

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
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
)	
)	

To: The Commission

**GRAIN MANAGEMENT, LLC’S REQUEST FOR CLARIFICATION OR WAIVER OF
THE COMMISSION’S “ATTRIBUTABLE MATERIAL RELATIONSHIP” RULE**

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**GRAIN MANAGEMENT, LLC’S REQUEST FOR CLARIFICATION OR WAIVER OF
THE COMMISSION’S “ATTRIBUTABLE MATERIAL RELATIONSHIP” RULE**

Grain Management, LLC (“Grain Management”) respectfully requests that the Federal Communication Commission’s (the “Commission”) clarify its rules concerning the eligibility of applicants and licensees for designated entity (“DE”) benefits, and specifically requests that the Commission clarify that the attributable material relationship rule is not applicable to leasing transactions between DEs and non-DEs where: (1) the licenses involved in the transaction were not acquired through the use of DE benefits and, instead, such licenses were acquired on the secondary market; and (2) the transaction does not involve a structure permitting a non-DE to exercise undue influence over a DE’s activities or decision making. In the alternative, Grain Management respectfully requests that the Commission waive application of the attributable material relationship rule to a leasing transaction involving AT&T Inc. (“AT&T”), Cellco

Partnership d/b/a Verizon Wireless (“Verizon”), and Grain Capital II, LLC, which the Commission approved on September 13, 2013 (the “Transaction”).

I. INTRODUCTION AND SUMMARY

In April 2006, the Commission promulgated the attributable material relationship rule, which was intended to carry out Congress’s directive both to assist DEs, through the use of tax credits and bidding preferences, and, at the same time, enact safeguards to ensure that such benefits are distributed in a way to prevent “unjust enrichment” to non-DEs.¹

Under the Commission’s rules, an applicant has an attributable material relationship when the applicant has one or more agreements with any individual entity for the lease or resale of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee.² If an attributable material relationship is found, the Commission’s rules cause the gross revenues of that entity and its attributable interest holders to be attributed to the applicant or licensee for the purposes of determining the applicant’s or licensee’s (i) eligibility for DE benefits and (ii) liability for “unjust enrichment” penalties.³

The attributable material relationship rule, as it is currently drafted, is overly broad and has the potential to deny entities whom Congress would have intended to receive DE benefits from receiving such benefits. For example, this rule could potentially disqualify an otherwise qualified DE by virtue of the entity’s mere participation in a leasing transaction with a non-DE that: (1) does not involve licenses acquired through DE benefits and, instead, involves only

1 See 47 C.F.R. § 1.2110(b)(3)(iv)(A); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Dkt. No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753, 4759-66 ¶¶ 15-30 (2006) (“DE Order”), modified by erratum, 21 FCC Rcd 6622 (2006), clarified by *Order on Reconsideration*, 21 FCC Rcd 6703, 6710-15 ¶¶ 15-30 (2006), affirmed in part by *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2110) (affirming attributable material relationship rule and vacating impermissible material relationship rule).

2 See 47 C.F.R. § 1.2110(b)(3)(iv)(B); see also *DE Order* at 4759-66 ¶¶ 15-30.

3 See *DE Order* at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41.

licenses acquired on the secondary market; and (2) carries no risk of a non-DE unduly influencing the DE's activities or decision-making.

This result is irrational, and contrary to the intent of Congress and the public interest. *First*, a leasing transaction involving licenses that were acquired without the use of any DE benefits does not pose any danger of unjustly enriching non-DE entities. *Second*, a leasing transaction between a DE and a non-DE, in and of itself, does not pose a danger of undue influence *unless* the leasing transaction involves some sort of future business relationship between the parties—such as a joint venture, governance relationship, or agreement related to future rights in spectrum capacity—that would confer undue influence over the DE's activities or decision-making. *Third*, the Commission has expressly recognized the importance of promoting secondary market spectrum transactions and the potential role for such transactions in enabling meaningful participation by minority-owned and small businesses in the wireless sector.

As illustrated by a recent transaction involving Grain, unless clarified, application of the attributable material relationship rule, as currently drafted, could have the effect of denying DE benefits to entities whom Congress intended to receive such benefits. If the Commission does not clarify the rule as requested herein, the Commission should waive application of the attributable material relationship rule to the Transaction.

II. CLARIFYING THE ATTRIBUTABLE MATERIAL RELATIONSHIP RULE WOULD BETTER ALIGN THE COMMISSION'S RULES WITH CONGRESS'S POLICY GOALS

Clarifying the attributable material relationship rule, as described above, would better align the Commission's rules with Congress's policy goals. The requested clarification includes sufficient protections against unjust enrichment and undue influence while, at the same time, advancing Congress's policy goals of ensuring that qualified entities receive DE benefits. Conversely, failure to clarify the attributable material relationship rule risks undermining

Congress's and the Commission's policy goals not only with respect to the DE program, but also with respect to supporting a vibrant secondary market for wireless spectrum.

A. Congress Intended for the Commission to Prevent Unjust Enrichment, a Concern Not Implicated When Designated Entity Benefits Are Not Involved in a Transaction

In 1993, Congress authorized the Commission to allocate spectrum through competitive bidding, and in doing so, Congress instructed the Commission to “promot[e] economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women.”⁴⁵

The Commission promulgated the attributable material relationship rule in order to carry out Congress's directive to both assist DEs, through the use of tax credits and bidding preferences, and, at the same time, enact safeguards to ensure that such benefits were distributed in a way to prevent “unjust enrichment” to non-DEs. The Commission noted that the challenge in carrying out Congress's directive is to balance the task of “providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and . . . ensuring that the rules effectively prevent entities ineligible for DE benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses.”⁶

4 47 U.S.C. § 309(j)(3)(B); *see also* 47 U.S.C. § 309(j)(4)(D) (“In prescribing regulations pursuant to paragraph (3), the Commission shall . . . ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”).

5 A more complete history of the DE program is described in a comment by the Minority Media & Telecom Council. *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Dkt. No. 05-211, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*, at 1-11 (rcv'd Feb. 27, 2014).

6 *DE Order* at 4756-57 ¶¶ 8-9.

But, in promulgating the attributable material relationship rule, the Commission did not make any explicit distinction between licenses that were acquired by the licensee without the use of any DE benefits, such as licenses acquired in an auction without discounts or on the secondary market (“Non-DE Licenses”), and those acquired through the use of DE discounts or set-asides (“DE Licenses”). Nor did the Commission explain anywhere in its order why this new rule should in fact apply to *every* license held by an entity, *whether or not* it is a DE License. To the contrary, in explaining the rationale for the new rule, in several places in the order, the Commission made it quite clear that its intent was to discourage these material relationships with respect to DE Licenses only (*i.e.*, licenses acquired using DE benefits) and that the rule was never intended to capture the leasing or resale of Non-DE Licenses. For example, the Commission stated the following (emphases added):

Through the decisions we make today, we will ensure that a designated entity licensee will preserve at least half of its spectrum capacity of each of its licenses for which it has been awarded and retained designated entity benefits for the provision of service as a facilities-based provider for the benefit of the public.⁷

[T]hese definitions of material relationship 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; that the Commission employs methods *to prevent unjust enrichment*; and that our *statutory-based benefits* are awarded only to those that Congress intended to receive them.⁸

As we indicated in the *Secondary Markets Second Report and Order*, “Congress specifically intended that, *in order to prevent unjust enrichment, the licensee receiving designated entity benefits* actually provide facilities-based services as authorized by its license.”⁹

⁷ *Id.* at 4763-64 ¶ 27.

⁸ *Id.* at 4763 ¶ 26.

⁹ *Id.* at 4762-63 ¶ 24.

It appears that the Commission assumed that, by definition, a DE would have acquired only DE Licenses, so there was no need to draw any distinction between an entity's DE and Non-DE Licenses. As it turns out, however, it is quite possible for a DE or potential DE to obtain Non-DE Licenses on the secondary market, and it does not appear that the Commission intended to include these licenses in assessing a DE's relationships with a larger carrier. Had the Commission intended, despite the statements quoted above, to consider the leasing or resale of Non-DE Licenses in determining the existence of material relationships, a reasonable explanation would have been necessary, given that the rationale for the new rule by its very nature would presumably implicate only DE Licenses.

In any event, it would not be reasonable for the Commission to include the lease or resale of Non-DE Licenses in determining whether a relationship with a large carrier is attributable. Because such Non-DE Licenses would have been acquired without bidding credits or set-asides, leasing those licenses would not implicate Congress's interests in ensuring that beneficiaries of DE benefits use their licenses for a particular purpose and do not receive unjust enrichment. To the extent that a DE has both DE and Non-DE Licenses, leasing or reselling the Non-DE Licenses would not limit or otherwise impact its ability to be a facilities-based carrier with respect to its DE Licenses. Many facilities-based carriers lease or resell spectrum as a way of rationalizing their spectrum holdings and/or raising capital.

In sum, there is no reasonable rationale for disqualifying an entity from being a DE because it leases or resells Non-DE Licenses that it acquired on the secondary market. Clarifying the rule, as described above, would address the overly broad reach of the attributable material relationship rule and would ensure that those entities whom Congress intended to receive DE

benefits actually receive such benefits. This clarification includes sufficient safeguards so as to pose no danger of the unjust enrichment of non-DEs.

B. Congress Was Concerned with Undue Influence, a Concern Not Implicated When a Leasing Transaction Does Not Involve an Ongoing Relationship between a DE and Non-DE

The Commission made clear that a primary factor leading to the adoption of the attributable material relationship rule was the potential for non-DEs to “exert undue influence over a designated entity licensee’s decision making regarding its service provision or the use of its licensed spectrum.”¹⁰

The Commission’s concern with undue influence was driven by the practical consideration that many DEs, when acquiring licenses or when entering into leasing transactions, form joint ventures, LLCs, governance or ongoing business relationships with larger non-DE carriers. These types of relationships, in turn, pose the danger of a non-DE exerting undue influence over the DE’s decision making. But simply because many DEs choose to enter into such business relationships does not mean that *all* DEs do so. In the absence of any structure or other mechanism permitting a non-DE to exercise undue influence over a DE’s activities or decision making, such as those described herein, there is no logical basis to assume that every leasing arrangement between a DE and a non-DE poses a risk of undue influence.

Clarifying the attributable material relationship rule would ensure that independent and otherwise qualified entities, whom Congress intended to be recipients of DE benefits, are not denied DE benefits by an overly broad rule. And the above-described clarification contains adequate safeguards to ensure that non-DEs cannot exert undue influence over DEs.

¹⁰ *Id.* at 4780-81 ¶ 81.

C. Applying the Attributable Material Relationship Rule to Leasing Transactions on the Secondary Market Involving Only Non-DE Licenses Undermines the Commission’s Goals of Supporting a Vibrant Secondary Market for Wireless Spectrum

Congress and the Commission have made it clear that the policy underlying the DE program is to assist in the development and organization of minority- or small business-controlled telecommunications entities. The Commission has also recognized the importance of promoting secondary market spectrum transactions and the potential role for such transactions in enabling meaningful participation by small, minority-owned businesses in the wireless sector.

In its *Secondary Markets Report and Order*, the Commission expressly stated that rule changes designed to expand opportunities for secondary market transactions were critical in furthering the “ability of licensees and entities that seek to gain access to spectrum, including *entrepreneurs and small business*, to enter into arrangements best suited [to] the parties’ respective needs and business models.”¹¹ Indeed, the Commission went so far as to note that “[f]acilitating the development of . . . secondary markets enhances and complements several of the Commission’s major policy initiatives and public interest objectives, including . . . access for the provision of communications services by designated entities.”¹²

But, contrary to the Commission’s goal of encouraging secondary market spectrum transactions, application of the attributable material relationship rule to secondary market transactions involving only Non-DE Licenses has the effect of stymieing the growth of a vibrant secondary market for wireless spectrum by discouraging small, independent, minority-owned businesses from engaging in secondary market transactions due to the risk of losing DE benefits. Clarifying the attributable material relationship rule, as described herein, would rectify the

¹¹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Dkt. No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604, 20607 ¶ 2 (2003) (emphasis added).

¹² *Id.*

anomalous situation where applying one of the Commission’s rules—the attributable material relationship rule—actually undermines a stated goal of the Commission. This clarification would encourage the growth of a vibrant secondary market and ensure that the entities whom Congress intended to receive DE benefits actually receive such benefits.¹³

III. A RECENT TRANSACTION INVOLVING GRAIN PROVIDES AN EXAMPLE OF THE POTENTIAL OVERLY BROAD REACH OF, AND A BASIS FOR WAIVING IN THIS INSTANCE, THE ATTRIBUTABLE MATERIAL RELATIONSHIP RULE

As illustrated by the recent Grain-AT&T-Verizon Transaction, unless clarified, application of the attributable material relationship rule, as currently drafted, could have the effect of denying DE benefits to entities whom Congress intended to receive such benefits.

A. Grain Management

Grain Management is a private equity and telecommunications infrastructure firm. Grain Management acquires, builds, owns, and operates telecommunications assets across North America and provides wireless infrastructure solutions to major commercial and governmental customers. Grain Management is indirectly 100 percent owned and controlled by David Grain, an African-American businessman with experience in investing in, owning, and managing telecommunications assets. Grain Management manages Grain Capital II, LLC, which in turn

¹³ Grain Management recognizes that, in adopting rules and regulations regarding the development of secondary market transactions, the Commission considered whether to provide licensees with the “unfettered right to lease spectrum to any entity, without regard to . . . eligibility rules for designated entities and entrepreneurs.” *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Dkt. No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd. 17503, 17537 at ¶ 69 (2004). But, in declining to provide such unfettered rights and in maintaining the Commission’s then-existing attribution rules, the Commission was primarily—if not solely—concerned with unjust enrichment *vis-à-vis* the transfer of DE benefits from a DE to a non-DE on the secondary market. *See id.* at 17538 at ¶ 71 (maintaining attribution rules to advance “Congress’ stated intent that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license”). This concern, of course, does not implicate leasing transactions on the secondary market involving solely Non-DE Licenses. *See supra* Sec. II. A.

wholly owns Grain Spectrum, LLC (“Grain I”) and Grain Spectrum II, LLC (“Grain II” and collectively, with Grain I, Grain Capital II, LLC and Grain Management, “Grain”).

Grain, as a small, independent, minority-owned business providing telecommunications services to the public, has the financial and other qualifications to be a designated entity pursuant to the Commission’s DE rules and regulations, potentially other than with respect to the subject matter discussed herein.

B. The Grain-AT&T-Verizon Transaction

On February 6, 2013, AT&T, Verizon, and Grain Capital II filed applications pursuant to section 310(d) of the Communications Act of 1934, as amended, seeking Commission consent to the assignment and lease of a number of Lower 700 MHz Band B Block and full and partitioned Advanced Wireless Services (“AWS-1”) licenses. The proposed transactions consisted of (a) a direct exchange of spectrum licenses between AT&T and Verizon and (b) assignments of spectrum licenses from AT&T and Verizon to Grain, who would lease the assigned spectrum to AT&T and Verizon under long-term de facto transfer spectrum leases. These applications made clear that the proposed transaction would further the Commission’s goal of extending opportunities in the wireless market to small and minority-owned businesses by enabling Grain, a minority-owned business, to purchase AWS-1 and Lower 700 MHz Band B Block licenses, becoming a new licensee.¹⁴ Subject to a condition involving the building out of the AWS-1 licenses and spectrum being acquired by Verizon, the Commission approved the applicants’ proposed transaction.¹⁵

¹⁴ See *In re Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC For Consent To Assign and Lease AWS-1 and Lower 700 MHz Licenses*, WT Dkt. No. 13-56, *Mem. Opin. & Order*, 28 FCC Rcd 12878, 12881 at ¶¶ 6-8 (2013).

¹⁵ *Id.* at 12879 ¶ 1.

In approving the Transaction, the Commission found many public interest benefits in Grain’s license acquisition, noting: In the most recent Section 257 report, the Commission recognized “the role that small communications businesses play in a robust American economy” and the importance of this “vital sector of the industry and the economy.” Particularly given that context, we find that the proposed assignment of licenses to Grain I and Grain II would result in transaction-specific public interest benefits, including by promoting spectrum license opportunities for entrepreneurs and other small businesses.¹⁶

Notably, none of the licenses involved in the Transaction were acquired through the use of DE discounts, set asides or other benefits. And, post-Transaction, neither AT&T nor Verizon has *any* influence or control over Grain. Grain continues to be a small, independent, minority-owned business providing telecommunications services for the benefit of the public. Grain did *not* form an entity, joint venture, LLC, or other joint business relationship with either AT&T or Verizon as a result of the Transaction and it continues to operate as a completely independent entity.

C. Disqualification of Grain from Future DE Benefits Based on the Application of the Attributable Material Relationship Rule to the Transaction Would Not Be in the Public Interest

If the attributable material relationship rule were to be mechanically applied to the Transaction, this rule may disqualify Grain from eligibility for DE benefits, despite the fact that the licenses involved in the Transaction were bought on the secondary market and were not acquired with DE benefits, thus obviating any unjust enrichment concerns, and that Grain remains a small, independent, minority-owned business providing telecommunications services for the benefit of the public, thus obviating any undue influence concerns.

¹⁶ *Id.* at 12905 ¶ 65-66.

In approving the Transaction, the Commission explicitly recognized “the role that small communications businesses play in a robust American economy” and the importance of this “vital sector of the industry and the economy.” The Commission thus found that the proposed assignment of licenses to Grain I and Grain II would result in transaction-specific public interest benefits, including by promoting spectrum license opportunities for entrepreneurs and other small businesses, which are the same benefits sought to be achieved by the DE rules.¹⁷

In addition, because they involved licenses acquired on the secondary market, the Transaction furthered the Commission’s express goals and policies underlying its support for a vibrant secondary market for wireless spectrum, including the increased efficiencies and consumer benefits that can result from secondary market transactions.

It would be irrational for a transaction that achieves two separate sets of policies deemed important by the Commission, while completely eschewing particular harms that the Commission has sought to avoid, would serve to disqualify an otherwise qualified DE that is well positioned to continue furthering the goals of the DE program from participating in that very program. Such a result would be tantamount to throwing out the baby with the bathwater. Clarification of the attributable material relationship rule would rectify this anomalous result for Grain and other similarly-situated companies. The above-referenced clarification would ensure that Congress’s intended beneficiaries of the DE program are not denied such DE benefits based on an overly broad rule.

In the alternative, the Commission should waive application of the attributable material relationship rule to the Transaction. The Commission, of course, may waive any of its rules, in whole or in part, according to the standard for general waivers set forth in Sections 1.3 and 76.7

¹⁷ *See id.*

of the Commission’s rules. The Commission has stated that rule waivers should be granted upon a showing of “good cause,”¹⁸ which has been interpreted to mean that a waiver request should be granted if (1) the rule waiver would not “conflict with the policy underlying the rule” and (2) “deviation from the general rule will serve the public interest.”¹⁹ As applied to the instant waiver request, granting such a narrow waiver would not conflict with the policy considerations underlying the attributable material relationship rule—as the Transaction poses no danger of unjust enrichment *vis-à-vis* the transfer of DE benefits to non-DEs or any risk of undue influence by a non-DE over Grain—and, on the contrary, the Transaction is actually in the public interest—as the Transaction advances several of Congress’s and the Commission’s policy goals.

IV. CONCLUSION

For the above-stated reasons, the Commission should clarify that the attributable material relationship rule is not applicable to leasing transactions between DEs and non-DEs where: (1) the licenses involved in the transaction were not acquired through the use of DE benefits and, instead, such licenses were acquired on the secondary market; and (2) the transaction does not involve a structure permitting a non-DE to exercise undue influence over a DE’s activities or decision making. In the alternative, the Commission should waive application of the attributable material relationship rule to the Transaction.

¹⁸ 47 C.F.R. §§ 1.3, 0.131(a).

¹⁹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Respectfully submitted,

/s/ Patrick S. Campbell

Patrick S. Campbell
Sean D. Jansen
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, N.W.
Washington, DC 20006-1047
(202) 223-7300
pcampbell@paulweiss.com
sjansen@paulweiss.com

Counsel for Grain Management, LLC

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