Before the
Federal Communications Commission
Washington, D.C. 20554

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

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Clyburn issuing a statement; Commissioners Pai and O'Rielly concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. Today we initiate a proceeding to revise certain of the Part 1 competitive bidding rules for the first time in years. An evaluation of these rules is particularly important now, in advance of an auction that holds historic potential for interested applicants to acquire licenses for below1-GHz spectrum in the Broadcast Television Spectrum Incentive Auction ("BIA"). We therefore propose to reform some of our general Part 1 rules governing competitive bidding for spectrum licenses to reflect changes in the marketplace, including the challenges faced by new entrants. Our proposals also advance the statutory directive to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities" or "DEs")[1] are given the opportunity to participate in the provision of spectrum-based services, and fulfill the commitment we made in the *BIA Report & Order*.[2] Together these proposals will assure that our Part 1 rules continue to promote our fundamental statutory objectives. We expect to act on the issues we raise here soon enough to allow all parties to account for any changes while planning for the BIA.

2. In this Notice of Proposed Rulemaking ("NPRM"), we propose to:

- Provide small businesses greater opportunity to participate in the provision of a wide range of spectrum-based services by modifying our eligibility requirements, updating the standardized schedule of small business sizes, and eliminating duplicative reporting requirements, while also seeking comment on whether to strengthen our rules to prevent the unjust enrichment of ineligible entities;

[1] In 1995, the Supreme Court decided *Adarand Constructors*, holding that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of review. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–30 (1995) (*Adarand Constructors*). The Court subsequently held in *VMI* that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (*VMI*). In response to the Court's holding, the Commission decided that it would use race- and gender-neutral provisions until it had developed a record that would provide the evidentiary support necessary to withstand this standard of review, and maintain provisions for small businesses. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975–77 ¶¶ 1–3 (1996). The Commission has noted that many minority- and women-owned businesses qualify for the provisions that the Commission has adopted for small businesses. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15318–19 ¶¶ 45–48 (2000) (*Part 1 Fifth Report and Order*), citing *Adarand Constructors*, 515 U.S. at 227.

[2] *See, e.g.*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6567, 6762 ¶ 474 (2014) (*BIA Report and Order*).

- Amend our former defaulter rule to balance concerns that the current rule is overly broad with our continued need to ensure that auction bidders are financially reliable;
- Codify an established competitive bidding procedure that prohibits the same individual or entity from becoming qualified to bid on the basis of more than one short form application in a specific auction;
- Prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on overlapping licenses based on more than one short-form application in a specific auction; and,
- Retain the current rules governing joint bidding arrangements among non-nationwide providers and prohibit joint bidding arrangements among nationwide providers.

3. We also provide notice of our intention to resolve long standing petitions for reconsideration and propose necessary clean up revisions to our Part 1 competitive bidding rules.[3]

II. ELIGIBILITY FOR BIDDING CREDITS

4. In establishing the Commission's auction authority, Congress vested the Commission with broad discretion in "balanc[ing] a number of competing objectives."[4] These included, among other things, special provisions to ensure that DEs, including small businesses, have the opportunity to participate at auction and in the provision of spectrum-based services.[5] Section 309(j)(4)(D) of the Communications Act ("the Act") requires that when the Commission prescribes regulations in designing systems of competitive bidding, it 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, and, for such purposes, consider the use of . . . bidding preferences."[6] In addition, the statute directs that in designing such systems of competitive bidding, the Commission shall seek to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[7] At the same time, the Act requires the Commission to "prevent unjust enrichment as a result of the methods employed to issue licenses . . . ."[8]

5. The Commission's challenge in providing opportunities to small businesses and entrepreneurs pursuant to these provisions has always been to find a reasonable balance between the competing goals of affording such entities reasonable flexibility to obtain the capital necessary to participate in the provision of spectrum-based services and effectively preventing the unjust enrichment

[3] *See* Petition for Partial Reconsideration and/or Clarification, Blooston, Mordkofsky, Dickers, Duffy & Prendergast, LLP ("Blooston"), WT Docket No. 05-211, filed June 2, 2006 (*Blooston Petition*); Petition for Reconsideration and Clarification, Cook Inlet Region, Inc., filed June 5, 2006; Reply to Opposition to Petitions for Reconsideration, Blooston, filed July 24, 2006 (*Blooston Reply*); Petition for Reconsideration, National Telecommunications Cooperative Association ("NTCA"), filed Mar. 9, 2006; Petition for Clarification and/or Reconsideration, Blooston, filed Mar. 9, 2006.

[4] *Fresno Mobile Radio, Inc. v. FCC,* 165 F.3d 965, 971 (D.C. Cir. 1999); *accord, Rural Cellular Ass'n v. FCC,* 588 F.3d 1095, 1103 (D.C. Cir. 2009).

[5] 47 U.S.C. § 309(j)(3)–(4).

[6] 47 U.S.C. § 309(j)(4)(D).

[7] 47 U.S.C. § 309(j)(3)(B).

[8] 47 U.S.C. § 309(j)(4)(E).

of ineligible entities.[9] Over the two-decade span of the auctions program, the Commission has periodically modified its rules to achieve the right balance given changing circumstances in the wireless industry.[10]

6. Today we take the opportunity to consider whether our rules continue to serve their intended purposes and the public interest in an evolving mobile wireless marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks.[11] This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum.[12] In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve.[13] As the costs of spectrum and network deployment especially for small and new entrants have increased in the last 20 years,[14] access to capital for acquiring licenses is critical for these providers to take advantage of different opportunities to participate in the provision of spectrum-based services, including through facilities-based deployment, spectrum leasing, and mobile virtual network operator arrangements.

7. In this Section, we address the concerns of parties that argue that our current rules inhibit, rather than foster, the inclusion of small businesses in the wireless marketplace. Below we offer proposals to increase the opportunities for small businesses to become spectrum licensees. At the same

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[9] *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 Rule Making*, 21 FCC Rcd 4753, 4756 ¶ 8 (2006) (*DE Second Report and Order*).

[10] *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 2 FCC Rcd 2348, 2388–2400 ¶¶ 227–97 (1994) (implementing the DE policies of section 309(j) of the Act); Implementation of Section 309(j) of the Communications Act, *Fifth Report and Order,* 9 FCC Rcd 5532, 5611–13 ¶¶ 183, 185 (1994) (*Competitive Bidding Fifth Report and Order*), *recon. Fifth Memorandum Opinion and Order,* 10 FCC Rcd 403 (1994), *modified, Sixth Report and Order,* 11 FCC Rcd 136 (1995), *aff'd sub nom, Omnipoint v. FCC,* 78 F.3d 620 (D.C. Cir. 1996) (adopting bidding credits for minority- and women-owned businesses and then, in light of *Adarand Constructors*, 515 U.S. 200, amending the rules to apply to all eligible small businesses); *Part 1 Fifth Report and Order*, 15 FCC Rcd 15293 (adopting as the Commission's general attribution rule a controlling interest standard for determining which applicants qualify as small businesses); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Secondary Markets First Report and Order*), *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (*Secondary Markets Second Report and Order*) (adopting rules allowing wireless licensees to lease their spectrum, with restrictions for small business lessors); *DE Second Report and Order*, 21 FCC Rcd 4753 (adopting additional restrictions for, *inter alia*, leasing by small business lessors).

[11] *See* Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6133, 6146 ¶ 23 (2014) (*Mobile Spectrum Holdings Report and Order*).

[12] *Id.*

[13] *Id.* at 6144 ¶ 18, 6206 ¶ 179.

[14] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, *Sixteenth Report*, 28 FCC Rcd 3700, 3766–69 ¶¶ 79–84 (2013) (*16th Mobile Wireless Competition Report*). *See also* ¶ 56 (discussing the percentage change in the GDP price index between 1997 and 2013); NTCA, NTCA 2013 WIRELESS SURVEY REPORT at 9–10 (2014), http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcawirelesssurvey.pdf.

time, we remain mindful of our responsibility to ensure that benefits are provided only to qualifying entities and seek comment on modifying our current unjust enrichment rules.

8. As a first step in reassessing how we determine small business eligibility, we propose to repeal the attributable material relationship ("AMR") rule and to re-examine the need for the related decade-old policy that has limited small businesses seeking bidding credits to providing primarily retail, facilities-based service directly to the public with each of their licenses. As discussed in detail below, we propose to instead adopt a more flexible approach under which we would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. Under this proposal, the Commission would apply existing rules requiring attribution of controlling interests in, and affiliates of, a small business venture to determine whether the applicant: (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the individual licenses for which it seeks benefits.[15] We further propose to modify the language of section 1.9020 to make clear that DE lessors may fully engage in spectrum manager leasing under the same *de facto* control standard as non-DE lessors.[16] With these proposals, we revisit our statutory mandate "to 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"[17] in light of today's wireless marketplace. Alternatively, as discussed fully below, we also seek comment on retaining the policy and/or some variation of the AMR rule. We also ask whether we should revisit our unjust enrichment rules to assure that we maintain the right balance considering our responsibility to safeguard the award of small business benefits to only eligible entities.

9. We also propose to modify the generally applicable schedule of small business size standards and bidding credits, which has remained unchanged in the 17 years since it was first adopted.[18] The goal of these proposals is to encourage small business participation in spectrum license auctions, and to ensure that our gross revenue definitions accurately reflect what constitutes a "small business" in today's marketplace, taking into consideration the relative size of the large, national providers. Specifically, we propose revisions to our small business definitions and seek comment on whether to change the bidding credit percentages that would apply to those definitions. We also seek comment on whether to offer alternative bidding preferences to entities based on criteria other than business size by revenue.

10. Additionally, we propose to repeal the DE annual reporting requirement.[19] We question whether the value of the information provided in those reports outweighs the regulatory burden that the reporting obligation places on small businesses.

11. Collectively, these proposals seek to update our rules to reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today's communications marketplace. We recognize that high capital costs associated with building and operating wireless broadband networks may require small businesses to find alternative revenue streams, including through secondary markets, so that they have an opportunity to acquire licenses at auction and participate in the provision of spectrum-based services. We anticipate that by revising our rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, the

[15] *See* 47 C.F.R. § 1.2110.

[16] *See* 47 C.F.R. § 1.9010; *see also* 47 C.F.R. § 1.9020(d)(4).

[17] *See* 47 U.S.C. § 309(j)(4)(D).

[18] 47 C.F.R. §1.2110(f).

[19] 47 C.F.R. §1.2110(n).

Commission can better achieve its statutory directives.[20] We nonetheless remain mindful of our obligation to prevent unjust enrichment of ineligible entities.[21] Below, we describe and seek comment on each of our specific proposals.

A. Attribution Rules and Small Business Policies

12. ***Background.*** As its principal means of fulfilling the statutory goals for DEs, the Commission makes auction bidding credits available to eligible small businesses.[22] A small business is eligible for bidding credits if its gross revenues, in combination with those of its "attributable" interest holders, fall below applicable service-specific financial caps.[23] Since 2000, the Commission has applied a "controlling interest" standard to all services when making these attribution determinations in the small business context.[24] Under this standard, the Commission attributes to an applicant the gross revenues of the applicant, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests.[25] A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control.[26] Affiliates include entities or individuals that directly or indirectly control or have the power to control the applicant, directly or indirectly are controlled by the applicant, directly or indirectly are controlled by a third party that also controls the applicant, or have an "identity of interest" with the applicant.[27]

13. In adopting secondary markets rules in 2004, the Commission sought to expand and enhance secondary markets "to permit spectrum to flow more freely among users and uses in response to economic demand, to the extent consistent with [its] public interest objectives."[28] The Commission explained that it intended for its rules to allow more flexible use of spectrum by licensees and other spectrum users, better define licensees' and spectrum users' rights and responsibilities, enable the use of spectrum across various dimensions (frequency, space, and time), promote the efficient use of spectrum, and provide for continued technological advances.[29] While the Commission ostensibly extended the new *de facto* control standard for spectrum manager leasing to DE lessors,[30] it nonetheless required "that a licensee receiving [DE] . . . benefits be an entity that actually provides service under the license."[31] The Commission explained that it intended that DEs should remain primarily providers of facilities-based

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[20] Once effective, these revised rules will allow all licensees that have acquired licenses with or without DE benefits this increased flexibility.

[21] 47 U.S.C. § 309(j)(4)(E).

[22] A bidding credit operates as a percentage discount on the winning bid amount of a qualifying small business. *See* Section II.C.1. (Small Business Bidding Credits); 47 C.F.R. § 1.2110(f)(1); 47 U.S.C. § 309(j)(4)(D).

[23] 47 C.F.R. § 1.2110.

[24] *See Part 1 Fifth Report and Order*, 15 FCC Rcd 15293, 15296–97 ¶¶ 4–5, 15323–27 ¶¶ 58–67.

[25] *See id.* at 15323–24 ¶ 59.

[26] 47 C.F.R. § 1.2110(c)(2).

[27] 47 C.F.R. § 1.2110(c)(5).

[28] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17505 ¶ 1.

[29] *Id.*

[30] *Id.* at 17543 ¶ 80; *see also Secondary Markets First Report and Order*, 18 FCC Rcd at 20654–55 ¶ 113 (indicating that DEs could undertake spectrum leasing arrangements so long as doing so was consistent with existing DE policies and rules, and specifying that to the extent there were any conflicts between the revised *de facto* control standard for spectrum leasing arrangements and the *de facto* control standard in the rules for DEs, the Commission would apply the latter for determinations regarding whether the licensee had maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits).

[31] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

service directly to the public.[32] That conclusion was based on an interpretation of the legislative history underlying the Communications Act's provisions regarding unjust enrichment, as well as the continued application of the Commission's controlling interest standard and affiliation rules.[33]

14. In that Order, the Commission also advised that "[i]n examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease."[34] The Commission concluded that a spectrum manager lease between a designated entity licensee and a spectrum lessee "with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible."[35] On the other hand, the Commission reasoned that "a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved."[36]

15. Subsequently in 2006, at the behest of interested parties, including Council Tree, the Commission released a *Further Notice*, which sought comment on the specific nature of the types of relationships that should trigger the attribution of revenues to determine eligibility for designated entity benefits.[37] For instance, Council Tree initially proposed that the Commission should restrict a designated entity applicant's "material relationships," including both financial and operational agreements, in order to more carefully ensure that designated entity benefits are awarded only to bona fide eligible entities.[38] Expanding upon that proposal and to further protect against unjust enrichment, the Commission departed from its case-by-case approach and instead adopted a bright line test to require a small business applicant or licensee to automatically attribute to itself the gross revenues of any entity with which it had an "attributable material relationship."[39] It reasoned that an agreement that concerns "the actual use of the [DE's] spectrum capacity" is one that "causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a [DE's] ability to become a facilities-based provider, as intended by Congress."[40] The Commission concluded that an applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or *de facto*

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[32] *Id.*

[33] *Id.* at 17538 ¶ 71 & n.182, quoting H.R. Rep. No. 103-111, at 257–58 (1993) (referring to deterrence of "participation in the licensing process by those who have no intention of offering service to the public"); *id.* at 17544 ¶ 82 & n.222.

[34] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17541–42 ¶ 77.

[35] *Id.* The Commission noted that even a spectrum manager lease between two designated entities might give rise to questions of eligibility, if affiliation between the licensee and spectrum lessee were the result. *Id.* at 17541–42 ¶ 77 n.205.

[36] *Id.* at 17541–42 ¶ 77.

[37] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Further Notice of Proposed Rule Making*, 21 FCC Rcd 1753, 1760 ¶ 13 (2006) (*DE Further Notice*).

[38] *Id.*

[39] *DE Second Report and Order*, 21 FCC Rcd at 4763–64 ¶¶ 25–27.

[40] *Id.* at 4762 ¶ 23.

transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee.[41]

16. Council Tree and others challenged the AMR rule and other aspects of the Commission's 2006 Order in the United States Court of Appeals for the Third Circuit on the grounds that they failed to take into account circumstances regarding small businesses' access to capital, among other things.[42] In subsequent years, the SBA's Office of Advocacy also expressed its belief to the Commission that the 2006 changes to the small business rules had "inhibited participation by small entities and minority businesses in recent spectrum auctions," and that the changes were unnecessary in light of the availability of the audit process included in the Commission's original auction rules.[43] In 2010, although the court ultimately upheld the AMR rule, it nonetheless questioned some of the Commission's reasoning, noting what it termed the Commission's "inattention" to the nature of the wireless wholesale business.[44] Questioning why the Commission chose to attribute certain relationships to achieve its stated policy of DEs as facilities-based providers, the court observed that wholesaling includes an extensive provision of service component.[45] The court said that it was therefore not obvious that the Commission needed to prohibit DEs from engaging primarily in a wholesale business in order to prevent them from simply monetizing their bidding credits with a large carrier, "so long as [DEs] do not sell or lease overly large quantities of their capacity to any single lessee or buyer."[46] Remarking that the Commission appeared not to have acknowledged this issue, the court commended it to the Commission's attention on remand.[47]

17. Recently, in February 2014, the Minority Media & Telecom Council ("MMTC") filed a white paper with the Commission making nine recommendations to facilitate the participation of minority and women owned businesses in upcoming auctions.[48] Listed first among these is the repeal of the AMR rule.[49] MMTC argues that the rule impedes the ability of small entities to become providers of spectrum-based service, explaining that wholesaling and leasing arrangements are important vehicles for small and minority-owned businesses to build and efficiently use capital.[50]

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[41] *Id.* at 4763 ¶ 25; *see* 47 C.F.R. § 1.2110(b)(3)(iv)(A).

[42] Brief for Petitioners Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council, *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284 (3d Cir. 2006) (No. 06-2943) (*Council Tree Brief*).

[43] Letter from Cheryl Johns, Assistant Chief Counsel for Telecommunications, SBA Office of Advocacy, to Marlene H. Dortch, Aug. 25, 2009, at 2. While this letter did not differentiate among the various 2006 changes to the DE rules, others of which were later revised in response to the Third Circuit's decision in *Council Tree,* as noted above other commenters view the AMR rule as a principal reason for DEs' continued lack of opportunity to participate in Commission spectrum auctions.

[44] *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 255 n.8 (3d Cir. 2010) (*Council Tree*).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] S. Jenell Trigg & Jeneba Jalloh Ghatt for MMTC, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*, GN Docket No. 12-268, at v, 32–34 (filed Feb. 27, 2014) (*Digital Déjà Vu*). Among other things, the white paper argues that DE participation in spectrum auctions dramatically decreased after the Commission's adoption of its 2006 rule modifications. *Id.* at 12–18.

[49] *Id.* at v, 32–34.

[50] *Id.* at 32; *see also id.* at 2, 28, 34. MMTC also laments that DEs won a smaller percentage of licenses in Auctions 66 and 73 than they had in Auctions 5, 10, 11, 14, and 22. *Id.* at 7–8, 12–18.

18. MMTC's White Paper argues that "[o]ver the course of fifty-six wireless auctions during the past 20 years, the majority of DEs that currently hold wireless licenses are incumbent rural telephone companies, very few DEs are new entrants, and even fewer DEs are (minority-owned business enterprises) MBEs."[51] MMTC and its supporters maintain that DE participation in spectrum auctions dramatically decreased after the Commission's adoption of its 2006 rule modifications and claim that the results from Auctions 66 and 73 "showed a precipitous drop in DE participation from the average 70 [percent] value of winning bids over previous years, to only 4.0 [percent] and 2.6 [percent], respectively."[52]

19. Other parties concur with MMTC's concerns about the AMR rule, arguing that the development of the Commission's rules and policies over the last decade, including adoption of the AMR rule, have significantly hindered their ability to access capital and largely impeded their ability to acquire and use wireless spectrum licenses in today's wireless marketplace.[53] Parties claim that the AMR rule creates insurmountable obstacles for new and existing small businesses to gain access to capital in secondary markets where they argue small businesses can play important roles in assuring that licensed spectrum is effectively and efficiently utilized.[54] In a March 2014 request for clarification or waiver of the AMR rule, Grain Management, LLC ("Grain") described how the rule could prevent a small, minority-owned, new-entrant lessor of spectrum capacity on licenses acquired without DE benefits from being eligible for such benefits in future auctions.[55]

20. ***Discussion***. We conclude that it is appropriate to revisit the Commission's small business eligibility rules and evaluate whether to rebalance our competing goals in order to provide small businesses additional opportunities to gain access to new sources of capital necessary for participation in the provision of spectrum-based services in today's marketplace, while guarding against unjust enrichment of ineligible entities. Chief among the actions that we take today is our proposal to repeal the AMR rule and to re-examine the related decade-old policy underlying it. In lieu of the bright line test of the AMR rule, we propose a two-pronged approach to evaluate an entity's eligibility for small business benefits. This approach would use our existing controlling interest and affiliation standards[56] to determine what revenues are attributable to an applicant based upon a rigorous review of all relevant relationships and agreements, which will ensure that the small business makes independent decisions about its business operation.[57] Alternatively, as detailed below, we also seek comment on whether we should retain the policy but modify the AMR rule with some other attribution threshold to determine an applicant's eligibility for small business benefits.

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[51] *Id.* at iv.

[52] *Id.* at 14.

[53] *See* Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (Mar. 18, 201[4]); *see also* Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (May 9, 2014).

[54] *See* Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (May 9, 2014); *see also* Letter from Council Tree Investors, Inc. to Marlene H. Dortch, Secretary, FCC (Mar. 18, 201[4]).

[55] Grain Management, LLC, Grain Management, LLC's Request for Clarification or Waiver of the Commission's "Attributable Material Relationship" Rule (filed Mar. 4, 2014) (*Grain Waiver Request*); *See* Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, WT Docket No. 05-211; GN Docket Nos. 12-268 and 13-185, *Order*, 29 FCC Rcd 9080 (2014) (*Grain AMR Waiver Order*).

[56] 47 C.F.R. § 1.2110.

[57] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)–(x).

21. Using long standing principles of control and affiliation, we propose to safeguard small business benefits by attributing the revenues of any entity that has the ability to control, or potentially control, an applicant's business venture. The Commission's existing attribution rules examine the extent to which a small business may combine its efforts, property, money, skill and knowledge with another. Further, where there is an agreement to share profits/losses proportionate to each party's contribution to the business operation, the existing rules consider these issues as a factor in whether to attribute that party to the applicant as its affiliate.[58] Insofar as our proposals should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, we anticipate that the combined effect of the proposals, by allowing a small business greater flexibility to adopt a more individualized business model for each license it holds, should increase the potential sources of revenue for the small business and potentially decrease the likelihood that it would be subject to undue influence by any particular user of a single license. Our proposed approach would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility in potential uses for any acquired without such benefits. We seek comment on this proposal and ask commenters to specifically address how and why a small business may be more or less likely to be subject to undue influence by a user of its spectrum under this approach. Additionally, we propose to modify the language of section 1.9020 to make clear how our secondary market rules apply to DE lessors, which should provide greater flexibility to small businesses in how they choose to use their spectrum.[59] We also seek comment on whether any corresponding changes may be warranted in our unjust enrichment rules as detailed below to ensure that small business bidding credits are extended only to qualifying small businesses.

22. The AMR rule and the policy that spurred its adoption were intended to prevent unjust enrichment, by establishing safeguards to ensure that entities ineligible for small business incentives could not circumvent the Commission's rules by obtaining those benefits indirectly, through their relationships with eligible entities.[60] The Commission based its decisions, in large measure, on legislative history suggesting that anti-trafficking restrictions and unjust enrichment payment obligations were needed to deter "participation in the licensing process by those who have no intention of offering service to the public."[61] For example, in the *Secondary Markets Second Report and Order*, the Commission relied on that legislative history in rejecting a commenter's argument that "[t]here [was] no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market - construction and operation of a facilities-based network."[62] In adopting the AMR rule, the Commission reaffirmed that interpretation of the legislative history,[63] concluding that the adoption of the AMR rule, along with other modifications, was "necessary to strengthen [its] implementation of Congress's directives with regard to [DEs] and to ensure that, in accordance with the intent of Congress, every recipient of [its DE] benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[64]

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[58] 47 C.F.R. § 1.2110(c)(5)(x).

[59] *See* 47 C.F.R. § 1.9010.

[60] *DE Second Report and Order*, 21 FCC Rcd at 4754 ¶ 1.

[61] *See id.* at 4754–55 ¶ 3 & n.9, 4759–60 ¶ 15; *see also Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

[62] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

[63] *DE Second Report and Order*, 21 FCC Rcd at 4762–63 ¶¶ 23–24 ("[A]s 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.'").

[64] *Id.* at 4754–55 ¶ 3 & n.9, citing H.R. Rep. No. 103-111, at 257–58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993)).

23. Yet, in the Commission's attempts to safeguard small business benefits from unjust enrichment, it appears that the Commission's policy and corresponding rule modifications may have had the unintended consequence of hindering the Commission's ability to satisfy its statutory goal of promoting opportunities for wireless entry by small businesses. Moreover, we note that the statute does not specifically state, nor does the House Report make clear, that Congress intended to require that "offering service to the public" be defined only as DEs "directly provid[ing] facilities-based telecommunications services for the benefit of the public."[65] The Commission may have placed undue weight on language from the House Report, given all of the various factors that the actual text of section 309(j) gives the Commission the discretion to balance. In interpreting statutes, "[a]nalysis of the statutory text, aided by established principles of interpretation, controls."[66]

24. While the policy of requiring primarily the direct provision of facilities-based service by a small business seeking bidding credits is one way to protect against unjust enrichment, we tentatively conclude that it is not the only way to ensure that benefits are provided solely to those entities that Congress intended. We also recognize that the AMR rule, which was adopted to further that policy, may inhibit the highest and best use of spectrum by preventing small businesses that lack access to traditional sources of capital from being able to acquire alternative revenue streams through leasing and other spectrum use arrangements, even in circumstances where they retain control over their business venture. MMTC argues that there has been a documented decline in DE participation and success at auction following the adoption of the Commission's rule changes in 2006, based on the relative value of licenses won by DEs compared to non-DEs.[67] While we note that the relative value of licenses won at auction is only one measure to gauge success of the small business program and that there are other relevant factors to consider in assessing whether the Commission has met its statutory obligations for small businesses, we nonetheless concur that over the last decade small businesses have faced various increased difficulties in becoming wireless licensees.[68]

25. We contemplate that a different approach may be more effective in balancing our competing goals of affording small businesses reasonable flexibility to obtain the capital necessary to participate in the provision of spectrum-based services and effectively preventing the unjust enrichment of ineligible entities. Insofar as Congress has granted us the discretion to weigh the varying objectives of section 309(j), we propose rule modifications that, if adopted, could offer a more balanced approach for achieving our statutory directives. We therefore propose to repeal the AMR rule and evaluate small business eligibility in a manner that could provide DEs with greater opportunities to participate in the provision of spectrum-based services, including through secondary market transactions. We anticipate

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[65] *See id.*; H.R. Rep. No. 103-111, at 257–58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993)).

[66] *See PM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228, 2236 (2014).

[67] *Digital Déjà Vu* at 6–18.

[68] We stress that by measuring auction results on the basis of the value of licenses won by DEs, commenters like MMTC mistakenly focus on the success rate of small businesses as opposed to whether the Commission has met its statutory goal of providing DEs with "opportunities" to participate the provision of spectrum based services as the language of section 309(j) requires. If we look instead at the percentages of applicants that were eligible for bidding credits in two of our largest, most recent auctions of mobile broadband spectrum, Auctions 66 (in 2006) and 73 (in 2008), we note that 55 percent of the qualified bidders were eligible for such benefits. *See* Auction of 700 MHz Band Licenses; 214 Bidders Qualified to Participate in Auction 73, AU Docket No. 07-157, *Public Notice*, 23 FCC Rcd 276, Appendix A (2008); Auction of Advanced Wireless Services Licenses; 168 Bidders Qualified to Participate in Auction No. 66; Information Disclosure Procedures Announced, *Public Notice*, 21 FCC Rcd 8585, Appendix A (2006). We emphasize that comparisons, like MMTC's, of DE participation across 20 years of auctions also have a number of causes, including the increasing demand for spectrum to provide broadband services, the trend toward consolidation in the wireless industry, and changes to the Commission's DE eligibility rules that have altered the definition of qualified entities. *See Digital Déjà Vu* at 6–18.

that this, in turn, will help DEs gain access to capital by enabling leasing and other spectrum use arrangements. By allowing more DEs and small businesses to participate in spectrum leases and other spectrum use agreements, this will also promote the Commission's goals of promoting more efficient and dynamic use of the important spectrum resource through secondary market spectrum transactions.

26. We seek comment on this proposal to repeal the AMR rule, and our tentative conclusions regarding our need to re-evaluate our small business policy. Should we discontinue our policy requiring small businesses seeking bidding credits to provide primarily direct, facilities-based service on each individual license? Would this proposal better promote Congress's intent for small businesses? Would the proposal to eliminate this policy and to repeal the AMR rule have the unintended effect of providing ineligible entities with access to discounted spectrum?

27. In a mature wireless industry where leasing and other spectrum use arrangements may be important tools to enable wireless providers to raise capital and participate at auction, is it appropriate to provide small businesses seeking bidding credits with greater flexibility to enter into such spectrum use arrangements? Should we consider an alternative spectrum capacity use limit for a bright line attribution test, and if so what is the appropriate percentage and what spectrum use arrangements should we include? Would eliminating the policy that small businesses provide primarily facilities-based service with each individual license increase or decrease the risk of unjust enrichment to ineligible entities and/or the warehousing of spectrum? What safeguards should we consider to ensure that bidding credits are extended only to qualifying small businesses, as Congress intended? Alternatively, should we retain the AMR rule and the related policy that small businesses primarily provide facilities-based service, but stipulate that neither would kick in for a set number of years? This approach might provide small businesses with an opportunity to raise capital early in the license term, but still require that they eventually become primarily facilities-based providers of service when the AMR kicks in. Commenters should address when the AMR rule and the related policy regarding facilities-based service should kick in and how construction build out requirements should be measured. Commenters should also address whether our proposed shift in policy would continue to allow auctions to award licenses to those entities that value the spectrum most highly, which fosters our ability to accomplish Congress's multi-faceted policy objectives. Will rebalancing our approach to Congress's goals provide adequate safeguards against unjust enrichment to ensure that bidding credits are awarded only to qualifying small businesses?

28. *Proposed Standard for Evaluating Small Business Eligibility*. We propose a more focused approach to evaluate small business eligibility that looks at who controls, or has the potential to control, the applicant and any spectrum acquired with the use of small business benefits. Specifically, we propose to apply a two-pronged test using our existing controlling interest and affiliation rules to determine whether: (1) an applicant meets the applicable small business size standard, and (2) whether it retains control over the spectrum associated with the licenses for which it seeks small business benefits. This approach will allow us to separate our review of those who control, or have the power to control, the small business applicant's business venture and are therefore attributable for purposes of determining eligibility from those that use (and may control) its spectrum capacity, which would affect the small business's ability to retain its benefits with respect to any particular license. Consistent with our existing controlling interest and affiliation rules, we will attribute the revenues of those entities or individuals that determine or significantly influence the nature or types of services offered by the small business, the terms upon which such services are offered, and the prices charged for such services.[69] The proposals we make today would expand the types of services the small business might offer as part of its overall business venture, but would not alter how we carefully monitor those that have the ability to control, or potentially control the applicant or licensee and its business venture. Below, we seek comment on these specific proposals.

[69] 47 C.F.R. § 1.2110(c)(2)(ii)(H)–(I).

29. The first prong would evaluate whether an applicant meets the applicable small business size standard and is therefore eligible for benefits. To evaluate small business eligibility, we propose to apply our existing controlling interest standard and affiliation rules to determine whether an entity should be attributable based on whether that entity has *de jure* or *de facto* control of, or is affiliated with, the applicant's overall business venture. *De jure* control is typically evidenced by the holding of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests.[70] *De facto* control is determined on a case-by-case basis to determine whether the licensee has actual control over its business venture.[71] Thus, pursuant to section 1.2110 and consistent with our current analysis, under our proposal control and affiliation may arise through, among other things, ownership interests, voting interests, or the terms of any agreements that create a controlling, or potentially controlling, relationship over the applicant's business venture.[72] We therefore note that our proposal to eliminate the policy that small businesses seeking benefits primarily provide facilities-based service does not alter the rules that require us to consider whether facilities sharing and other agreements confer control of or create affiliation with the applicant. The proposal also does not alter the general standard by which the Commission evaluates whether a licensee has ceded *de facto* control and effected an unauthorized transfer of control of its spectrum authorization to a third party.

30. Our continued careful and targeted examination of these issues will allow us to ensure that a small business applicant has the independent ability to direct its decision making regarding its overall business venture and how its licenses are used to offer service to the public. Moreover, those claiming small business benefits will continue to be bound by our existing rules regarding control and attribution, which should be familiar to all existing and future Commission licensees. By providing small businesses with greater opportunities to access revenue streams through leasing and other spectrum use agreements, we anticipate that they will have more flexibility to employ business models that suit their individual needs and therefore will be less likely to be influenced by deep pocketed investors or parties with which they have a spectrum use agreement. Furthermore, this approach recognizes the Commission's earlier conclusion in the *Secondary Markets* proceeding that the mere existence of a spectrum use agreement between a small business and another party does not, without more, cause the other party to become an attributable interest holder in the applicant.[73] This approach, coupled with our proposed departure from the policy of requiring small businesses to provide primarily facilities-based service directly to the public with each of its licenses, should allow small businesses to gain access to capital and better enable them to participate in auctions and in the provision of spectrum-based services, so long as the terms of any spectrum use agreement do not confer control or create an affiliation that would lead to attribution of disqualifying revenues. Will this approach promote long term investment, market participation and competition in the wireless industry by small businesses?

31. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, we propose to determine an entity's eligibility to retain small business benefits on a license-by-license basis, based on whether it has maintained *de jure* and *de facto* control of the license. Under this proposed license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license.[74] Instead, while a small business might incur unjust enrichment obligations if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, so long as

[70] 47 C.F.R. § 1.2110(c).

[71] *Id. See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating long standing principles of control into section 1.2110 of the Commission's rules).

[72] *See, e.g.*, 47 C.F.R. § 1.2110(c)(5)(vii)–(x) (explaining how affiliation can arise where one concern has the power to control or potentially control the other concern).

[73] *Id.*; *see, e.g., Secondary Markets Second Report and Order*, 19 FCC Rcd at 17542–44 ¶¶ 78–80.

[74] *Contra DE Second Report and Order,* 21 FCC Rcd at 4763 ¶ 25.

the revenues of its attributable interest holders (i.e., the DE's affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. In other words, an applicant need not be eligible for small business benefits on each of the licenses it holds in order to demonstrate its overall eligibility for such benefits.[75] For instance, if a small business chooses to permissibly relinquish benefits, incurring any applicable unjust enrichment obligation,[76] and transfer *de facto* control of a license through a *de facto* transfer lease, that lease will not necessarily make the lessee an attributable interest holder in the applicant or cause the applicant to become ineligible for other small business benefits it might have or want to acquire.

32. We stress that small businesses, like all Commission licensees, remain subject to our rules to prevent unauthorized transfers of control of their license authorizations pursuant to section 310(d) of the Communications Act.[77] Accordingly, if a small business seeking benefits executes a spectrum use agreement that does not comply with the Commission's relevant standard of *de facto* control,[78] it will be subject to unjust enrichment obligations for the benefits associated with that particular license. If the terms of that spectrum use agreement go so far as to confer control of, or the potential to control, the small business's overall business venture, the business could risk the attribution of revenues, which could render it ineligible for all current and future small business benefits on all licenses.[79] Except where the leasing standard of *de facto* control applies under the secondary market rules, the criteria of *Intermountain Microwave* and *Ellis Thompson* will continue to apply to any Commission licensee, including a small business, for purposes of assessing whether it can demonstrate that it retains *de facto* control of its business venture and spectrum authorization. Small businesses will, however, be free under this proposal from the added policy requirement regarding the extent to which it must use each individual spectrum license for the provision of facilities-based service in order to retain eligibility for small business benefits.

33. We seek comment on our proposed two-pronged approach to evaluate attribution and establish eligibility for small business benefits. Will this proposal provide small businesses with the flexibility necessary to participate in an evolving wireless marketplace? Does the absence of a bright line attribution standard hinder an applicant's ability to assess its eligibility for small business benefits? Will our proposed approach allow the Commission to safeguard the benefits we award and prevent ineligible entities from obtaining benefits indirectly, through arrangements with eligible small businesses? Should we take additional steps to assure that ineligible entities cannot exercise undue influence over a small business or will our proposed approach empower small businesses to make their own decisions with respect to the highest and best use of each of their licenses without risking the undue influence of their investors or spectrum users? For instance, should we, in considering whether the user's revenues should be attributable to the small business applicant, consider any limits on the amount of its spectrum capacity a small business seeking benefits can allow a third party to use, even where such use is otherwise

[75] *See, e.g., Grain AMR Waiver Order*.

[76] 47 C.F.R. §§ 1.2111(d) (2013), 1.9030(d)(4).

[77] Section 310(d) of the Communications Act prohibits the transfer or assignment of a construction permit or station license, or any attendant rights, unless authorized by the Commission. 47 C.F.R. § 310(d). *See also* 47 C.F.R. § 1.9010.

[78] *See* 47 C.F.R. § 1.9010 (*de facto* control for spectrum leasing arrangements); *see also* Applications for Microwave Transfers to Teleprompter Approved with Warning; Non-broadcast and General Action Report No. 1142, *Public Notice* (by the Commission *en banc*), 12 FCC 2d 559, 559–60 (1963) (*Intermountain Microwave*) (*de facto* control for non-leasing situations); 47 C.F.R. § 1.2110(c) (*de facto* control for DEs); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating the *Intermountain Microwave* principles of control into section 1.2110 of the Commission's rules).

[79] Our proposal does not alter the requirement of full dilution in 47 C.F.R. § 1.2110(c)(2)(ii)(A).

permissible under our rules and the agreement on its own does not create a controlling interest or affiliation in the applicant's business venture?

34. Should we limit the ability of a small business seeking benefits to lease all of its spectrum capacity or should we allow it to be primarily engaged in the business of leasing provided that it complies with small business eligibility rules? Would allowing a small business seeking benefits to lease 100 percent of its spectrum capacity on any individual license, and/or on all of its licenses, increase the potential of the unjust enrichment of ineligible entities? Commenters should address how that risk increases or decreases based on the amount of spectrum capacity that may be leased. Should the Commission be concerned that a small business leasing large quantities of its spectrum capacity to a single user has allowed another entity to receive the benefit of its bidding credits?[80]

35. Should there be a standard by which we should automatically attribute the gross revenues of an entity with which a small business seeking benefits has spectrum use agreements if it has such agreements with a single entity in numerous markets? How should the Commission view small businesses that have multiple financial and/or operational arrangements with another licensee or entity where the agreements do not otherwise create a controlling interest or affiliation with the small business? Should the existence of such multiple agreements create a rebuttable presumption of affiliation similar to the kinship affiliation rule,[81] or does our existing rule of "affiliation through contractual relationships"[82] already adequately guard against a third party acquiring control, or the potential to control, the small business through such agreements? For instance, should the Commission permit a small business seeking benefits to have a combination of capital investments, loan, marketing, management and leasing agreements with another Commission licensee without attributing the gross revenues of that entity to the small business? Is there a combination of agreements that should cause more concern in assessing small business benefit eligibility and should any combination of agreements with a single party create a rebuttable presumption of attribution or an ineligibility for small business benefits? Are there any specific types of agreements that are more likely to confer control or undue influence of the small business seeking benefits that should cause the Commission to automatically attribute the gross revenues of the entity to the small business or render the small business ineligible for benefits?

36. Do our proposals provide small business applicants with sufficient flexibility to access capital, compete in auctions, and participate in new and innovative ways in the provision of service in the wireless marketplace while retaining their benefits? Do our proposals make it more or less likely that a small business will be unduly influenced by the entities with which they engage in spectrum use agreements? Commenters opposing these proposals should indicate specific concerns. Commenters supporting these proposals should offer any other suggestions the Commission should consider to revise its rules and reform its small business policies. To what extent do the changes we have proposed for small business eligibility positively or negatively affect auction revenues? To what extent do our proposals appropriately balance our competing statutory obligations in section 309(j) of the Act?

37. *Proposed Standard for Evaluating DE Leasing*. We also propose to modify the language of section 1.9020 to comport with our proposed approach to assessing small business eligibility. Specifically, we propose to make clear that DEs may fully benefit from the same *de facto* control standard for spectrum manager leasing in our secondary market rules as non-DE lessors.

38. In developing its regulatory scheme for leasing generally, the Commission determined that section 310(d) of the Communications Act did not require the continued application of the facilities-

[80] *See e.g., Council Tree*, 619 F.3d at 255 n.8.

[81] *See* 47 C.F.R. §1.2110(c)(5)(iii)(B).

[82] *See* 47 C.F.R. §1.2110(c)(5)(ix).

based *Intermountain Microwave* six-part test[83] that had, since 1963, been applied to determine whether a licensee was exercising the requisite level of *de facto* control over its licensed operations.[84] Instead, the Commission adopted a revised *de facto* control standard for leasing arrangements for purposes of applying the requirements of section 310(d).[85] Under the revised standard, a spectrum manager lease does not constitute a transfer of *de facto* control so long as the licensee (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules.[86]

39. While the Commission nominally applied the new standard to all licensees, it explained that DEs would be required to retain their eligibility under the traditional facilities-focused *de facto* control standard of section 1.2110 and *Intermountain Microwave*.[87] Thus, the Commission stated that small businesses could engage in leasing only to the extent that doing so would not affect their eligibility for benefits.[88] Further, it required "that a licensee receiving [DE] . . . benefits be an entity that actually provides service under the license."[89] As explained above, the Commission expressed concern that unless it continued to require DEs to remain engaged primarily in the provision of facilities-based services to the public it would run the risk that small business incentives, particularly bidding credits, would indirectly benefit entities that would not qualify for those incentives in the primary market.[90] To that end, the Commission specified that small businesses could not retain their benefits if they made spectrum leasing their primary business.[91]

40. Consistent with our proposed revisions to assessing small business eligibility, including the elimination of the requirement that small businesses primarily provide facilities-based service on each license they hold, we propose a modification to our spectrum manager leasing rule. Specifically, we propose to modify the language in section 1.9020(d)(4) to remove the conflicting reference to the control standard of section 1.2110 in order to make clear that small business lessors are fully subject to the same *de facto* control standard for spectrum manager leasing that applies to all other licensees.[92] This

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[83] In *Intermountain Microwave* the Commission, interpreting what is now section 310(d) of the Act (and was then section 310(b)), articulated the following six indicia of control: (1) unfettered use of all facilities and equipment; (2) day-to-day operation and control; (3) determination and carrying out of policy decisions, including preparation and filing of Commission applications; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations, including operational expenses; and (6) receipt of moneys and profits derived from the operation of the facilities. *Intermountain Microwave*, 12 FCC 2d at 559–60.

[84] *Secondary Markets First Report and Order*, 18 FCC Rcd at 20608 ¶ 3, 20610 ¶¶ 10–11, 20623–24 ¶¶ 40–41, 20629–42 ¶¶ 51–81.

[85] *Id.*

[86] 47 C.F.R. § 1.9010; *Secondary Markets First Report and Order*, 18 FCC Rcd at 20610 ¶ 11.

[87] *Secondary Markets First Report and Order*, 18 FCC Rcd at 20654–55 ¶ 113; *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17536–44 ¶¶ 67–82.

[88] *Secondary Markets First Report and Order*, 18 FCC Rcd at 20654–55 ¶ 113, 20666–67 ¶ 145; *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17536–44 ¶¶ 67–82. To accommodate the realities of leasing, however, the Commission clarified that a spectrum lessee's construction or use of facilities in the licensee's service area or over its bandwidth would not, by itself, create an attributable relationship, and neither would the mere existence of the leasing agreement. *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17542–43 ¶¶ 78–79.

[89] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17538 ¶ 71.

[90] *Id.* at 17538 ¶ 71.

[91] *Id.* at 17540–41 ¶ 76.

[92] *See* 47 C.F.R. § 1.9020(d)(4).

modification should clarify that section 1.9010 alone defines whether a licensee, including a small business, retains *de facto* control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing.[93] This proposal does not alter the fact that small businesses must remain eligible for benefits under section 1.2110. Instead, the proposed modification clarifies that one *de facto* standard applies to determine if the licensee has *de facto* control of the spectrum in the context of a spectrum manager lease (i.e., 1.9010), and the other applies to determine if a third party has control, and the potential to control, the licensee and its business venture for the purposes of attribution of revenues (i.e., 1.2110). In sum, our proposal departs from the traditional *Intermountain Microwave* facilities-focused *de facto* control standard with regard to an individual spectrum lease agreement for a particular license. As long as the small business: (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules, it will be considered to maintain *de facto* control of its spectrum for the purposes of that spectrum manager lease.[94] As discussed above, spectrum manager leasing applications will continue to be evaluated to determine whether control of, or affiliation with, the small business applicant and its overall business venture has arisen through any the terms of the leasing agreement that might lead to attribution and result in unjust enrichment under section 1.2110.[95]

41. When the Commission adopted section 1.9010 of its rules, it noted that "a licensee's continued control over the licensed use of spectrum lies at the heart of what it means to retain the license and the rights thereunder" and that it could "no longer generally assume that the licensee must perform non-licensed activities . . . in order to conclude that the licensee has retained its license and all rights thereunder."[96] We propose that our modification will make clear that this conclusion applies equally to all licensees. Are there any reasons why we should retain our existing language in section 1.9020(d)(4)? Should we consider limiting the amount of spectrum a small business can lease to a single entity under section 1.9020, in order to ensure that they retain control over their business venture as required in section 1.2110? Commenters opposing our proposal should offer alternative suggestions for how we could allow small businesses to play a larger role in secondary market transactions.

B. Unjust Enrichment

42. As discussed above, the integrity of the small business benefit program depends on ensuring that only entities eligible for benefits receive them. To safeguard against abuse, the Commission has long relied on unjust enrichment provisions, which require a small business to pay back the benefits it accrued where appropriate, and careful vigilance in approving applications and transactions. With the proposals we set forth today, we anticipate that these provisions will be as important as ever and that strong enforcement of our rules is critical. As discussed below, we therefore seek comment on whether any changes are appropriate to strengthen our unjust enrichment rules and how best the Commission can continue to scrutinize applications and proposed transactions to ensure that only eligible entities receive benefits, while not undermining the Communications Act's directive to ensure that DEs are given the opportunity to participate in the provision of spectrum-based services.

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[93] *See* 47 C.F.R. §§ 1.9010, 1.9020(d)(4). Because we do not plan to extend streamlined processing to leasing applications by DE lessors, Commission staff will have an opportunity to review the applications to determine whether they contain anything that will trigger a more extensive review under sections 1.9020(d)(4) and 1.2110. *See* 47 C.F.R. §§ 1.2110, 1.9020(d)(4).

[94] 47 C.F.R. § 1.9010; *Secondary Markets First Report and Order*, 18 FCC Rcd at 20610 ¶ 11.

[95] *See also Secondary Markets Second Report and Order*, 19 FCC Rcd at 17537–44 ¶¶ 69–82.

[96] *Secondary Markets First Report and Order,* 18 FCC Rcd at 20639 ¶¶ 74–75.

43. Under our rules, small businesses are obligated to make unjust enrichment payments if they seek, *inter alia,* to assign or transfer control of licenses to a non-eligible party, for a period of up to five years from the initial issuance of the license.[97] In rebalancing our policy objectives to provide small businesses greater opportunities to participate at auction and in the provision of spectrum-based services, we remain focused on our responsibility to ensure that benefits are provided only to qualifying entities.

44. We therefore invite comment on whether our existing five year unjust enrichment payment schedule continues to provide a sufficient safeguard to ensure that benefits are provided only to qualifying entities. Commenters should be specific about whether there is a need to adjust our current five year unjust enrichment repayment schedule, and the appropriate length and reimbursement percentages for any repayment schedule revisions. If commenters support a different repayment period or different percentages for the repayment schedule, they should be specific about why their suggested approach would better meet our goals and balance our statutory objectives.

45. Specifically, we also seek comment on whether we should consider adopting a 10 year unjust enrichment repayment schedule, including its benefits and costs.[98] Extending the length of the unjust enrichment repayment schedule to 10 years could help deter speculation and prevent spectrum warehousing. At the same time, extending the length of the unjust enrichment repayment schedule could restrict small businesses' access to capital, which could limit their ability to participate in the provision of spectrum-based services, contrary to our underlying goals in this proceeding. How does the length of the repayment schedule affect a small business's capital fundraising and business planning efforts?[99] Are there lessons we can draw from based on parties' experience raising capital when the 10 year unjust enrichment period was in place from 2006 until 2010? If we repeal the AMR rule as proposed and also modify the unjust enrichment rules, what would be the combined effect on the ability of a small business to raise capital and participate at auction and in the provision of service, particularly when compared to the existing rule?[100]

46. Are there other unjust enrichment provisions that the Commission should consider? For example, should the Commission require full reimbursement, plus interest, if a small business loses its eligibility prior to meeting the construction requirements applicable at the end of the license term?[101] Commenters should discuss how such an approach would impact the Commission's interest in protecting against unjust enrichment, while ensuring that small businesses have access to capital to participate at auction and in the provision of service. Is a different reimbursement percentage (something less than 100 percent) preferable? Are other safeguards sufficient to protect the Commission's interests regarding unjust enrichment?

47. We seek comment on whether the Commission may grant small businesses greater flexibility to participate in the provision of spectrum-based services, as it has proposed, while also

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[97] 47 C.F.R. § 1.2111(b).

[98] The Commission adopted a 10-year repayment schedule in 2006, which was vacated by the Third Circuit for lack of notice. There the Commission adopted a 10 year unjust enrichment schedule for licenses acquired with bidding credits. Under that rule, a small business that lost eligibility for a bidding credit for any reason was liable for repaying 100 percent of the bidding credit, plus interest during the first five years of the license term, 75 percent of the bidding credit, plus interest, during years six and seven, 50 percent of the bidding credit, plus interest, during years eight and nine, and 25 percent of the bidding credit, plus interest, during year ten. *See DE Second Report and Order*, 21 FCC Rcd at 4766–67 ¶¶ 37–38.

[99] *See* MMTC Petition for Reconsideration at 9–11 (noting that 10 year unjust enrichment period would adversely affect a DE's ability to attract capital because, for example, it falls out of most lenders' investment horizon).

[100] *See, e.g., Council Tree Brief* at 29–30 (arguing that the 10 year unjust enrichment period adopted in 2006 must be evaluated in connection with leasing and other restrictions to determine the likely impact of a DE's ability to raise and retain capital, particularly compared to a shorter, five year period.)

[101] *DE Second Report and Order*, 21 FCC Rcd at 4767 ¶¶ 38–39.

ensuring that only those entities Congress intended have access to benefits. We ask commenters to address how the unjust enrichment rules affect their ability to secure and retain capital and whether the Commission's rules require other further modifications to safeguard the award of small business benefits. By granting small businesses greater regulatory flexibility to demonstrate eligibility, do we increase or decrease the likelihood that non-eligible entities can assert undue influence over a small business's decision making for its business venture and its utilization of licenses to participate in the provision of spectrum-based services?

48. We also seek comment on how other government programs ensure that only an intended class of recipients receive benefits that are awarded to eligible entities. Are there other government programs that have greater safeguards than we currently employ? How do other government agencies and small business benefit programs prevent abuse and guard against unjust enrichment of ineligible entities? Commenters should be specific about any analogies that can be drawn between the Commission's small business benefits and similar benefits awarded by other agencies and programs.

49. Our efforts to provide increased flexibility to small businesses must be balanced with vigilant enforcement to ensure that only *bona fide* small businesses receive benefits. The Commission has a strong interest in ensuring that truthful and accurate information is available to the Commission and the public for purposes of implementing and enforcing policies it finds to be in the public interest. Such information is imperative to the Commission's ability to safeguard the benefits it awards and to prevent unjust enrichment. To the extent we modify rules regarding the Commission's small business benefits, we will remain vigilant, as we are today, in undertaking careful review of all applications of those seeking to acquire or retain bidding credits to ensure that the gross revenues of all parties that control, or have the potential to control, the applicant are properly attributed in compliance with our controlling interest and affiliation rules. We emphasize that the Commission will remain focused on ensuring that an applicant's certifications for eligibility comport with the actual terms of its agreements with relevant parties. In so doing, we expect that we can properly execute our statutory responsibility to continue to prevent unjust enrichment of ineligible entities.

C. Bidding Credits

50. We also take a fresh look at the primary way that the Commission facilitates participation by small businesses at auction through its bidding credit program. We note that the generally applicable small business definitions and corresponding bidding preferences were adopted in 1997 and find that it is appropriate to revisit whether these standards have kept pace with an evolving wireless marketplace.[102] Toward that end, and as discussed below, we propose to increase the general size standards, measured by gross revenues, for purposes of determining an entity's eligibility for a bidding preference. We also propose to continue our practice of evaluating which small business definitions will apply on a service-by-service basis, based upon associated capital requirements for a particular service. In addition, we seek comment on whether to increase the bidding credit percentages applicable to associated small business categories. Finally, we seek comment on our ability to consider bidding preferences for other types of DEs, entities that serve unserved/underserved areas or areas with persistent poverty, as well as persons and entities that have overcome disadvantages. We expect that the questions raised here will provide a meaningful opportunity to evaluate whether the Commission's bidding credit program continues to achieve our objectives. We seek concrete, specific, data-driven feedback by commenters to facilitate our review. In addition to addressing the targeted questions described below, we invite commenters to suggest other creative ideas that would promote our statutory objectives, but we emphasize that for any such proposals it is imperative to provide ample supporting evidence.

[102] *See* CCA *AWS-3 NPRM* Comments at 11–12.

1. Small Business Bidding Credits

51. ***Background***. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business.[103] By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service, adopting one or more definitions of the small businesses that will be eligible. The Commission's small business definitions have been based on an applicant's average annual gross revenues over a three-year period.[104] In establishing the gross revenues thresholds for the small business definitions to be applied to a specific service, the Commission takes into account the capital requirements and other characteristics of the particular service.[105] Thus, as explained above, in order to qualify for a small business bidding credit, an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below the applicable financial caps.[106]

52. The Commission's rules provide a schedule of small business definitions and corresponding bidding credits.[107] In adopting bidding credits for a particular service, the Commission has found that the use of the small business size standards and credits set forth in the Part 1 schedule provides consistency and predictability for small businesses.[108] The rule sets forth three tiers of bidding credits:

- A 35 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $3 million;
- A 25 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $15 million; and
- A 15 percent bidding credit for businesses with average annual gross revenues for the preceding three years not exceeding $40 million.[109]

53. ***Discussion.*** We propose to increase the gross revenues thresholds defining the three tiers of small businesses in the Part 1 schedule by which we provide the corresponding available bidding credits and seek comment on alternatives. We also propose to continue our practice of deciding which small business definitions will apply on a service-by-service basis depending on the capital requirements of the particular spectrum to be auctioned. In addition, we seek comment on whether the bidding credit percentages that apply to these small business definitions should be increased.

54. Since the inception of the Commission's DE program, and particularly in the past decade, the evolution of the mobile wireless marketplace from mobile voice to mobile broadband has increased the demands on wireless networks and the need for access to spectrum, heightening the capital-intensive nature of the industry. Moreover, as stated above, the number of small and regional mobile wireless service providers has significantly decreased, though regional and local service providers continue to offer consumers additional choices in the areas they serve.[110] In light of these changes and our statutory

[103] A bidding credit is a discount applied to the gross bid amount for a license when the high bidder meets specific designated criteria.

[104] *See* 47 C.F.R. § 1.2110(f)(2).

[105] *See* 47 C.F.R. § 1.2110(c)(1).

[106] *See* 47 C.F.R. § 1.2110(b).

[107] 47 C.F.R. § 1.2110(f).

[108] *See, e.g.*, 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, *Report and Order*, 29 FCC Rcd 4610, 4680–81 ¶ 189 (2014) (*AWS-3 Report and Order*).

[109] 47 C.F.R. § 1.2110(f).

[110] *See* ¶ 6. *See also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6144 ¶ 18, 6206 ¶ 179.

goals, we seek comment on how we should reconsider our definition of what constitutes a small business in the wireless industry.

55. We propose to increase the gross revenues thresholds in our Part 1 schedule to reflect the changing nature of the wireless industry, including the overall increase in the size of wireless networks and the increase in capital costs to deploy them. We note that these changes have resulted in an increase in the size of the wireless service providers that can be considered to be "small" relative to the large nationwide providers. By proposing adjustments to our small business size standards, we aim to promote the effective participation of small businesses in auctions and in the provision of spectrum-based services.

56. In considering how much to adjust the gross revenues thresholds in our small business definitions, we propose to use the price index for the U.S. Gross Domestic Product ("GDP price index") published by the U.S. Department of Commerce.[111] We note that the U.S. Small Business Administration ("SBA") as part of its size standards review, recently used the GDP price index to adjust its receipts-based industry size standards.[112] In particular, we propose to adjust the current gross revenues thresholds with the percentage change in the GDP price index between 1997 and 2013.[113] We believe that the GDP price index may reflect certain industry trends and a relevant range of economic activity better than the available wireless industry price indices. In barely a decade, the shift from a voice-centric to a data-centric wireless industry has seen mobile broadband data services grow from their nascent stage to become a significant share of the industry's market revenues.[114] However, the available wireless industry price indices may underrepresent broadband data services because the indices are based on voice-centric definitions of service plans.[115] Furthermore, the wireless industry consumer and producer price indices may exclude goods and inputs that are relevant for the range of economic activity involved in the provision of wireless services. Therefore, we propose to use the broader GDP price index. The GDP price index increased by 36.4 percent from 1997 to 2013.[116] Based on this 36.4 percent increase, we propose new gross revenues thresholds that are obtained by multiplying the current thresholds by 1.364 and rounding to the nearest million. Specifically, we propose to revise the standardized schedule in section 1.2110(f) as follows:

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[111] The U.S. GDP price index is published by the U.S. Department of Commerce, Bureau of Economic Analysis ("BEA") on a quarterly basis as part of its National Income and Product Accounts. *See generally* BEA, Interactive Data, http://www.bea.gov/itable (last visited July 18, 2014).

[112] Small Business Size Standards: Inflation Adjustment to Monetary Based Size Standards, *Interim Final Rule*, 79 Fed. Reg. 33,647 (June 12, 2014).

[113] The GDP price index, also known as the GDP implicit price deflator, is defined as the ratio of current-dollar GDP to chained-dollar GDP, multiplied by 100. *See* BEA, Interactive Data, Tables 1.1.4 and 1.1.5, http://www.bea.gov/itable (last visited July 18, 2014).

[114] *See 16th Mobile Wireless Competition Report*, 28 FCC Rcd at 3883–85 ¶ 277.

[115] The Bureau of Labor and Statistics ("BLS") publishes consumer and producer price indices ("CPI" and "PPI," respectively) for the wireless industry. The BLS states that both the wireless CPI and PPI are based on providers' revenues from certain service plans. Broadband data plans are not treated as a separate category, and the BLS description of the indices is unclear about how the advent of mobile broadband services has been factored into the voice-centric CPI and PPI indices that were introduced in 1997 and 1999, respectively, long before the advent of mobile broadband services. *See* BLS, How the Consumer Price Index Measures Price Change for Telephone Services, http://www.bls.gov/cpi/cpifactc.htm (last visited July 18, 2014). Both the wireless CPI and PPI have declined by more than 35 percent since 1997 and 1999, respectively. *See 16th Mobile Wireless Competition Report*, 28 FCC Rcd at 3875–76 ¶ 266; BLS, Producer Price Index for Wireless Telecommunications Carriers–NAICS 517210, http://www.bls.gov/ppi/ppinaics51721.htm (last visited July 18, 2014).

[116] The base year is 2009, and the values of the index in 1997 and 2013 are 78.097 and 106.486, respectively. *See* BEA, Interactive Data, http://www.bea.gov/itable (last visited July 18, 2014); BEA, National Economic Accounts, http://www.bea.gov/national/Index.htm (last visited July 18, 2014).

- Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit;
- Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and
- Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit.

57. We seek comment on our proposal to adjust the current gross revenues thresholds in our small business size standards using the GDP price index. Is there a different price index that better reflects industry developments and the relevant range of economic activity? Is there an alternative method for setting new gross revenues thresholds that does not require adjusting the current gross revenues thresholds with a price index?

58. We tentatively conclude that our proposed gross revenues thresholds better reflect the larger size of wireless networks today, and thus expect that they will preserve the effectiveness of the Commission's bidding credit program in the current mobile wireless marketplace. Consumer demand for widely available mobile broadband services has increased providers' need for additional capital to acquire spectrum and deploy service. This trend is reflected in the changing structure of the industry described above. By increasing the gross revenues thresholds that define small businesses and thereby making bidding credits available to a larger number of entities, we seek to facilitate a higher rate of participation by entities that might otherwise find it difficult to obtain the necessary capital to participate at auction. We seek comment on whether the proposed increases in the revenues thresholds are likely to increase the percentage of entities that will benefit from our small business bidding credits, by providing better access to capital and enabling them to seek access to the spectrum necessary to meet consumer demand for mobile broadband services. At the same time, to further the statutory objectives of the auction program,[117] we must adopt revenues thresholds that will avoid including firms that have adequate access to financing for spectrum based on their revenue levels. We therefore seek to avoid setting eligibility for bidding credits at a level that is over inclusive, which would defeat the purpose of the bidding credits and undermine the statutory objectives of the program. Any new thresholds we adopt should provide economic opportunity to small businesses, while maintaining good economic incentives for small businesses to seek diverse forms of financing for spectrum.

59. We seek comment on this proposal. Specifically, how have capital costs, construction costs, and administrative costs faced by wireless providers changed since the mid-1990s? Have the costs of spectrum usage rights increased significantly since the early stages of our auction program such that it is more difficult for small businesses to acquire wireless spectrum today?

60. Commenters who agree that the industry's evolution warrants new definitions for small businesses should discuss what gross revenues thresholds are appropriate for defining small businesses in the wireless context. Commenters should explain their methodologies for deriving alternative thresholds and should supply supporting data or justifications for the Commission's use in evaluating and applying such methodologies. If commenters do not provide data on wireless providers' gross revenues, what alternative factors should we consider in determining what constitutes a "small business" in today's wireless marketplace?

61. We also seek comment on whether to adopt a small business size standard based on criteria other than gross revenues. As we recently noted in the AWS-3 proceeding, in first adopting gross revenues-based small business size standards for eligibility for DE benefits, the Commission rejected the

[117] *See* 47 U.S.C. § 309(j)(3), requiring the Commission, among other things, to seek to promote the development and rapid deployment of new technologies and services; to promote economic opportunity and competition, by avoiding excessive concentration of licenses and by disseminating licenses among a variety of applicants (including DEs); and to promote recovery for the public of a portion of the value of the public spectrum resource.

SBA's employee-based business size standard for cellular or other wireless telecommunications entities as a means to qualify as a DE.[118] The Commission concluded that such a definition would be too inclusive and would allow many large telecommunications firms to take advantage of preferences not intended for them.[119] We note that according to census data, if we adopted the SBA's small business employee-based size standard for cellular or other wireless telecommunications entities (i.e., 1,500 or fewer employees),[120] more than 96 percent of wireless companies would be considered small businesses.[121] We therefore tentatively conclude not to reconsider the Commission's conclusion that the SBA's employee-based definition is too inclusive for the purposes of establishing DE eligibility.

62. In addition, we ask commenters to consider whether we should increase the bidding credit percentages (i.e., discount amounts) currently available to small businesses in section 1.2110(f). Should we use the existing bidding credit percentages, but apply them to higher gross revenues thresholds? Should we add additional small business definitions and associated tiers of bidding credits above or below the tiers proposed above? Commenters supporting additional tiers of bidding credits should propose a corresponding gross revenues threshold for each additional tier. Commenters supporting changes to the existing bidding credit percentages in our Part 1 rules should explain the basis for their proposals and provide any supporting data for the Commission's use in evaluating potential changes to the Part 1 schedule. Commenters should also address whether increases in the bidding credit percentages are necessary if we adopt our proposal to modify the gross revenues thresholds for our small business definitions since that will have the effect of increasing the level of bidding credit a substantial number of small businesses would receive compared to our current rules.[122]

63. Further, we propose to continue our practice of soliciting comment on the appropriate small business size standards in connection with establishing rules for any particular service. As we have done in the past and pursuant to section 1.2110(c)(1), we would continue to take into consideration the characteristics and capital requirements of each service.[123] We seek comment on this proposal. Alternatively, should the Commission utilize all three small business definitions and bidding credit tiers in every service? Under this approach, the Commission would make bidding credits available to any business that meets one of the small business definitions without engaging in an assessment of the likely

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[118] *See AWS-3 Report and Order*, 29 FCC Rcd at 4680–81 ¶ 189.

[119] *Id.*

[120] 13 C.F.R. § 121.201, NAICS code 517210. In determining an entity's number of employees, the SBA includes employees of each of that entity's affiliates. *See* 13 C.F.R. § 121.106 (SBA method for calculating number of employees).

[121] For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year. U.S. Census Bureau, Table No. EC0751SSSZ5, Information: Subject Series - Establishment and Firm Size: Employment Size of Firms for the United States: 2007 (NAICS code 517210), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5 (last visited July 23, 2014). Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more. *Id*. The U.S. Census Bureau defines a firm as a "business organization or entity consisting of one domestic establishment (location) or more under common ownership or control. All establishments of subsidiary firms are included as part of the owning or controlling firm." U.S. Census Bureau, Frequently Asked Questions: What is the difference between establishment and firm? What about companies?, https://ask.census.gov/faq.php?id=5000&faqId=487 (last visited July 23, 2014).

[122] By increasing the revenues thresholds, entities previously eligible for small business bidding credits under the current schedule may become eligible for a higher bidding credit tier under the proposed amended schedule, and entities that previously exceeded the highest revenue threshold may become eligible. Similarly, bidders that previously exceeded the thresholds as a result of attributable revenues under the AMR rule may fall below the thresholds, and thus become eligible for small business bidding credits, if the AMR rule is eliminated as proposed in this NPRM.

[123] *See* 47 C.F.R. § 1.2110(c)(1).

capital requirements of the specific service for which licenses are being offered. What are the advantages and disadvantages of this alternative approach? If the Commission continues to adopt small business definitions on a service-by-service basis, are there other factors that it should consider in determining which small business definition to apply to a specific service? Alternatively, if the Commission adopts its proposed modifications to the AMR and small business size standards, should it consider reducing the level of bidding credits it awards? Commenters should provide specific suggestions on how the Commission should weigh its proposals collectively.

64. We also seek comment on whether any revisions we adopt in this proceeding to our Part 1 schedule of small business size standards and associated bidding credit percentage levels should apply to the specific small business definitions and bidding credit percentages we have previously adopted for specific services, and, if so, how such revisions would be implemented. In particular, we propose that any new rules adopted in this proceeding would apply to the 600 MHz band spectrum licenses to be offered in the Broadcast Television Spectrum Incentive Auction ("BIA"). In the BIA proceeding, we adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $15 million).[124] Consistent with the increased gross revenues thresholds we propose for the standardized schedule in our Part 1 competitive bidding rules, we propose to increase the gross revenues thresholds associated with the 15 and 25 percent bidding credits adopted for the 600 MHz band.[125] We seek comment on this proposal. In addition, we seek comment on whether to adopt a third tier of small business bidding credits for the 600 MHz band that would provide a 35 percent bidding credit to businesses with average gross revenues for the preceding three years not exceeding $4 million. If the Commission re-auctions licenses for existing services, should the previously adopted service-specific small business definitions and bidding credit percentages be revised for those services to reflect any changes to our Part 1 schedule in section 1.2110(f)(2)?

2. Other Bidding Preferences

65. As explained above, the Commission's primary method of fulfilling its statutory mandate regarding DEs has been to offer auction bidding credits to small business applicants. Periodically, however, interested parties have suggested that the Commission offer bidding preferences to entities based on other criteria than business size. As the Commission has explained in the past, our ability to implement suggestions to target bidding credits to other types of entities is constrained by both its statutory authority and standards of judicial review. We seek comment on these suggestions below, and ask commenters to specifically address the statutory authority and judicial scrutiny issues that may limit our ability to entertain recommendations to alter the focus of our current bidding preferences.

a. Minority- and Women-Owned Businesses and Rural Telephone Companies

66. The Communications Act directs us to consider the use of bidding preferences to "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."[126] We seek comment on whether the current small business provisions are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies. To the extent that commenters propose additional provisions to ensure participation by minority-owned or women-owned

[124] *See BIA Report and Order*, 29 FCC Rcd at 6762–67 ¶¶ 474–83.

[125] That is, for the 600 MHz band, we propose to provide a bidding credit of 25 percent for businesses with average gross revenues for the preceding three years not exceeding $20 million and a bidding credit of 15 percent for businesses with average gross revenues for the preceding three years not exceeding $55 million.

[126] 47 U.S.C. § 309(j)(4)(D).

businesses, they should address how such provisions could be crafted to meet the relevant standards of judicial review.[127] We ask commenters advocating for the adoption of rural bidding credits to supply data demonstrating that rural telephone companies lack access to capital or face barriers to capital formation similar to those faced by other DEs.[128]

b. Unserved/Underserved Areas and Persistent Poverty Preferences

67. We seek comment on whether the Commission should extend bidding credits to winning bidders that deploy facilities and provide service to unserved or underserved areas.[129] If we adopt bidding credits for service to unserved or underserved areas, what criteria should we consider to determine if an area is unserved or underserved? Should any unserved/underserved area bidding credits be available in all areas lacking service, only in rural areas, or only in persistently poor counties, as described below? As required of providers awarded universal service funds through the Mobility Fund Phase I auctions, should a wireless provider awarded an unserved/underserved bidding credit be required to provide a certain level of service (e.g., 3G or 4G) by a certain time frame (e.g., two or three years) in order to retain the benefit of the bidding credit?

68. We also seek comment on whether the Commission should offer a bidding credit to winning bidders that will use their licensed spectrum to deploy service to persistent poverty counties. As defined by the Department of Agriculture's Economic Research Service ("ERS"), a county is persistently poor if 20 percent or more of its population was living in poverty over the last 30 years.[130] According to the ERS, "there are currently 353 persistently poor counties in the United States (comprising 11.2 percent of all U.S. counties)."[131] If we adopt such a bidding credit, should the Commission impose strict performance requirements on providers awarded bidding credits for licenses covering persistent poverty counties similar to those required of winning bidders awarded Tribal land bidding credits?[132] Should this type of bidding credit only apply to licenses covering persistent poverty counties that are only served by two or fewer wireless service providers?

69. If we adopt unserved/underserved area and/or persistent poverty county bidding credits, should the bidding credits be available only to small businesses and/or other DEs, or to any applicant? How would the Commission calculate the credit amount where the unserved or underserved area or targeted counties cover a portion of a license area? Should the bidding credit be applied to the total amount of the winning bid for a license, or should it be applied to a portion of the winning bid based on a percentage of population or square miles of the license area covered by the unserved/underserved area or identified counties or some other metric? What size bidding credit would be appropriate for either an unserved/underserved area bidding credit or a persistent poverty county bidding credit? If an applicant qualifies for both bidding credits, should we limit the amount of the combined credit? Similarly, if an

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[127] *See* note 1.

[128] *See* Service Rules for Advanced Wireless Services H Block—Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands, WT Docket No. 12-357, *Report and Order*, 28 FCC Rcd 9483, 9580–81 ¶ 260 (2013); *AWS-3 Report and Order*, 29 FCC Rcd at 4679–80 ¶ 187; *BIA Report and Order*, 29 FCC Rcd at 6764–65 ¶ 479.

[129] *See, e.g.*, RTG *BIA NPRM* Comments at 8.

[130] *See* ERS, Geography of Poverty, http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx (last visited July 18, 2014).

[131] *Id.* The ERS further explains that "[t]he large majority (301 or 85.3 percent) of the persistent-poverty counties are nonmetro, accounting for 15.2 percent of all nonmetro counties. Persistent poverty also demonstrates a strong regional pattern, with nearly 84 percent of persistent-poverty counties in the South, comprising of more than 20 percent of all counties in the region." *Id.*

[132] For example, the Commission could require a recipient of such a bidding credit to cover at least 75 percent of the affected counties within its market within three years of licensing or risk losing the benefit of the bidding credit.

applicant qualifies for one of these credits in addition to a small business bidding credit, should the credits be cumulative and, if so, should there be a limit on the amount of the aggregate bidding credit provided? Should any limit be an amount greater than the maximum small business bidding credit to allow DEs eligible for the highest bidding credit tier to receive an increased benefit for also providing service to an unserved/underserved area and/or persistent poverty county?[133] Commenters supporting cumulative bidding credits should provide data or support justifying the need for higher bidding credits in unserved/underserved and/or persistent poverty areas. Alternatively, are issues related to lack of deployment or low levels of deployment of wireless services in rural and poor areas better addressed through means other than our bidding credit program, such as through service-specific build-out requirements or reliance on incentives through our Mobility Fund and other universal service programs?[134]

70. We seek comment on our authority to implement these types of bidding preferences. We note that the Commission has previously implemented bidding credits based on other criteria than business size in order to facilitate service to Tribal lands.[135] In that proceeding, the Commission found that the objectives and requirements of section 309(j) of the Act,[136] which the Commission must consider in designing competitive bidding systems, authorized it to grant bidding credits targeted specifically to entities that commit to bringing much needed wireless telecommunications services to Tribal lands.[137] We tentatively conclude that section 309(j) of the Act similarly authorizes the Commission to provide bidding credits for service to unserved/underserved areas and persistent poverty counties. We seek comment on our tentative conclusion.

c. Overcoming Disadvantages Preference

71. In view of renewed interest raised in the BIA proceeding,[138] we also seek additional comment on the 2010 FCC's Advisory Committee on Diversity for Communications in the Digital Age recommendation to implement a bidding preference for persons or entities who have overcome substantial

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[133] For example, if the maximum small business bidding credit is 35 percent, should a DE eligible for that credit and for a persistent poverty credit be limited to an aggregate credit of 40 percent?

[134] *See* 47 U.S.C. § 309(j)(4)(B) (authorizing the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services").

[135] Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11794, 11800 ¶ 16 (2000) (finding that "establishing bidding credits for carriers, regardless of size, who agree to extend coverage to [T]ribal areas is in the public interest") (*Tribal Lands Report & Order*).

[136] 47 U.S.C. § 309(j)(3) & (4). The Commission found that Tribal land bidding credits further the objective of section 309(j)(3)(A) to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas . . ." and the objective of section 309(j)(3)(D) of promoting "efficient and intensive use of the electromagnetic spectrum." *Tribal Lands Report & Order,* 15 FCC Rcd at 11801 ¶ 18; *see* 47 U.S.C. § 309(j)(3)(A) & (D). The Commission also found that there is no indication in section 309(j)(4)(D) or in its legislative history that the Commission's authority to award bidding preferences is limited to small businesses, rural telephone companies, and businesses owned by members of minority groups and women. *Tribal Lands Report & Order,* 15 FCC Rcd at 11802 ¶ 19; *see* 47 U.S.C. § 309(j)(4)(D).

[137] *Tribal Lands Report & Order*, 15 FCC Rcd at 11801 ¶ 18.

[138] *See, e.g.*, IAA *BIA NPRM* Comments at 7–9; Letter from David Honig, President and Executive Director, MMTC, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, IB Docket No. 11-133, GN Docket No. 12-268, at 1–2 (filed Jan. 10, 2013); Letter from David Honig, President, MMTC, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, IB Docket No. 11-133, GN Docket No. 12-268, at 4 (filed Dec. 5, 2012).

disadvantage (referred to herein as an "overcoming disadvantages preference," or "ODP").[139] In that 2010 Recommendation, the Committee proposed that the Commission should provide an auction bidding credit for otherwise qualified persons or entities that have overcome substantial disadvantages, to allow them to compete on equal footing with other applicants. The Committee stated that an ODP would provide a fair opportunity for highly qualified applicants to compete for spectrum licenses, thereby expanding the pool of eligible bidders in an auction.

72. Commenters should specifically address the Commission's statutory authority to adopt such a preference and how such a preference could be crafted to meet the relevant standards of judicial review.[140] Would a preference for those who have overcome a substantial disadvantage be subject to a "rational basis" constitutional standard, as the Advisory Committee's Recommendation indicates?[141] Additionally, we seek detailed comment on how the preference would provide additional opportunities not available under the current bidding credit program, particularly if the current program is amended as proposed in this NPRM.

73. We also ask for input on how the Commission might systematically collect and maintain data in order to implement and administer an ODP. What legal basis do we have to collect data, and what precise data would we need to support such a proposal?

74. We ask commenters to address how eligibility for an ODP could be demonstrated, providing specific information as to what definitions of disadvantages could qualify individuals or entities for the preference. How would we measure when any particular disadvantage had been overcome? The Advisory Committee's Recommendation provides a non-exhaustive list that includes disadvantages such as physical disabilities or psychological disorders that rendered professional or business advancement substantially more difficult than for most individuals.[142] How could we avoid subjective determinations and implement and apply an ODP on a neutral basis? We ask commenters to discuss how the Commission could establish eligibility for the preference objectively. How could the Commission render eligibility determinations for an ODP without appearing arbitrary? How could the Commission safeguard any such benefits to ensure they are awarded only to eligible persons or entities?

75. We also seek detailed comment on how the Commission could administer an ODP. Commenters should identify the costs and benefits associated with such a program, addressing matters such as how reviews would be conducted, and the nature of the demonstration applicants seeking a preference would be required to make,[143] as well as how individualized evaluation for the preference would be incorporated into a time-sensitive short-form application process[144] or whether alternatives such as pre-qualification would be necessary.[145]

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[139] Advisory Committee on Diversity for Communications in the Digital Age, *Recommendations to Federal Communications Commission: Preference for Overcoming Disadvantage*, Oct. 14, 2010, http://www.fcc.gov/DiversityFAC/meeting101410.html (*Recommendation*). The Media and Wireless Telecommunications Bureaus subsequently issued a public notice seeking comment on additional information that would be helpful in evaluating whether and how to pursue the Committee's proposal. Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, GN Docket No. 10-244, *Public Notice*, 25 FCC Rcd 16854 (2010) (*Overcoming Disadvantage Preference Public Notice*).

[140] *See* note 1.

[141] *Recommendation* at 10.

[142] *Recommendation* at 4.

[143] *Overcoming Disadvantage Preference Public Notice*, 25 FCC Rcd at 16857–58 ¶ 10.

[144] The Commission's short-form application is the first part of its two-phased auction application process. In the first phase, any party desiring to participate in an auction must file a streamlined short-form application in which it certifies under penalty of perjury as to its qualifications to participate in a Commission auction. *See* 47 C.F.R.

(continued….)

76. As acknowledged by the Advisory Committee, its ODP proposal raises a number of issues that need to be refined and resolved in order to design and implement such a preference,[146] and comment provided to date has not provided sufficient basis or justification for doing so.[147] Therefore, commenters that continue to support the adoption of an ODP are encouraged to provide as detailed and specific suggestions as possible regarding the Commission's authority to establish the ODP and its objectives in doing so, as well as eligibility for, and administration of, the preference, to assist the Commission in determining a legal, neutral, and efficient way in which it could implement an ODP. Alternatively, we ask commenters to consider whether the proposals we have made to amend our existing DE program would obviate the need for the adoption of such a preference.

D. DE Reporting Requirements

77. ***Background***. Section 1.2110(n) of our rules requires DE licensees to file an annual report with the Commission that includes, at a minimum, a list and summaries of all agreements and arrangements, extant or proposed, that relate to eligibility for DE benefits.[148] The list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.[149] DEs are required to file a report for each of their licenses no later than, and up to five business days before, the anniversary of the date of license grant.[150]

78. ***Discussion***. We propose to repeal this reporting requirement.[151] The information DEs are required to include in their annual reports is duplicative of information that they provide in their auction and license applications.[152] In addition, before entering into leases or other agreements that might affect their eligibility, DEs must seek Commission approval and must list and summarize those

(Continued from previous page)

§ 1.2105. In its review of the short-form applications, Commission staff presumes the information and certifications contained in the short-form applications are true unless they are incomplete, internally inconsistent or contradicted by information in the Commission's records. *See* Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746, 19749–50 ¶ 7 (2002). Eligibility to participate in bidding is based on information in an applicant's short-form application and its certifications, and on its upfront payment. In the second phase of our application process, a winning bidder files a more comprehensive long-form application. *See* 47 C.F.R. § 1.2107. The long-form application is subject to more extensive review and is the basis for any determination that a winning bidder is qualified to hold a Commission license and for the award of any claimed bidding credit. *See generally* 47 U.S.C. § 308(b) (license applications must provide factual information to demonstrate applicant qualifications).

[145] *Overcoming Disadvantage Preference Public Notice*, 25 FCC Rcd at 16858 ¶¶ 11–12. *See also Recommendation* at 8–9.

[146] *See Recommendation* at 7 ("An FCC rulemaking should flesh out similarities and differences and would refine and resolve some of the issues identified below."). *See also Overcoming Disadvantage Preference Public Notice*, 25 FCC Rcd at 16854.

[147] Nine comments and two reply comments were filed in response to the *Overcoming Disadvantage Preference Public Notice*. The commenters who supported the Advisory Committee's Recommendation largely did so with reservations, or simultaneously expressed support for other diversity initiatives. Few commenters responded in detail to the questions presented.

[148] *DE Second Report and Order*, 21 FCC Rcd at 4770 ¶¶ 47–48; *see DE Order on Reconsideration*, 21 FCC Rcd at 6719 ¶ 42; 47 C.F.R. § 1.2110(n).

[149] *DE Second Report and Order*, 21 FCC Rcd at 4770 ¶¶ 47–48; *see id.* ¶ 46; 47 C.F.R. § 1.2110(n).

[150] 47 C.F.R § 1.2110(n).

[151] This proposal addresses an issue raised by Blooston in a petition for reconsideration of the *DE Second Report and Order*. *Blooston Petition* at 9. *See also Blooston Reply* at 7–8.

[152] *See* 47 C.F.R. §§ 1.2110(j), 1.2112(b)(2)(iii).

agreements, including the parties to and the dates of the agreements.[153] Moreover, for licensees with multiple auction licenses, each having a different grant date, the burden of the annual reporting requirement is exacerbated by the obligation to file multiple reports each year. For these reasons, we tentatively conclude that the value of the information provided in these reports may no longer outweigh the reporting burden that they impose on DEs.[154]

79. We seek comment on our proposal. In particular, commenters are invited to address whether there are any benefits to retaining the annual reporting requirement that we have failed to consider. Does this reporting requirement in any way help the Commission identify agreements between parties relating to small business eligibility that might otherwise escape attention? Commenters should specifically address how other rules render this reporting requirement duplicative and how other rules adequately ensure that the Commission is aware of all agreements between parties relating to small business eligibility. Will relieving DEs of this annual reporting requirement reduce their regulatory burdens to any measurable degree? Without this reporting requirement, will the Commission continue to have the necessary tools to safeguard DE benefits from unjustly enriching ineligible entities? If the Commission adopts this proposal to eliminate this annual reporting requirement, should we amend our rule for reporting eligibility events to require that a small business must list and summarize all existing agreements to provide context each time it reports a new eligibility event?[155]

E. MMTC's White Paper Requests

80. ***Background***. As we noted above, in February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance minority and women spectrum license ownership.[156] In addition to requesting the elimination of the AMR, an increase in bidding credits, and a substantive review of proposed DE rules, all of which are addressed above, the White Paper requests Commission action in the following areas:

- Reinstitute select DE-only closed spectrum auctions;
- Incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions ("M&As") and secondary market spectrum transactions;
- Conduct ongoing recordkeeping of DE performance;
- Complete the *Adarand* Studies, updating the section 257 studies released in 2000;
- Regularize procedural requirements; and
- Support increased funding for and statutory amendments regarding the Telecommunications Development Fund.[157]

81. ***Discussion***. We seek comment on the proposals noted above, that are not otherwise addressed in this NPRM, and to the extent that they relate to our competitive bidding rules. We observe that certain proposals appear to be outside the scope of this proceeding and others may not be needed in light of other changes proposed herein. Toward that end, we tentatively conclude that the following MMTC proposals are outside the scope of this proceeding, which is focused on our competitive bidding rules, and thus will not be addressed here: (1) incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2)

[153] 47 C.F.R. § 1.2114.

[154] We are also cognizant of the administrative burden on Commission staff that results from reviewing the annual reports.

[155] 47 C.F.R. § 1.2114.

[156] *Digital Déjà Vu*.

[157] *Id.* at v, 32–34.

supporting increased funding for and statutory amendments regarding the Telecommunications Development Fund.[158] We seek comment on MMTC's additional requests, including discussion regarding the relative costs and benefits of each proposal. Are the proposals that we describe elsewhere in this NPRM, including the elimination of the AMR rule, sufficient to address the concerns identified by MMTC regarding the participation of businesses owned by members of minority groups and women in the provision of spectrum-based services?

III. OTHER PART 1 CONSIDERATIONS

82. In advance of an auction that could hold historic potential for interested applicants to acquire licenses for below-1-GHz spectrum, we also explore the need for other revisions to our general Part 1 competitive bidding rules to improve the transparency and efficiency of the auction and our processes. In the Section below, we propose changes to our former defaulter rule that seek to balance commenters' concerns that the current rules are overly broad with our continued need to ensure that auction bidders are financially reliable. We also propose to codify an existing competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction and we propose a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on the basis of more than one short-form application in a specific auction. Both proposals seek to prevent duplicative filings and to avert anticompetitive bidding behavior at auction. Regarding the joint bidding rules, we seek comment on, among other issues, our tentative conclusions that it would be in the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. Additionally, below, we provide notice of our intention to resolve long standing petitions for reconsideration and propose necessary clean up revisions to our Part 1 competitive bidding rules.

A. Former Defaulter Rule

83. ***Background***. Each potential participant in a Commission auction must certify on its pre-auction "short-form" application whether or not the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency.[159] With the exception of our upcoming auction for AWS-3 licenses (Auction 97) for which we recently granted a limited blanket waiver that is discussed more fully below,[160] an applicant is considered to be a "former defaulter" if the applicant,

[158] We note that MMTC's request with respect to "ongoing recordkeeping of DE performance" refers to "retain[ing] specific information about the [minority-owned business enterprises] and [woman-owned business enterprises] status of bidders, in addition to the small business status." *Id.* at 33. The Commission has sought comment in WT Docket No. 13-135 on the need to collect information on the participation of minority and women-owned enterprises in the mobile wireless industry, pursuant to similar MMTC requests. Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises and Extends Period for Reply Comments, WT Docket No. 13-135, *Public Notice*, 28 FCC Rcd 9125 (2013).

[159] 47 C.F.R. § 1.2105(a)(2)(xi) (former defaulter certification). Each applicant must also certify that, as of the short-form application deadline, it is currently not in default on any Commission license or delinquent on any non-tax debt owed to any Federal agency; if it is currently in default or delinquent, it cannot participate in the auction. Controlling interests and affiliates are defined at 47 C.F.R. § 1.2110. *See also* Wireless Telecommunications Bureau Reminds Prospective Broadband PCS Spectrum Auction Applicants of Default and Delinquency Disclosure Requirements, *Public Notice*, 19 FCC Rcd 21920 (2004) (providing auction applicants information regarding the interplay between defaults, delinquencies, and the Commission's "red light" rule). We do not intend in this proceeding to revisit this rule with respect to *current* defaults and delinquencies.

[160] *See* 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; Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 (Auction 97), RM-11395; AU Docket No. 14-78, *Order*, FCC 14-130 (rel. Aug. 29, 2014) (*Auction 97 Former Defaulter Waiver Order*).

including any of its affiliates, its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission license or been delinquent on any non-tax debt owed to any Federal agency, but has since remedied all such defaults and cured all of its outstanding non-tax delinquencies.[161] Former defaulters are eligible to bid in a Commission auction provided they are otherwise qualified,[162] but are required to pay upfront payments that are 50 percent more than the normal upfront payment amounts.[163]

84. The "former defaulter" policies were incorporated into the Commission's Part 1 general competitive bidding rules in 2000.[164] The Commission reasoned that "the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from applicants with a poor Federal financial track record."[165] Thus, while cure of an outstanding Federal default or delinquency enables the former defaulter to participate in an auction, the rules require the former defaulter to make a larger upfront payment. Other than in the recent waiver for Auction 97, the former defaulter rule has been applied without any limitation as to age or scope of an applicant's prior default or delinquency.[166]

85. As noted above, on August 29, 2014, in response to unopposed requests from wireless industry parties,[167] we granted a limited blanket waiver to narrow the circumstances under which an

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[161] *See*, *e.g.*, Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66, AU Docket No. 06-30, *Public Notice*, 21 FCC Rcd 4562, 4589 ¶¶ 82–83 (2006) (*Auction 66 Public Notice*).

[162] An applicant is not eligible to participate in competitive bidding if the applicant, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests is currently in default on any Commission license or is delinquent on any non-tax debt owed to any Federal agency, as of the filing deadline for applications to participate in a specific auction. *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15317 n.142 ("If any one of an applicant's controlling interests or their affiliates . . . is in default on any Commission licenses or is delinquent on any non-tax debt owed to any Federal agency at the time the applicant files it[s] Form 175, the applicant will not be able to make the certification required by [s]ection 1.2105(a)(2)(x) . . . and will not be eligible to participate in Commission auctions.").

[163] 47 C.F.R. § 1.2106(a).

[164] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316 ¶ 41. The Commission determined that, while it was "necessary to limit participation in Commission auctions to entities that can certify that they are not in default on certain debts, … past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee." *Id*. at 15316 ¶ 41, citing Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15753–54 ¶ 18 (1998) (*C Block Fourth Report and Order*).

[165] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15317 ¶ 42, citing *C Block Fourth Report and Order*, 13 FCC Rcd at 15761–62 ¶ 34.

[166] In 2004, an applicant for an FM Broadcast auction (Auction 37) sought waiver of 47 C.F.R. § 1.2106(a) on the grounds that the controlling interest of the auction applicant had cured his loan default 12 years earlier. The Auctions and Spectrum Access Division of the Wireless Telecommunications Bureau denied the request, and the Commission upheld the denial, based on the finding that a waiver of the former defaulter rule would lead to an inconsistent application of the Commission's rules and would not serve the public interest. *See* Letter to Richard Hodson, Hodson Broadcasting, from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated Sept. 14, 2004, 19 FCC Rcd 18101 (2004), *recon. denied*, Richard Hodson – Request for Waiver of Section 1.2106(a) of the Commission's Rules, *Memorandum Opinion and Order*, 19 FCC Rcd 22309 (2004) (noting that the petitioner failed to explain why he should be treated differently and how the interests of the public would be served by a grant of a waiver in his case).

[167] 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, filed June 8, 2007, RM-11395 (*DIRECTV/EchoStar Petition*); AT&T *DIRECTV/EchoStar Petition* Comments; Letter from Barry J. Ohlson to

(continued….)

applicant for Auction 97 would be considered a former defaulter and required to submit a larger upfront payment to qualify to bid.[168] We concluded that the underlying purpose of the upfront payment and former defaulter rules would not be served by their broad application in the AWS-3 auction, and that a limited waiver served the public interest.[169] Specifically, for Auction 97, we waived the former defaulter rule for applicants to exclude any cured default or delinquency for which any of the following criteria were met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline of September 12, 2014; (2) the amount of the default or delinquency falls below $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.[170] Pursuant to the *Auction 97 Former Defaulter Waiver Order*, only applicants that have had a cured default or delinquency that falls outside of these exclusions would have to certify to being a "former defaulter" and submit a larger upfront payment in Auction 97.[171] The *Auction 97 Former Defaulter Waiver Order* noted that our limited grant of the blanket waiver for Auction 97 was without prejudice to our further examination and disposition, based on a complete record, of the issues surrounding the former defaulter rule through a rulemaking proceeding.[172]

86. ***Discussion***. Although the former defaulter rule serves an important and necessary function to ensure that bidders are capable of meeting their financial commitments, we tentatively conclude that the rule may be too far-reaching and impose unnecessary costs and burdens on auction participants. Below, we propose a more tailored approach by balancing concerns that the current application of the rule is overbroad with our continued need to ensure that auction bidders are financially reliable. We seek comment on revising the rule to narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter.

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Marlene H. Dortch, Secretary, FCC, RM-11395 (filed Aug. 13, 2010) (DIRECTV/EchoStar et al. Aug. 13, 2010 *Ex Parte* Letter); Letter from Christine M. Crowe to Marlene H. Dortch, Secretary, FCC, RM-11395 (filed Oct. 6, 2010); Letter from Competitive Carriers Association, Consumer Electronics Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, RM-11395, GN Docket No. 13-185, AU Docket No. 14-78, GN Docket No. 12-268 (filed May 30, 2014) (*Four Associations May 30th Letter*); Letter from Joan Marsh, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185 (filed July 24, 2014); *but see* Letter from Richard B. Engelman, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78, RM-11395 (filed July 31, 2014) (asserting that AT&T's criteria is an expansion over the current rules and suggesting that the criteria expressed by the Four Associations is "more relevant and appropriate for many potential auction bidders and in relation to the Commission's underlying policy"); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185 (filed Aug. 1, 2014) (Consumer Electronics Association did not join in this filing); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed Aug. 14, 2014) (*Three Associations August 14th Letter*); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed Aug. 20, 2014) (*Three Associations August 20th Letter*); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed Aug. 28, 2014).

[168] *Auction 97 Former Defaulter Waiver Order* at ¶¶ 3–6 (providing a detailed history of the origin of the waiver request and petition for rulemaking).

[169] *Id.* at ¶ 8.

[170] *Id*. at ¶ 1.

[171] *Id*.

[172] *Id.* at ¶ 8.

Specifically, we propose to exclude any cured default on any Commission license or delinquency on any non-tax debt owed to any Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.[173] Additionally, we seek comment on limiting the individuals and entities that an applicant must consider when determining its status as a former defaulter.

87. In offering these proposals to limit the former defaulter rule, we keep in mind the underlying purposes of the upfront payment rule generally, and the increased upfront payment required of former defaulters. The Commission typically requires auction participants to provide upfront payments in order to qualify to bid in an auction.[174] Upfront payments help prevent frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of auction.[175] In adopting an upfront payment requirement, the Commission also recognized that it was "balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders."[176] The original former defaulter rule appeared in the Commission's Part 24 Broadband PCS rules in the wake of financial difficulties of participants in the C Block auctions.[177] The Commission subsequently incorporated the

[173] Depending on the origin of any federal non-tax debt giving rise to a default or delinquency, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied. Consistent with guidance previously provided with respect to applicability of the former defaulter rules, *see*, *e.g.*, Letter to Cheryl A. Tritt, Esq., from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004), for purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. Thus, to the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. In addition, we provide the following clarification with regard to defaults on Commission licenses. Any winning bidder that fails timely to pay its post-auction down payment or the balance of its bid payment or is disqualified for any reason after the close of an auction will be in default and subject to a default payment. *See* 47 C.F.R § 1.2109(c). *See also*, *e.g.*, Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled For November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 8386, 8450 ¶ 239 (2014). Commission staff provide individual notice of the amount of such a default payment as well as procedures and information required by the Debt Collection Improvement Act of 1996, including the payment due date and any charges, interest, and/or penalties that accrue in the event of delinquency. *See*, *e.g.*, 31 U.S.C. §§ 3716, 3717; *see also* 47 C.F.R. §§ 1.1911, 1.1912, 1.1940. *See also* Auction of Lower and Upper Paging Bands Licenses Closes; Winning Bidders Announced for Auction 95, *Public Notice,* 28 FCC Rcd 11848 (2013). For purposes of the certifications required on a short-form auction application, such notice provided by Commission staff assessing a default payment arising out of a default on a winning bid, constitutes notice of the final payment deadline with respect to a default on a Commission license.

[174] 47 C.F.R. § 1.2106.

[175] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377–79 ¶¶ 169–76.

[176] *Id*. at 2378 ¶ 171.

[177] In explaining that rule, the Commission stated that "[a]n applicant must state under penalty of perjury whether or not any entity whose gross revenues and total assets are required to be attributed to the applicant under section 24.709 of the Commission's rules has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency. If any entity whose gross revenues and total assets are required to be attributed to the applicant under section 24.709 of the Commission's rules has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency, the applicant will be considered a 'former defaulter' for purposes of the upfront payment requirements for Auction No. 22." *See*

(continued….)

Part 24 former defaulter policies into the Part 1 general competitive bidding rules, noting that the rule's purpose was "to preserve the integrity of the auction process and ensure that bidders are capable of meeting their financial commitments to the Commission."[178] As we noted in the *Auction 97 Former Defaulter Waiver Order*, in the 14 years since that Commission action, "our auctions program has matured and the mobile wireless industry has grown into a major segment of the nation's economy."[179] Accordingly, we consider here whether the current broad rule continues to strike the right balance to promote the goals of our upfront payment and former defaulter rule.

88. The parties that requested waiver of the former defaulter rule also suggest that we modify the rule.[180] DIRECTV/EchoStar argue that, as currently written, the former defaulter rule "appl[ies] too broadly to effectively advance the Commission's goal of ensuring that auction bidders are financially reliable."[181] In their joint filing, CCA, CEA, CTIA and NTCA ("the Four Associations") mirror that sentiment and suggest that the scope of the rule is unnecessary to achieve its purpose, particularly when the former defaults or delinquencies are in a relatively small amount or were cured years prior.[182] These parties offer a variety of ways to limit the scope of the former defaulter inquiry, but all consistently contend that the rule is unnecessarily broad to serve its underlying purpose.[183] We seek comment below on our specific proposals to narrow the scope of the defaults and delinquencies that would trigger an auction applicant's former defaulter status and ask commenters to address whether, if such proposals are adopted, the Commission can still promote the important protective functions of our upfront payment and former defaulter rules.[184]

89. Parties urge first that prior delinquencies and defaults more than a certain number of years old should be excluded from the scope of the former defaulter rule.[185] In the *Auction 97 Former Defaulter Waiver Order*, we excluded from consideration under the former defaulter rule any cured default or delinquency for which the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline of September 12, 2014.[186] We concluded that the rule's current unlimited time period may capture former defaults and delinquencies that have lost their relevance to a bidder's current capability to meet its financial commitments to the Commission, and thus may no longer warrant a larger upfront payment for Auction 97.[187] Initially, advocates seeking a more limited time frame for the rule's application argued that a three-year period would correspond to certain federal tax statute of limitations.[188] More recently, in seeking a waiver for

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Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 98-2604 (rel. Dec. 23, 1998).

[178] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316 ¶ 40.

[179] *Auction 97 Former Defaulter Waiver Order* at ¶ 15.

[180] *See, e.g.*, *DIRECTV/EchoStar Petition*.

[181] *DIRECTV/EchoStar Petition* at 2.

[182] *Four Associations May 30th Letter* at 2.

[183] *See, e.g., DIRECTV/EchoStar Petition* at 5–7; *Four Associations May 30th Letter* at 3.

[184] The Commission has noted that "past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee." *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316 ¶ 41.

[185] *See, e.g.*, *DIRECTV/EchoStar Petition* at 8; *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 4.

[186] *Auction 97 Former Defaulter Waiver Order* at ¶ 17.

[187] *Id.*

[188] *See*, *e.g.*, *DIRECTV/EchoStar Petition* at 10–11.

Auction 97, CCA, CTIA and NTCA ("the Three Associations") suggested that we should define former defaulters to include only those applicants who have received notice of defaults or delinquencies within seven years before the Auction 97 short-form application deadline.[189] In the *Auction 97 Former Defaulter Waiver Order*, we noted that while federal tax laws have a three-year statute of limitations to determine if certain forms of additional tax are owed, the period of limitations to determine whether income was under-reported is six years and the Internal Revenue Service has a seven-year period to review a claim for a loss from worthless securities or a bad debt deduction.[190] Likewise, we acknowledged that the Fair Credit Reporting Act limits many types of reporting by consumer credit agencies for a period of seven years.[191] In light of these longer federal limitations periods, we tentatively conclude that the purposes of the upfront payment and former defaulter rules may be furthered more precisely if we exclude any cured default on a Commission license or a delinquency on a non-tax debt owed to a Federal agency where the notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline. We seek comment on all aspects of this proposal—the number of years specified (seven), the triggering event (upon receipt of the notice of the final payment deadline or delinquency), and the point at which the counting of the age of the triggering event is cut off (the short-form application deadline).[192] To the extent commenters advocate a different length of time, an alternate triggering event, or another way of calculating how long ago the triggering event occurred, we urge them to be specific as to why their proposal is more appropriate given the policies behind our rule. Should the length of time it took the defaulter to cure the debt, or how recently the cure occurred, be a factor?

90. Those favoring modification of the rule also suggest excluding former defaults or delinquencies that fall below a certain amount. The *Auction 97 Former Defaulter Waiver Order* excluded from consideration under the former defaulter rule for Auction 97 any former default or delinquency for which the amount of the resolved debt or delinquency fell below $100,000. Parties initially suggested excluding defaults or delinquencies of what they defined as "*de minimis* nature," and specifically suggested that we should ignore any former default or delinquency totaling less than the lesser of $100,000 or 0.1 percent of the average annual revenues of the applicant, as computed by our competitive bidding rules.[193] The Three Associations later suggested that we exclude from the definition of former defaulter any cured defaults on a Commission license or delinquencies on a non-tax debt owed to a Federal agency in an amount of less than $100,000.[194] In the *Auction 97 Former Defaulter Waiver Order* we noted the $100,000 amount is used in other contexts to distinguish between less significant or material issues and more significant ones and we concluded that for the purposes of Auction 97, "[r]equiring a larger upfront payment based on any cured default or delinquency that is less than $100,000 could discourage participation in Auction 97 without appreciably ameliorating the risk of bidder defaults, and thereby undermine the underlying purposes of our upfront payment and former defaulter rules."[195]

91. For clarity and efficiency of the administration of the former defaulter rule from both the Commission's and applicants' perspectives, we now propose to adopt for future auctions generally the same bright line standard established in the *Auction 97 Former Defaulter Waiver Order* that would

[189] *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 4.

[190] *Auction 97 Former Defaulter Waiver Order* at ¶ 17 citing 26 U.S.C. § 6511(d)(1).

[191] *Auction 97 Former Defaulter Waiver Order* at ¶ 17 citing 15 U.S.C. § 1681c.

[192] *See Auction 97 Former Defaulter Waiver Order* at ¶ 17 n.39.

[193] *DIRECTV/EchoStar Petition* at 8–9. *See also Four Associations May 30th Letter* at 3.

[194] *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 3–4.

[195] *Auction 97 Former Defaulter Waiver Order* at ¶ 18; *see Three Associations August 20th Letter* at 3–4 (noting that $100,000 is the threshold for forfeiture orders that can be issued on delegated authority, establishing "material noncompliance" with the Commission's rules according to the Universal Service Administrative Company, and determining materiality in certain arbitration contexts).

exclude from the rule any former default on a Commission license or delinquency on a non-tax debt owed to a Federal agency where the amount of the resolved debt falls below $100,000. We tentatively conclude that such an exclusion will simplify the application process and minimize implementation costs imposed on applicants by excluding former defaults and delinquencies for which consideration is no longer necessary to ensure bidders in a more mature wireless industry submit serious, qualified bids. The $100,000 threshold aligns with Commission precedent and is used in other contexts to determine the materiality or significance of various issues.[196] If commenters disagree with the amount proposed, we encourage them to provide specific examples of how former defaults or delinquencies of a different amount would better reflect an auction applicant's financial reliability. We also seek comment on whether our proposal adequately weighs our need to consider debts of a serious nature that are indicative of a bidder's poor Federal track record with the burdens faced by many applicants in complying with the current rule, which might be considered open-ended in scope.

92. To address situations where, due to incorrect addresses, delivery problems, or internal issues, applicants may not timely pay obligations, but cure such debts when discovered, the Three Associations also contend that the Commission should for the purposes of the former defaulter rule exclude certain additional resolved debts.[197] For Auction 97 applicants, we waived the former defaulter rule to exclude any cured default or delinquency where the debt was paid within two quarters (i.e., 6 months) after receiving the notice of final payment deadline or delinquency.[198] There, we concluded that the prompt cure of such a default or delinquency sufficiently demonstrated an applicant's financial wherewithal, that therefore it was unnecessary to require a larger upfront payment from the applicant, and that a waiver under such circumstances served the public interest by encouraging prompt payment of debts owed to the government.[199] We now propose to modify the former defaulter rule generally to exclude a default or delinquency that was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency for the same reasons articulated in the *Auction 97 Former Defaulter Waiver Order*.[200] We seek comment on whether this exclusion will allow us to appropriately balance the practicalities that may affect applicants' ability to timely resolve their debts with the need to ensure that bidders are capable of meeting their financial commitments to the Commission. We also invite commenters to address whether payment within some other time period might better strike that balance, and whether receipt of the notice of the final payment deadline or delinquency is the appropriate triggering event for this exclusion.

93. Similarly, the Three Associations also suggest for the purposes of modifying the former defaulter rule that an applicant should not be considered to be "in default if any debt . . . is the subject of a good faith dispute or a pending legal or arbitration proceeding."[201] In the *Auction 97 Former Defaulter Waiver Order*, we included this suggestion in part, and concluded that where the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding, an applicant has demonstrated sufficient financial credibility so that it was not necessary to require a larger

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[196] *See* note 195; *see also*, *e.g.*, In the Matter of Amendment of Parts 0 & 1 of the Commission's Rules Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, MD Docket No. 02-339, *Report and Order*, 19 FCC Rcd 6540, 6545 ¶ 16 (2004) (discussing a delegation of authority for the head of the agency to collect claims for money that do not exceed $100,000).

[197] *Three Associations August 20th Letter* at 4–5.

[198] *Auction 97 Former Defaulter Waiver Order* at ¶ 19.

[199] *Id.*

[200] *See, e.g.*, *id.* (concluding that a waiver under these circumstances serves the public interest by encouraging prompt payments of debts owed to the government).

[201] *Three Associations August 20th Letter* at 2.

upfront payment from it in Auction 97.[202] We determined that waiver under such circumstances served the public interest by encouraging prompt resolution of debts associated with legal or arbitration proceedings.[203] We declined, however, to waive the larger upfront payment requirement for debts that are subject to a "good faith dispute" because we reasoned that such a provision, even for cured debts, would be too ambiguous to be efficiently applied during the auction short-form application process. We propose to modify the former defaulter rule generally to exclude a default or delinquency that was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding. As in the *Auction 97 Former Defaulter Waiver Order*,[204] we do not intend to include within the scope of this exclusion any proceedings based on requests for waiver of a rule requiring payment of a debt or delinquency. We seek comment on whether our proposed exclusion addresses parties' concerns that debts such as these are not indicative of an applicant's financial credibility such that they should require an applicant to submit a larger upfront payment. Should we also exclude debts cured after resolution of a "good faith dispute," and if so, how could such "good faith disputes" be verified during the short-form application process, if necessary? Is the proposed general exclusion for debts cured upon resolution of a legal or arbitration proceeding necessary? In the alternative, should we expect financially reliable applicants to pay outstanding defaults on Commission licenses, or delinquencies on any non-tax debt owed to any Federal agency, while legal or arbitration proceedings are pending, even if the applicant's liability or the amount of the debt is in dispute?

94. We note that the initial request that we modify the former defaulter rule also maintains that the rule should apply only to auction participants and those individuals or entities that "are in [a] position to affect whether such applicants meet their auction-related financial responsibilities"[205] and urge the exclusion of debts/delinquencies relating to personal obligations of officers or directors of entities that are not the auction applicant, e.g., excluding personal obligations of officers and directors of the applicant's parent companies.[206] More recent requests to amend the former defaulter rule do not include any suggestion to limit the scope of individuals and entities that an applicant needs to consider in evaluating its former defaulter status.[207]

95. In implementing the former defaulter provisions, the Commission has included the applicant's affiliates, its controlling interests, and affiliates of its controlling interests in determining if an applicant is a former defaulter.[208] We recognize, however, that some of the individuals and entities that fall within these definitions may play no role in the applicant's general financial responsibilities and may not affect an applicant's ability to meet its financial obligations arising from an auction. Therefore, we seek comment on possible ways to amend the former defaulter provisions to apply only to individuals and entities that play a role in the applicant's financial responsibilities. If we were to adopt DIRECTV/EchoStar's proposal to include only individuals or entities that "are in a position to affect whether such applicants meet their auction-related financial responsibilities," how could the Commission verify who would fit within such a category? In their request for waiver, DIRECTV/EchoStar suggest

[202] *Auction 97 Former Defaulter Waiver Order* at ¶ 20.

[203] *Id.*

[204] *See id.* at ¶ 20 n.51.

[205] *DIRECTV/EchoStar Petition* at 8.

[206] *Id*. at 9.

[207] *See, e.g., Four Associations May 30th Letter* at 2 (urging the Commission to waive the rule as to two categories of debts, those more than 3 years prior and under certain amounts).

[208] *See*, *e.g.*, *Auction 66 Public Notice*, 21 FCC Rcd at 4589 ¶¶ 82–83.

specifically not applying the rule to officers and directors of parent entities.[209] Under such an option, however, what would prevent applicants from evading the rule by simply creating a shell company to be the auction applicant?

96. Another option would be to limit the former defaulter inquiry to those individuals or entities that an applicant must disclose on its short-form application pursuant to section 1.2112.[210] We recognize, however, that, while such an option may exclude some individuals and entities not directly related to an applicant's auction finances, it could also expand the scope of individuals or entities that must be considered in some respects. We could limit the inquiry further to, for example, the real party or parties in interest in the applicant or application, which must be disclosed pursuant to section 1.2112(a)(1).[211] Would this option capture the individuals and entities that are in a position to affect whether an applicant meets its auction-related financial responsibilities? Would excluding officers and directors not otherwise covered by 1.2112(a)(1) be inconsistent with our policy to attribute them for purposes of evaluating eligibility for designated entity bidding credits in light of their potential ability to influence the management or operation of the applicant?

97. Finally, we seek comment as to other possible ways to limit the scope of the former defaulter rule. For example, we could define the rules to include only defaults and delinquencies related to Commission auction payments, or defaults or delinquencies on debt owed only to the Commission as opposed to those owed on other government non-tax debt, such as student loans. We note, however, that such further limitations may not be necessary given the other limitations that we propose above.

B. Commonly Controlled Entities

98. In this Section of the NPRM, we propose to codify an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application. Additionally, we propose a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application.

99. ***Background***. The Commission's competitive bidding procedures have long prohibited the same individual or entity from submitting multiple short-form applications in any auction.[212] This restriction prevents duplicative filings and may avert anticompetitive bidding behavior.

100. There is currently no similar procedure for commonly controlled entities. The competitive bidding rules and procedures currently contain no explicit prohibition on commonly controlled entities participating in the same auction and bidding on the same licenses. Several years ago, the Commission declined to set aside the results of an auction based on allegations relating to the

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[209] *DIRECTV/EchoStar Petition* at 10. *See also* DIRECTV/EchoStar et al. Aug. 13, 2010 *Ex Parte* Letter at 10 (Commission should exclude "defaults/delinquencies relating to personal obligation of officer/director of entity other than the auction applicant").

[210] 47 C.F.R. § 1.2112. For non-DEs, this would limit the inquiry to the applicant and its disclosable interest holders under 47 C.F.R. § 1.2112(a). For DEs, since the Commission attributes to the applicant the gross revenues of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests, *see* 47 C.F.R. § 1.2112(b)(iv), we could, under this option, continue to include those individuals and entities in any consideration of an applicant's former defaulter status.

[211] 47 C.F.R. § 1.2112(a)(1).

[212] *See, e.g.*, Auction of Lower and Upper Paging Bands Licenses Scheduled for May 25, 2010; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 87, AU Docket No. 09-205, *Public Notice*, 25 FCC Rcd 6333, 6348 ¶ 62 (2010) ("An entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications, only one application may become qualified to bid.").

participation of separate applicants that were commonly controlled.[213] In that decision, the Commission acknowledged that auction participation by commonly controlled applicants could serve legitimate business purposes if such entities have different business plans, financing requirements, or marketing needs; however, it noted that there could be risks inherent in allowing commonly controlled bidders to participate in an auction.[214]

101. ***Discussion.*** We propose to amend our competitive bidding rules to codify our restriction on the filing of multiple auction applications by the same individual or entity and to adopt a new rule that would prevent entities that are controlled exclusively by the same single individual or set of individuals from qualifying to bid based on multiple auction applications for the same or overlapping geographic license areas. By proposing these amendments to our Part 1 competitive bidding rules, we seek to improve the transparency and efficiency of the auction process, by making clearer who the qualified bidders actually are and ensuring against the potential for anticompetitive auction behavior.

102. *Duplicate auction applications*. We propose to amend section 1.2105 to prohibit the same individual or entity from filing more than one short-form application for an auction. We observe that in contexts other than competitive bidding, our rules already limit repetitious or conflicting applications.[215] Prohibiting the same individual or entity from filing multiple applications to participate in an auction protects the Commission against the burden of duplicative, repetitious or conflicting applications. Moreover, in this context, such applications raise potential concerns that duplicate filers may be able to manipulate the auction process—using, for example, identical bids or multiple activity waivers—to pursue potentially anticompetitive ends. We seek comment on this proposal. Are there any specific reasons the Commission should allow for the filing of more than a single short form application from the same individual or entity? Commenters should describe any public interest benefits to support their positions.

103. *Applications by entities exclusively controlled by the same individual or set of individuals*. We also propose to adopt a new rule to provide that where entities are under the common, exclusive control of a single individual or set of individuals (i.e., a single individual or same set of individuals is the exclusive controlling interest of more than one entity) only one short-form application from such entities could become qualified to participate with respect to any particular geographic license area or overlapping areas. In defining the entities that would be subject to this rule, we propose to use the concepts of "control" or "controlling interest" from section 1.2110 of the Commission's rules,[216] which also applies by its terms to DEs. Even when applicants are not identical, if more than one applicant is under the exclusive control of a single individual or set of individuals, such common control may allow the controlling individual or set of individuals to attempt to gain advantages in the bidding process based on certain coordinated bidding actions (e.g., tied bids, activity waivers). While such entities may have different business plans, financing, accounting, non-controlling interest-holders or minority investors, if they are under exclusive control of a single individual or set of individuals, under our proposal those entities could not become qualified to bid in an auction with respect to the same or overlapping geographic license areas. We seek comment on this proposal and on specific alternatives to address our concerns.

104. Multiple applicants under the common control of a single individual or set of individuals may coordinate their bidding actions in ways not available to a single bidder, and may, in some cases, derive some advantage from doing so. For example, such multiple applicants would have more activity

[213] Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order,* 25 FCC Rcd 4036 (2010).

[214] *See id.* at 4063 ¶ 88.

[215] *See* 47 C.F.R. §§ 1.937(d), 73.3518.

[216] 47 C.F.R. § 1.2110(c)(2).

waivers to use to ensure that the auction remains open, or would be able to submit identical bids on a license in ways intended to exploit auction bidding procedures. In addition, such multiple applicants could potentially coordinate their bidding to gain some advantage in the context of random tie-breakers or through increasing the bidding activity on a single license in order to raise minimum acceptable bids more quickly through application of the exponential smoothing formula.

105. Further, the mere presence of commonly controlled applicants making identical bids in a single auction may damage the transparency of the auction process. For example, the placing of multiple identical bids by commonly controlled applicants may mislead other bidders about the extent of bidding competition, especially in an anonymous bidding auction where competitors are unable to discern whether bids are placed by commonly controlled applicants or independent competitors. We anticipate that these and other potentially problematic behaviors could be curbed by requiring such applicants to participate as a single applicant with respect to any particular geographic license area or overlapping areas.

106. Do commenters share our concern that the participation of commonly controlled applicants in an auction potentially undermines evenhandedness and transparency in the auction process? Commenters opposing our proposals should indicate how codifying our existing auction procedure and/or adopting our new proposed rule would harm the efficiency or undermine the competitiveness of our current auction process. We note that to the extent that the commonly controlled entities have an interest in holding licenses won at auction separately, such entities might consider assigning the licenses to related entities in the secondary market. Are there legitimate business reasons for filing these types of applications that we have failed to consider that could be undermined by our proposal?

C. Joint Bidding

107. In this Section, we initiate a review of our rules and policies governing joint bidding and other arrangements in order to ensure that they fulfill our statutory objectives, given the changes in the mobile wireless marketplace since the Commission's initial adoption of its bidding rules two decades ago, and the increasing importance of spectrum for service providers to meet consumer demand for mobile wireless services. Our goal in reviewing these rules and policies is to ensure that they preserve and promote competition in the mobile wireless marketplace and facilitate competition among bidders at auction, while providing potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible.

108. Consistent with our commitment in the *Mobile Spectrum Holdings Report and Order*,[217] we seek to develop a record on how joint bidding and other arrangements affect competition in the mobile wireless marketplace, and the appropriate policies and procedures for substantive competitive review of joint bidding. In that regard, we note that the scope of our inquiry here—unlike our other proposals in this *Notice of Proposed Rulemaking*—applies only to joint bidding and other arrangements in auctions of licenses likely to be used for mobile telephony/mobile broadband services.

109. To best serve the public interest and preserve and promote robust competition, we also propose to adopt policies tailored to the characteristics of joint bidding and other arrangements and the likely competitive effects on the mobile wireless marketplace. Specifically, we tentatively conclude that it would best serve the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. In addition, we seek comment on whether we should revise any of our current rules as applied to arrangements between nationwide providers and other entities, including our rules governing short-form applications. Further, we seek comment on whether any revisions to our rules governing long-form applications are necessary in light of our consideration of the potential harms and benefits of joint bidding and other arrangements.

[217] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6203 ¶ 171.

110. ***Background***. Rules and Policies Governing Joint Bidding. In 1994, the Commission adopted rules to "serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders."[218] The Commission also sought to help "ensure that the government receives a fair market price for the use of the spectrum."[219] The Commission further concluded that adopting safeguards to prevent collusive behavior among bidders would help "ensure prompt delivery of services (including to rural areas), rapid deployment of new services and technologies, development of competitive markets, and wide access to a variety of services."[220] Moreover, the Commission observed that collusive conduct among bidders could "prevent the formation of a competitive post-auction market structure."[221] At the same time, the Commission recognized that "if anticollusion rules are too strict or are not sufficiently clear, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities that might not otherwise be able to compete in the auction process."[222]

111. The Commission concluded that in most cases the number of bidders likely to participate in the auction, an auction design safeguards adopted by the Commission, and existing antitrust law would effectively deter collusion, but adopted certain measures to help ensure collusion would not jeopardize the competitiveness of the auction process.[223] Importantly, the Commission found these safeguards sufficient in the context of other competition-related determinations it had made regarding the initial licensing of Broadband PCS licenses through competitive bidding. Specifically, the Commission had set a limit on the amount of broadband PCS spectrum that the incumbent cellular licensees in each market could acquire at the upcoming PCS auctions as well as a separate limit on the amount of such spectrum that any bidder could acquire at the upcoming Broadband PCS auctions.[224] In 1991, the Commission had adopted

[218] *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2386 ¶ 221; *see also id*. at 2386–88 ¶¶ 221–26 (adopting rules to prevent collusion in the competitive bidding process, prior to the Commission's first auction in 1994). In 2006, the Commission conducted a limited review of its joint bidding rules. *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, 21 FCC Rcd 891, 892–93 ¶ 3 (2006) (adopting several modifications to the Commission's competitive bidding rules required by the Commercial Spectrum Enhancement Act and several modifications intended to enhance the effectiveness of the Commission's auctions program).

[219] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386 ¶ 221.

[220] *Id*. at 2385 ¶ 210.

[221] *Id*. at 2387 ¶ 223.

[222] *Id*. at 2386–87 ¶ 221.

[223] *Id*. at 2387, 2387–88 ¶¶ 223, 225. With respect to auction design safeguards, the Commission indicated that withholding bidder identities during the competitive bidding process "should help to deter anticompetitive conduct by impeding bidders' efforts to uncover the bidding strategies of their competitors." *Id*. at 2387 ¶ 224. In addition, the Commission observed that it "may establish a minimum bid or reservation price where appropriate to ensure that a fair value is received for a particular license or group of licenses or to reduce the likelihood of unjust enrichment." *Id*. The Communications Act was amended in 1997 to require use of a reasonable reserve price or minimum bid unless the Commission determines that such a reserve price or minimum bid is not in the public interest. 47 U.S.C. § 309(j)(4)(F).

[224] Specifically, cellular licensees were prohibited from holding a license of more than 10 megahertz of broadband PCS spectrum in any PCS license area that significantly overlapped with the cellular license area. *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, RM-7140, 7175, and 76-18, *Second Report and Order*, 8 FCC Rcd 7700, 7728, 7745 ¶¶ 61, 106–07 (1993). In addition, PCS licensees were prohibited from holding an ownership interest in frequency blocks that totaled more than 40 megahertz and served the same geographic area. *See id*. This PCS cap and the cellular/PCS cross-ownership rule were eliminated in 1996 in favor of a modified CMRS spectrum cap. *See* Amendment of Parts 20 and 24 of the Commission's Rules-Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 7869 ¶ 94 (1996). In addition, a few months

(continued….)

a cellular cross-interest rule that substantially limited any affiliation between the two cellular licensees in an area.[225]

112. With relatively minor changes adopted since 1994, the Commission's current rules allow potential participants in a Commission auction, prior to the short-form application deadline, to enter into various kinds of agreements related to the licenses being auctioned as long as the applicants disclose on the short-form application on both the existence (but not the terms and conditions) of any joint bidding arrangements and the real-parties-in-interest to the application.[226] After the short-form application deadline, applicants may not enter into any additional arrangements regarding the amount of bids, bidding strategies or particular licenses on which they will or will not bid, subject to certain limited exceptions,[227] and may not communicate bidding information to other applicants for licenses in any of the same geographic areas unless those other applicant(s) were identified on the short-form application.[228] Post-auction, winning bidders must disclose on the long-form application the specific terms, conditions, and parties involved in any agreement into which the applicant has entered, and the winning bidder must be the same entity that files the long-form application.[229]

113. We note that the Commission has always made clear with respect to its rules and policies governing joint bidding that "conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws,"[230] review under which is subject to other and differing standards under the Sherman and Clayton Acts.[231] Our auction procedures public notices for specific auctions caution that "[c]ompliance with the disclosure requirements of section 1.2105(c) will not insulate a party from

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after adopting its joint bidding rules, the Commission set aside the C and F Blocks in the broadband PCS band as "entrepreneurs' blocks" for individuals and entities under a certain financial size. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5580 ¶ 113.

[225] In particular, the rule prohibited any entity with an attributable interest in one cellular licensee from having a material ownership interest in the other licensee. *See* 47 C.F.R. § 22.942 (repealed 2004). *See also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6138 ¶ 9 (citing Amendment of Part 22 of the Commission's Rules to provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Services and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6248 App. D (1991)).

[226] 47 C.F.R. §§ 1.2105(a)(2)(ii), 1.2105(a)(2)(viii), 1.2107(d), 1.2112(a)(1). The Commission has adopted certain joint bidding rules applicable only in the designated entity (DE) context that allow an individual member of a bidding consortium of small or very small businesses to qualify for DE bidding credits based solely on the individual member's revenues, rather than having to qualify based on the aggregated revenues of all members of the consortium. 47 C.F.R. § 1.2110(b)(3)(i), 1.2110(c)(6).

[227] 47 C.F.R. § 1.2105(a)(2)(ix). *See* 47 C.F.R. § 1.2105(c)(2), 1.2105(c)(3), 1.2105(c)(4) (detailing exceptions for arrangements entered into after the short-form application deadline).

[228] *See* 47 C.F.R. § 1.2105(c)(1).

[229] 47 C.F.R. § 1.2107(d).

[230] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, WT Docket No. 93-253, *Memorandum Opinion and Order,* 9 FCC Rcd 7684, 7689 ¶ 12 (1994).

[231] Joint bidding arrangements subject to section 1 of the Sherman Act are prohibited if they constitute a "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1. Joint bidding arrangements subject to section 7 of the Clayton Act are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The Commission's review of joint bidding arrangements is subject to, among other things, the public interest goals set forth in Section 309(j) of the Communications Act. *See* 47 U.S.C. § 309(j)(3), 309(j)(4)(D). The Commission's "competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles." Applications of SoftBank Corp., Starburst II, Inc., Sprint Nextel Corp, and Clearwire Corp., IB Docket No. 12-343, *Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration*, 28 FCC Rcd 9642, 9651 ¶ 25 (2013).

enforcement of the antitrust laws."[232] Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject to forfeiture, prohibition from auction participation, and other sanctions.[233]

114. *Evolution of the Mobile Wireless Marketplace*. The Commission adopted these joint bidding rules 20 years ago when the mobile wireless industry was at a nascent stage: For example, at the end of 1994, the nationwide penetration rate for mobile wireless service was approximately 9 percent,[234] compared to 106 percent at the end of 2011.[235] Moreover, when the Commission adopted its joint bidding rules in 1994, it had yet to hold even the first of the numerous auctions it has conducted in its history of licenses likely to be used for mobile telephony/mobile broadband services.

115. The Commission's competitive bidding rules, as adopted in 1994, reflected the developing nature of the mobile wireless industry, as the Commission sought to promote economic growth in the "new wireless services" and "to enhance access to telecommunication services by encouraging broad participation in the provision of spectrum-based services and ensuring that spectrum-based services are available to a wide range of consumers."[236] In 1998, the Commission observed again that "[m]uch of the mobile telephone market is still in its infancy."[237]

116. Since 1994, and particularly in the past decade, the marketplace has changed significantly. It is no longer nascent. Consumer demand for wireless services has exploded, with the industry focus changing from the provision of mobile voice services to the provision of mobile broadband services.[238] The adoption of smartphones and tablet computers, and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, is driving significantly more intensive use of mobile networks and increasing providers' need for spectrum.[239] In addition, during the past decade, the wireless marketplace has undergone significant consolidation, with a reduction from six to four nationwide providers, an increase in the market share of the major providers, and a smaller number of regional and local providers.[240] Indeed, by December 2013,

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[232] *See, e.g.*, Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Bands Scheduled for January 14, 2014, Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 96, AU Docket No. 13-178, *Public Notice*, 28 FCC Rcd 13019, 13030 ¶ 31 (2013) ("Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace.").

[233] 47 C.F.R. § 1.2109(d).

[234] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 98-91, *Third Report*, 13 FCC Rcd 19746, 19766, Figure 3 (Mobile Telephony Industry 1993–1997) (1998) (*3rd Mobile Wireless Competition Report*).

[235] *See 16th Mobile Wireless Competition Report*, 28 FCC Rcd at 3956 ¶ 407. Penetration rates represent mobile wireless connections across geographic areas by estimating mobile wireless connections per 100 people. *Id*. at 3862 ¶ 252.

[236] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2350 ¶ 6. Moreover, the Commission stated that "[b]y establishing an efficient licensing mechanism that will promote the rapid deployment of a wide range of new products and services in all areas of the country, we seek to increase residential consumer and large user access to new technologies and services." *Id.* at 2350 ¶ 7.

[237] *3rd Mobile Wireless Competition Report*, 13 FCC Rcd at 19767.

[238] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6146 ¶ 23.

[239] *See id.* at 6134, 6146 ¶¶ 2, 23.

[240] *See id*. at 6144, 6146–47 ¶¶ 18, 24–25.

the top four facilities-based nationwide providers had combined market share of approximately 97 percent of subscribers.[241]

117. Consistent with the evolution of the mobile wireless marketplace and the Commission's statutory directives and policy goals, we continue to strive to adopt policies to preserve and promote consumer choice and competition among multiple service providers, promote the efficient and intensive use of spectrum, maximize economic opportunity, and foster the deployment of innovative technologies.[242] For instance, we recently concluded in the *Mobile Spectrum Holdings Report and Order* that any mobile spectrum limit on the initial licensing of a spectrum band through competitive bidding should be articulated and applied prior to the start of the auction in order to provide bidders greater certainty regarding how many licenses they would be permitted to acquire.[243]

118. In the *Mobile Spectrum Holdings Report and Order*, we established a market-based spectrum reserve for the Broadcast Television Spectrum Incentive Auction of up to 30 megahertz in each license area, recognizing that the Incentive Auction represents a once-in-a-generation opportunity to auction significant amounts of greenfield low-band spectrum.[244] We limited nationwide providers from bidding on reserved spectrum in Partial Economic Areas ("PEAs") where they hold 45 megahertz or more of suitable and available below-1-GHz spectrum.[245] By contrast, we permitted regional and local service providers to bid on reserved spectrum in all PEAs, observing that non-nationwide service providers present a significantly lower risk of effectively denying their rivals access to low band spectrum to foreclose competition or to raise rivals' costs because of their relative lack of resources.[246] At the same time, in the *Mobile Spectrum Holdings Report and Order*, the Commission placed no limitation on the amount of spectrum that bidders could acquire in the AWS-3 auction.[247]

119. In the *Mobile Spectrum Holdings Report and Order*, we also stated we would consider in a Further Notice of Proposed Rulemaking possible changes to certain auction rules relating to joint bidding arrangements and strategies in the Incentive Auction.[248] We here undertake a reexamination of our auction rules on these issues, including but not limited to their application in the Incentive Auction.

120. ***Discussion***. In light of the changes in the mobile wireless marketplace since the Commission adopted the current joint bidding rules 20 years ago, we review our rules on joint bidding and other arrangements to ensure that the potential competitive harms that may arise out of such arrangements do not outweigh any public interest benefits. To best serve the public interest and preserve

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[241] UBS Investment Research, *US Wireless 411: Version 51*, Mar. 18, 2014, Figure 21 at 14. By contrast, as of December 2003, the top six facilities-based nationwide providers accounted for approximately 79 percent of mobile wireless subscribers in the country. *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6147 ¶ 25 (citing Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 04-111, *Ninth Report,* 19 FCC Rcd 20597, 20697 Appendix A, Table 1 (CTIA's Semi-Annual Mobile Telephone Industry Survey) & Table 4 (Top 25 Mobile Telephony Operators by Subscribers) (2004).

[242] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6145 ¶ 21. *See also* 47 U.S.C. § 309(j)(3)(B).

[243] *Id*. at 6192–93 ¶¶ 139–44.

[244] *Id*. at 6196 ¶ 153. *See also BIA Report and Order*, 29 FCC Rcd at 6708 ¶ 325.

[245] *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6196 ¶ 153.

[246] *Id*. at 6207 ¶ 180. The Commission characterized "nationwide" providers as Verizon Wireless, AT&T, Sprint, and T-Mobile, with other providers characterized as "non-nationwide." *Id*. at 6206 n.502 (citing *16th Annual Competition Report*, 28 FCC Rcd at 3736–37 ¶ 26). In the discussion section below, we propose to define nationwide and non-nationwide providers in the same manner for purposes of this proceeding.

[247] *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6174–75 ¶ 222.

[248] *Id*. at 6203 ¶ 171.

and promote robust competition into the foreseeable future, we seek to further our statutory objectives today by adopting policies tailored to the type of arrangement and its likely competitive effect on the conduct of the auction and on the mobile wireless marketplace.[249] Specifically, we tentatively conclude that it would serve the public interest to retain the current rules governing joint bidding and other arrangements among non-nationwide providers, but to prohibit certain joint bidding and other arrangements among nationwide providers. In addition, we seek comment on whether we should revise any of our current rules as applied to arrangements between nationwide providers and other entities, including our rules governing short-form applications. Further, we seek comment on whether any revisions to our rules governing long-form applications are necessary in light of our consideration of the potential harms and benefits of joint bidding and other arrangements.

121. For purposes of this proceeding, we define "joint bidding and other arrangements" to include any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation. In light of our focus on promoting and preserving competition, we consider this definition to include not only arrangements among entities that apply to bid in an auction, but also arrangements between entities that apply to bid in an auction and those entities that do not, insofar as such arrangements have the potential to affect competition in the mobile wireless telephony/mobile broadband marketplace.

122. *Competitive Effects of Joint Bidding and Other Arrangements*. When assessing the competitive effects of joint bidding and other arrangements, we must ensure that our policies and rules facilitate access to spectrum in a manner that promotes competition to the benefit of consumers.[250] As the Commission has found, in order for there to be robust competition, multiple competing service providers must have access to or hold sufficient spectrum to be able to enter the marketplace or expand output rapidly in response to any price increase, reduction in quality, or other competitive change that would harm consumer welfare.[251]

123. Joint conduct or competitor collaboration that is more limited in scope and does not result in a full integration of economic activity does not end all competition between participants post bidding and are analyzed differently from joint ventures that fully integrate the participants downstream

[249] In particular, Section 309(j)(3) of the Communications Act provides that, in designing systems of competitive bidding, the Commission must (1) "include safeguards to protect the public interest in the use of the spectrum," and must seek to promote various objectives, including (2) "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," (3) encouraging rapid deployment "including … in rural areas," and (4) promoting "efficient and intensive use" of spectrum. 47 U.S.C. § 309(j)(3). Our auction rules must also "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." 47 U.S.C. § 309(j)(4)(D).

[250] A key element of this determination is whether the relevant agreement would likely harm competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. *See* U.S. Dept. of Justice & Federal Trade Commission, Antitrust Guidelines for Collaboration Among Competitors (2000) at §1.2 (FTC/DOJ Competitor Collaboration Guidelines).

[251] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6144 ¶ 17. *See, e.g.,* Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corp., Horizon Wi-Com, LLC, Nextwave Wireless, Inc., and San Diego Gas & Electric Company for Consent to Assign and Transfer Licenses, WT Docket No. 12-240, *Memorandum Opinion and Order*, 27 FCC Rcd 16459, 16467 ¶ 20 (2012); Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, WT Docket No. 12-4, *Memorandum Opinion and Order*, 27 FCC Rcd 10698, 10716 ¶ 47 (2012); Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations, WT Docket No. 11-18, *Order*, 26 FCC Rcd 17589, 17601–02 ¶ 30 (2011).

competition. The latter, in certain circumstances, may be properly analyzed as a merger.[252] Either type of competitor collaboration however may result in procompetitive benefits and/or anticompetitive effects.

124. Because some joint bidding and other competitor collaborations contemplate competition among participants post auction, they raise the risk that the spectrum acquired through a winning bid will be allocated among the joint venture participants in a manner that could harm the public interest.[253] Because the joint venture may be comprised of same market competitors, the arrangement may require proper safeguards to prevent the exchange of competitively sensitive price and output information, ensure independent decision making or otherwise avoid lessening competition among the participants in the downstream mobile wireless marketplace.[254]

125. Joint bidding and other arrangements, however, also have the potential to result in procompetitive benefits if they enable participation in auctions by those otherwise without sufficient financial resources to bid, or otherwise reduce entry costs into a geographic area or enable the joint bidders to compete more robustly against other competitors in the marketplace. For example, the pooling of capital resources could allow smaller providers to better exploit financial economies of scale[255] and enter into bidding for geographic areas that otherwise would not have been accessible, which may be particularly important given the high capital costs of network deployment and spectrum acquisition.

126. We seek comment on the foregoing analysis. The Commission's public interest review of applications for assignment of licenses through competitive bidding generally encompasses a review of the competitive effects of such assignments. In light of the changing marketplace described above, and consistent with our recent emphasis in the *Mobile Spectrum Holdings* proceeding on the need for clearly-defined rules prior to the auction on the licenses a bidder would be permitted to acquire, we seek comment on how best to conduct our competitive review of joint bidding arrangements going forward.

127. Given the potential benefits and harms of different types of arrangements, we seek comment on the rules and procedures that should govern the Commission's review of joint bidding and other arrangements entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation. In addition, we seek comment on whether the distinctions that we set forth below—as to arrangements among non-nationwide providers, among nationwide providers, and between nationwide providers and other entities—provide an effective framework for addressing the relative harms and benefits of joint bidding arrangements in light of our goal of providing clearly-defined rules for potential bidders in auctions. Further, we seek comment on whether these rules or procedures should differ in instances in which the Commission has adopted a mobile spectrum holding limit for the initial licensing of a particular spectrum band through competitive

[252] *See* FTC/DOJ Competitor Collaboration Guidelines at § 1.3. This is ordinarily the case where the collaboration is a full integration of the participants and eliminates all competition among them and does not terminate within a sufficiently limited period by its own specific and express terms. *See id.*

[253] Additionally, joint bidding and other arrangements have the potential to limit the number of bidders at auction. We caution that unlike mergers or joint ventures involving full integration, certain kinds of joint bidding and other arrangements are *per se* illegal under Section 1 of the Sherman Act. *See id*. at § 1.2. These include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. *Id.* As noted above, our Part 1 competitive bidding rules are not intended in any way to provide an exemption from the application of the antitrust laws, and our analysis below of the competitive effects of joint bidding and other arrangements for purposes of determining whether and to what extent to revise those Commission rules is not intended to address the application of antitrust law.

[254] *Id*. at § 2.2.

[255] "Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. . . [a] collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant." *Id*. §2.1.

bidding and, if so, how the type of mobile spectrum holding limit and the statutory goals applicable to the particular auction should affect these rules and procedures.

128. For purposes of the joint bidding rules, we propose to define "nationwide" providers to include the providers in the U.S. with networks that cover a majority of the population and land area of the country—currently, Verizon Wireless, AT&T, Sprint, and T-Mobile—with other providers being considered "non-nationwide" providers.[256] We seek comment on how this definition of nationwide providers should take into account entities partially owned by Verizon Wireless, AT&T, Sprint, and T-Mobile. Should the definition include entities that are "affiliates" (as that term is defined in our rules for attributing revenues to small businesses) of the four providers, entities with spectrum holdings that would be attributable to these four providers (as defined by our mobile spectrum holdings rules), or a category of entities defined in some other manner?[257]

129. *Arrangements among Non-Nationwide Providers*. Considering the current competitive landscape and the need for access to spectrum by non-nationwide providers, we tentatively conclude that our current rules are sufficient to prevent any potential competitive harm from outweighing the likely public interest benefits associated with allowing joint bidding and other arrangements among non-nationwide providers. For example, joint bidding and other arrangements among non-nationwide providers can better overcome the challenging capital costs of license acquisition to maintain or increase their competitive presence to the benefit of American consumers. In light of the relatively small size and scope of non-nationwide providers following substantial consolidation since our current rules were adopted, and the increased costs of spectrum and other capital expenditures necessary to provide mobile broadband service over large license areas, we believe it is highly unlikely in most circumstances that such arrangements would lead to competitive harm or otherwise harm the public interest. In addition, we have observed that non-nationwide service providers present a significantly lower risk of effectively denying their rivals access to spectrum in order to foreclose downstream competition or to raise rivals' costs because of their relative lack of resources.[258] We seek comment on these views in connection with the competitive impact of joint bidding and other arrangements.

130. Commenters proposing any changes to our joint bidding rules for arrangements among non-nationwide providers should discuss why such changes are necessary to address particular competitive concerns and whether, on balance, such changes would ensure that the pro-competitive benefits and bidding flexibility arising out of our current rules remain in place. In addition, we seek comment on whether any types of arrangements between non-nationwide service providers and potential new entrants would warrant closer examination of the competitive effects and, if so, whether any changes to our joint bidding rules are necessary to address any such scenarios.

131. *Arrangements among Nationwide Providers*. In contrast, we tentatively conclude that joint bidding arrangements between or among nationwide providers likely would raise competitive

[256] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6206 n.502 (citing *16th Annual Competition Report*, 28 FCC Rcd at 3736–37 ¶ 26).

[257] *See, e.g.,* 47 C.F.R. § 1.2110(c)(5)(i) (An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity (A) directly or indirectly controls or has the power to control the applicant, or (B) is directly or indirectly controlled by the applicant, or (C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or (D) has an "identity of interest" with the applicant); 47 C.F.R. § 20.22(b) (attributable interests include (1) controlling interests, (2) non-controlling interests of ten percent or more, (3) certain interests in spectrum, including (i) officers and directors of the licensee, (ii) indirectly held ownership interests pursuant to the Commission's successive multiplication rule, (iii) certain persons who manage operations of the licensee pursuant to a management agreement, (iv) licensees and affiliates who enter into joint marketing arrangements with another licensee or affiliate, (v) limited partnership interests, (vi) certain debts and instruments, and (vii) certain long-term *de facto* transfer leasing arrangements).

[258] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6207 ¶ 180.

concerns, as these arrangements would have the potential to serve as a vehicle for anticompetitive conduct by altering post auction incentives to compete, and thus, would outweigh any public interest benefits from such arrangements such as the attainment of scale or scope economies. As the Commission has noted, the mobile wireless marketplace today is characterized by factors—such as high market concentration, high margins and high barriers to entry—that increase the potential for anticompetitive conduct.[259] In particular, by year end 2013, the top four facilities-based nationwide providers had a combined market share, as measured by number of subscribers or mobile wireless service revenues, of at least 97 percent.[260]

132. Moreover, in light of these factors, joint bidding arrangements among nationwide providers would reduce the participants' ability or incentive to compete independently, which would lessen competition in the downstream mobile wireless marketplace and could harm American consumers by increasing the price or reducing the quality of mobile wireless services.[261] Because of these greater risks of public interest harms, we believe it is unlikely that the potential benefits of joint bidding arrangements among nationwide providers would outweigh these risks. We seek comment on this analysis.

133. Further, as we have emphasized recently, it is important to provide bidders with certainty and clarity in advance of the start of an auction regarding whether any limitations on their ability to acquire licenses would apply.[262] In that regard, we observe that post-auction enforcement of antitrust law—envisioned as a safeguard by the Commission in 1994[263]—may not be as well suited to preventing anti-competitive joint bidding arrangements as the bright-line prohibition we propose herein.[264] In addition, we note that, while in 1994 bright-line prohibitions on certain types of bidding arrangements

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[259] *See id*. at 6165 ¶ 62 (citing Submission of the United States Department of Justice, WT Docket No. 12-269, at 2 (filed May 14, 2014) (DOJ May 14, 2014 *Ex Parte*); Submission of the United States Department of Justice, WT Docket No. 12-269, at 11 (filed Apr. 11, 2013) (DOJ Apr. 11, 2013 *Ex Parte*)).

[260] *See Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6147 ¶ 25 (citing UBS Investment Research, *US Wireless 411: Version 51*, Mar. 18, 2014, Figure 21 at 14); UBS Investment Research, *US Wireless 411: Version 51*, Mar. 18, 2014, at 14 and 19.

[261] In the *Mobile Spectrum Holdings Report and Order*, we observed that "[t]oday's mobile wireless marketplace is characterized by factors that, according to DOJ, increase the potential for anticompetitive conduct, including high market concentration, highly concentrated holdings of low-band spectrum, high margins, and high barriers to entry." 29 FCC Rcd at 6165 ¶ 62 (citing DOJ May 14, 2014 *Ex Parte* at 2; DOJ Apr. 11, 2013 *Ex Parte* at 11). Moreover, to the extent that a joint bidding arrangement includes a full integration of economic activity among participants such that they will no longer independently compete, the joint venture may raise competitive concerns similar to those raised in a merger, i.e., whether as a result of the integration, the newly formed joint venture, would have the incentive or ability to increase prices, decrease quality, or reduce investment and innovation to the detriment of American consumers.

[262] *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6192–93 ¶¶ 139–44 (declining to continue applying as a matter of routine its spectrum screen to post-auction review of applications for assignment of licenses through competitive bidding, and finding that any mobile spectrum limit on the initial licensing of a spectrum band through competitive bidding should be articulated and applied prior to the start of the auction in order to provide bidders greater certainty regarding how many licenses they would be permitted to acquire).

[263] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 226. Regarding existing antitrust law, the Commission articulated that "[w]here specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions." *Id*.

[264] As noted above, DOJ review and FCC review of joint bidding and other arrangements are conducted under different standards, and compliance with one is not a safe harbor for compliance with the other.

might not have been ideally suited for an industry at a nascent stage, as discussed in the background section above, the mobile wireless industry today is much more mature than it was in 1994. Moreover, the limit set by the Commission at that time on the amount of broadband PCS spectrum that the two incumbent cellular licensees in each market could acquire at the auctions effectively eliminated the incentives of those providers to enter into joint bidding arrangements, which would have raised significant competitive concerns.

134. Accordingly, we tentatively conclude that it would best serve the public interest at this time to have a bright-line rule that would prohibit joint bidding and other arrangements among nationwide providers, including agreements to participate in an auction through a newly formed joint entity, given that such arrangements have a greater potential to harm the public interest by negatively affecting the competitive bidding process and downstream competition in the provision of mobile wireless services. We seek comment on the costs and benefits of prohibiting applications to participate in an auction that involve joint bidding and other arrangements, such as a new joint venture, between two or more nationwide providers. We note that our tentative conclusion to prohibit joint bidding and other arrangements between two nationwide providers would also include prohibiting arrangements among two nationwide providers, together with other entities.

135. *Arrangements between A Nationwide Provider and Other Entities*. We seek comment on what policies and procedures should apply to bidding arrangements between a single nationwide provider and other entities, either non-nationwide providers or potential new entrants, in order to promote competition. Under what circumstances would these arrangements raise competitive concerns? Under what circumstances would these arrangements likely result in public interest benefits, such as the expansion of mobile wireless services in additional geographic areas and increasing access to capital by more applicants to acquire spectrum? Should any limits apply to these types of arrangements, or should we continue to review these types of arrangements on a case-by-case basis?

136. If we review these types of arrangements on a case-by-case basis, what process and factors should we use in assessing the competitive implications? Our current approach for reviewing joint ventures in the context of assignment or transfer of licenses involves the determination of the appropriate market definitions and the likelihood of public interest harm from the incentive and ability of the joint venture to act anticompetitively, either unilaterally or in concert with other service providers.[265] Should a similar approach apply to our competitive review of joint bidding arrangements? How should a case-by-case approach to review joint bidding arrangements be designed to provide clarity to potential bidders?[266] What are the costs and benefits of Commission review of joint bidding arrangements on a case-by-case basis, including the administrative cost and burden to make such a case-by-case determination prior to the start of an auction?

137. To make case-by-case determinations regarding arrangements between nationwide providers and other entities, should we modify any of our current rules that apply to the pre-auction review process? In particular, should the terms and conditions of such joint bidding arrangements be disclosed prior to the auction, in the short-form application, or even prior to the filing of that application? If so, are there changes to our rules or procedures that would be necessary to protect any confidential information? If the deadline for disclosure of terms and conditions is in advance of the short-form

[265] Applications of GCI Communications Corp, ACS Wireless License Sub Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc., for Consent to Assign Licenses to the Alaska Wireless Network, LLC, WT Docket No. 12-187, WC Docket No. 09-197, *Memorandum Opinion and Order and Declaratory Ruling*, 28 FCC Rcd 10433, 10447, 10446–47 ¶ 33, nn.102, 103 (2013). We analyze whether the joint venture changes the ability or incentive of each applicant to compete independently at the retail level and whether their formation of a production joint venture and other arrangements are reasonably necessary to achieve the asserted procompetitive benefits.

[266] In the *Mobile Spectrum Holdings Report and Order*, we found that upfront, clear determinations would provide potential bidders with greater certainty in the auction process regarding how much spectrum they would be permitted to acquire at auction. 29 FCC Rcd at 6192 ¶ 139.

application deadline, how would this process be affected by the rules prohibiting certain types of communications? Commenters on this issue should include any costs or benefits to changing the rules and procedures regarding the disclosure of a joint bidding requirement.

138. If we were to make a determination that the potential harms associated with a particular joint bidding arrangement outweigh the potential benefits, what remedies should the Commission impose either at the short-form application stage or the long-form application stage? For example, should the Commission find that a short-form application is unacceptable or incomplete and bar the applicant from bidding in the auction? Should the Commission find that an applicant at the long-form stage is unqualified to hold the license and deemed in default? Commenters proposing particular remedies should discuss the costs and benefits of such remedies.

139. *Other Issues*. Our current rules require the entity that filed the short form application to be the same entity that files the long form application (FCC Form 601) seeking consent to acquire a new license.[267] Our public interest review of long form applications generally encompasses a review of the competitive effects of such assignments, as would our review of a secondary market transaction to disseminate licenses from a joint entity to its individual members. We seek comment on whether it is necessary to modify our current joint bidding rules, standards, and procedures that apply to the post-auction review of long-form applications or review of a secondary market transaction to disseminate licenses from a joint entity to its individual members, in order to promote competition in the mobile wireless marketplace.

140. Further, we propose to clarify that the provision that permits DEs to participate in an auction as a non-legally-recognizable consortium, with a requirement that each member of the consortium file separate applications for licenses covered by the winning bids of the consortium,[268] is applicable only in the DE context, where there are special provisions regarding the attribution of revenues for purposes of qualifying for bidding credits. We seek comment on this clarification.

D. Miscellaneous Part 1 Revisions

141. ***Background***. Part 1, Subpart Q, of our rules generally governs competitive bidding proceedings to assign spectrum licenses.[269] In Appendix A, in addition to changes that would implement the proposals discussed above, we propose changes to two of our Part 1, Subpart Q, rules, sections 1.2111 and 1.2112. We also intend, when we resolve the issues raised in this NPRM, to resolve long standing petitions for reconsideration to our Part 1 competitive bidding rules.[270]

142. ***Discussion***. *Section 1.2111*. We propose to repeal the first two paragraphs of section 1.2111. We propose to repeal section 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information. We believe that this requirement places a burden on licensees without a corresponding benefit to the Commission or the public. We also propose to repeal section 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses.

143. *Section 1.2112*. Our proposed changes to this rule would clarify the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. We propose further changes to specify application requirements for bidding consortia. Finally, we propose to correct two errors in the rule caused by the inadvertent substitution of an incorrect

[267] *See* 47 C.F.R. § 1.2107(c). See ¶ 112 above for an explanation of the disclosure requirements for agreements and for parties to those agreements on the short-form application.

[268] 47 C.F.R. § 1.2107(f).

[269] *See* 47 C.F.R. § 1.2101 (explaining that the provisions of Subpart Q implement section 309(j) of the Act, as added by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66) and subsequent amendments).

[270] *See* note 3.

paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the *DE Second Report and Order*.[271] The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. We propose to delete the requirement with respect to the short-form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum licenses. We propose to reinstate this requirement.

144. We seek comment on the above proposals.

IV. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

145. *Requests for Ex Parte Meetings*. The proceeding this NPRM initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[272] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Comment Period and Filing Procedures

146. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All filings related to this NPRM should refer to WT Docket No. 14-170. Further, we strongly encourage parties to develop responses to this NPRM that adhere to the organization and structure of this NPRM. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

[271] *Compare* 71 Fed. Reg. 26245, 26253 (May 4, 2006) (publishing summary of *DE Second Report and Order*, 21 FCC Rcd 4753), *with* 47 C.F.R. § 1.2112 (Oct. 1, 2006).

[272] 47 C.F.R. §§ 1.1200 *et seq.*

147. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

148. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

C. Initial Regulatory Flexibility Analysis

149. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B.

D. Paperwork Reduction Act Analysis

150. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

E. Further Information

151. For further information about this NPRM, please contact Kathryn Hinton at (202) 418-0660, Kathryn.Hinton@fcc.gov.

V. ORDERING CLAUSES

152. IT IS ORDERED that pursuant to sections 1, 4(i), 303(r), 309(j), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), and 316, this *Notice of Proposed Rule Making* IS ADOPTED.

153. IT IS FURTHER ORDERED that the Petition for Expedited Rulemaking filed by DIRECTV Group, Inc. and EchoStar LLC on June 8, 2007, RM-11395, IS GRANTED to the extent provided for herein and IS OTHERWISE DENIED.

154. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rule Making,* including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 1 and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

2. Section 1.2105 is amended by revising paragraphs (a)(2)(xi) and (b)(1) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of certain communications.

* * * * *

(a) * * *

(2) * * *

(xi) An attached statement made under penalty of perjury indicating whether or not the applicant has been in default on any Commission license or has been delinquent on any non-tax debt owed to any Federal agency. For purposes of this certification, an applicant may exclude from consideration as a former default any default on a Commission license or delinquency on non-tax debt to any Federal agency that has been resolved and meets any of the following criteria: (1) the notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.

(xii) * * *

(b) Modification and Dismissal of Short-Form Application (FCC Form 175).

(1) (a) Any short-form application (FCC Form 175) that does not contain all of the certifications required

pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be deemed incomplete, the applicant will not be found qualified to bid, and the upfront payment, if paid, will be returned.

(b) If (i) an individual or entity submits multiple applications in a single auction; or (ii) entities commonly controlled by the same individual or same set of individuals submit applications for any set of licenses in the same or overlapping geographic areas in a single auction; then only one of such applications may be deemed complete, and the other such application(s) will be deemed incomplete, such applicants will not be found qualified to bid, and the associated upfront payment(s), if paid, will be returned.

* * * * *

3. Section 1.2106 is amended by revising paragraph (a) to read as follows:

§ 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that, pursuant to § 1.2105(a)(2)(xi), certifies that it is a former defaulter must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

* * * * *

4. Section 1.2110 is amended by removing paragraphs (b)(3)(iv) and (n); redesignating paragraphs (o) and (p) as paragraphs (n) and (o); and revising paragraphs (b)(1)(i) and (ii), (f)(2), and (j) to read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) * * *

(1) * * *

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a

cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

* * * * *

(b) * * *

(3) * * *

(iv) [Removed]

(c) * * *

* * * * *

(f) * * *

(2) Size of bidding credits. A winning bidder that qualifies as a small business may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding 3 years not exceeding $4 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding 3 years not exceeding $20 million are

eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding 3 years not exceeding $55 million are eligible for bidding credits of 15 percent.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity. Designated entities also must provide the date(s) on which they entered into of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

* * * * *

(n) [Removed]

(o) [Redesignated as (n)] * * *

(p) [Redesignated as (o)] * * *

5. Section 1.2111 is revised to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Unjust enrichment payment: installment financing.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of

assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee's losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee's qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

(b) Unjust enrichment payment: bidding credits.

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit makes any ownership change or enters into any agreement that would result in the licensee's losing eligibility for a bidding credit (or qualifying for a

lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring or under the agreement), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (b)(1) of this section will be reduced over time as follows:

(A) A loss of eligibility in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A loss of eligibility in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 75 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(C) A loss of eligibility in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 50 percent of the difference between the bidding credit received and the bidding credit for which it is eligible);

(D) A loss of eligibility in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit (or in the case of eligibility changing to qualify for a lower bidding credit, 25 percent of the difference between the bidding credit received and the bidding credit for which it is eligible); and

(E) For a loss of eligibility in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change or reportable eligibility event (see § 1.2114).

(c) Unjust enrichment: partitioning and disaggregation--

(1) Installment payments. Licensees making installment payments, that partition their licenses or

disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) Apportioning unjust enrichment payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

6. Section 1.2112 is revised to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

(a) * * *

(1) * * *

(7) List any FCC-regulated entity or applicant for an FCC license, in which the applicant or any of the parties identified in paragraphs (a)(1) through (a)(5) of this section holds a 10 percent or greater ownership interest, regardless of the type of business entity, including both active and passive interests. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant (e.g., Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C, then Companies A and C must be listed on Company B's application, where C is an FCC licensee and/or license applicant).

(b) * * *

(1) * * *

(iii) List all parties with which the applicant has entered into arrangements for the spectrum lease or resale (including wholesale arrangements) of any of the capacity of any of the applicant’s spectrum.

(iv) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for

each of the following: The applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium.

(v) If applying as a consortium under § 1.2110(b)(3)(i), provide the information in paragraphs (b)(i)-(iv) separately for each member of the consortium.

(2) * * *

(ii) List any FCC-regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

(vii) * * *

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium; and

* * * * *

7. Section 1.9020 is amended by revising paragraph (d)(4) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

* * * * *

(d) * * *

(4) Designated entity/entrepreneur rules. A licensee that holds a license pursuant to small business and/or

entrepreneur provisions (see § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (see § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (see § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (see § 1.2110) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (see § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a "controlling interest" or "affiliate" (see § 1.2110) of the licensee such that the licensee would lose its eligibility as a designated entity or entrepreneur.

(5) * * *

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

8. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

9. Section 27.1301 is amended by removing the introductory text and revising paragraphs (a)(1) and (2) to read as follows:

§ 27.1301 Designated entities in the 600 MHz band.

(a) Eligibility for small business provisions.

(1) A small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding $55 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding $20 million for the preceding three (3) years.

* * * * *

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking ("NPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments indicated on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the NPRM and this IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The NPRM initiates a proceeding to revise certain of the Part 1 competitive bidding rules in advance of an auction that holds historic potential for interested applicants to acquire licenses for below 1-GHz spectrum in the Broadcast Television Spectrum Incentive Auction ("BIA"). The NPRM therefore proposes to reform some of the Commission's general Part 1 rules governing competitive bidding for spectrum licenses to reflect changes in the marketplace, including the challenges faced by new entrants. The NPRM's proposals also advance the statutory directive to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities" or "DEs")[4] are given the opportunity to participate in the provision of spectrum-based services, and fulfill the commitment made in the *BIA Report & Order*.[5] Together these proposals will assure that the Commission's Part 1 rules continue to promote the Commission's fundamental statutory objectives. The Commission expects to act on the issues raised in the NPRM soon enough to allow all parties to account for any changes while planning for the BIA.

3. Specifically, the NPRM proposes to:

- Provide small businesses greater opportunity to participate in the provision of a wide range of spectrum-based services by modifying the Commission's eligibility

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] In 1995, the Supreme Court decided *Adarand Constructors*, holding that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of review. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–30 (1995) (*Adarand Constructors*). The Court subsequently held in *VMI* that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (*VMI*). In response to the Court's holding, the Commission decided that it would use race- and gender-neutral provisions until it had developed a record that would provide the evidentiary support necessary to withstand this standard of review, and maintain provisions for small businesses. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975–77 ¶¶ 1–3 (1996). The Commission has noted that many minority- and women-owned businesses qualify for the provisions that the Commission has adopted for small businesses. Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15318–19 ¶¶ 45–48 (2000), citing *Adarand Constructors*, 515 U.S. at 227.

[5] *See, e.g.*, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6567, 6762 ¶ 474 (2014) (*BIA Report and Order*).

requirements, updating the standardized schedule of small business sizes, and eliminating duplicative reporting requirements, while also seeking comment on strengthening our rules to prevent the unjust enrichment of ineligible entities;

- Amend the Commission's former defaulter rule to balance concerns that the current rule is overly broad with the Commission's continued need to ensure that auction bidders are financially reliable;
- Codify an established competitive bidding procedure that prohibits the same individual or entity from becoming qualified to bid on the basis of more than one short form application in a specific auction;
- Prevent entities that are exclusively controlled by a single individual or set of individuals from becoming qualified to bid on overlapping licenses based on more than one short-form application in a specific auction; and,
- Retain the current rules governing joint bidding arrangements among non-nationwide providers and prohibit joint bidding arrangements among nationwide providers.

The NPRM also provides notice of the Commission's intention to resolve long standing petitions for reconsideration and proposes necessary clean up revisions to the Commission's Part 1 competitive bidding rules.[6]

4. With respect to small businesses, the NPRM's proposals seek to update the Commission's rules to reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today's communications marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks.[7] This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum.[8] In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve.[9] The Commission anticipates that by revising its rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, the Commission can better achieve its statutory directives.[10] Nonetheless, the Commission remains mindful of its obligation to prevent unjust enrichment of ineligible entities.[11]

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[6] *See* Petition for Partial Reconsideration and/or Clarification, Blooston, Mordkofsky, Dickers, Duffy & Prendergast, LLP ("Blooston"), WT Docket No. 05-211, filed June 2, 2006; Petition for Reconsideration and Clarification, Cook Inlet Region, Inc., filed June 5, 2006; Reply to Opposition to Petitions for Reconsideration, Blooston, filed July 24, 2006; Petition for Reconsideration, National Telecommunications Cooperative Association, filed Mar. 9, 2006; Petition for Clarification and/or Reconsideration, Blooston, filed Mar. 9, 2006.

[7] *See* Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6133, 6146 ¶ 23 (2014) (*Mobile Spectrum Holdings Report and Order*).

[8] *Id.*

[9] *Id.* at 6144 ¶ 18, 6206 ¶ 179.

[10] Once effective, these revised rules will allow all licensees that have acquired licenses with or without DE benefits this increased flexibility.

[11] 47 U.S.C. § 309(j)(4)(E).

B. Legal Basis

5. The proposed action is authorized under sections 1, 4(i), 303(r), 309(j), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 303(r), 309(j), and 316.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[15]

7. Small Businesses, Small Organizations, and Small Governmental Jurisdictions. If adopted, the NPRM's proposals may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[16] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[17] In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[18] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[19] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[20] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[21] We estimate that, of this total, as many as 88,506 entities may qualify as "small governmental jurisdictions."[22] Thus, we estimate that most governmental jurisdictions are small.

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[12] 5 U.S.C. § 603(b)(3).

[13] 5 U.S.C. § 601(6).

[14] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[16] *See* 5 U.S.C. § 601(3)–(6).

[17] *See* SBA, Office of Advocacy, Frequently Asked Questions, http://www.sba.gov/sites/default/files/sbfaq.pdf (showing figures from 2009) (last visited Aug. 8, 2014).

[18] 5 U.S.C. § 601(4).

[19] INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

[20] 5 U.S.C. § 601(5).

[21] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427: Number of Local Governments by Types–States: 2007, *available at* http://www.census.gov/prod/2011pubs/11statab/stlocgov.pdf.

[22] The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental

(continued….)

8. Licenses Assigned by Auction. The changes and additions to the Commission's rules proposed in the NPRM are of general applicability to all auctionable services. Accordingly, this IRFA provides a general analysis of the impact of the proposals on small businesses rather than a service-by-service analysis. The number of entities that may apply to participate in future Commission spectrum auctions is unknown. Moreover, the number of small businesses that have participated in prior spectrum auctions has varied. As a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of changes in control, changes in material relationships or assignments or transfers, unjust enrichment issues are implicated.

9. Wireless Telecommunications Carriers (except satellite). The Census Bureau defines this category to include "establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services."[23] The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except satellite).[24] Under the SBA's standard, a business is small if it has 1,500 or fewer employees.[25] For this category, Census data for 2007 show that there were 1,383 firms that operated for the entire year.[26] Of this total, 1,368 firms (approximately 99%) had employment of 999 or fewer employees and only 15 (approximately 1%) had employment of 1,000 employees or more.[27] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by the NPRM's proposed actions.[28]

10. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).[29] In connection with the 1996 BRS auction, the

(Continued from previous page)
organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 88,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. *Id.* at Tables 427, 426 (data cited therein are from 2007).

[23] U.S. Census Bureau, Industry Statistics Portal, 2012 NAICS: 517210 – Wireless telecommunications carriers (except satellite), Definition & Comparability, http://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6# (last visited Aug. 11, 2014).

[24] 13 C.F.R. § 121.201, NAICS code 517210.

[25] *Id.*

[26] U.S. Census Bureau, 2007 Economic Census, Table No. EC0751SSSZ5, Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 (NAICS Code 517210), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table (last visited Aug. 19, 2014).

[27] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1,000 employees or more." *Id.*

[28] *See id.*

[29] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the (continued….)

Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[30] The BRS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, based on our review of licensing records, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).[31] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[32] The Commission established three small business size standards that were used in Auction 86: (i) an entity with attributed average annual gross revenues that exceeded $15 million and do not exceed $40 million for the preceding three years was considered a small business; (ii) an entity with attributed average annual gross revenues that exceeded $3 million and did not exceed $15 million for the preceding three years was considered a very small business; and (iii) an entity with attributed average annual gross revenues that did not exceed $3 million for the preceding three years was considered an entrepreneur.[33] Auction 86 concluded in 2009 with the sale of 61 licenses.[34] Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses. We note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service.

11. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based educational broadcasting services. Since 2007, Wired Telecommunications Carriers have been defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[35] Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution

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Communications Act—Competitive Bidding, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995).

[30] 47 C.F.R. § 21.961(b)(1) (1996).

[31] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

[32] Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, AU Docket No. 09-56, *Public Notice*, 24 FCC Rcd 8277 (2009).

[33] *Id.* at 8296.

[34] Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

[35] U.S. Census Bureau, 2012 NAICS Definitions: 517110 Wired Telecommunications Carriers, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012 (last visited Aug. 19, 2014).

services using facilities and infrastructure that they operate are included in this industry.[36] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[37] Census data for 2007 shows that there were 3,188 firms that operated for the duration of that year.[38] Of those, 3,144 had fewer than 1,000 employees, and 44 firms had more than 1,000 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small. In addition to Census data, the Commission's Universal Licensing System indicates that as of July 2014, there are 2,006 active EBS licenses. The Commission estimates that of these 2,006 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[39]

12. Television Broadcasting. This economic census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[40] The SBA has created the following small business size standard for Television Broadcasting firms: those having $38.5 million or less in annual receipts.[41] The Commission has estimated the number of licensed commercial television stations to be 1,387.[42] In addition, according to Commission staff review of the BIA/Kelsey, LLC's *Media Access Pro Television Database* on July 30, 2014, about 1,276 of an estimated 1,387 commercial television stations (or approximately 92 percent) had revenues of $38.5 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

13. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.[43] Our estimate, therefore, likely overstates the number of small entities that might be affected by the NPRM's proposals because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

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[36] *Id.*

[37] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[38] U.S. Census Bureau, 2007 Economic Census, Table No. EC0751SSSZ5, Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the United States: 2007 (NAICS code 517110), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5 (last visited Aug. 11, 2014).

[39] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. § 601(4)–(6).

[40] U.S. Census Bureau, 2012 NAICS Definitions: 515120 Television Broadcasting, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2012 (last visited Aug. 19, 2014).

[41] 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2014).

[42] *See* FCC News Release, Broadcast Station Totals as of June 30, 2014 (rel. July 9, 2014), available at http://www.fcc.gov/document/broadcast-station-totals-june-30-2014 (*June 2014 Broadcast Station Totals*).

[43] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

14. In addition, the Commission has estimated the number of licensed noncommercial educational ("NCE") television stations to be 395.[44] These stations are non-profit, and therefore considered to be small entities.[45]

15. There are also 2,460 LPTV stations, including Class A stations, and 3,838 TV translator stations.[46] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

16. Radio Broadcasting. The SBA defines a radio broadcast station as a small business if such station has no more than $38.5 million in annual receipts.[47] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[48] According to review of the BIA/Kelsey, LLC's *Media Access Pro Radio Database* as of July 30, 2014, about 11,332 (or about 99.9 percent) of 11,343 commercial radio stations have revenues of $38.5 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

17. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

18. The NPRM proposes and seeks comment on a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. Each of these changes is described below.

19. Eligibility for Bidding Credits. The NPRM proposes changes to the Commission's process for evaluating small business eligibility for bidding credits. In particular, the NPRM proposes to repeal the attributable material relationship ("AMR") rule and tentatively concludes that the Commission should re-examine the need for the related decade-old policy that has limited small businesses seeking bidding credits to providing primarily retail, facilities-based service directly to the public with each of their licenses. Under the AMR, a small business applicant or licensee must automatically attribute to itself the gross revenues of any entity with which it has an "attributable material relationship." An applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any

[44] *See June 2014 Broadcast Station Totals*.

[45] *See generally* 5 U.S.C. § 601(4), (6).

[46] *See June 2014 Broadcast Station Totals*.

[47] 13 C.F.R § 121.201, NAICS code 515112 (updated for inflation in 2014).

[48] U.S. Census Bureau, 2012 NAICS Definitions: 515112 Radio Stations, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2012 (last visited Aug. 19, 2014).

individual license held by the applicant or licensee.[49] The NPRM seeks comment on the proposal to repeal the AMR rule, and the Commission's tentative conclusions regarding its need to re-evaluate its small business policy. Alternatively, the NPRM also seeks comment on retaining the Commission's small business policy and/or some variation of the AMR rule. For instance, the NPRM seeks comment on whether the Commission should adopt a rule with some other spectrum capacity use limit that would render an applicant ineligible for all current and future benefits.

20. The NPRM also proposes to adopt a more flexible approach under which the Commission would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. The first prong would evaluate whether an applicant meets the applicable small business size standard and is therefore eligible for benefits. To evaluate small business eligibility, the NPRM proposes to apply the Commission's existing controlling interest standard and affiliation rules to determine whether an entity should be attributable based on whether that entity has *de jure* or *de facto* control of, or is affiliated with, the applicant's overall business venture. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, the NPRM proposes to determine an entity's eligibility to retain small business benefits on a license-by-license basis, based on whether it has maintained *de jure* and *de facto* control of the license. Under this proposed license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license. Instead, while a small business might incur unjust enrichment obligations if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, so long as the revenues of its attributable interest holders (i.e., the DE's affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. The NPRM seeks comment on the proposed two-pronged approach to evaluate attribution and establish eligibility for small business benefits.

21. The NPRM also proposes to modify the Commission's secondary market rules to comport with the Commission's proposed approach to assessing small business eligibility. Specifically, the NPRM proposes to modify the language in section 1.9020(d)(4) to remove the conflicting reference to the control standard of section 1.2110 in order to make clear that small business lessors are fully subject to the same *de facto* control standard for spectrum manager leasing that applies to all other licensees.[50] This modification should clarify that section 1.9010 alone defines whether a licensee, including a small business, retains *de facto* control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing.

22. The NPRM seeks comment on whether any changes are appropriate to the Commission's unjust enrichment rules that provide additional safeguards by requiring repayment of small business benefits where an applicant loses eligibility for any reason. Specifically, the NPRM invites comment on, among other things, whether to adjust the Commission's current five year unjust enrichment schedule either in terms of the duration of the requirements or the percentages of the repayment schedule. The NPRM also seeks comment on how best the Commission can continue to scrutinize applications and proposed transactions to ensure that only eligible entities receive benefits, while not undermining the Communications Act's directive to ensure that DEs are given the opportunity to participate in the provision of spectrum-based services. Specifically, the NPRM seeks comment on adopting a 10 year

[49] *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 Rule Making*, 21 FCC Rcd 4753, 4763 ¶ 25 (2006) (*DE Second Report and Order*); *see* 47 C.F.R. § 1.2110(b)(3)(iv)(A).

[50] *See* 47 C.F.R. § 1.9010; *see also* 47 C.F.R. § 1.9020(d)(4).

unjust enrichment repayment schedule similar to the one it adopted in 2006,[51] but vacated by the Third Circuit for lack of notice.[52]

23. Bidding Credits. The NPRM examines the primary way that the Commission facilitates participation by small businesses at auction through its bidding credit program. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business. By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service, adopting one or more definitions of the small businesses that will be eligible. The Commission's small business definitions have been based on an applicant's average annual gross revenues over a three-year period. The NPRM proposes to increase the general schedule of size standards in its Part 1 rules, measured by gross revenues, for purposes of determining an entity's eligibility for a bidding preference. Specifically, the NPRM proposes to revise the standardized schedule in section 1.2110(f) as follows:

- Businesses with average annual gross revenues for the preceding three years not exceeding $4 million would be eligible for a 35 percent bidding credit;
- Businesses with average annual gross revenues for the preceding three years not exceeding $20 million would be eligible for a 25 percent bidding credit; and
- Businesses with average annual gross revenues for the preceding three years not exceeding $55 million would be eligible for a 15 percent bidding credit.

The NPRM also asks about alternative methods for setting new gross revenues thresholds.

24. The NPRM seeks comment on whether to adopt a small business size standard based on criteria other than gross revenues, and proposes to continue the Commission's practice of evaluating which small business definitions will apply on a service-by-service basis, based upon associated capital requirements for a particular service. In addition, the NPRM seeks comment on whether to increase the bidding credit percentages (i.e., discount amounts) applicable to associated small business categories. The NPRM also seeks comment on whether any revisions the Commission adopts in this proceeding to its Part 1 schedule of small business size standards and associated bidding credit percentage levels should apply to the specific small business definitions and bidding credit percentages the Commission previously adopted for specific services, and, if so, how such revisions would be implemented. The NPRM proposes that any new rules adopted in this proceeding would apply to the 600 MHz band spectrum licenses to be offered in the Broadcast Television Spectrum Incentive Auction ("BIA"). In the BIA proceeding, the Commission adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding $15 million). Accordingly, the NPRM proposes to adopt for the 600 MHz band increases in the gross revenues thresholds associated with the 25 percent and 15 percent bidding credits that are consistent with the increased gross revenues thresholds proposed in the NPRM for the standardized schedule in our Part 1 competitive bidding rules. The NPRM also seeks comment on whether the Commission should adopt a third small business bidding credit tier for the 600 MHz band

[51] *See DE Second Report and Order*, 21 FCC Rcd at 4766–67 ¶¶ 37–38. There the Commission adopted a 10 year unjust enrichment schedule for licenses acquired with bidding credits. For the first five years of the license term, if a small business lost its eligibility for a bidding credit for any reason, it owed 100 percent of the bidding credit, plus interest. For years six and seven of the license term, 75 percent of the bidding credit, plus interest, was owed. For years eight and nine, 50 percent of the bidding credit, plus interest, was owed, and for year 10, 25 percent of the bidding credit, plus interest, was owed.

[52] *Council Tree*, 619 F.3d at 256.

that would provide a 35 percent bidding credit to businesses with average gross revenues for the preceding three years not exceeding $4 million.

25. Further, the NPRM seeks comment on the Commission's ability to consider bidding preferences for other types of DEs,[53] entities that serve unserved/underserved areas or areas with persistent poverty,[54] as well as persons or entities that have overcome disadvantages.[55] The NPRM asks commenters to specifically address the statutory authority and judicial scrutiny issues that may limit the Commission's ability to entertain recommendations to alter the focus of its current bidding preferences by offering bidding preferences to entities based on other criteria than business size.

26. The Commission expects that the questions raised in the NPRM will provide a meaningful opportunity to evaluate whether its bidding credit program continues to achieve the Commission's objectives. To facilitate the Commission's review, the NPRM seeks concrete, specific, data-driven feedback by commenters. In addition, the NPRM invites commenters to suggest other creative ideas that would promote the Commission's statutory objectives, but emphasizes that for any such proposals it is imperative to provide ample supporting evidence.

27. DE Reporting Requirements. The NPRM proposes to eliminate the DE annual reporting requirement in section 1.2110(n) of the Commission's rules and questions whether the value of the information provided in those reports outweighs the regulatory burden that the reporting obligation places on small businesses.[56] The NPRM seeks comment on this proposal. Among other things, the NPRM asks if the Commission adopts the proposal to eliminate this annual reporting requirement, whether it should amend its rule for reporting eligibility events to require that a small business must list and summarize all existing agreements to provide context each time it reports a new eligibility event.[57]

28. MMTC White Paper Requests. In February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance licensing of spectrum to minority- and women-owned businesses.[58] The NPRM raises and addresses several of these issues and seeks comments on the other proposals that are not otherwise addressed in the NPRM, and to the extent that they relate to the

[53] Specifically, the NPRM seeks comment on whether the current small business provisions are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies.

[54] As defined by the Department of Agriculture, a county is persistently poor if 20 percent or more of its population was living in poverty over the last 30 years. *See* USDA, Geography of Poverty, http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx (last visited July 9, 2014).

[55] In view of renewed interest raised in the BIA proceeding, the NPRM seeks comment on the 2010 FCC's Advisory Committee on Diversity for Communications in the Digital Age recommendation to implement a bidding preference for persons or entities who have overcome substantial disadvantage. Advisory Committee on Diversity for Communications in the Digital Age, *Recommendations to Federal Communications Commission: Preference for Overcoming Disadvantage*, Oct. 14, 2010, http://www.fcc.gov/DiversityFAC/meeting101410.html (*Recommendation*). In the *Recommendation*, the Committee proposed to provide a bidding credit for otherwise qualified persons or entities that have overcome substantial disadvantages, to allow them to compete on equal footing with other applicants. *Id.*

[56] 47 C.F.R. §1.2110(n). This rule requires DE licensees to file an annual report with the Commission that includes, at a minimum, a list and summaries of all agreements and arrangements, extant or proposed, that relate to eligibility for DE benefits. *Id.*

[57] 47 C.F.R. § 1.2114.

[58] S. Jenell Trigg & Jeneba Jalloh Ghatt for MMTC, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*, GN Docket No. 12-268 (filed Feb. 27, 2014).

Commission's competitive bidding rules.[59] The NPRM observes that certain proposals appear to be outside the scope of this proceeding and others may not be needed in light of other changes proposed in the NPRM. Toward that end, the NPRM tentatively concludes that the following MMTC proposals are outside the scope of this proceeding, which is focused on the Commission's competitive bidding rules, and thus will not be addressed in the NPRM: (1) incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2) supporting increased funding for and statutory amendments regarding the Telecommunications Development Fund.[60]

29. Former Defaulter Rule. The NPRM proposes changes to the Commission's former defaulter rule to balance concerns that the current rule is overly broad with the Commission's continued need to ensure that auction bidders are financially reliable. The NPRM seeks comment on revising the rule to narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter. Specifically, the NPRM proposes to exclude any cured default on any Commission license or delinquency on any non-tax debt owed to any Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than $100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.[61] Additionally, the NPRM seeks comment on limiting the individuals and entities that an applicant must consider when determining its status as a former defaulter.

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[59] In addition to requesting the elimination of the AMR, an increase in bidding credits, and a substantive review of proposed DE rules, all of which are addressed in the NPRM, the White Paper requests Commission action in the following areas: (1) reinstitute select DE-only closed spectrum auctions; (2) incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; (3) conduct ongoing recordkeeping of DE performance; (4) complete the *Adarand* Studies, updating the Section 257 studies released in 2000; (5) regularize procedural requirements; and (6) support increased funding for and statutory amendments regarding the Telecommunications Development Fund. *Id.* at v, 32–34.

[60] We note that MMTC's request with respect to "ongoing recordkeeping of DE performance" refers to "retain[ing] specific information about the [minority-owned business enterprises] and [woman-owned business enterprises] status of bidders, in addition to the small business status." *Id.* at 33. The Commission has sought comment in WT Docket No. 13-135 on the need to collect information on the participation of minority and women-owned enterprises in the mobile wireless industry, pursuant to similar MMTC requests. Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises and Extends Period for Reply Comments, WT Docket No. 13-135, *Public Notice*, 28 FCC Rcd 9125 (2013).

[61] Depending on the origin of any federal non-tax debt giving rise to a default or delinquency, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied. Consistent with guidance previously provided with respect to applicability of the former defaulter rules, *see*, *e.g.*, Letter to Cheryl A. Tritt, Esq., from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004), for purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. Thus, to the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. In addition, we provide the following clarification with regard to defaults on Commission licenses. Any winning bidder that fails timely to pay its post-auction down payment or the balance of its bid payment or is disqualified for any reason after the close of an auction will be in default and subject to a default payment. *See* 47 C.F.R § 1.2109(c). *See also*, *e.g.*, Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled For November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 8386, 8450 ¶ 239 (2014). Commission staff provide individual notice of the amount of such a

(continued….)

30. Commonly Controlled Entities. The NPRM proposes to codify an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction.[62] The NPRM also proposes a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application.[63] These proposals seek to improve the transparency and efficiency of the auction process, by making clearer who the qualified bidders actually are and ensuring against the potential for anticompetitive auction behavior. The NPRM seeks comment on these proposals and on specific alternatives to address the Commission's concern that common control may allow the controlling individual or set of individuals to attempt to gain advantages in the bidding process based on certain coordinated bidding actions (e.g., tied bids, activity waivers).

31. Joint Bidding. The NPRM initiates a review of the Commission's rules and policies governing joint bidding and other arrangements in order to ensure that they fulfill the Commission's statutory objectives, given the changes in the mobile wireless marketplace since the initial adoption of the bidding rules two decades ago, and the increasing importance of spectrum for service providers to meet consumer demand for mobile wireless services.[64] The NPRM seeks comment on the Commission's tentative conclusions that it would be in the public interest to retain the current rules governing joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. Additionally, the NPRM seeks comment on whether the Commission should revise any of its current rules as applied to arrangements between nationwide providers and other entities, including its rules governing short-form applications. Further, the NPRM seeks comment on whether any revisions to the Commission's rules governing long-form applications are necessary in light of the Commission's consideration of the potential harms and benefits of joint bidding and other arrangements.

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default payment as well as procedures and information required by the Debt Collection Improvement Act of 1996, including the payment due date and any charges, interest, and/or penalties that accrue in the event of delinquency. *See*, *e.g.*, 31 U.S.C. §§ 3716, 3717; *see also* 47 C.F.R. §§ 1.1911, 1.1912, 1.1940. *See also* Auction of Lower and Upper Paging Bands Licenses Closes; Winning Bidders Announced for Auction 95, *Public Notice,* 28 FCC Rcd 11848 (2013). For purposes of the certifications required on a short-form auction application, such notice provided by Commission staff assessing a default payment arising out of a default on a winning bid, constitutes notice of the final payment deadline with respect to a default on a Commission license.

[62] The Commission's short-form application is the first part of its two-phased auction application process. In the first phase, any party desiring to participate in an auction must file a streamlined short-form application in which it certifies under penalty of perjury as to its qualifications to participate in a Commission auction. *See* 47 C.F.R. § 1.2105. In its review of the short-form applications, Commission staff presumes the information and certifications contained in the short-form applications are true unless they are incomplete, internally inconsistent or contradicted by information in the Commission's records. *See* Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746, 19749–50 ¶ 7 (2002). Eligibility to participate in bidding is based on information in an applicant's short-form application and its certifications, and on its upfront payment. In the second phase of the Commission's application process, a winning bidder files a more comprehensive long-form application. *See* 47 C.F.R. § 1.2107. The long-form application is subject to more extensive review and is the basis for any determination that a winning bidder is qualified to hold a Commission license and for the award of any claimed bidding credit. *See generally* 47 U.S.C. § 308(b) (license applications must provide factual information to demonstrate applicant qualifications).

[63] In other words, where multiple entities are under the common, exclusive control of a single individual (i.e., a single individual is the exclusive controlling interest of more than one entity) or set of individuals, only one short-form application from such entities could become qualified to participate with respect to any particular geographic license area or overlapping areas.

[64] For purposes of this proceeding, the NPRM defines "joint bidding and other arrangements" to include any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation.

32. Miscellaneous Part 1 Revisions. In addition to changes that would implement the foregoing proposals, the NPRM proposes changes to two of the Commission's Part 1, Subpart Q, rules, sections 1.2111 and 1.2112.

- *Section 1.2111* – The NPRM proposes to eliminate two provisions of this rule: (1) section 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information, and (2) section 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses.
- *Section 1.2112* – The NPRM's proposed changes to this rule clarify the auction application requirements for reporting an entity's percentage ownership in the applicant and in FCC-regulated entities. The NPRM proposes further changes to specify application requirements for bidding consortia. The NPRM also proposes to correct two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the Federal Register summary of the *DE Second Report and Order*.[65] The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. The NPRM proposes to delete the requirement with respect to the short-form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants' spectrum. The NPRM proposes to reinstate this requirement.

33. The NPRM seeks comments on these proposals. In addition, the NPRM notes that the Commission intends, when it resolves the issues raised in the NPRM, to resolve long standing petitions for reconsideration to the Commission's Part 1 competitive bidding rules.[66]

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

34. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;[67] (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[68]

35. If adopted, the NPRM's proposed approach to evaluating attribution and establishing small business eligibility could provide small businesses with greater opportunities to participate in the provision of spectrum-based services. Moreover, insofar as the NPRM's proposals should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, the Commission anticipates that the combined intent of the proposals should increase the potential sources of revenue for the small business and decrease the likelihood that it would be subject to undue influence by any particular user of a single license. The NPRM's proposed

[65] *Compare* 71 Fed. Reg. 26245, 26253 (May 4, 2006) (publishing summary of *DE Second Report and Order*, 21 FCC Rcd 4753), *with* 47 C.F.R. § 1.2112 (Oct. 1, 2006).

[66] *See* note 6.

[67] We note that all references to small entities in this IRFA apply also to minority-and women-owned small businesses.

[68] 5 U.S.C. § 603(c)(1)–(c)(4).

two-pronged approach to establishing small business eligibility would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility for any acquired without such benefits. Further, the proposal to eliminate the AMR rule and to clarify how spectrum manager leasing rules apply to DEs should allow small businesses greater certainty to participate in secondary markets transactions.

36. The NPRM's proposed increases in the gross revenues thresholds that define the three tiers of small businesses in the Part 1 schedule by which the Commission provides the corresponding available bidding credits would encourage small business participation in spectrum license auctions. The proposed gross revenues thresholds are intended to more accurately reflect what constitutes a "small business" in today's marketplace, taking into consideration the relative size of the large, national providers. This proposal will provide an economic benefit to small entities by making it easier to acquire spectrum licenses. Moreover, the NPRM's proposal to repeal the DE reporting requirement would eliminate the burden on DEs to submit annual reports.

37. The proposed changes to the Part 1 rules will apply to all entities in the same manner as the Commission will apply these changes uniformly to all entities that choose to participate in spectrum license auctions. The Commission believes that applying the same rules equally to all entities in these contexts promotes fairness. The Commission does not believe that the limited costs and/or administrative burdens associated with the rule revisions will unduly burden small entities. In fact, many of the proposed rule revisions clarify the Commission's competitive bidding rules, including short-form application requirements, as well as reduce reporting requirements.

38. Finally, the NPRM's joint bidding proposals are intended to preserve and promote robust competition in the mobile wireless marketplace and facilitate competition among bidders at auction, including small entities. These proposals provide potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible. In addition, the NPRM's proposal to retain its current rules for joint bidding arrangements among non-nationwide providers would maintain flexibility for small businesses to enter into such arrangements.

F. Federal Rules Which Duplicate, Overlap, or Conflict With the Proposed Rules

39. None.

G. Report to Small Business Administration

40. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this NPRM, including this IRFA, to the Chief Counsel for Advocacy of the SBA.

APPENDIX C

Short Names of Commenters Cited in this NPRM

A. Broadcast Television Spectrum Incentive Auction Proceeding – GN Docket No. 12-268

Name of Filer	Short Name
Council Tree Investors, Inc.	Council Tree
Incentive Auction Advocates	IAA
Minority Media and Telecommunications Council	MMTC
Rural Telecommunications Group, Inc.	RTG

B. AWS-3 Proceeding – GN Docket No. 13-185

Name of Filer	Short Name
Competitive Carriers Association	CCA

C. Former Defaulter Proceeding – RM-11395

Name of Filer	Short Name
AT&T, Inc.	AT&T
Competitive Carriers Association, Consumer Electronics Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association	CCA, CEA, CTIA and NTCA, or collectively, "the Four Associations"
Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association	CCA, CTIA and NCTA, or collectively, "the Three Associations"
DIRECTV Group, Inc.	DIRECTV
EchoStar LLC	EchoStar

D. Auction 97 Proceeding – AU Docket No. 14-78

Name of Filer	Short Name
AT&T, Inc.	AT&T
Competitive Carriers Association	CCA
Dish Network Corporation	Dish Network
Verizon Wireless	Verizon

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

Since 2010, I have been calling on the Commission to consider creative and legally sustainable approaches to promote greater participation by small businesses in the communications industry.[1] Therefore, I applaud Chairman Wheeler for putting forth comprehensive reforms to the Commission's competitive bidding rules that will enable small businesses to compete more effectively in auctions and in the commercial wireless market. These proposals address important developments in the wireless industry and are fully consistent with Congress's directives that authorize the agency to conduct spectrum auctions. It is imperative that we update our rules in advance of the voluntary broadcast TV incentive auction, which will offer applicants a historic opportunity to acquire substantial amounts of valuable wireless spectrum below 1 GHz. While I support all the proposals in this NPRM, I find three proposals particularly noteworthy: (1) the repeal of the AMR rule; (2) bidding credits for winning bidders who plan to deploy networks to underserved areas; and (3) changes to the former defaulter rule.

Congress's Directive to Promote Small Business and Deter Unjust Enrichment

In 1993, Congress authorized the Commission to conduct spectrum auctions by enacting Section 309(j) of the Communications Act. It realized that small businesses faced significant barriers to entering the communications market particularly when competing against large, well-capitalized, and entrenched communications companies. It was concerned that unless the Commission "is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications businesses."[2] Therefore, Section 309(j) directs the Commission to adopt auction rules that would "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses."[3]

In implementing its auctions authority, the Commission has tried to promote small business participation in the wireless industry primarily by awarding auction bidding credits through its Designated Entity (DE) program. The challenge for the Commission has been to find the proper balance between allowing small businesses to acquire spectrum through DE credits, on the one hand, while preventing parties from circumventing the purpose of those rules and being unjustly enriched, on the other.

[1] Statement of FCC Commissioner Mignon L. Clyburn, Statement on Public Notice Seeking Comment on Proposal to create an "Overcoming Disadvantage" category for its current Designated Entity rules (December 3, 2010); Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and other Small Businesses, *Report*, 26 FCC Rcd 2909, 2969-70 (2011) (Separate Statement of FCC Commissioner Mignon L. Clyburn); Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357, 12368 (2012) (Separate Statement of FCC Commissioner Mignon L. Clyburn).

[2] H.R. Rep. No. 103-111 at 254 (1993).

[3] 47 U.S.C. § 309(j)(3)(B).

In 2004, the Commission Decides DEs Must Use the Spectrum they Obtained with Bidding Credits to Directly Provide Facilities Based Service

Between 2004 and 2006, the Commission made policy changes which shifted that balance towards further preventing non-DEs from improperly benefitting from spectrum won using small business credits. In 2004, as part of its proceeding to promote efficient use of spectrum by removing barriers to secondary market transactions, the Commission rejected a request that it allow DE licensees to lease spectrum to any entity, without regard to how the spectrum lease might affect the licensees' status as DEs. The Commission believed it was required to interpret Section 309(j) of the Communications Act so that licensees, which acquired spectrum at auction with small business credits, must use that spectrum to directly provide facilities based services to the public.[4] The Commission based that interpretation on the following two sentences in the House Report that accompanied draft amendments to the Communications Act.

> This paragraph expressly authorizes the Commission to impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses. The Committee anticipates that the Commission will use this authority to deter speculation and participation in the licensing process by those who have no intention of offering service to the public.[5]

To determine "whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee," the 2004 Order explained that the Commission would conduct a case-by-case approach and "look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease."[6]

The Attributable Material Relationship (AMR) Rule Moves the Commission from Case-by-Case Review of Spectrum Leases to a Bright Line Test

The 2006 Designated Entities Order reaffirmed the Commission's earlier interpretation that Congress intended the Commission to require small businesses, who acquire spectrum with small business credits, to use that spectrum to directly provide facilities based services. But it went even further to prevent unjust enrichment. It also adopted the Attributable Material Relationship (AMR) rule that would require every small business to attribute the gross revenues of another entity if that small business planned to apply for DE benefits and entered into an arrangement with that entity to lease, wholesale, or resell more than 25 percent of the capacity of any one of its licenses to that entity.

By adopting the AMR rule in 2006, the Commission moved away from the case-by-case examination of the relationships between DEs and lessees, which it had reaffirmed in the 2004 Secondary Markets Order, to a bright line rule that would require attribution, under the terms of the AMR rule, without an

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[4] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration*, *and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17541 ¶ 71 (2004) (*Secondary Markets Second Report and Order*) ("While we believe that spectrum leasing by small businesses serves many policy goals, we cannot disregard Congress' stated intent that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license.")

[5] H.R. Rep. No. 103-111, at 257-58 (1993).

[6] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17542 ¶ 77.

inquiry into what influence the lessee entity might have on the small business. The AMR rule would also require a DE to make this attribution even if the spectrum it leased was not acquired with DE bidding credits. For example, the AMR Rule would penalize a DE for raising funds for its own spectrum-based communications business by temporarily leasing to another company more than 25 percent of any of its licenses even if those licenses were not acquired with DE bidding credits and the lessee had no influence over the DE.

The 2004 and 2006 Policies Were Based on an Unnecessarily Narrow Interpretation of Section 309(j)

The Supreme Court has made clear this Commission has the discretion to depart from an earlier policy choice when "there are sound reasons for the new policy."[7] Today's NPRM provides several sound bases to reevaluate those earlier DE policies. As an initial matter, there is no reason the Commission should believe it is bound by the statutory interpretations reached in those 2004 and 2006 Orders. The starting point of statutory interpretation is the language in the statute itself.[8] The term "facilities based service" does not appear anywhere in Section 309(j). Nor is there any other language in Section 309(j) which would compel the Commission to decide that entities who acquire licenses with small business bidding credits must use that spectrum to directly provide facilities based service.

Although legislative history can be helpful, there is no specific language in those two sentences from the 1993 House Report that requires the phrase "offering service to the public" to be defined as "designated entities providing facilities based service." The plain meaning of those two sentences in the House Report is that any entity, which uses a small business bidding credit to acquire spectrum in an auction, should primarily intend that the spectrum be used to serve the public and not simply try to resell the spectrum to another entity for a profit. That is why the Commission defined trafficking as "obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use."[9] Thus, if a designated entity used bidding credits to acquire spectrum at an auction, with the intent of offering service to the public, and then leased the spectrum to another entity (DE or non-DE) and that lessee used the spectrum to provide facilities based services, then such an arrangement would not appear to violate the plain language of the anti-trafficking and unjust enrichment provisions of Section 309(j) or the legislative history of those provisions.

The better reading of this statute is that Congress gave the Commission wide discretion to adopt DE policies that strike an appropriate balance between (1) promoting small business participation in the wireless industry, and (2) deterring unjust enrichment, and to amend those policies when developments in the commercial wireless market warrant such changes.

Developments in the Commercial Wireless Industry Require Changes to the AMR Rule

Substantial changes in the structure of the commercial wireless market call for a change to the AMR rule. We have seen increased consolidation in the commercial wireless industry. In 2003, six nationwide wireless carriers accounted for 79 percent of the mobile wireless subscribers. In 2013, four nationwide carriers had a combined market share of approximately 97 percent of subscribers. The Commission uses the widely accepted Herfindahl-Hirschman Index (HHI) to measure concentration in competition analysis. A highly concentrated industry is one with an HHI over 2500. In 2006, when the Commission adopted

[7] *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

[8] *Dean v. United States*, 556 U.S. 568, 572 (2009) ("We start, as always, with the language of the statute.")

[9] 47 C.F.R. § 1.948(i)(1).

the AMR rule, the HHI for the wireless industry was 2674. By 2013, it had increased to 2873.[10] Voice and data roaming and other network sharing agreements could stimulate the deployment of more networks to offer competitive alternatives. Despite the Commission's 2010 adoption of the data roaming order, it appears that continued resistance to entering into these agreements is preventing smaller carriers from providing competitive service offerings.

In addition, with the introduction of more innovative smartphones and tablets since 2008, we have seen explosive consumer demand for mobile broadband services. This demand is driving intense use of mobile networks and an increasing need for more spectrum. At the same time, the costs of spectrum and network deployment, especially for small and new entrants, have increased in the last 20 years.[11] These developments in the commercial wireless market mean it is more important now, than it was in 1993, for small businesses to develop business models that can attract capital for both acquiring communications licenses and for deploying networks that can provide service to the public.

According to a number of commenters, the AMR rule is having an adverse effect on small businesses at a time when these entities are facing increasing challenges to compete effectively in the commercial wireless industry. It appears to have prevented some small businesses, which previously qualified as DEs and had entered into spectrum leases before the rule was adopted, from participating as DEs in the auctions for valuable AWS-1 and 700 MHz spectrum. One party asserts there was "a precipitous drop in DE participation from 70% of winning bids to only 4.0 percent and 2.6 % respectively in those auctions."[12] That significant a drop in DE participation is not only alarming, it indicates the Commission is not doing enough to meet the clear directive of Section 309(j), that auctions "promote economic opportunity and competition… by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses."[13]

The AMR rule is also likely deterring current DEs from leasing spectrum they previously acquired at auction for fear they will lose their DE status in upcoming auctions. This type of reaction to our DE rules also improperly impedes our secondary market policies that are important to the dynamic and productive use of spectrum for commercial services. DEs, and other small businesses who want to compete in the wireless market, need flexibility to take advantage of opportunities to participate in the provision of spectrum-based services, including through spectrum leasing, and mobile virtual network operator arrangements.

<u>These Proposed Changes to the DE Rule are Consistent with Congressional Intent</u>

To be sure, I fully support rules and policies that properly enforce Congress's intent that small businesses who acquire spectrum bidding credits are not unjustly enriched by simply reselling spectrum in the aftermarket. But, we can do a better job in developing DE rules, which promote that policy, as well as giving small businesses the flexibility they need to enter into leases and other relationships that will help them secure financing and develop business models to effectively compete in an increasingly consolidated wireless market. By applying well established principles to examine control and affiliation

[10] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, Sixteenth Report, 28 FCC Rcd 3700, 3719 (2013) (*Sixteenth Mobile Services Report*).

[11] *Id*. at 3766–69 ¶¶ 79–84.

[12] S. Jenell Trigg & Jeneba Jalloh Ghatt for MMTC, Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry, GN Docket No. 12-268, at 32 (filed Feb. 27, 2014) (Digital Déjà Vu).

[13] 47 U.S.C. 309(j)(3)(B).

of entities, and thoroughly reviewing leasing agreements, we can safeguard small business benefits by attributing the revenues of any entity that has the ability to control, or potentially control, an applicant's business venture. In addition, by allowing small businesses greater flexibility to engage in a wider range of business arrangements, this should increase the potential sources of revenue for the small businesses and decrease the likelihood they would be subject to undue influence by any particular user of a single license.

The Commission Should Promote Deployment to Under Served Areas and Persistent Poverty Counties

I am also pleased this NPRM seeks comment on whether the Commission should extend bidding credits to winning bidders that deploy facilities and provide service to underserved areas, particularly those areas that would constitute persistent poverty counties. As defined by the Department of Agriculture's Economic Research Service ("ERS"), a county is persistently poor if 20 percent or more of its population was living in poverty over the last 30 years. According to the ERS, "there are currently 353 persistently poor counties in the United States (comprising 11.2 percent of all U.S. counties)."[14] Despite the fact that 98 percent of Americans have access to commercial mobile wireless networks, our last report on the mobile wireless market found that 7.7 million people live in rural areas with two or fewer service options, and there are still 400,000 Americans who lack access to any mobile service option.[15] Deployment of new wireless networks can drive jobs and economic growth in communities. Given that the upcoming broadcast TV incentive auction holds such promise to stimulating investment and innovation in mobile networks, the Commission should consider proposals to promote investment in low income communities that do not have the same level of mobile service competition most areas of the Nation enjoy. Revising our DE rules, auctioning smaller license blocks and geographic license areas, and mandating interoperability are all important regulatory measures that can lower barriers to entry and attract carriers, who may have less capital than nationwide providers, yet possess a strong desire to deploy networks to underserved areas such as persistent poverty counties.

The Commission Properly Adopted Limited Waivers of the AMR and Former Defaulter Rules

I also want to take this opportunity to explain why it was appropriate for the Commission to grant limited waivers of the AMR and the former defaulter rules before the adoption of this NPRM.[16] Those Orders are important to holding an AWS-3 auction that better complies with the directives of the Communications Act to design auctions that promote competition and "disseminat[e] licenses among a

[14] *See* ERS, Geography of Poverty, http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx (last visited July 18, 2014).

[15] *Sixteenth Mobile Services Report*, 28 FCC Rcd at 3725-27.

[16] The Commission has, on prior occasions, granted waivers pending the completion of rulemakings. *See* Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, RM-11688, WT Docket No. 13-32, *Order*, 28 FCC Rcd 7758 (2013) (Granting waivers four months before the adoption of a Notice of Proposed Rulemaking to consider proposed changes to the rules involved in the waivers); Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, WT Docket No. 09-114, *Notice of Proposed Rulemaking and Order*, 24 FCC Rcd 9620, 9630 ¶ 24 (2009) (granting waiver pending outcome of rulemaking when no party, who could be potentially harmed by the waiver order, opposed the grant of the waiver); Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, *Order*, 22 FCC Rcd 20354 (2007) (waiving the impermissible material relationship rule for purposes of determining DE eligibility solely with respect to arrangements for lease or resale (including wholesale) of the Upper 700 MHz Band D Block license).

wide variety of applicants including small businesses."[17] That auction, which the Commission plans to hold this fall, will make 65 megahertz of spectrum available for flexible commercial wireless use. It is the first auction to offer multiple blocks of paired spectrum licenses on a nationwide basis since the 700 MHz auction some eight years ago. The March 2014 AWS-3 Order helped to promote robust competitive bidding and opportunities for both small and larger carriers by adopting a band plan with a mix of five and 10 megahertz license blocks and small and large geographic license areas (CMAs and EAs). Such a band plan promotes an efficient allocation of spectrum to its highest and best use because it offers interested parties diverse options, thereby encouraging participation by large and small carriers.

But there was more the Commission could do to encourage participation in the AWS-3 auction, as a number of parties have shown through petitions for waivers of parts of our Part 1 Competitive Bidding Rules. Specifically, Grain Management, LLC. petitioned to waive the AMR rule. It contended that a bright line application of the AMR rule would require every small business to attribute the gross revenues of another entity if that small business planned to apply for DE benefits and entered into an arrangement with that entity to lease more than 25 percent of the capacity of any one of its licenses to that entity. This attribution would be required even if, as in the case of Grain, the small business acquired the spectrum license without using DE bidding credits. The attribution would also be required without any inquiry into what influence the other entity might have on the small business. Separately, CTIA, CCA, and NTCA filed a joint petition to waive the former defaulter rule for this auction. Under that rule, an applicant is considered to be a former defaulter if the entity, including any of its affiliates, its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission license or has been delinquent on any non-tax debt owed to any Federal agency. Former defaulters are eligible to bid in a Commission auction, provided they are otherwise qualified, but they must pay an upfront payment that is 50 percent more than the normal upfront payment amount.

Although two of my colleagues dissented from the granting of the Grain limited waiver in July, I continue to support both waivers because the waiver petitions are procedurally similar and advance the Communications Act's goals of designing auctions that promote competition. The petitions were filed by entities who intend to participate in the AWS-3 auctions. The Commission released Public Notices seeking comment on both waiver petitions. No party filed oppositions to the petitions. Both petitions sought waivers of bright line rules that the Commission adopted years ago to strike a balance between competing policy objectives. In the case of the AMR rule, those objectives were promoting participation by smaller businesses in auctions through DE credits, while deterring unjust enrichment by those who acquired auction using those DE credits. With regard to the former defaulter rule, the Commission was balancing the goal of encouraging bidders to submit serious bids with the recognition that past business misfortunes do not necessarily preclude an entity from meeting present and future responsibilities as a Commission licensee. Both petitions persuasively argued that the Commission needed to reevaluate the balances it struck with those rules because, due to developments in the industry, those rules were now acting as unnecessary barriers to greater competition in auctions. The Grain petition and its supporters demonstrated that the AMR rule was having an undue adverse effect on the ability of small businesses to secure financing and compete. The former defaulter rule petition showed that it has been 14 years since the Commission adopted the former defaulter rules and the application of those rules could require applicants that are now well-established in a mature industry to make larger upfront payments based on very old or relatively small defaults. This Competitive Bidding NPRM finds that the public interest would be served by initiating a proceeding to change both of those rules.

Contrary to what some have said, the waiver of the AMR Rule is consistent with the Commission's policies with regard to Joint Sales Agreements (JSA). In both contexts, the Commission's public interest goals are the same because the Commission is looking to see whether a broadcast station or a DE has lost

[17] 47 U.S.C. §309(j)(3)(B).

actual control of its operations. But the broadcast media business is different from the commercial wireless industry and, with regard to our proposal to repeal the AMR rule, we simply recognize that spectrum leasing arrangements do not automatically result in a surrender of control over a small wireless carrier's decision-making. Moreover, we would keep the Commission's other existing control rules, which include a thorough review of all pertinent spectrum leasing agreements.

As I mentioned earlier in this statement, I have been asking the Commission for years to consider approaches to promote greater small business participation in auctions and the communications industry. The parties filing these petitions needed the Commission to waive the application of those rules, before the September 12, 2014, deadline for filing short form applications for the AWS-3 auction. Both waivers could give small businesses greater access to capital and enhance their ability to more effectively compete in the important AWS-3 auction. Once again, I commend Chairman Wheeler for circulating orders granting both limited waivers so the entire industry has clear guidance in advance of the AWS-3 auction.

STATEMENT OF
COMMISSIONER AJIT PAI
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

When Congress authorized the Commission to provide small businesses with taxpayer-funded discounts on auctioned spectrum, it required us to put safeguards in place to prevent abuse and unjust enrichment at the expense of the American people.[1] And for over 20 years, the FCC has worked in a bipartisan manner to ensure that discounted spectrum could not just be passed along to large, well-funded corporations.[2] Indeed, the whole point was to promote independent, facilities-based competition by small providers—competition that will spur the deployment of new service to the public, including in rural and underserved areas—not to create taxpayer-funded middlemen.

But today, the Commission proposes to jettison this framework. The NPRM proposes to permit small businesses (known as "designated entities" or "DEs") to obtain taxpayer-funded discounts and then turn around and lease 100% of their spectrum to the world's largest corporations. It does absolutely nothing good for competition in the wireless marketplace to award bidding credits to entities that flip their spectrum to large incumbent providers. To the contrary, it only makes it harder for small and regional facilities-based providers to win spectrum and compete on a level playing field.

The Commission did not need to take this approach. We could have adopted an NPRM that focused exclusively on ways we could lawfully advance and strengthen our DE program, improve our competitive bidding regulations, and make it easier for DEs and other providers to deploy facilities. To be sure, the NPRM asks some questions along those lines. And I thank my colleagues for agreeing to include some suggestions designed to promote DE participation while guarding against unjust enrichment, such as seeking comment on whether the FCC should retain a modified version of the facilities-based requirement or adopt a 10-year unjust enrichment schedule. But I cannot support the vast majority of today's proposals. As a result, I am concurring in part and dissenting in part.

I.

At the outset, let's be clear about what the Commission's proposal would allow. A small business would be permitted to purchase spectrum at a 35% discount and then lease all of its spectrum capacity to our nation's largest wireless carriers. I can see how this could be good for the large wireless carrier that would gain access to discounted spectrum (rather than purchasing it for itself at full price). And I can see how this would be profitable for the small business with no business plan beyond regulatory arbitrage. But how is any of this in the public interest? It isn't. By failing to recover the full value of spectrum, we are adding to the national debt. And by failing to require DEs to offer service to the public, we are

[1] *See* 47 U.S.C. § 309(j)(4)(D)–(E); *see also* Conference Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep. 103-213, 103rd Cong., 1st Sess. 484 (1993), *available at* http://go.usa.gov/55wx.

[2] *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2394-95, paras. 258-65 (1994) (*Competitive Bidding Second Report and Order*).

denying the American people the benefits of additional competition that taxpayer-funded discounts were intended to provide. In fact, by giving bidding credits to entities that simply lease all of their spectrum capacity to the nation's largest wireless carriers, we are *increasing* concentration in the wireless market by preventing smaller carriers that actually provide facilities-based service from obtaining spectrum.

In short, this proposal would make a very small number of Americans very wealthy and leave 99.99% of us worse off.

Indeed, the NPRM's approach creates all the wrong incentives, as both Democratic and Republican FCC Commissioners have consistently recognized. For example, Commissioner Michael Copps called on the Commission to strengthen—not eliminate—the facilities-based requirement the last time the FCC examined these rules precisely because it encourages competition from smaller providers and gives them a "fighting chance to compete with industry giants."[3] Commissioner Copps recognized that giving large corporations access to "discounts they were never meant to enjoy"—which today's NPRM proposes to do—"threatens the integrity of our auctions and, worse, it cheats consumers. It costs taxpayers millions of dollars in foregone revenue. It also means that spectrum goes to those most willing and able to manipulate the rules of the game, rather than to the entities Congress actually intended to benefit."[4]

What is more, the NPRM actually proposes to eliminate an FCC rule that enables the Commission to conduct oversight of DE leases.[5] So at the very moment the FCC is proposing DE rules that invite abuse, it is seeking to eliminate reporting requirements that enable the FCC to police just such misconduct. This is troubling.

In my view, and consistent with Commissioner Copps' views years ago, proposing to eliminate the long-standing facilities-based requirement is contrary to our statutory authority, undermines the integrity of the DE program, impedes competition, and abdicates the responsibilities we owe to the American taxpayer.

II.

It should come as no surprise that the NPRM's proposal to eliminate the requirement that taxpayer-funded businesses provide facilities-based service runs contrary to the statutory scheme Congress enacted, as numerous bipartisan FCC decisions make clear. How does the NPRM justify this drastic change of course? It engages in some revisionist history. It casually asserts that up until today, the Commission's decisions simply "placed undue weight on language" contained in certain legislative history.[6] This assertion does not withstand scrutiny.

Start with Section 309(j) itself. In that provision, Congress authorized the Commission to use bidding credits to provide DEs with "the opportunity to participate in the provision of spectrum-based services."[7] Congress then codified its determination that the Commission shall "require such transfer disclosures and antitrafficking restrictions . . . as may be necessary to prevent unjust enrichment as a result of the methods

[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, 4808 (2006) (Statement of Commissioner Michael J. Copps) (*CSEA/Part I Second Report and Order*).

[4] *Id*.

[5] *NPRM* at paras. 77–79.

[6] *See NPRM* at para. 23.

[7] 47 U.S.C. § 309(j)(4)(D).

employed to issue licenses and permits."[8]

The Commission has consistently and unanimously recognized this language as requiring DEs to operate as facilities-based providers—not profiteering middlemen. Less than seven months after Congress passed Section 309(j), the Commission recognized that "[i]t would be unjust and inconsistent with the will of Congress for [DEs] . . . to obtain a license with the government's help, transfer that license after a short period of time to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market value of the license and the discounted price which they paid the government for that license."[9]

Ten years later, when the FCC sought to liberalize its secondary market rules, it recognized that Section 309(j) required it to treat leases of DE spectrum differently than all others. Congress's "statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service."[10] The Commission also stated, "the licensee cannot make spectrum leasing its primary business and must . . . continue to provide facilities-based network services under its licenses" regardless of the degree of control the DE maintains over the leased spectrum.[11] In fact, the Commission rejected the contention made by many large wireless providers at the time that DEs "need not be limited to constructing and operating a facilities-based network in order to satisfy Congress' objective that they participate in the spectrum market." It stated that "[w]e cannot accept that reading of Section 309(j)" because "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."[12]

The statutory basis for this decision was clear. The Commission stated that "Section 309(j) . . . directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment."[13] Treating DE leases differently was necessary, the Commission determined, because otherwise "we would run the risk that [DE] . . . incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent."[14]

When the Commission took up the question of Section 309(j)'s application to DE leases in 2006, the Commission found no wiggle room in the statutory language. It recognized that the provision directs the FCC to ensure that "every 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."[15] It adopted the current rules "to ensure, as Congress intended, that . . . benefits are awarded to provide opportunities for designated entities to become robust independent facilities-based service providers with the ability to

[8] 47 U.S.C. § 309(j)(4)(E).

[9] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, para. 260.

[10] *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17538, para. 70 (2004) (*Secondary Markets Second Report and Order*); *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, para. 260.

[11] *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17541, para. 76.

[12] *Id.* at 17544, para. 82.

[13] *Id.* at 175378, para. 71.

[14] *Id.*

[15] *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15.

provide new and innovative services to the public."[16] It held that "where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress."[17]

In a subsequent order, the FCC again stated that "Section 309(j)(4)(D) directs the Commission to issue regulations to 'ensure' that designated entities 'are given the opportunity to participate in the provision of spectrum-based services.'"[18] "We believe that the word 'participate' in this directive contemplates significant involvement in the provision of services to the public, *not merely passive ownership of a license to spectrum used by others to provide service*."[19]

Given this strikingly consistent approach over many years, the NPRM's abrupt assertion that the FCC's facilities-based requirement was grounded in a misreading of legislative history belies credulity. The legislative history shows that Congress passed the relevant portions of Section 309(j) "to deter speculation and participation in the licensing process by those who have no intention of offering service to the public."[20] There is simply no way to square the NPRM's proposal to eliminate the facilities-based requirement with Section 309(j) or the policies underlying that provision.[21]

What is more, there has been broad-based support for the FCC's long-held view that imposing limits on DE leasing is critical to the success and integrity of the Commission's program. For example, Commissioner Copps in 2006 urged the Commission to "move quickly to curb abuses of the DE program" by adopting the facilities-based requirement that the NPRM proposes to eliminate today.[22] He explained that without the rule in place "entities with deep pockets helped themselves to discounts they were never meant to enjoy."[23] "[B]y strengthening our unjust enrichment rules," Commissioner Copps stated, "we take away the incentive for speculators to try to masquerade as legitimate DEs . . . . And most importantly, we reserve the DE program for companies that actually intend to use their spectrum to serve customers."[24]

Commissioner Adelstein shared a similar position. He believed that the Commission should be acting to close "loophole[s]" in the DE program, not opening them up.[25] He expressed serious concerns about

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[16] *Id.* at 4762, para. 21.

[17] *Id.* at 4762, para. 23.

[18] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration, 21 FCC Rcd 6703, 6705, n.8 (2006) (emphasis added) (*CSEA/Part I Order on Reconsideration*).

[19] *Id*. (emphasis added).

[20] H.R. Rep. No. 103-111, at 257–58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993)).

[21] While some have cited consolidation in the wireless industry as counseling in favor of eliminating the facilities-based requirement, any such consolidation is irrelevant to determining the limits Congress imposed on the FCC's authority. And in any case, as mentioned above, eliminating that requirement would only increase market concentration since spectrum would be flipped from non-facilities-based entities to the largest wireless carriers.

[22] *See CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4808 (Statement of Commissioner Michael J. Copps).

[23] *Id*.

[24] *Id*.

[25] *Id.* at 4810 (Statement of Commissioner Jonathan Adelstein Approving in Part, Dissenting in Part).

the impact a contrary approach would have on American taxpayers: "Do we really want the nation's largest wireless carriers partnering with DEs to get a 25% discount so that auction revenues to the U.S. Treasury could potentially be reduced by billions of dollars? How is the public interest served in that outcome?"[26]

The U.S. Court of Appeals for the Third Circuit made the same point when it reviewed the FCC's 2006 DE rules.[27] The court drew a distinction between the provision of facilities-based service, on the one hand, and arrangements under which "a DE merely monetizes its credits or partners with a large carrier, thus rendering the DE's separate existence a mere formality" on the other.[28] The court indicated that the rationale underlying the relevant DE rule would not permit small businesses to "sell or lease overly large quantities of their capacity to any single lessee."[29]

And the U.S. Department of Justice has stated that "the FCC should disqualify a DE that has any . . . agreement with a large wireless carrier that suggests that the licenses will be used principally for the benefit of the large wireless carrier."[30]

Congress, numerous FCC Commissioners over the years, the Third Circuit, the Department of Justice—all were in unison regarding how to ensure that DEs are truly independent providers. Yet today's NPRM blesses just the opposite approach.

III.

The NPRM's proposals suffer from several additional flaws as well. *First*, the NPRM's approach to DE leasing cannot be reconciled with its proposal on joint bidding.[31] In the joint bidding section of the NPRM, the Commission proposes to adopt a broad prohibition against any agreement between nationwide wireless providers that even relates to the competitive bidding process, even though the NPRM identifies no evidence that there's any need for such a rule.[32] The FCC's reasoning? Any such arrangement "would reduce the participants' ability or incentive to compete independently, which would lessen competition . . . and could harm American consumers by increasing the price or reducing the quality of mobile wireless service."[33] This begs the question: How can the NPRM conclude that *any* type of agreement between two nationwide providers would necessarily harm consumers and reduce the incentives to compete, yet maintain that an agreement under which a small provider leases 100% of its spectrum to a large corporation raises no such concerns? The NPRM offers no answer.

Second, and similarly, the proposal to eliminate the facilities-based requirement cannot be reconciled

[26] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, 21 FCC Rcd 1753, 1772 (2006) (Statement of Commissioner Jonathan Adelstein).

[27] *See Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 255 n.8 (3d Cir. 2010).

[28] *Id.*

[29] *Id.*

[30] *See* Ex Parte Submission of the U.S. Department of Justice, WT Docket No. 05-211, at 5 (Mar. 17, 2006), *available at* http://go.usa.gov/58fY.

[31] *See NPRM* at paras. 107–40.

[32] *See id.* paras. 131–34.

[33] *Id.* para. 132.

with the FCC's recent approach to Joint Sales Agreements (JSAs) in the broadcast television industry.[34] In the JSA context, the FCC prohibited one broadcast television licensee from selling more than 15% of another station's advertising time. The FCC's theory? It claimed that the mere existence of such an agreement gave licensees selling the advertising "the opportunity, ability, and incentive to exert significant influence over the" other station.[35] It was said then that "[w]hen one licensee controls the cash flow of another, it controls the other. The old admonition 'follow the money' has never been more appropriate."[36] The Commission thus determined that the mere presence of these agreements required attribution for purposes of the agency's media ownership rules because the risk of undue influence was simply too great.[37]

Yet under today's proposal, one licensee could control 100% of the spectrum of another. How can the FCC reconcile these different approaches? How is it that one television station in a small market selling 16% of another station's advertising is conclusive evidence of "undue influence" and an intolerable end-run around our rules, but, as proposed in this NPRM, a DE can lease 100% of its spectrum to some of the largest companies in the world without triggering any concerns about undue influence? As I stated earlier when the Commission waived our facilities-based requirement for the benefit of a single private equity firm,[38] whatever happened to the old admonition "follow the money"? Why follow 16% of the money, but not 100% of the money? Some say that we must take into account differences between the broadcast television business and the wireless business. But if anything, those differences cut the other way. Indeed, a middleman that simply leases all of its spectrum to our nation's largest wireless carriers is not even a "wireless carrier" in any meaningful sense of the term.

Third, the NPRM makes no attempt to harmonize its proposed approach to DE leasing with other Commission precedents. For example, the NPRM proposes to replace our existing, bright-line approach

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[34] *See, e.g.*, *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 29 FCC Rcd 2647 (Med. Bur. 2014) (*JSA Processing PN*).

[35] *2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al*., MB Docket Nos. 14-50, 09-182, 07-294, 04-256, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527 para. 340 (2014) (*2014 Quadrennial Regulatory Review*) ("[T]he ability of a broker to control a brokered television station's advertising revenue, its principal source of income, affords the broker the opportunity, ability, and incentive to exert significant influence over the brokered station."); *see also id*. at 4533, para. 350 ("[T]elevision JSAs involving a significant portion of the brokered station's advertising time convey the incentive and potential for the broker to influence program selection and station operations."); *id*. at 4539, para. 360 ("[A] 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, including programming choices, and give them an incentive to do so."); *id*. at 4539, para. 361 ("As the amount of advertising revenue controlled by the brokering station increases, so too does its incentive and ability to influence brokered station's programming."); *id*. at 4582 (Statement of Chairman Tom Wheeler) (JSAs provide broker stations "the incentive and ability to unduly influence the operations" of brokered stations), *available at* http://go.usa.gov/58Ck.

[36] *Id.* at 4582 (Statement of Chairman Tom Wheeler).

[37] *See JSA Processing PN*, 29 FCC Rcd at 2648; *but see* Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), http://go.usa.gov/58ax; *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4587 (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/58a5; Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on Three More TV Stations Going Dark Under The FCC's New JSA Policy (June 24, 2014), http://go.usa.gov/58xQ; Statement of Commissioners Ajit Pai and Michael O'Rielly on the Negative Impact of the Decision to Restrict Television Stations' Use of Joint Sales Agreements (May 29, 2014), http://go.usa.gov/9N7V.

[38] *See Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules*, WT Docket No. 05-211, Order, FCC 14-103 (2014) (Dissenting Statement of Commissioner Ajit Pai), go.usa.gov/5PSY.

to DE leasing with a post-auction, fact-based inquiry into the degree of control that particular leases would give large companies over the DE. But the level of uncertainty that this case-by-case approach will create is directly contrary to the FCC's recent approach to spectrum auctions. In the FCC's *Mobile Spectrum Holdings Order*, for example, the Commission concluded that "it is in the public interest to replace our post-auction case-by-case analysis" with bright-line, *ex ante* rules.[39] Likewise, the NPRM itself states in the joint bidding section that "certainty and clarity in advance of the start of an auction . . . best serve the public interest."[40] There isn't any way to square those approaches with the decision here, and the NPRM doesn't try. It would seem the Commission chooses either the certainty of bright-line rules or the flexibility of case-by-case adjudication as necessary to further its ideological agenda.

Fourth, I do not support the Commission's decision to seek comment on instituting closed, DE-only spectrum auctions.[41] In my view, the FCC should not limit competitors' ability to compete. We should not pick winners and losers. Instead, we should pursue policies that maximize participation in our spectrum auctions. That's especially the case when bidding limitations by definition will reduce the revenue the U.S. Government (and hence taxpayers) could gain from such auctions while providing no offsetting public benefits under the new spectrum-flipping regime.

Finally, at a time when the FCC is proposing changes that invite arbitrage and abuse of the DE program, I cannot support the NPRM's proposal to lessen FCC oversight.[42] This is not the time to discard tools that can help the FCC identify misuse of taxpayer funds. Nonetheless, the NPRM proposes to eliminate the requirement that DE licensees file annual reports with the FCC that identify all agreements, in existence or proposed, that relate to the licensee's eligibility for DE benefits. In my view, transparency is essential here.

IV.

While I do not support the NPRM's proposal to eliminate the facilities-based requirement, I appreciate my colleagues agreeing to incorporate some of my suggestions. I am glad that the NPRM now seeks comment on retaining a modified version of the facilities-based requirement and whether eliminating the requirement would increase the chances that DEs would be subject to undue influence. Also, the NPRM now seeks comment on how its proposed approach could impact auction revenues and whether it would result in ineligible entities obtaining access to discounted spectrum. Moreover, the NPRM now seeks specific comment on whether the Commission should strengthen its unjust enrichment rules by adopting a 10-year repayment schedule[43] and by requiring full reimbursement of any taxpayer-funded discounts, plus interest, if a DE loses eligibility before completing its licensing obligations.[44] Finally, the NPRM asks whether a DE with multiple agreements or arrangements with a large provider merits more rigorous scrutiny.[45] I hope commenters submit useful information on these important topics.

The NPRM includes other proposals that are worth exploring. For example, it seeks comment on prohibiting a single entity from filing multiple short-form applications and on prohibiting commonly-

[39] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 619, paras. 139–42 (2014).

[40] *NPRM* at paras. 133–34.

[41] *See id.* paras. 80–81.

[42] *See id.* paras. 77–79 (proposing to repeal the reporting requirement at 47 C.F.R. § 1.2110(n)).

[43] *Id.* para. 45.

[44] *Id.* para. 46.

[45] *Id.* para. 35.

controlled entities from submitting multiple applications. In addition, the NPRM seeks comment on whether the FCC should modify our former defaulter rule. I concur in these portions of the NPRM.

* * *

In the end, this NPRM is the latest lost opportunity to focus on ways we could, on a bipartisan basis, lawfully promote entry by small companies into the wireless business, facilitate the deployment of new facilities, and encourage the provision of service to underserved areas. Instead, the Commission proposes an arbitrage scheme that allows DEs to obtain discounted access to spectrum and then profit as middlemen. This impedes—rather than furthers—the type of competition that Congress sought to promote when it authorized taxpayer-funded discounts on spectrum. I therefore hope that the Commission veers from its current course in this proceeding.

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.