

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

July 31, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

Pursuant to Rules X and XI of the United States House of Representatives, the Energy and Commerce Committee is examining the process by which the Federal Communications Commission (“FCC”) granted Grain Management, LLC (“Grain Management”) a waiver of the Commission’s rules.

On June 23, 2014, the FCC released publicly an order granting Grain Management, a private equity company controlled by David Grain, a waiver of the FCC’s “attributable material relationship” rule (“AMR rule”). The waiver will permit Grain Management to qualify as a small business and receive bidding credits in upcoming spectrum auctions.

The AMR rule is part of the FCC’s Designated Entity (DE) program which was adopted by the FCC to implement Congress’s directive that it “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 services¹” through its auctions. The FCC’s DE program provides bidding credits to these small businesses based on the gross revenues attributable to each DE applicant. The AMR 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.”² The rule is intended to prevent unjust enrichment to ineligible entities and

¹ 47 U.S.C. § 309(j)(4)(D)

² 47 C.F.R. § 1.2110(b)(3)(iv)(A).

to ensure that DEs have opportunities to become independent facilities-based service providers.³ Grain is currently an FCC licensee and leases 100% of its spectrum.⁴

Prior to the release of the order, *Bloomberg News* reported that the Commission had granted the waiver on June 21, 2014. The report noted that Grain Management may not have been eligible for bidding credits without the waiver because it has spectrum leases with AT&T and Verizon that would have disqualified it under the AMR rule.

The Energy and Commerce Committee is committed to conducting vigorous oversight to ensure that Commission processes are fair, open, and transparent, and that they serve the public interest. The granting of the Grain Management waiver raises questions about these processes. In order to assist the committee in understanding the facts and circumstances surrounding this decision, please provide the following documents and information by August 15, 2014:

1. Copies of all draft versions of the order granting Grain Management a waiver of the AMR rule.
2. All communications from November 4, 2013, to present between Grain Management and the Commission.
3. All communications from November 4, 2013, to present between or among the members or employees of the Commission relating to Grain Management, the application of the AMR rule, or the Commission's designated entity rules, or to the grant of the waiver of the AMR rule for Grain Management. This request includes all communications regarding the use of delegated authority, options memos, and timelines for Commission action.
4. All materials maintained or produced by the Commission's Electronic Chairman's Lifecycle Agenda Tracking System (eCLAS) related to the Grain Management waiver.
5. All written and electronic communications from April 25, 2006, to present between Grain Management and the Commission regarding the Commission's auction rules or procedures.
6. All documents created by the Commission or submitted to the Commission on or after April 25, 2006, relating to the AMR rule.

We also respectfully ask that you provide a written answer to the following question by August 15, 2014:

³ See *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 and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4762 ¶ 21 (2006).

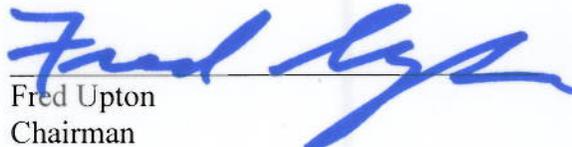
⁴ Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules, filed March 4, 2014, at 2, 9.

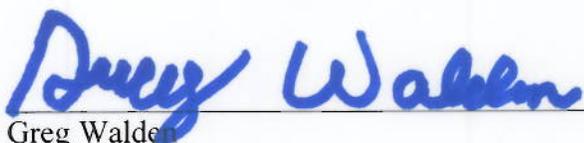
1. Provide a list of each waiver of the AMR rule granted by the Commission since its adoption on April 25, 2006. Please include the name of the entity which received the waiver, the date on which the waiver was granted, the FCC or DA number of the decision, and the FCC's reasoning for granting it.

We also request that the Commission provide a briefing to committee staff no later than August 15, 2014 on the process by which the Grain Management waiver was issued.

An attachment to this letter provides additional information on responding to the Committee's requests. We appreciate your prompt attention to the committee's request. Please contact David Redl or Karen Christian at (202) 225-2927 if you have any questions and to schedule the briefing.

Sincerely,


Fred Upton
Chairman


Greg Walden
Chairman
Subcommittee on Communications and Technology


Tim Murphy
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Anna Eshoo, Ranking Member, Subcommittee on Communications & Technology

The Honorable Diana DeGette, Ranking Member, Subcommittee on Oversight and Investigations

Commissioner Mignon Clyburn, FCC

Commissioner Jessica Rosenworcel, FCC

Commissioner Ajit Pai, FCC

Commissioner Michael O'Rielly, FCC

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

- a. how the document was disposed of;
- b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
- c. the date of disposition;
- d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The term "Federal Communications Commission" or "Commission" means and refers to any of its offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on behalf or under the control or direction of the Federal Communications Commission.

8. The term "Grain Management LLC" or "Grain Management" means and refers to any of its offices, subdivisions, subsidiaries, entities, officials, officers, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on behalf or under the control or direction of Grain Management.

8. For government recipients, the terms "you" or "your" mean and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter