here will help to prevent high net

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<sup>45</sup> See 47 C.F.R. § 1.2110(c)(5) (2004).

<sup>46</sup> See *id.*, § 1.2110(b)(1)(i)-(ii).

worth individuals from avoiding disqualification under the rule by, *inter alia*, transferring assets among family members.

To calculate “personal net worth,” the Commission may rely on its own earlier definition of the term. The Commission created personal net worth limitations in 1994 as part of its original broadband PCS rules, where it defined personal net worth to mean:

the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his or her individual capacity or as a joint obligor.<sup>47</sup>

In performing the corresponding calculation today, the SBA excludes the value of the individual investor’s ownership interest in the applicant and the value of the individual investor’s equity in his or her primary personal residence.<sup>48</sup> Should the Commission employ here the definition of personal net worth set forth in its original broadband PCS rules, it should also apply the SBA’s current exclusions to ensure consistency with that agency’s approach.<sup>49</sup>

Thus, for the purposes of this personal net worth limitation, an attributable individual investor should be any individual who (a) is the applicant; (b) has a controlling interest in and directly or indirectly holds 1 percent or more of the equity of the applicant; or (c) is an affiliate of the persons just described. Officers and directors with no meaningful equity stake in the applicant will not be affected. Similarly, wealthy individuals without a controlling interest in the applicant will still be free to invest. It will be wealthy individuals masquerading as designated

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<sup>47</sup> See Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5647 (setting forth text of newly-promulgated Section 24.720(h)).

<sup>48</sup> See 13 C.F.R. §§ 124.104(c)(2); 124.1002(c).

<sup>49</sup> See 15 U.S.C. § 632(a)(2)(C)(iii) (2004) (providing that no federal agency may prescribe a small business size standard that is not approved by the SBA administrator).

entities who will — and should — be denied government assistance. Establishing and enforcing this rule will help to ensure that the benefits to be offered in the competitive bidding process will be reserved for those that need government assistance to participate in the provision of spectrum-based services. It will also help to preserve the designated entity program by adhering strictly to the intent of Congress, not promoting the interests of “deep pockets.”

**IV. CONCLUSION**

For these reasons, Council Tree urges the Commission to amend Part 1 of its Rules, as set forth in ATTACHMENT 1 hereto, to include a personal net worth limitation for competitive bidding small business preference eligibility.

Respectfully submitted,

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March 8, 2004

**TEXT OF PROPOSED RULES**

Part 1 of Title 47 of the Code of Federal Regulations is revised as follows:

1. Amend § 1.2110 by inserting “personal” before “net” in paragraph (c)(5)(iii)(A) and by adding new paragraphs (b)(1)(iii) and (p) and revising paragraphs (b)(3)(ii) and (c)(2)(ii)(F) to read as follows:

**§ 1.2110 Designated entities.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

\* \* \* \* \*

(iii) The personal net worth of the attributable individual investors in the applicant, as provided in paragraph (p), shall be considered on a non-cumulative basis for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications the personal net worth of each attributable individual investor in the applicant at the time the applicant’s short-form application (Form 175) is filed.

\* \* \* \* \*

(3) \* \* \*

\* \* \* \* \*

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, (A) the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable, and (B) the personal net worth of all individuals that hold interests in the applicant, and their affiliates, will be considered for the purposes of paragraph (p).

(c) \* \* \*

\* \* \* \* \*

(2) \* \* \*

\* \* \* \* \*

(ii) \* \* \* \*

\* \* \* \* \*

(F) Officers and directors of the applicant shall be considered to have a controlling interest in the applicant. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant. Except as provided in paragraph (p), the personal net worth, including personal income of the officers and directors of an applicant, is not attributed to the applicant. To the extent that the officers and directors of an applicant are affiliates of other entities, the gross revenues of the other entities are attributed to the applicant.

\* \* \* \* \*

(p) *Personal Net Worth.*

- (1) No competitive bidding preference based on business size shall be awarded to an applicant (or licensee) if the personal net worth of any attributable individual investor in the applicant equals \$750,000 or more at the time the applicant's short-form application (Form 175) is filed.
- (2) Personal net worth shall mean the market value of all assets, real and personal, tangible and intangible, owned by an individual, excluding the individual's ownership interest in the applicant and the equity in the individual's primary personal residence, less all liabilities, including personal guarantees, owed by the individual in his or her individual capacity or as a joint obligor.
- (3) An attributable individual investor is any individual who:
  - (i) is the applicant; or
  - (ii) (A) has a controlling interest in the applicant, and  
(B) directly or indirectly holds 1 percent or more of the equity (whether in the form of stock, partnership interests, or member interests) of the applicant; or
  - (iii) is an affiliate of an individual described in paragraphs (p)(3)(i) or (ii).
- (4) For the purposes of calculating the equity holdings of a controlling interest individual under paragraph (p)(3)(ii)(B), § 1.2110(c)(2)(ii)(G) shall not be applied

to the extent it requires treatment of any link that represents actual control in an ownership chain as if it were a 100 percent interest.

- (5) As part of the applicant's (or licensee's) short- and long-form applications, each attributable individual investor in the applicant shall certify that the personal net worth listed for that individual is accurate.
2. Amend § 1.2112 by removing "and" after the semicolon in paragraph (b)(1)(ii), by redesignating paragraph (b)(1)(iii) as (b)(1)(iv), by redesignating paragraphs (b)(2)(v) and (b)(2)(vi) as (b)(2)(vi) and (b)(2)(vii), and by adding new paragraphs (b)(1)(iii) and (b)(2)(v) to read as follows:

**§ 1.2112 Ownership disclosure requirements for applications.**

\* \* \* \* \*

(b) \* \* \*

\* \* \* \* \*

(1) \* \* \*

\* \* \* \* \*

(iii) List separately the personal net worth, computed in accordance with § 1.2110, of each attributable individual investor in the applicant; and

\* \* \* \* \*

(2) \* \* \*

\* \* \* \* \*

(v) List separately the personal net worth, computed in accordance with § 1.2110, of each attributable individual investor in the applicant;

\* \* \* \* \*