

FCC Diversity Advisory Committee, Telecom and Broadband Issues Subcommittee

Proposal to Restore the FCC's Designated Entity ("DE") Program

September 14, 2009

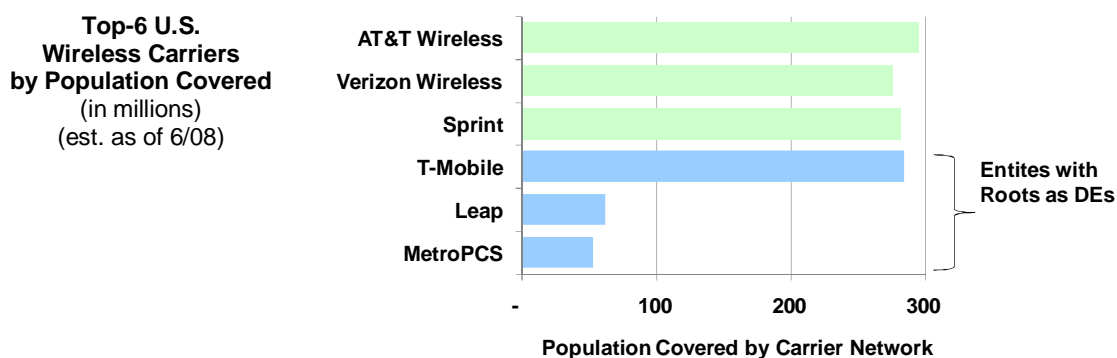
1. PROPOSAL SUMMARY

- **1. Undo the FCC's April 2006 DE Rule Changes**
 - Changes that effectively terminated the DE Program
 - DEs won \$23 billion (or 50%) of \$45 billion of licenses sold before the DE rule changes
 - DEs won \$1 billion (or 3%) of \$33 billion of licenses sold after the DE rule changes
 - The DE Program is a cornerstone for building diversity / competition in wireless / new media

- **2. Restore Closed License Auctions for DEs**
 - Closed license auctions under previous FCCs (e.g., 1990s) ushered in a new era of DE competition
 - The Advisory Committee will conduct a pre-auction review of each auction, in order to advise the Commission if overriding public policy goals or other factors warrant limiting the scope of closed licenses and whether such limitation should be balanced by an increase in bid credits

2. BACKGROUND TO THE DE PROGRAM

- **§309(j) Directs the FCC to Assist Small / Minority Owned Businesses in Wireless Auctions**
 - To ensure widespread dissemination of licenses, specifically among small, minority-owned, women-owned and rural businesses (“Designated Entities” or “DEs”)
- **The FCC’s DE Program Historically Fostered DE Success Via Two Mechanisms**
 - Via licenses reserved for DE bidders only (Closed Licenses)
 - Via DE bidding discounts (e.g., 25% - 35% Bidding Credits)
- **Many DE Success Stories from 1990 – 2006, Including Genesis of 3 of the Top-6 National Carriers**



- **The DE Program Is Race And Gender Neutral, And Defines Eligibility On The Basis Of Small Business Status And Revenues. The Program Presents No Constitutional Issues.**

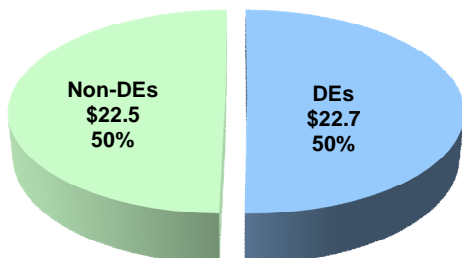
3. OVERVIEW OF THE 2006 DE RULE CHANGES THAT INCAPACITATED THE DE PROGRAM

- **In 2006 the Commission Implemented Two DE Rule Changes with Substantial Unforeseen Effects on National Spectrum Allocation**
 - Effectively eliminated DE auction participation – see next page
- **Rule Change #1: New 10 Year Hold Requirement** – doubles from 5 to 10 years the period of time that DEs must hold licenses
 - Policy cuts off DE access to debt and equity capital, because 10 years is simply too long
 - Companies need ability to exit / restructure in a reasonable time frame
 - Especially critical in times of economic stress
- **Rule Change #2: New Wholesale / Lease Restriction** – strict new limits on DE leasing / wholesaling
 - e.g., DE cannot wholesale / lease > 50% of capacity overall or > 25% to any one party
 - Prohibits DEs from building a network and selling > 50% capacity to bulk purchase tenants
 - i.e., significantly limits “Anchor Tenants”
 - Significantly restricts DEs’ access to financing, contrary to the FCC’s own Secondary Markets Initiative whose flexibility the Commission heralded to Congress (§257 Triennial Report)

- **RESULT: DE Auction Success Has Declined to Near-Zero (Net Winning Bids, \$ in billions)**

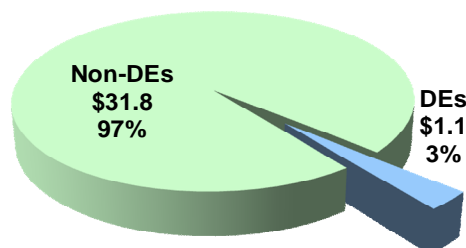
BEFORE DE Rule Change: 1994 – April 2006

\$45.2 Billion of Licenses in 64 Auctions



AFTER DE Rule Change: April 2006 – 2008

\$32.8 Billion of Licenses, Principally Auctions 66 / 73



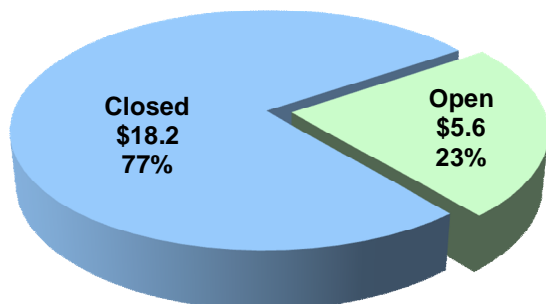
- **The New DE Rules Were Broadly Opposed (by All But the National Incumbent Carriers)**
 - 10 Prominent Civil Rights and Public Interest Groups

Asian American Justice Center	National Organization for Women
Benton Foundation	Media Alliance
NAACP	Office of Comm. of the United Church of Christ
National Hispanic Media Coalition	Rainbow PUSH Coalition
National Indian Telecom. Institute	Women's Institute for Freedom of the Press
 - Communications Public Interest Groups – Media Access Project, Free Press, Public Knowledge
 - Rural Industry Groups – Rural Telecom Group, OPASTCO, NTCA, Blooston Rural Carriers
 - DEs – Blooston Carriers, 3G PCS, Eezinet, Coral Wireless, Wirefree Partners, Council Tree, others
 - Financial Investors – Opportunity Capital Partners, Columbia Capital, M/C Partners, Catalyst Investors, Attucks Capital LLC, Greenwood 361^o and others
 - Wireless Carriers – US Cellular, MetroPCS, Leap Wireless, Cleveland Unlimited
- **The FCC's Own Diversity Advisory Committee Strongly Opposed the Two New Rules**
 - Resolution issued on April 25, 2006 (see Appendix 1 for full text)

4. OVERVIEW OF WHY CLOSED LICENSES ARE THE KEY TO A MEANINGFUL DE PROGRAM

- **Closed License Auctions Account for \$18 billion, or 77%, of the \$24 Billion of DE Licenses Won**
 - Includes all DE licenses won over the history of the DE Program the past 15 years

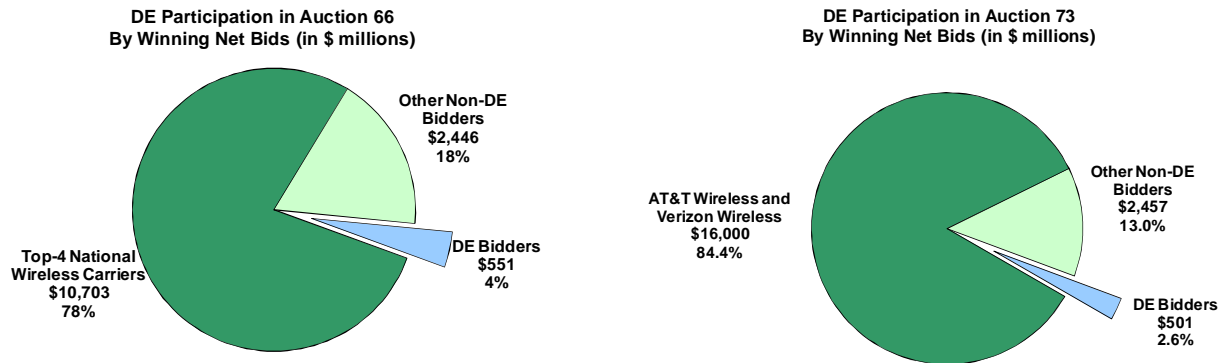
DE Auction Winnings: Closed vs. Open
\$23.8 Billion in Total DE Winnings (\$ billions)



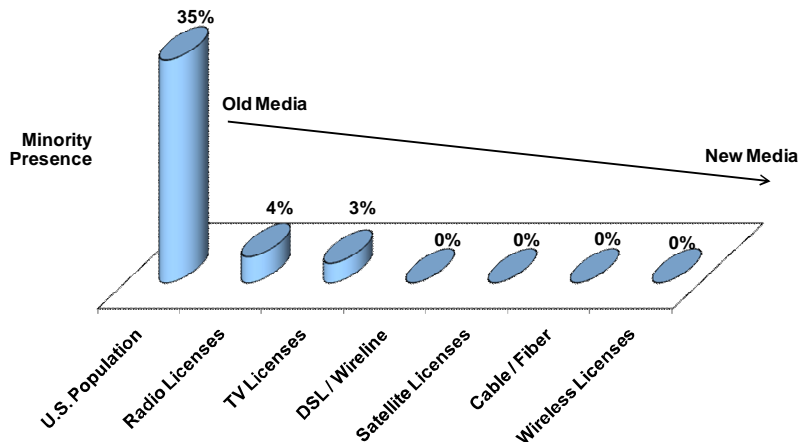
- **Previously the FCC Recognized that Closed License Auctions Are Vital to DE Success**
 - Provides DEs opportunity to participate without competition from large incumbent carriers
 - Recognizes that a bidding credit alone does little good to DEs facing large carrier competition
 - Ensures:
 - ➔ Diversity of Ownership
 - ➔ Competition
 - ➔ Widespread Dissemination of Licenses
 - Provides remedial benefit for low DE/diversity participation since 2006
 - Consistent success after separate “free credit” policy removed in light of NextWave; examples: Auctions 35 and 58

5. WHAT ARE THE BIGGER PICTURE CONSEQUENCES OF THE NEW DE RULES?

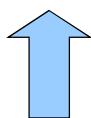
- The New DE Rules, Along with No Closed Auctions, Have Resulted In DE Auction Success Declining to Near Zero



- Eliminating DE Competition Only Worsened the Near Total Absence of Minority Ownership (data rounded to nearest whole number)

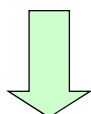


- Wireless Is the New Media, Making Diversity and Competition More Vital Now Than Ever



Minority Population

- ▶ The U.S. minority population is growing dramatically
 - 35% today
 - 45% projected in the span of just two White House terms
 - Represents more than one out of every two new voters



Diversity Initiatives

- ▶ Once vibrant FCC diversity initiatives are now disabled
 - Designated Entity (DE) Program – essentially eliminated with '06 FCC rules
 - Tax Certificate Program – eliminated in 1995
 - Ongoing Media Consolidation – and no new diversity measures

6. THE NEW COMMISSION HAS AN HISTORIC OPPORTUNITY TO CHART A POSITIVE NEW COURSE

- **We Urge the Commission to Rescind the New DE Rules**

- **We Urge the Commission to Restore Meaningful Closed License Auctions for DEs**

- **These Recommendations Are Consistent with the Goals of the New Administration**
 - Pro-Diversity
 - Pro-Small Business
 - Pro-Competition

- **These Recommendations Will Ensure Robust DE Participation in Important Upcoming Auctions**
 - AWS-3 – 25 MHz of spectrum nationwide
 - 700 MHz D-block – new public safety network via nationwide spectrum
 - Others TBD

- **These Changes Are Readily Implemented and Offer the New Commission an Excellent Opportunity to Achieve an Early Policy Success**

APPENDIX 1

Resolution Adopted by the FCC's Diversity Advisory Committee on April 25, 2006

- The Resolution below was adopted by the FCC's Diversity Advisory Committee on the morning of April 25, 2006, following which the Commission released the Two New Rules, ignoring the Committee's Resolution and advice. Underlining below added for emphasis.

Resolution Regarding Designated Entity Investment Rules

WHEREAS, the Commission's Designated Entity ("DE") rules were developed to satisfy the Commission's obligations under Section 309(j) of the Communications Act to avoid the excessive concentration of licenses and provide small businesses and businesses owned by members of minority groups and women (collectively, "DEs") with the meaningful opportunity to participate in the provision of spectrum-based services;

WHEREAS, the often times capital-intensive nature of communications businesses and the difficulties experienced by DEs in accessing capital and experience make it virtually impossible for DEs to secure valuable spectrum licenses when bidding against well-capitalized incumbents and to compete in the market;

WHEREAS, the Commission's DE rules have consistently been designed to ensure that DEs who 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;

WHEREAS, in a proceeding captioned WT Docket No. 05-211 ("Proceeding"), the Commission is currently considering whether to modify its DE rules to prohibit the award of competitive bidding preferences to DEs having material relationships with large in-region incumbent wireless services providers; and

WHEREAS, the Advisory Committee on Diversity for Communications in the Digital Age was formed to advise the Commission on an on-going basis on diversity in communications;

Therefore, be it

RESOLVED that the Advisory Committee on Diversity for Communications in the Digital Age strongly urges the Commission that if it should not decide, at this time, to restrict large incumbent national wireless carriers from participation in the DE program, we recommend that the Commission adopt the following measures: (1) impose no new restrictions or limitations on who can invest in a DE in Auction 66; (2) issue a Second Further Notice of Proposed Rulemaking seeking further comment on the reform proposals in the February 3, 2006 FNPRM and particularly on how future auctions could be improved based on the Commission's experience with Auction 66; and (3) reaffirm for all FCC Auctions the enforcement of the Commission's existing rules, including expeditious qualification reviews consistent with speedy license awards, compliance audits, and unjust enrichment penalties for violation of the Commission's rules.

APPENDIX 2

Selected Quotes from FCC Commissioners

On the New DE Rules

- **Commissioner Copps, April 25, 2006 [on the New DE Rules]:** “At the same time, we must also be cautious about overshooting the mark and harming the very small carriers and entrepreneurs that Congress meant to protect. Legitimate DEs must have access to capital to compete meaningfully against the large carriers. I would not support any measures that improperly compromised their ability to do so.....The limited time available to us for consideration of this item did not allow us to resolve these questions.....” [Statement: FCC Modifies Its "Designated Entity" Eligibility Rules in Advance of the Upcoming Advanced Wireless Services Auction]
- **Commissioner Adelstein, May 19, 2006:** “And now it appears that the changes that the Commission did adopt may actually do more harm than good to the DE participation in the upcoming auction, notwithstanding this last-ditch effort to cure this troubled proceeding.” [Statement: FCC Modifies Advanced Wireless Services Auction Schedule, Moves Start Date To August 9, 2006]
- **Commissioner Adelstein, June 2, 2006:** “I hope that the Commission's decisions over the past several months do not prove to be the undoing of our most significant auction in 10 years.” [Statement: Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures]
- **Commissioner Adelstein, March 20, 2008:** “It's appalling that women and minorities were virtually shut out of this monumental auction [73]. It's an outrage that we've failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse. This gives whole new meaning to "white spaces" in the spectrum.” [Statement: Lack of Diversity Among Winners of 700 MHz Auction]

On the Importance of Diversity

- **Commissioner Copps, September 26, 2008:** “I'm not going to spend much time talking about the results of this rabid deregulation.....to our collective shame, a country that is now one-third minority in which people of color own just 3% of all full-power commercial television stations.....” [National Association of Black Owned Broadcasters (NABOB) Broadcast Management Conference]
- **Commissioner Copps, January 29, 2001:** “Diversity should be America's song, and the FCC, standing at the forefront of the great transforming forces of our generation, should be leading the choir.....” [In the Matter of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies]
- **Commissioner Copps, October 31, 2007:** “Consolidation denigrates diversity, denies minorities and women, and diminishes our already-distorted democratic dialogue.” [Public Hearing on Localism]
- **Commissioner Copps, April 28, 2003:** “America will succeed in the Twenty-first century not in spite of our diversity, but because of our diversity. Diversity is not a problem to be overcome. It is our greatest strength.....Why not ask these questions before we change the rules instead of creating the potential for even more harm?” [USC Media Consolidation Forum]
- **Commissioner Adelstein, December 18, 2007:** “As the gatekeeper of the public airwaves, the Commission has a solemn obligation to ensure that all Americans have equal access and opportunity to own, operate and control broadcast outlets. Indeed, the founding charter of the FCC requires us.....to take affirmative steps to promote diversity of ownership because, in America, ownership is the key to having your voice heard.” [Statement: FCC Adopts Rules To Promote Diversification Of Broadcast Ownership]