DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: ***Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185.***

When Congress first granted the Commission auction authority, it wanted to ensure that small businesses could participate in the provision of spectrum-based services.[1] To implement this congressional directive, the Commission adopted the designated entity (DE) program, which seeks to promote opportunities for small businesses to provide facilities-based services to the public. As part of the DE program, the Commission adopted a rule—the attributable material relationship (AMR) rule—that kicks in whenever an applicant for DE benefits leases more than 25 percent of the spectrum capacity of *any one* of its licenses to another company.[2] The purpose of the AMR rule is to ensure that a DE that benefits from the program "uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public" and is not unduly controlled or influenced by a third party.[3]

Today, the Commission jettisons this entire framework by waiving the AMR rule for the benefit of Grain Management, LLC (Grain), a private equity firm that leases *100 percent* of the spectrum capacity *of all of its licenses* to the two largest wireless carriers in the country.

This decision cannot be justified under the Commission's waiver law, since waiving the AMR rule here eviscerates—rather than promotes—the purpose of the rule. The Commission's suggestion that the rationale underlying the AMR rule does not apply when a DE applicant obtained its spectrum licenses without the benefit of bidding credits simply cannot be squared with either the text of the rule or the reasoning of the Commission decision that adopted it. In addition, the Commission's claim that Grain's leasing agreements do not support any inference of undue influence flatly contradicts its determinations in the context of joint sales agreements among broadcast television stations. Finally, today's decision will likely produce anomalous results, inject needless uncertainty into the Commission's auction process, and invite arbitrageurs to make creative end-runs around our DE rules—all of which is unnecessary given the upcoming DE rulemaking. For all these reasons, I dissent.

1. This Request Does Not Meet the Waiver Standard.

To start, the Grain petition falls far short of satisfying even the first element of the waiver standard—that the "underlying purpose of [the AMR rule] would not be served or would be frustrated by

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[1] *See* 47 U.S.C. § 309(j)(4)(D) (stating that the Commission shall ensure that certain designated entities "are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures"); Conference Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep. 103-213, 103rd Cong., 1st Sess. 484 (1993) (same), *available at* http://go.usa.gov/55wx.

[2] *See* 47 C.F.R. § 1.2110(b)(3)(iv)(A). The Commission's DE program provides bidding credits to small businesses based on the gross revenues attributable to each DE applicant. The AMR rule is part of that calculus. It states that every DE applicant must include, as part of its attributable gross revenues, the revenues of any entity that leases, "on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses." *Id.*; *see also Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report & Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4762–63, paras. 21–24 (2006) (*CSEA/Part I Second Report and Order*) (adopting the AMR rule and stating that the Commission intended to prevent DEs from leasing more than a certain percentage of their spectrum to other companies).

[3] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15.

application to the instant case."[4] The Commission reaches a contrary conclusion by boldly asserting that awarding DE benefits to a company that leases 100 percent of its spectrum to the nation's two largest wireless providers does not even "implicate any of the . . . policies underlying the AMR rule."[5] This determination does not withstand even casual scrutiny and cannot be reconciled with the purpose of the rule.

Why did the Commission adopt the AMR rule? It's pretty simple: to make sure that those who benefited from the DE program would use their licenses to provide facilities-based services directly to the public.[6] Indeed, the Commission has consistently said that the Communications Act requires DEs to have "significant involvement in the provision of services to the public, not merely passive ownership of a license to spectrum used by others to provide service."[7] Thus, "in accordance with the intent of Congress, *every* recipient of the Commission's designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[8] The whole point of the AMR rule—indeed, the entire DE framework—is to promote competition, not arbitrage; competitors, not middlemen.

Against this backdrop, the Commission's decision today—that a company can lease every last slice of its spectrum without even *implicating* the purpose underlying the AMR rule and therefore obtain DE benefits—is as unlawful as it is absurd. The decision violates the AMR rule's core purpose of limiting DE benefits to companies that use their spectrum to offer facilities-based service, since Grain offers no such service and its waiver petition evinces no intention whatsoever that it will do so. Indeed, this is the very case for which the AMR rule was *designed*, not one that merits its waiver.

But even if one were to ignore the AMR rule's fundamental purpose, the waiver decision itself acknowledges another important purpose. It states that the Commission adopted the rule because it "was concerned about 'the potential [for leasing agreements] to significantly influence' the DE applicant."[9]

Under the Commission's own framing, then, it can grant Grain's request only if there is no concern about the potential for undue influence. But how could that possibly be the case? How is the potential for leasing agreements to significantly influence a DE *not* present when those leases cover 100 percent of the DE's spectrum? If this reason for the rule is ever at play, it is here.

While the *Order* offers no apparent response,[10] this is not a point that escaped commenters' notice. As Council Tree observes, there is no reason why the AMR's purpose does not apply in Grain's

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[4] *See* 47 C.F.R. § 1.925(b)(3)(i).

[5] *Order* at para. 12.

[6] *See, e.g.*, *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4763, para. 26 (concluding that the material relationship rules "are necessary to ensure that the recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public").

[7] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration, 21 FCC Rcd 6703, 6705 n.8 (2006) (*CSEA/Part I Second Report and Order Recon*); *see also Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17538, para. 70 (2004) (*Secondary Markets Second Report and Order*) (Section 309(j)'s "statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service.").

[8] *CSEA/Part I Second Report and Order Recon*, 21 FCC Rcd at 6705, para. 3 (emphasis added). Although some have argued that "'[t]here is no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market—construction and operation of a facilities-based network[,]'" the Commission has stated that "Section 309(j) indicates otherwise." *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538, paras. 70–71.

[9] *Order* at para. 10 (quoting *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4762–63, paras. 21–22).

case.[11] It states that "the analytical foundation of the AMR rule, stated simply, is the proposition that a lease of more than 25% of spectrum capacity in a given license by Party A to Party B creates 'undue influence' by Party B on Party A." "[I]f this proposition is true," Council Tree points out, "there is no reason to believe that it is untrue in the case of the Grain Request." Indeed, Council Tree recognizes that granting a waiver here would be "analytically illogical and unsupportable in the face of a continuing AMR rule."[12]

2. This Waiver Has No Foundation in Either the AMR Rule or Commission Precedent.

Next, the item engages in some revisionist history by suggesting that the Commission never intended the AMR rule to apply when a potential DE applicant, like Grain, obtained all of its existing spectrum licenses without the benefit of DE credits.[13] This contention is belied by both the plain text of the AMR rule and the Commission's prior decisions.

The AMR rule provides that an entity has an attributable material relationship "when it has one or more arrangements with any individual entity for the lease . . . of, on a cumulative basis, more than 25 percent of the spectrum capacity of *any one of the applicant's or licensee's licenses*."[14] The language thus requires the DE applicant to determine whether it exceeds the leasing threshold with respect to "any one of" its licenses. This language covers *all* of the applicant's existing spectrum holdings without any exception for licenses obtained without DE benefits. The AMR rule admits of no ambiguity here.

Moreover, the Commission's claim that the rationale for the AMR rule lacks force where a lease agreement does not involve DE spectrum is misplaced. As indicated above, the Commission adopted the rule because it "conclude[d] that certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility."[15] "In this regard," it stated, "where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress."[16]

It was the lease agreement itself (where the agreement concerned more than 25 percent of the spectrum capacity) that worried the Commission and motivated it to adopt the AMR rule. It was wholly irrelevant whether the agreement involved a particular license that had been obtained using DE credits. The risk of undue influence was the same in either case.

That was certainly the view expressed by the U.S. Department of Justice in the Commission's AMR rulemaking.[17] To ensure that DEs are truly independent, the DOJ stated that "the FCC should

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[10] In fact, in conducting its analysis, the Commission turns the waiver standard on its head, stating at one point that "we are unable to conclude that the underlying purpose of the bright-line provision of the AMR rule would be served by its application" in this case. *Order* at para. 11. But our rules do not permit the Commission to grant a waiver based on an asserted inability to reach such a conclusion; rather, "[t]he Commission may grant a request for waiver if it is shown that . . . the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case." 47 C.F.R. § 1.925(b)(3).

[11] *See* Letter from Steve Hillard, Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, GN Docket Nos. 12-268, 13-185 (May 9, 2014) *available at* http://go.usa.gov/5NTA.

[12] *Id.*

[13] *Order* at para. 11.

[14] 47 C.F.R. § 1.2110(b)(3)(iv)(A) (emphasis added).

[15] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4762, para. 23.

[16] *Id*.

[17] *See* Ex Parte Submission of the U.S. Department of Justice, WT Docket No. 05-211, at 5 (Mar. 17, 2006), *available at* http://go.usa.gov/58fY.

disqualify"—not merely attribute revenues, but disqualify—"a DE that has any . . . agreement with a large wireless carrier that suggests that the licenses will be used principally for the benefit of the large wireless carrier."[18] But today, we pave the way for precisely this.

Simply put, the idea embraced by the Commission today—that undue influence (if there is any) flows differently through an agreement that relates to spectrum that was originally purchased with DE credits than it does through an agreement that relates to non-DE spectrum—is untenable. If a small business pays $1 million for a license, having obtained it with no DE benefits, and then leases 100 percent of the capacity to a large provider, the risk from an AMR perspective is no different than if the same company paid 10 percent less for that license, having obtained it through the use of DE credits, and then leased 100 percent to the same large provider. How could the use of DE benefits in an auction change the influence a lessor has over the licensee? It couldn't, and the Commission offers no reason why it could. In the end, the Commission's decision today does not waive the AMR rule; it rewrites it.[19]

This begs the question—how will the Commission apply its new approach going forward? If Grain or a similarly situated company uses bidding credits to obtain spectrum at auction, how will the Commission determine whether the pre-existing leases present a risk of undue influence? The Commission claims that it will engage in a case-by-case review. But what will that review look like? Will the Commission just rubber-stamp those agreements? Or will it engage in a thorough review of the underlying agreements and relationships? Neither option has much appeal. If it's the former, the Commission will simply confirm that it eviscerated the AMR rule today. If it's the latter, how will the Commission perform the inquiry? What criteria will apply? What documents and other information will it need to review? How long will this review take? Will the review jeopardize the results of the auction? Today's decision offers no guidance.[20]

3. This Decision Contradicts the Commission's Recent Ban on Joint Sales Agreements Among Broadcast Television Stations.

It is striking how irreconcilable the Commission's decision here is with its recent crackdown on the use of joint sales agreements (JSAs), under which one broadcast television licensee sells advertising time on behalf of another licensee's station.[21] In the latter context, the agency recently instituted a flat

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[18] *Id.* at 5.

[19] *See, e.g.*, *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

[20] The claim that Commission review of Grain's leases after the conclusion of the auction would be "in accordance with established Commission policy," *Order* at n.39, is patently inaccurate. Under the Commission's established rules, leases such as Grain's render a company ineligible for DE benefits so entities such as Grain are not allowed to participate in the auction as if they were DEs. Today's decision waives that "established Commission policy" and allows Grain to receive DE treatment during the bidding process. Moreover, the Commission's desire to conduct a post-auction, case-by-case review in this instance is quite curious given its decision only a couple of months ago to replace post-auction, case-by-case review of licenses in auctions with pre-auction, bright-line rules governing reserved and unreserved spectrum. In explaining that policy shift, the Commission reasoned that "upfront, clear determination, instead of case-by-case analysis post-auction, would provide potential bidders with greater certainty in the auction process." *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269; Docket No. 12-268, Report and Order, FCC 14-63 at para. 139 (2014). It also maintained that *ex ante* restrictions "would provide greater certainty and efficiency in the process of licensing through competitive bidding" than a post-auction, case-by-case analysis. *Id.* at para. 140. The Commission stated that "[i]n particular, upfront, bright-line determinations would streamline the post-auction review of license applications, which should allow winning bidders to receive their licenses more quickly and proceed to deploy service using the acquired spectrum." *Id*. All of this goes out the window in today's decision.

[21] *See Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 29 FCC Rcd 2647 (Med. Bur. 2014) (*JSA Processing PN*); *see also 2014 Quadrennial Regulatory*

ban in most markets, through tightened attribution rules, on one station selling more than 15 percent of advertising for another station, darkly ruing the hypothetical concern (and it was hypothetical, as no evidence of undue influence was proffered and no advertiser had ever complained) that the mere existence of the agreements gave licensees "the opportunity, ability, and incentive to exert significant influence over the brokered station" of competing licensees.[22] It was said then that "[w]hen one licensee controls the cash flow of another, it controls the other. The old admonition 'follow the money' has never been more appropriate."[23] The Commission thus determined that the fact of these agreements required attribution for purposes of the agency's media ownership rules because the risk of undue influence was simply too great.[24]

So here's a riddle: How is it that one television station in a small market selling 16 percent of another station's advertising is conclusive evidence of "undue influence" and an intolerable end-run around our rules, but an investment firm's scheme to lease every last speck of its spectrum to two of the world's Fortune 50 corporations does not even justify a presumption of "undue influence"? Whatever happened to the old admonition "follow the money"? Why follow 16 percent of the money, but not 100 percent of the money? Yet again, today's decision offers no answer. And there is none. A foolish consistency may be the hobgoblin of little minds, but a deliberate inconsistency is the ogre of arbitrariness.[25]

4. This Decision is Entirely Unnecessary in Light of the Upcoming DE Rulemaking.

Not only is the Commission's decision to gut a rule through waiver legally infirm,[26] thus creating risk and uncertainty for our upcoming auctions, it is not a step the Commission had to take. The Commission stated in the *Incentive Auction Order* that it would "general[ly] re-examine the AMR rule"

Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket Nos. 14-50, 09-182, 07-294, 04-256, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527–45, paras. 340–72 (2014) (*2014 Quadrennial Regulatory Review*).

[22] *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4527, para. 340 ("[T]he ability of a broker to control a brokered television station's advertising revenue, its principal source of income, affords the broker the opportunity, ability, and incentive to exert significant influence over the brokered station."); *see also id*. at 4533, para. 350 ("[T]elevision JSAs involving a significant portion of the brokered station's advertising time convey the incentive and potential for the broker to influence program selection and station operations."); *id*. at 4539, para. 360 ("[A] 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, including programming choices, and give them an incentive to do so."); *id*. at 4539, para. 361 ("As the amount of advertising revenue controlled by the brokering station increases, so too does its incentive and ability to influence brokered station's programming."); *id*. at 4582 (Statement of Chairman Tom Wheeler) (JSAs provide broker stations "the incentive and ability to unduly influence the operations" of brokered stations), *available at* http://go.usa.gov/58Ck.

[23] *Id.* at 4582 (Statement of Chairman Tom Wheeler).

[24] *See JSA Processing PN*, 29 FCC Rcd at 2648; *but see* Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), http://go.usa.gov/58ax; *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4587 (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/58a5; Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on Three More TV Stations Going Dark Under The FCC's New JSA Policy (June 24, 2014), http://go.usa.gov/58xQ; Statement of Commissioners Ajit Pai and Michael O'Rielly on the Negative Impact of the Decision to Restrict Television Stations' Use Of Joint Sales Agreements (May 29, 2014), http://go.usa.gov/9N7V.

[25] The Commission's assertion that the treatment of Grain's leases under the wireless spectrum screen is consistent with the Commission's treatment of JSAs among television stations is beside the point. *Order* at n.39. The relevant inconsistency is between the justification for today's waiver of our DE rules and the rationale for the Commission's new JSA rules. On this point, the Commission has no response.

[26] *See, e.g.*, *WAIT Radio*, 418 F.2d at 1159.

as part of a broader review of the DE program.[27] It reiterates this intention in its decision today.[28] Thus, regardless of what one thinks about the merits of today's waiver, the proper way forward would have been to consider these issues in the context of the agency's industry-wide DE rulemaking.

Notably, even parties that support Grain's request on the merits argue that a rulemaking was the appropriate forum to address it. They argue, among other things, that "[c]onsideration of this matter can only be done as part of a review of the AMR, its policy rationale, and its effects on all DEs."[29] The Commission's decision to take a piecemeal approach will either complicate or prejudge the agency's broader consideration of these and other DE-related issues.

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We need clear, predictable, and legal rules that apply to all players and promote entry by small companies into the wireless business—not arbitrary waivers that yield no benefits other than a serendipitous profit to a preferred entity.

Because this waiver does not meet the standard set forth in our rules; because it cannot be reconciled with either the text of our AMR rule or Commission decisions expounding it; because it effectively rewrites the rule in a way that raises questions about how these issues will be handled as we approach important spectrum auctions; because it blesses a questionable scheme just months after the agency denounced as illicit far more legitimate arrangements in the media context; because the far better tactic is to consider this request in the general rulemaking, expected to commence soon; in short, because to describe this waiver request is to decide against it, I respectfully dissent.

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[27] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, FCC 14-50 at para. 482 (June 2, 2014).

[28] *Order* at para. 16.

[29] Letter from Steve Hillard, Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, GN Docket Nos. 12-268, 13-185 (Mar. 18, 2013), *available at* http://go.usa.gov/5NTT.