

proposed rule would clarify that bad debts are not allowable for entities paid under a reasonable-charge or fee schedule methodology.

This notice announces an extension of the timeline for publication of a final rule responding to comments on the above proposed rule. Section 1871(a)(3)(B) of the Social Security Act (the Act) requires us generally to publish a Medicare final rule no later than 3 years after the publication date of the proposed rule. To meet this 3-year timeframe, the final rule at issue here would have to be published by February 10, 2006.

Section 1871(a)(3)(B) also provides, however, that under "exceptional circumstances" the Secretary may extend the initial targeted publication date of a final regulation, if the Secretary provides public notice of this extension, including a brief explanation of the justification for the variation, no later than the regulation's previously established proposed publication date.

This notice extends the timeline based on the following exceptional circumstances, which we believe justify such an extension in this case. On February 1, 2006, the Congress completed action on final legislation (S. 1932) that affects the provisions that would be modified under the proposed rule at issue here. Section 5004 of this bill, also known as the Deficit Reduction Act (DRA), generally provides for a 30 percent reduction in bad debt reimbursement to Skilled Nursing Facilities (SNFs), but only with respect to debt attributable to non-dual eligibles. Bad debt payment for dual eligibles would remain at 100 percent. By contrast, the proposed rule applied the 30 percent reduction to all providers other than hospitals, and had no exception for debt attributable to dual-eligibles.

If we were to finalize the SNF bad debt provisions of the proposed rule at issue here before the enactment of section 5004 of the DRA, these provisions could be superseded by contrary legislation very shortly after publication. This would require a new round of rulemaking to address the impact of the new legislation. By extending the deadline for publication of a final rule, we would hope to avoid needless and duplicative rulemaking, and confusion of the public, by responding to comments on this proposed rule, and addressing the effects of section 5004 of the DRA on the proposed rule, in one rulemaking document.

In order to allow time for the President to act on the DRA, and for us to fully assess the impact of this

legislation on the provisions in the proposed rule, we are extending the timeline for this rulemaking for up to one year, and intend to publish the final rule no later than February 10, 2007. As required under section 1871(a)(3)(D), we will include a discussion of this extension in a report to Congress.

Authority: Section 1871 of the Social Security Act (42 U.S.C. 1395hh). (Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 3, 2006.

Ann C. Agnew,

Executive Secretary to the Department.

[FR Doc. E6-1821 Filed 2-9-06; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 05-211; FCC 06-8]

Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this *Further Notice of Proposed Rule Making* the Commission considers whether it should modify its general competitive bidding rules governing benefits reserved for designated entities (i.e., small businesses, rural telephone companies and businesses owned by women and minorities). The Commission has reached a tentative conclusion that it should modify its part 1 rules to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a material relationship with a large in-region incumbent wireless service provider," and the Commission seeks comment on how it should define the elements of such a restriction. The Commission also seeks comment on whether it should restrict the award of designated entity benefits where an otherwise qualified designated entity has a "material relationship" with a large entity that has a significant interest in communications services.

DATES: Comments due February 24, 2006 and Reply Comments due March 3, 2006. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and

other interested parties on or before April 11, 2006.

ADDRESSES: You may submit comments, identified by WT Docket No. 05-211; FCC 06-8 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to PRA@fcc.gov, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, via the Internet to Kristy.LaLonde@omb.eop.gov, or via fax at 202-395-5167.

For detailed instructions for submitting comments and additional information on the rule making process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Brian Carter or Gary Michaels, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, (202) 418-0660. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith B. Herman at 202-418-0214, or via the Internet at PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. *All filings related to this Further Notice of Proposed Rule Making should refer to WT Docket No. 05-211.* Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). The public may view a full copy of this document at

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-8A1.doc.

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.

Filers should follow the instructions provided on the Web site for submitting comments. Filers should follow the instructions provided on the Web site for submitting comments.

- For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

- **People with Disabilities:** Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

Initial Paperwork Reduction Act of 1995 Analysis

This document contains proposed new or modified information collection

requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due April 11, 2006. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

OMB Control Number: 3060-0600.

Title: Application to Participate in an Auction.

Form No.: FCC Form 175.

Type of Review: Revision of currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions and/or state, local or tribal governments.

Estimated Number of Respondents: 560 (60 respondents for this FNPRM; 500 respondents in a previously approved submission to OMB).

Estimated Time Per Response: .166 hours-1.5 hours.

Frequency of Response: On occasion reporting requirement.

Estimated Total Annual Burden: 760 hours (10 hours for this FNPRM submission and 750 hours for the previous submission approved by OMB).

Estimated Total Annual Costs: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: Respondents would be required to amend their short form applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to § 1.2110 of the Commission's rules effective as of the date of the statement. The information collected will be used by the Commission to determine if the applicant is legally, technically, and

financially qualified to participate in an FCC auction and eligible for the status requested. The Commission's auction rules and requirements are designed to ensure that the competitive bidding process is limited to serious qualified applicants; to deter possible abuse of the bidding and licensing process; and to enhance the use of competitive bidding to assign Commission licenses in furtherance of the public interest.

I. Introduction

1. With this *Further Notice of Proposed Rule Making* ("FNPRM"), WT Docket No. 05-211, FCC 06-8, released February 3, 2006, the Commission considers whether it should modify its general competitive bidding rules ("part 1" rules) governing benefits reserved for designated entities (*i.e.*, small businesses, rural telephone companies, and businesses owned by women and minorities). See 47 CFR 1.2110. Specifically, the Commission seeks comment on the elements of a proposal raised by Council Tree Communications, Inc. ("Council Tree") that seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a "material relationship" with a "large in-region incumbent wireless service provider." Council Tree maintains that such a prohibition should apply to "otherwise qualified designated entities." In examining this proposal, the Commission reaches a tentative conclusion that it should modify its part 1 rules to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a "material relationship" with a "large in-region incumbent wireless service provider," and the Commission seeks comment on how it should define the elements of such a restriction. Moreover, as discussed further below, the Commission seeks comment on whether it should restrict the award of designated entity benefits where an otherwise qualified designated entity has a "material relationship" with a large entity that has a significant interest in communications services. The Commission intends to complete this proceeding in time so that any modifications to its rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services ("AWS"), which currently is scheduled to begin June 29, 2006. In light of its upcoming auction schedule, the Commission seeks comment on a proposal to require designated entity auction applicants to certify their qualifications subject to the changed rules by amending any auction

applications that are pending on the effective date of any rule changes adopted in this proceeding.

II. Background

2. In the Commission's *Declaratory Ruling and Notice of Proposed Rulemaking*, 70 FR 43322 (July 27, 2005), 70 FR 43376 (July 27, 2005) to implement rules and procedures needed to comply with the Commercial Spectrum Enhancement Act ("CSEA"), the Commission proposed a number of changes to its part 1 competitive bidding rules that were necessary, apart from CSEA, to bring them in line with the current requirements of its auctions program. With this *FNPRM*, the Commission considers further updates to its part 1 competitive bidding rules and procedures.

3. The questions and tentative conclusion the Commission poses here arise out of a proposal made by Council Tree in an *ex parte* filing that in part supplemented its petition for reconsideration of the Commission's order establishing service rules for Advanced Wireless Services ("AWS") in the 1710–1755 and 2110–2155 MHz bands. In the *AWS–1 Service Rules Order*, 69 FR 5711, February 6, 2004, the Commission adopted rules designed to ensure that designated entities are given the opportunity to participate in an auction of AWS spectrum. By establishing a range of geographic licensing areas including relatively small areas, such as Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs), and a range of spectrum block sizes, the Commission believed that it would encourage participation by smaller and rural entities. Accordingly, it concluded that adopting set-asides or eligibility restrictions would not be necessary. The Commission also adopted two small business size standards and associated bidding credits for small businesses, concluding that small business size standards and bidding credit levels that matched those offered in auctions of broadband Personal Communications Service (PCS) licenses were appropriate because broadband PCS presented service opportunities, capital requirements, and entry issues comparable to those presented by AWS.

4. Council Tree's petition for reconsideration of the *AWS–1 Service Rules Order*, urged the Commission to reconsider its position with respect to set-asides for designated entities or, in the alternative, to add a third small business size standard and offer qualifying entities a 35 percent bidding credit. Council Tree's *ex parte* filing sought to supplement its petition for

reconsideration and proposed, among other things, that the Commission prohibit the award of bidding credits or other small business benefits to entities that would "otherwise qualify" for eligibility but have what it refers to as a "material relationship" with a "large in-region incumbent wireless service provider." Council Tree's proposal also suggested standards by which it sought to define both "material relationship" and "large in-region incumbent wireless service provider."

5. In its *Order on Reconsideration*, 70 FR 58061, October 5, 2005, the Commission rejected Council Tree's Petition and the *ex parte* proposals it made in the AWS proceeding. The Commission concluded, however, that Council Tree's suggestion to restrict the award of bidding credits or other small business benefits where an entity "otherwise qualified" for eligibility but has a "material relationship" with a "large in-region incumbent wireless service provider" warranted further study. It is this conclusion that forms the basis for this *FNPRM* today. In examining our current rules, the Commission tentatively concludes that it should modify its requirements regarding designated entity eligibility to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a "material relationship" with a "large in-region incumbent wireless service provider." As noted below, the Commission seeks comment on the specific elements of Council Tree's proposal. Additionally, the Commission seeks comment on whether it should restrict the availability of designated entity benefits where an otherwise qualified designated entity has a "material relationship" with a large entity that has a significant interest in the provision of communication services, *e.g.*, voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers (hereinafter collectively referred to as "entity(ies) with significant interests in communications services").

III. Discussion

6. Since the inception of the auctions program, the Commission has sought to facilitate the participation of small businesses in the competitive bidding process. In the *Competitive Bidding Second Report and Order*, 59 FR 22980, May 4, 1994, the Commission established various incentives, such as bidding credits and spectrum set-asides, to encourage designated entities to participate in future auctions and in the

provision of service. The Commission also has made substantial efforts to ensure that only legitimate small businesses reap the benefits of the Commission's designated entity program. Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules.

7. The Commission intends its small business provisions to be available only to bona fide small businesses. In this *FNPRM*, the Commission tentatively concludes that modifications to its designated entity rules are warranted. In determining whether additional safeguards are necessary to ensure that bidding credits and other benefits are awarded to the appropriate entities, the Commission recognizes that it must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding have sufficient capital and flexibility to structure their businesses to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public.

8. In its *ex parte* filing, Council Tree proposes that the Commission prohibit the availability of bidding credits or other small business benefits where an "otherwise qualified" entity seeking such eligibility has what Council Tree refers to as a "material relationship" with a "large, in-region, incumbent wireless service provider." Council Tree asserts that if the Commission does not limit the availability of bidding credits and other designated entity benefits in such instances, spectrum rights will be concentrated in the hands of large, incumbent wireless service providers. Council Tree states that "following the consummation of announced mergers, the top-5 wireless carriers today will control 89 percent of United States wireless service subscribers, up from just 50 percent in 1995." It further asserts that in Auction 58, the Commission's recent broadband PCS auction, the five largest wireless carriers won \$367 million of licenses, or 18 percent of the auction total. Council Tree maintains that "these same carriers also partnered with designated entities in Auction 58 to win an additional \$1.03 billion of licenses, representing another 51 percent of the auction total." Council Tree concludes that the large carriers structured their relationships with designated entities as a means to realize for themselves the benefits and

opportunities that the Commission had intended for small businesses.

9. CTIA—The Wireless Association (“CTIA”) opposes Council Tree’s *ex parte* asserting, among other things, that Council Tree’s proposed constraint on relationships between large wireless carriers and those seeking eligibility for small business and entrepreneur provisions is contrary to the Commission’s goal of providing legitimate small businesses maximum flexibility in attracting passive financing. CTIA further states that such a limitation on a small business’ ability to raise capital would undermine the Commission’s intention of promoting small business participation in the highly competitive telecommunications marketplace.

10. In its continued effort to preserve for small businesses and entrepreneurs the benefits reserved for designated entities, the Commission seeks comment generally on whether the Commission’s existing rules should be modified as suggested by our tentative conclusion and Council Tree’s proposal to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities. The Commission also seeks comment below on the particular elements of Council Tree’s proposal. Additionally, the Commission seeks comment on whether it should restrict the availability of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with an “entity with significant interests in communications services.”

11. The Commission’s existing part 1 rules include generally applicable provisions regarding the attribution of gross revenues of an entity and its controlling interests and affiliates to determine whether that entity meets service-specific eligibility standards for designated entity benefits, such as bidding credits. Council Tree proposes that even where an entity qualifies for designated entity benefits under the Commission’s existing rules, such benefits should not be available to that entity if it has a “material relationship” with a “large, in-region, incumbent wireless provider.” The Commission tentatively concludes that it should modify its rules to restrict the award of designated entity benefits where such a relationship exists. The Commission seeks comment on Council Tree’s proposal for defining “material relationship” and on the two elements Council Tree proposes to use in defining a “large, in-region, incumbent wireless service provider”—the geographic overlap between the incumbent and the designated entity applicant, as well as

the incumbent’s wireless gross revenues. The Commission also seeks comment on the factual assertions upon which Council Tree’s proposals are based and the impact, if any, that the adoption of the proposed restriction would have on the ability of small businesses to provide spectrum-based services. In addition, the Commission seeks comment on whether it should extend any rule modifications it adopts to restrict the availability of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with an “entity with significant interests in communications services.”

12. *Material Relationship.* As noted above, the Commission currently applies a gross revenues test as its general standard for measuring the size of an entity for the purposes of awarding small business benefits, in part because such a standard provides “an accurate, equitable, and easily ascertainable measure of business size.” Under this standard, the Commission attributes to an applicant the gross revenues of its “controlling interests” and its “affiliates” in assessing whether the applicant is qualified to take advantage of our small business provisions, such as bidding credits. A “controlling interest” includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control and under a totality of the circumstances analysis. Council Tree suggests, however, that the Commission’s current rules do not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses.

13. According to Council Tree, the Commission should determine that a “material relationship” exists if a “large, in-region, incumbent wireless service provider” has provided a material portion of the total capitalization of the applicant (*i.e.*, equity plus debt), or has any material operational arrangement with the applicant (such as management, joint marketing, trademark, or other arrangements) or other material financial arrangement relating to the overlap markets. In the event that there is such a “material relationship,” Council Tree advocates that designated entity benefits should be withheld even if the entity would otherwise qualify for designated entity eligibility under our existing rules. As noted above, the Commission tentatively concludes that a relationship between a “large, in-region incumbent wireless service provider” and an

otherwise qualified designated entity applicant should trigger a restriction on the availability of designated entity benefits. The Commission therefore seeks comment on the specific nature of the relationship that should trigger such a restriction. Additionally, the Commission seeks comment on whether other “material” relationships, such as those between an otherwise qualified designated entity and an “entity with significant interests in communications services,” should trigger a restriction on the award of designated entity benefits.

14. With respect to determining what may constitute a “material financial” or “material operational” relationship, the Commission also seeks comment on whether our existing “controlling interest standard” and affiliation rules appropriately measure and take into consideration the existence of those factors raised by Council Tree. For instance, Council Tree proposes that the material operational arrangements that should trigger any proposed restriction should include management, joint marketing, and trademark arrangements. Insofar as the Commission already attributes the gross revenues of those that have management or marketing agreements with an applicant where such agreements grant authority over key aspects of the applicant’s business, the Commission seeks comment on whether a different standard should be used where the relationship in question is with a “large, in-region incumbent wireless service provider” or with an “entity with significant interests in communications services.” If so, how should that standard differ from the factors that the Commission currently considers for determining indicia of control? If commenters believe that the Commission’s rules do not already address these types of arrangements, they should specify how it should define these arrangements.

15. The Commission also seeks comment on whether a prohibition based on certain relationships, such as the one proposed by Council Tree, would be too harsh or limit a designated entity’s ability to gain access to capital or industry expertise. The Commission seeks comment on whether there may be instances where the existence of either a “material financial agreement” or a “material operational agreement,” in and of itself, may be appropriate between a designated entity and a “large incumbent wireless service provider” or an “entity with significant interests in communications services,” and may not raise issues of undue control. Should the Commission allow designated entities to obtain a bidding credit if they have only a “material financial

agreement” or only a “material operational agreement” with a “large incumbent wireless service provider,” or an “entity with significant interests in communications services,” but not both? What factors should the Commission consider in determining whether either type of agreement may be permissible? Would this approach be sufficient to address any concerns that the Commission’s designated entity program may be subject to potential abuse from larger corporate entities? Commenters should address the appropriate level of financial or operational participation of a “large incumbent wireless service provider” or an “entity with significant interests in communications services” that should trigger any proposed prohibition of the award of designated entity benefits to entities that are otherwise qualified. As a general matter, should the definition of “material relationship” differ if the Commission adopts its tentative conclusion or if the Commission expands the restriction to include relationships with “entities with significant interests in communications services?”

16. In its Secondary Markets proceeding, the Commission concluded that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee would cause the spectrum lessee to become an attributable affiliate of the licensee, thus rendering the licensee ineligible for designated entity benefits and making such a spectrum lease impermissible. The Commission seeks comment on what, if any, standard should be used to determine whether a spectrum leasing arrangement is a “material relationship” for the purpose of any additional restriction on the availability of designated entity benefits that it might adopt. The Commission also seeks comment on whether other arrangements should be taken into account. If so, what arrangements should it consider?

17. *Wireless Gross Revenues.* Council Tree suggests that “large, in-region, incumbent wireless providers” should be defined, in part, as those having what Council Tree refers to as “average gross wireless revenues” for the preceding three years exceeding \$5 billion. The Commission seeks comment on this proposed benchmark and whether it is a useful element for consideration if it adopts its tentative conclusion to modify the Commission’s part 1 rules to include additional restrictions on the availability of designated entity benefits. Is \$5 billion an appropriate level at which to set the benchmark to define “large, in-region incumbent wireless

provider?” In contemplating this proposal, the Commission also seeks comment on whether it should evaluate the service provider’s “gross wireless revenues” as suggested by Council Tree or instead if it should generally consider “gross revenues” as defined in § 1.2110(n) of the Commission’s rules. Should the Commission consider an alternative benchmark? What would be the appropriate benchmark if it extends the restriction on designated entity benefits to designated entities that have material relationships with “entities with significant interests in communications services?” Commenters supporting an alternative benchmark should provide specific data to support any such alternative. What standard should the Commission use to attribute revenues, wireless or otherwise, to the incumbent wireless provider or to an “entity with significant interests in communications services”, if any? Should the Commission use the same “controlling interest” standard and affiliation rules currently used to attribute to an applicant the gross revenues of its investors and affiliates in determining whether the applicant qualifies for small business benefits?

18. *Significant Geographic Overlap.* In addition to a gross revenues benchmark, Council Tree proposes that the Commission define a “large, in-region, incumbent wireless service provider” as an entity (including all parties under common control) that is, or has an attributable interest in, a CMRS or AWS licensee whose licensed service area has significant overlap in the geographic area to be licensed to the designated entity applicant. As a general matter, the Commission seeks comment on whether geographic overlap should be an element in establishing any additional restriction on the availability of designated entity benefits. Council Tree proposes that for purposes of determining significant geographic overlap in defining an in-region incumbent wireless service provider, the Commission should apply the standard set forth in § 20.6(c) of the Commission’s rules. Although the CMRS spectrum aggregation limit sunset on January 1, 2003, § 20.6 defined significant overlap of geographic service areas for the purpose of that limit, and provides that significant overlap occurs when there is an overlap of at least 10 percent of the population within the impacted service areas. The further seeks comment on whether it should apply the standard set forth in § 20.6(c) of the Commission’s rules as proposed by Council Tree. If so, what factors should the Commission consider in

applying this standard to all wireless services? Should it apply a different, or any, geographic standard if it extends the restriction on designated entity benefits to designated entities that have material relationships with “entities with significant interests in communications services?” If the Commission determines that a significant geographic overlap does exist, how should the Commission implement such a restriction? Should an incumbent be allowed to divest its interest in the subject service area to allow a designated entity applicant to maintain eligibility for a bidding credit? If so, within what time period should the Commission require the divestiture? The Commission seeks comment on whether the application of the standard set forth in § 20.6(c) of the Commission’s rules or any other geographic overlap restriction would place an undue administrative burden on the Commission, making it difficult to monitor an applicant’s compliance with any adopted geographic overlap restriction. Should the Commission consider adopting any other geographic overlap standards? In addressing these issues, commenters should state with specificity what factors the Commission should consider and what mechanisms it should adopt to ensure an applicant’s continued compliance with any geographic overlap restriction.

19. *Entities with Significant Interests in Communications Services.* As noted above, the Commission seeks comment on whether we should prohibit the award of designated entity benefits where an otherwise qualified designated entity applicant has a “material relationship” with an “entity with significant interests in communications services.” If the Commission extends the restriction in this manner, should the Commission define “entities with significant interests in communications services” to include a broad category of businesses such as voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers? The Commission seeks comment on whether all of these entities should be included as part of its definition of “entities with significant interests in communications services.” Should the Commission consider excluding some of these entities from its proposed definition? If so, which entities should the Commission exclude and why? Are there additional entities that it should consider including as part of its proposed definition? If so, which entities should the Commission include,

and why? Moreover, the Commission seeks comment on how it should specifically define “significant interests in communications services?” Does the Commission’s consideration of the category “communications services” provide additional safeguards to ensure the award of its designated entity benefits only to legitimate small businesses or does it create too many obstacles for designated entities to obtain access to capital?

20. *Unjust Enrichment.* The Commission’s existing rules require the payment of unjust enrichment when an entity that acquires its license with small business benefits loses its eligibility for such benefits or transfers a license to another entity that is not eligible for the same level of benefits. Council Tree suggests that the Commission should also impose a reimbursement obligation on a licensee that, in the first five years of its license term, acquires a license with a bidding credit and subsequently makes a change in its “material relationships” or seeks to assign or transfer control of the license to an entity that would result in its loss of eligibility for the bidding credit pursuant to any eligibility restriction that the Commission adopt. Council Tree asserts that such a requirement is necessary to fulfill the Commission’s statutory obligation to prevent unjust enrichment and to ensure that the new eligibility requirement for bidding credits has the intended effect of helping eligible small businesses to acquire spectrum licenses. Council Tree also proposes, however, that an unjust enrichment payment should not be required in the case of “natural growth” of the revenues attributed to an incumbent carrier above the established benchmark. Instead, it suggests that the reimbursement obligation should apply only where the licensee takes on new investment, or enters into any operational agreement, that would have disqualified the licensee for the bidding credit at the time of the licensee’s initial application. The Commission seeks comment on whether, if it adopts a new restriction on the award of bidding credits to designated entities, the Commission should adopt revisions to its unjust enrichment rules such as those proposed by Council Tree, or in some other manner. Should any reimbursement obligation the Commission adopts apply where the licensee takes on new investment, or also where it enters into any new “material financial relationship” or “material operational relationship” that would have rendered the licensee

ineligible for a bidding credit? If the Commission requires reimbursement by licensees that, either through a change of “material relationships” or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that it might adopt, over what portion of the license term should such unjust enrichment provisions apply?

21. *Pending Auction Provisions.* As stated at the outset, the Commission intends any changes adopted in this proceeding to apply to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006. In light of the current auction schedule, any changes that the Commission adopts in this proceeding may become effective after the deadline for filing applications to participate in that auction. Under Commission rules, applicants asserting designated entity status in a Commission auction are required to declare, under penalty of perjury, that they are qualified as a designated entity under § 1.2110 of the Commission’s rules. In the event that any designated entity applicants have filed an application to participate in an auction prior to the effective date of any designated entity rule changes adopted in this proceeding, the Commission proposes to require such applicants to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to § 1.2110 of the Commission’s rules effective as of the date of the statement. In the event applicants fail to file such a statement pursuant to procedures announced by public notice, they will be ineligible to qualify as a designated entity, *e.g.*, receive small business bidding credits, either generally or with respect to specific licenses. The Commission seeks comment on this proposal.

IV. Conclusion

22. For the reasons stated above, the Commission seeks comment on its competitive bidding rules, on the elements of the specific proposal raised by Council Tree, and on its tentative conclusion to modify its part 1 rules to prohibit the award of designated entity benefits where an otherwise qualified designated entity has a “material relationship” with a “large, in-region wireless service provider.”

V. Procedural Matters

A. *Ex Parte Rules—Permit-But-Disclose Proceeding*

23. For purposes of this permit-but-disclose notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted, except during the sunshine Agenda period, provided that the presentations are disclosed pursuant to the Commission’s rules.

B. *Initial Regulatory Flexibility Analysis*

24. As required by the Regulatory Flexibility Act, see 5 U.S.C. 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this *Further Notice of Proposed Rulemaking*. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this *FNPRM*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, this *FNPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

i. Need for, and Objectives of, the Proposed Rules

25. This *FNPRM* tentatively concludes that the Commission should modify its general competitive bidding rules governing benefits reserved for designated entities (*i.e.*, small businesses, rural telephone companies, and businesses owned by women and minorities). Specifically, the Commission seeks comment on the specific elements of a proposal raised by Council Tree Communications, Inc. (“Council Tree”) that seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a “material relationship” with a “large in-region incumbent wireless service provider.” Additionally, the Commission seeks comment on whether there are other entities that might have a significant interest in the provision of communication services, *e.g.*, voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers (hereinafter collectively referred to as “entity(ies) with significant interests in communications services,”) whose

relationship with an otherwise qualified designated entity applicant should trigger a restriction on the availability of designated entity benefits.

26. Over the last decade, the Commission has engaged in numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules. To that end, in determining whether to award designated entity benefits, the Commission adopted a strict eligibility standard that focused on whether the applicant maintained control of the corporate entity. The Commission's objective in employing such a standard was "to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings." The Commission intends its small business provisions to be available only to bona fide small businesses.

27. By this *FNPRM*, the Commission tentatively concludes that modifications to its designated entity rules are warranted. In determining what additional safeguards are necessary to ensure that bidding credits and other benefits are awarded to the appropriate entities, the Commission recognizes that it must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding, have sufficient capital to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public. In its continued effort to reserve for small businesses and entrepreneurs the designated entity benefits that the Commission offers, this *FNPRM* seeks comment on the elements of Council Tree's proposal and the Commission's tentative conclusion that its existing rules should be modified.

ii. Legal Basis

28. The proposed actions are authorized under sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j).

iii. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

29. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small

business," and "small governmental jurisdiction." The term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (a) Is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the SBA.

30. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, the Commission estimates the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

31. Any proposed changes or additions to the Commission's part 1 rules that may be made as a result of this *FNPRM* would be of general applicability to all services, applying to all entities of any size that apply to participate in Commission auctions. Accordingly, this *IRFA* provides a general analysis of the impact of the proposals on small businesses rather than a service by service analysis. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of the Commission's auctions held to date, 1,973 out of a total of 3,303 qualified bidders either have claimed eligibility for small business bidding credits or have self-reported their status as small businesses as that term has been defined under rules adopted by the Commission for specific services. In addition, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the

context of assignments or transfers, unjust enrichment issues are implicated.

iv. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

32. In the event that the Commission changes its designated entity rules in this proceeding, designated entity applicants that have filed applications to participate in an auction before the effective date of any changes may be required to amend their applications on or after the effective date of the rule changes with a statement declaring, under penalty of perjury, that the applicant is qualified as a designated entity pursuant to the Commission's rules effective as of the date of the statement.

v. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (c) the use of performance, rather than design, standards; and (d) an exemption from coverage of the rule or any part thereof for small entities.

34. This *FNPRM* tentatively concludes that the Commission should modify its general competitive bidding rules regarding designated entity eligibility. The Commission seeks comment on the specific elements described in a proposal raised by Council Tree Communications, Inc., which seeks to prohibit the award of bidding credits or other small business benefits to entities that have what Council Tree refers to as a "material relationship" with a "large in-region incumbent wireless service provider." The Commission also seeks comment on whether such a restriction should apply to "entities with significant interests in communications services." The Commission seeks guidance from the industry on how it should define the elements of any restrictions it might adopt regarding the award of designated entity benefits. Small entity comments are specifically requested.

vi. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

35. None.

C. Ordering Clauses

36. Accordingly, *it is ordered that*, pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j), this *Further Notice of Proposed Rule Making* is hereby adopted.

37. *It is further ordered that* the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[I.D. 101405C]

RIN 0648-AT84

Endangered and Threatened Species; Revision of Critical Habitat for the Northern Right Whale in the Pacific Ocean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule, reopening of public comment period.

SUMMARY: On November 2, 2005, NMFS published a proposed rule to revise current critical habitat (CH) under the Endangered Species Act of 1973 (ESA) for the northern right whale (*Eubalaena glacialis*) by designating areas within the North Pacific Ocean. Two areas are proposed for designation: an area in the southeast Bering Sea and a second area in the Gulf of Alaska south of Kodiak Island. In response to a request, a public hearing on this proposed rule will be held on March 2, 2006, in Anchorage, AK.

DATES: The hearing will be held in Anchorage, AK on Thursday, March 2, 2006, from 3 p.m. to 5 p.m. The public

comment period on the proposed rule (70 FR 66332) will reopen on February 10, 2006 so that additional comments submitted at, or in response to the hearing may be considered in the promulgation of the final rule. Any additional comments on this proposed rule must be received on or before March 9, 2006.

ADDRESSES: The hearing will be in room 154 of the U.S. Federal Office Building, 222 W. 7th Avenue, Anchorage, AK. Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, AK Region, NMFS, Attn: Ellen Walsh. Comments may be submitted by:

- E-mail: 0648-AT84-NPRWCH@noaa.gov. Include in the subject line the following document identifier: Right Whale Critical Habitat PR. E-mail comments, with or without attachments, are limited to 5 megabytes.

- Webform at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at that site for submitting comments.

- Mail: P. O. Box 21668, Juneau, AK 99802

- Hand delivery to the Federal Building : 709 W. 9th Street, Juneau, AK

- Fax: (907) 586-7012

The proposed rule, maps, stock assessments, and other materials relating to this proposal can be found on the NMFS Alaska Region website <http://www.fakr.noaa.gov/>.

FOR FURTHER INFORMATION CONTACT: Brad Smith, (907) 271-3023, e-mail: Brad.Smith@NOAA.gov or Marta Nammack, (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Regulations governing petitions to revise critical habitat under the ESA provide that a public hearing shall be held if any person so requests within 45 days of publication of a proposed regulation (50 CFR 424.16(c)(3)). Notice of such hearing is to be published in the **Federal Register** no later than 15 days prior to the hearing.

Comments and Responses

The November 2 proposed rule concerning designation of critical habitat established a comment period ending on January 3, 2006. Twenty-one comments were received on the proposed rule. These comments are summarized below. Responses to these and to comments received during the public hearing will appear in the final rule on this action.

Size of Proposed Critical Habitat is Too Large

Comment: The southern and western boundaries of the proposed critical habitat in the Bering Sea are based on very few right whale sightings. Eliminating these areas would reduce the extent of the critical habitat from 27,700 to 24,000 square miles but retain approximately 99 percent of all sightings.

Comment: The area designated as CH is arbitrary because there is no obvious correlation between copepod abundance and the distribution of the northern right whale.

Proposed Critical Habitat is Too Small

Comment: The proposed designations fail to address unoccupied right whale habitat. Additional areas outside of the known range of the northern right whale at the time of ESA listing should be included in this designation.

Comment: The extent of the areas proposed for designation as critical habitat in the North Pacific Ocean would not be sufficient to provide for the recovery of the northern right whale.

Comment: The proposed designation is negatively biased in that it is based on sighting effort which is not consistent over the range of the northern right whale. Therefore, the designation should be expanded to compensate for this bias. Both right whales and their Primary Constituent Elements (PCE's) are likely to occur elsewhere in densities equivalent to those occurring in the designated critical habitats.

Comment: The proposed designation should be expanded to recognize the probability of increased importance of adjacent areas, and to be consistent with similar efforts to designate CH for the northern right whale in the North Atlantic Ocean.

Comment: The precautionary principle requires NMFS to designate other areas with similar habitat conditions as CH.

Comment: The designation should include State of Alaska waters because they have nearly identical features to the proposed CH areas.

Comment: NMFS should consider designation of adjacent areas to preserve diversity and act as buffer areas.

Comment: NMFS should include in its designation historical right whale habitat which was essential to their conservation.

Comment: NMFS data demonstrate right whales are found through Unimak Pass and eastward to Kodiak Island. These waters also contain important features or serve important biological needs and should be added to the areas proposed for designation.