

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Auction of Toll Free Numbers in the)	AU Docket No. 19-101
833 Code)	
)	WC Docket No. 17-192
Toll Free Assignment Modernization)	
)	CC Docket No. 95-155
Toll Free Service Access Codes)	

**COMMENTS OF
1-800 CONTACTS, INC.**

1-800 CONTACTS, Inc. (“1-800 CONTACTS”) hereby provides the following comments on the Commission’s public notice proposing application procedures and qualification requirements for participants in the “experimental” auction of approximately 17,000 toll free numbers in the 833 code.¹ As the Commission is aware, 1-800 CONTACTS strongly opposed the use of an auction to distribute toll free telephone numbers, expressing concern that it would fail to protect the statutorily-ensured trademark rights of existing users of vanity toll free numbers. The Commission, however, declined to adopt any protections for trademark holders, requiring instead that the enforcement of these legal rights “be addressed by the courts under the trademark protection and unfair competition laws, rather than by the Commission.”²

1-800 CONTACTS will not dwell on its trademark concerns in these comments. Instead, 1-800 CONTACTS urges the Commission to recognize that the auction of a relatively small

¹ See Public Notice, *Auction Of Toll Free Numbers in the 833 Code, Comment Sought on Competitive Bidding Procedures*, FCC 19-41 (May 10, 2019) (“833 Auction Public Notice”).

² Toll Free Assignment Modernization, Toll Free Service Access Codes, WC Docket No. 17-192, CC Docket No. 95-155, *Report and Order*, FCC 18-137, ¶ 77 (Sept. 27, 2018) (“833 Auction Order”).

percentage of toll free telephone numbers is a vastly more modest undertaking than the Commission's historic obligation to manage scarce spectrum resources in furtherance of the public interest. Therefore, Commission regulations that have been supplemented over decades to govern statutory issues of *de jure* and *de facto* control of FCC licensees and spectrum should not be imposed on a blanket basis to participants in this experimental auction. Instead, the Commission should develop application procedures and qualification requirements for the 833 Auction that are much less burdensome for prospective participants and do not preclude participation by some companies as a result of ownership and control issues that are completely unrelated to their use of toll free numbers to communicate with customers.

I. THE COMMISSION SHOULD ADOPT A DEFINITION OF COMMON CONTROL THAT IS AS MINIMALLY PRECLUSIVE AS POSSIBLE

The Commission's *833 Auction Order* prohibits companies that have a common controlling interest from both participating in the 833 Auction.³ As the *833 Auction Order* acknowledges, this restriction was borrowed from the Commission's spectrum auction rules,⁴ where it arguably serves an important purpose. In spectrum auctions, bidders are usually seeking to secure spectrum to compete against each other in wireless business ventures. Spectrum auctions are often exceedingly complex, entailing numerous bidding rounds, minimum activity requirements, billions of dollars in bids, and future business plans often at stake.

³ *833 Auction Order*, ¶ 46.

⁴ *See id.* (citing Updating Part 1 Competitive Bidding Rules, FCC 15-80, *Report and Order*, 30 FCC Rcd 7493, 7579-81, ¶¶ 205-208 (2015)).

In contrast, toll free telephone numbers are used by countless diverse business interests that often have no competitive interest in relation to each other. Hotel chains, car dealerships, airlines, bedding companies, flower shops, pizza chains, paging and conference call services, insurance providers, ticket agents, delivery companies, and even lawyers all use toll free telephone numbers and many of them may seek to participate in the 833 Auction.

Unfortunately, the Commission's common control restriction, if applied in a sweeping manner, could preclude many entities from participating in the auction if they are commonly owned through large investment funds or corporate conglomerates. As just a few high profile examples, the Commission's rules could prohibit both the Washington Post and Amazon from participating in the 833 Auction. It could also prohibit Geico, Dairy Queen, Duracell, and Benjamin Moore Paints from all participating. Countless other examples exist involving less recognized companies.

It is not enough for the Commission to conclude that these diverse entities can participate jointly in a coordinated manner, such as by designating a single entity or a RespOrg to represent all of them in the 833 Auction. Most such commonly controlled companies have no day-to-day involvement with each other. Further, the Commission's rules permit such consolidated bidding only if none of the parties seek to secure the same numbers.⁵ This would necessitate the development of a coordinated bidding strategy between the parties, which is just the sort of collusive behavior that the rules are intended to avoid.

Instead, the enforcement of a common control restriction in a sweeping manner would be exceedingly burdensome, could greatly diminish participation in the auction, and would be entirely unnecessary given the very minimal chance that otherwise independent companies may collude

⁵ See *833 Auction Order* at 9291, ¶ 48.

with each other in the auction process. For broadcast and wireless companies, spectrum resources are their life blood. For every other business, vanity toll free telephone numbers are incidental and discretionary. Modern businesses have countless ways to communicate with their customers, including using the Internet or non-vanity toll free numbers that are still available on a first-come, first-served basis. The incidental nature of toll free numbers is particularly true with respect to the 833 code, which duplicates the 800, 888, 877, 866, 855 and 844 codes and therefore may be secured by many companies solely to prevent confusion with the other toll free telephone numbers that they already use in their businesses.

Therefore, the Commission should adopt a definition of common control that is as lenient as possible. Fortunately, the Commission is not subject to any statutory restrictions in defining control. The Communications Act directs only that the Commission must make numbering resources available on an equitable basis.⁶ Although restrictions on control exist elsewhere in the Act, they relate solely to broadcasting and spectrum and, most importantly, the Act refrains from defining control, reflecting a conscious decision by Congress to delegate these issues to the Commission.⁷

Although substantial case law exists on the definition of control, the Commission has recognized that its control definitions can differ based on context and sometimes over time with respect to the same context. For example, the Commission modified its Intermountain Microwave

⁶ 47 U.S.C. § 251(e)(1).

⁷ See Stephen Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Com. L.J. 277, 295 (July 1991) (citing H.R. REP. NO. 1850, 73d Cong., 2d Sess. 4-5 (1934)).

standard of *de facto* control to promote secondary markets, concluding that spectrum licensees should no longer be required to exercise immediate direct control of their transmitting facilities.⁸

Recognizing this inherent flexibility and the need for auction procedures that are scaled appropriately to reflect the minimal risks and corresponding administrative burdens of an experimental toll free auction, the Commission should adopt a definition of control that bars as few auction participants as possible. For example, the Commission could define control as limited to *de jure* control combined with actual day-to-day involvement in the operational activities of the company. Thus, equity ownership, on its own, would not constitute control absent an active participatory role in the bidding entity.

1-800-CONTACTS recognizes that this proposed definition has a modest subjective element (*i.e.*, what constitutes active day-to-day involvement), but, given the context of this experimental auction, it should be sufficient to require auction participants to certify that they have fully disclosed the existence of any such controlling parties. Further, it would permit participation by countless additional businesses that may desire to secure vanity 833 numbers, but are under common ownership with unrelated businesses that may share the same interest.

⁸ See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services; 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services; Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation, WT Docket Nos. 02-381, 01-14 and 03-202, *Report and Order and Further Notice Of Proposed Rule Making*, 19 FCC Rcd 19078, 19140-19141, ¶ 115 (2004).

II. INADEQUATE JUSTIFICATION EXISTS TO REQUIRE DISCLOSURE OF AN AUCTION APPLICANT'S DIRECT AND INDIRECT INTEREST HOLDERS

The Commission's *833 Auction Public Notice* proposes to require auction participants to disclose the identities of all direct and indirect holders of ownership interests of 10% or more.⁹ As the *Public Notice* acknowledges,¹⁰ the 10% disclosure requirement was drawn from the Commissions' rules for commercial wireless services, which are subject to spectrum aggregation limits to promote competition in the provision of mobile services.¹¹ The spectrum aggregation limits are enforced both on Commission licensees and their attributable interest holders, which has long been defined in part as direct and indirect interest holders of 10% or more.¹² To enforce these restrictions, the Commission requires commercial spectrum licensees to disclose their 10% interest holders as a part of the license application process.

No such aggregate ownership restrictions exist, however, with respect to toll free telephone numbers. Instead, the only relevant restriction that has been proposed by the Commission is its prohibition on communications between auction participants. The Commission has proposed to apply this restriction to all parties that have an attributable interest in an auction applicant, including direct and indirect interest holders of 10% or more.¹³

⁹ See *833 Auction Public Notice*, ¶¶ 32-33.

¹⁰ See *id.*, ¶ 33, n.47.

¹¹ See Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket Nos. 12-269 and 12-268, *Report and Order*, FCC 14-63, ¶ 1 (June 2, 2014).

¹² See 47 C.F.R. 20.22(b)(3).

¹³ See *833 Auction Public Notice*, ¶ 19.

1-800-CONTACTS fully supports the Commission's proposal to apply its prohibition on auction-related communications very broadly since this will help to ensure the integrity of the auction process. 1-800-CONTACTS also agrees that auction applicants should be required to certify that they (and their attributable interest holders) have not entered into any explicit or implicit agreements, arrangements, or understandings with undisclosed parties regarding the auction.¹⁴

The Commission, however, does not need to additionally require auction applicants to disclose the identifies of each of their direct and indirect interest holders of 10% or more. Given the relatively limited relevance of toll free telephone numbers to most businesses (as compared to the value of spectrum for wireless carriers), the risk of collusive communications involving an applicant's attributable interest holders seems very modest. In contrast, the proposed 10% disclosure requirement is exceedingly burdensome, particularly on prospective auction participants that may be held through complex private investment funds.

The Commission has long recognized that its attributable interest disclosure requirements are very burdensome, albeit necessary to regulate spectrum aggregation in the wireless industry and multiple ownership, cross-ownership and foreign ownership in the broadcast industry. To mitigate this burden, the Commission adopted insulation criteria that permits indirect investors in broadcast and wireless properties to maintain non-attributable status.¹⁵ No such insulation

¹⁴ See 833 *Auction Order*, ¶ 48.

¹⁵ See, e.g., Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986) (describing the Commission's insulation criteria for broadcast licensees).

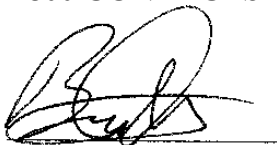
exception exists for investors in toll free auction participants, nor should it. The proposed rules are already far more complicated than necessary.

Instead, the Commission should recognize the relatively modest level of collusive risk that is presented by this experimental auction (particularly with respect to collusion between attributable interest holders) and the significant burden that would be imposed by the 10% direct and indirect disclosure requirement. Many parties, including 1-800-CONTACTS, may choose to refrain from participating in the auction solely because of the 10% disclosure requirement and the burden that it would place on its investors.

As an alternative, the Commission should require only that auction applicants certify that they and their attributable interest holders are in compliance with the Commission's auction rules, including the prohibition on undisclosed communications. At least with respect to this initial experimental auction, such a certification requirement should be adequate and should not be supplemented with a burdensome disclosure requirement addressing the 10% or greater direct and indirect interest holders of every auction participant.

Respectfully submitted,

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