STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
CONCURRING IN PART, DISSENTING IN PART

Re: ***In the Matter of Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver, RM-11395; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211***

Over the years, Congress has charged the Commission with implementing important—and sometimes competing—statutory provisions regarding small businesses. The Commission's role is to faithfully execute Congressional intent, without substituting its own policy objectives. To do otherwise would untether communications policy decisions from the duly-elected members of Congress and those they represent, and rest it in the hands of appointed Commissioners. While this item is still in the Notice of Proposed Rulemaking stage, I have deep concerns that it violates this basic tenet. Not to mention, if certain proposals are enacted, it would impose a questionable policy that favors certain entities and distorts the wireless marketplace. Therefore, I must dissent on much of this item, while concurring with a few portions.

One of the proposals, if adopted, would remove the requirement that a designated entity (DE) actually function as a facilities-based provider of wireless services. To support this about face, the item uses legal somersaults to justify the abandonment of our current precedent and seems to discard the true meaning of the statute and its legislative history in an ends-justify-the-means approach to achieve the desired outcome.

Under this proposed regime, small businesses could obtain licenses at a substantial discount from the market rate and then lease the entirety of the spectrum to another entity, instead of building their own networks and offering services to the American people. In other words, rather than provide head-to-head competition, a DE could merely integrate its spectrum into the network of an incumbent wireless provider. Given this likelihood, it is hard to see how this wouldn't sanction middlemen to underpay the American people for their collectively owned scare resource (i.e., spectrum) and pocket the money while doing almost nothing.

In the past, critics of the DE program have raised a number of concerns. One issue that has been raised is the ability of licensees receiving bidding credits to "flip" their licenses to larger wireless providers for huge profits after the unjust enrichment period expires. Instead of the proposals in the NPRM, the Commission should look at steps to prevent this by strengthening its controlling interest and unjust enrichment rules, and imposing and enforcing buildout requirements. Those actions would have a greater impact on license ownership diversity.

While this item focuses on designated entities in spectrum auctions, I can't ignore the apparent hypocrisy generated by what is being proposed here and the Commission's actions to effectively ban joint sales agreements (JSAs) for television stations. Just months ago, we were told that JSAs deceive the American public by allowing one television station, often of questionable financial situation, to contractually partner with another station in the market to perform certain functions. These agreements were considered offensive because the larger station supposedly would be able to influence the programming selection of the other broadcaster. The solution was to impose mandatory sell-offs to avoid violations of this new ban. In reality, the Commission's actions actually harmed consumers, because a number of stations went dark resulting in viewers losing valuable programming. Yet in this item, it is the

flip side of the same coin, but the outcome is somehow different. We would be sanctioning small entities that acquired licenses with government subsidies to build partnerships with larger wireless providers. In this case, we are giving away money to entities that may never provide service; whereas JSAs served the public interest by assisting stations, either in financial distress or not, to provide Americans with more and better programming options. Surely, if the contractual links created by JSAs were objectionable, then even greater opposition should be expressed over the newly proposed structures for DEs.

There are a host of other ideas in the item that cause concern. For instance, I am extremely troubled that the Commission is entertaining the possibility of new eligibility categories for DE status (i.e., new classes of protected citizens) based on flawed concepts. Ideas like offering DE preferences for areas of persistent poverty or for overcoming disadvantages would generate years of litigation, open the Commission up to ridicule for trying to define the qualifications for such categories, and violate the U.S. Constitution. Further, the Commission is also proposing to raise the revenue thresholds for designated entity eligibility, allowing a greater number of auction applicants to meet the criteria for bidding credits, which is dubious at best.

On a positive note, the item raises a host of questions regarding the Commission's former defaulter rule. These issues were recently addressed in a separate waiver item for the upcoming AWS-3 auction. As such, I see some merit in considering the proposed changes for other auctions going forward and am willing to concur on this portion of the notice. In addition, the proposal to address issues with commonly controlling entities participating in an auction seems worthy of questions and consideration.

While I couldn't support most of the item, I do thank the staff in the Wireless Telecommunications Bureau for their work on this matter and for briefing me and my staff.