

**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
	)	

**COMMENTS OF NTCH, INC.**

NTCH, Inc., by its attorneys, submits these comments in the above-referenced Docket. NTCH applauds the Commission for taking steps to update Designated Entity rules that in many cases are outdated, counterproductive, or discourage rather than foster the participation of DE's in the FCC auction process.

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## SUMMARY

NTCH recommends the following actions for reasons which will be set out in more detail below:

1. The attribution of gross revenues for “affiliates” of applicants should be revised to limit attribution of remote family members and non-controlling corporate officials. The current rules too broadly and inaccurately assume that each controlling person of an applicant is controlled by relatives such as siblings, in-laws, step-parents, step-siblings and step-children. Similarly, many corporate officers and most corporate directors have no executive authority whatsoever and no real power to control the entity. These per se affiliations should be eliminated.
2. Eligibility for DE credits should be expanded to meet Congressional directives other than just small businesses. Eligible entities should include companies committed to serving underserved areas and companies who are not nationwide providers *and* hold less than 40 MHz of the CMRS spectrum in any given market. These eligibility criteria should apply to the Incentive Auction.
3. The Former Defaulter rule should either be deleted altogether or be modified to eliminate small, dated, non-final, and non-FCC defaults. In particular, the categorization of an applicant as both a current and a Former Defaulter should follow the same rule as the “red light” rule which correctly declines to treat an applicant as in default until the matter has been finally decided. It is unjust to penalize someone as a Defaulter when it may well turn out that there actually was no default. The stigma of Defaulter should also be limited to, but should include, entities or affiliates of entities that both control the auction applicant *and* controlled the defaulting entity when the default occurred. It is these entities that should raise concern, if any concern there be.
4. The Commission should take other non-auction-related steps to ensure that the benefits intended to be created by the auction procedures are not negated by post-auction restraints on competition or regulatory burdens.

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## **1. Non-Attribution of Non-Controlling Affiliations**

Kinship affiliation is too broad. The Commission's rules currently call for the presumptive allocation of gross revenues from tangential parties who in the real world are highly unlikely to exercise "control" over the applicant entity. On the family side, Section 1.2110 treats all of an applicant's in-laws, half-siblings, and step-relations as presumptively controlling the applicant. In our experience it is an almost infinitely remote possibility that a brother-in-law or sister-in-law, for example, would exercise control over an applicant's financial affairs. Many of the kinfolk deemed to be presumptively in control of an applicant would not even receive an invitation to an applicant's holiday dinner, much less exercise control over him. Kinship with step-relations is invariably even more remote and less likely to constitute control. Yet the Commission's rules (1.2110(c)(5)(iii)(B) require applicants to affirmatively demonstrate that these remote relations are not "closely involved with each other in business matters." This presumption can be difficult to overcome if an applicant has, for example, loaned a brother-in-law a small sum of money. This "close involvement" would require full disclosure of all of the gross revenues of the brother-in-law from other businesses he may be involved in. This is not only absurd but can lead to, and has led to, considerable inter-family contention. It is also often difficult to extract financial information from these distant family members who have no connection with the application whatsoever and no desire to have their financial affairs made public.

Non-executive officer and director affiliation is unwarranted. Similar considerations apply to certain officers and directors of corporations. Many corporations have officers such as secretaries and assistant secretaries and even vice-presidents and treasurers who have no executive authority whatsoever. Frequently these officer positions are strictly ministerial or

contingent positions with no actual control authority. We are aware of one instance where an individual had prophylactically been named a vice-president of an entity in case anything happened to the president, but thereafter had no contact with or connection with the company whatsoever and no knowledge of its financial activities. Yet that individual was deemed by operation of Section 2110(c)(2)(ii)(F) to “control” the entity. While the board of directors, of course, controls a corporation as a whole, any individual director has no control whatsoever. To suggest that a single director (other than a director who also has actual executive authority and is therefore independently attributable) “controls” the company is legally and factually inaccurate. Of course, if a group of directors are appointed or elected by a single controlling entity, the controlling entity would be deemed to control the applicant rather than the directors themselves.

Under the current rules, each individual director and each of that director’s in-laws, siblings, step-siblings, and half-siblings, along with her husband and children, are presumed to control the entity on whose board the hapless director sits. This net is cast far too wide. We do not believe the Commission has actually applied this rule as it reads, but in any case it should be revised to eliminate presumptive attributions which bear no relation to reality as we know it. The Commission can eliminate unnecessary burdens on applicants by eliminating directors, *qua* directors, as controlling persons, deeming only officers with executive authority to be controlling persons, and limiting presumptive kinship affiliation to spouses, grandparents and children, unless the applicant has more than incidental business relationships with a particular relation.

## 2. Expansion of Universe of Eligible DEs

One of the most thought-provoking items in the NPRM is the Commission's request for input on whether the Designated Entity status should be conferred on applicants other than small businesses and Indian tribes. Section 309(j)(3) of the Act requires the Commission to avoid excessive concentration of licenses and to foster diverse ownership, including ownership by small businesses, rural telephone companies, and businesses owned by minorities and women. While the Constitution precludes the Commission from directly favoring minorities and women, the Commission has nevertheless sought alternative ways to aid these groups by avenues which are based on neither race nor gender. NTCH agrees that diversity of ownership of licenses is a good thing which should be promoted by the Commission's rules, but we do not believe that the "ODP" or "overcoming disadvantage preference" as floated by the NPRM is workable.

ODP is unworkable and in many cases unjustified. Most fundamentally, it is not clear that merely overcoming substantial disadvantages should be a basis for a preference. This category could include not only minorities and women but ex-convicts, high school drop-outs, drug addicts, the mentally ill, felons, illegal aliens, non-English speakers, the elderly, single parents, orphans, homeless people, unemployed people, retarded people, and many other categories of people who must struggle with disadvantages which are either of their own making or result from natural causes. While we can feel sympathy for some of these people, just suffering a disadvantage in life is not something FCC licensing policies should try to ameliorate.

Congress seemed to be rightly concerned in Section 309(j)(3) with systemic problems that prevent groups like minorities and women from having access to the capital necessary to acquire licenses. But to expand this concept to include anybody who has suffered a substantial disadvantage would likely result in unworthy or unqualified individuals acquiring licenses. This

exercise in social engineering is almost certain to lead to licenses being held by people with no real qualifications to use them. The disadvantaged licensees will just be exploited once again and the program will not have accomplished its well-meaning purposes.

Tribal credits should be justified on a tribe by tribe basis. In this regard we question whether Indian tribes continue to merit per se qualification as a disadvantaged category. The Commission's rules already take into account the fact that a number of Indian tribes have actually become quite wealthy through casino revenues and other business enterprises. Many reservations now receive highly subsidized high speed broadband by virtue of various grant programs targeting their specific needs. To be sure, there are many tribes whose members remain impoverished and challenged by the lack of access to the mainstream of the American economy, but not all Indians fit that mold. The Commission should therefore not treat Indians as a generic category of people deserving special preferences in the auction context. Rather, the Commission should determine the justification for a preference based on whether the affected tribe either already has access to the desired communications service via other Federal programs or whether the tribe has sufficient financial resources of its own to make extra credits based on tribal status unnecessary and actually unfair to others. The Commission's remedial policy toward Indians should not be based on guilt or paternalism but on a fair assessment of the real needs of the tribes concerned.

Diversity of ownership should be primary basis for preference. NTCH believes that the better key to implementing the 307(j)(3) mandate is to focus on the avoidance of "concentration of licenses." NTCH believes that the Commission's auction licensing policies have largely ignored this requirement of the Act, with the result that much of the CMRS spectrum in the US has become concentrated in a handful of companies. Going forward, this concentration can be

reduced by offering significant discounts to persons who hold less than 40 MHz of spectrum in the given market at issue *and* who are also not counted as “nationwide providers,” as defined by the Commission in the NPRM. The 40 MHz threshold is borrowed from the Incentive Auction proceeding as a reasonable benchmark for defining a significant current spectrum holding.

We note that diversity of media ownership was long a cornerstone of FCC policy in the mass media area, and no one questioned the wisdom of having multiple media voices in the marketplace. It turns out, as Congress recognized, that diversity of ownership is also important where program content is not implicated. Diverse ownership has been shown to enhance competition, to spur innovation in services, to permit locally-based service to customers, and to spread out the benefits of stewardship of a national resource (spectrum) to a broader segment of the American people. The Commission should, and by edict of 309(j)(3) must, adopt auction procedures that foster this goal. To that end, the Commission should grant a 50% bidding credit for bidders who can deliver this important diversity benefit by acquiring licenses. We recognize that this is a large number, but given the history of auctions to date where 15%, 25% and even 35% discounts have had little impact on the ability of DEs to win auctions, a large number is justified. The diversity credit, if we may call it that, is also very likely to indirectly aid in allowing minorities and women to acquire licenses because it is their very historical exclusion from licenseeship that qualifies them for this credit, without any unconstitutional taint of racial or gender discrimination.

Credit for service to unserved/underserved areas. The Commission also inquired whether bidding credits should be awarded for proposing to serve disadvantaged areas which have little or no current service or are subject to poverty. NTCH believes this concept has merit and should be supported with bidding credits. NTCH has previously suggested that the Commission

could save the populace literally billions in USF subsidies by simply requiring winning bidders to build out service to such disadvantaged areas as part of their duties as licensees. The Commission has historically closed its ears to that suggestion, preferring to administer a hugely inefficient and expensive bureaucracy to dole out funds extracted from the public in order to accomplish the same thing.

To be sure, adoption of this credit will somewhat lower the bids obtained in the auction because bidders will have to calculate in the cost of providing service to high cost/low return areas, but this is surely a more direct and easily administrable way to accomplish service than subsidies. NTCH proposes here a very high credit because the credit will necessarily have to be high to overcome the economic disadvantages of taking on the build-out and service obligation to these areas: 75%. Qualifying areas would be those that qualify as (i) “persistently poor” under the USDA’s definition or (ii) counties which have two or fewer CMRS service providers in the majority of the county’s land area. The credit would be proportional to the percentage of the MEA, MSA or other defined license market area that suffers these disabilities.

Credits should be aggregated up to a limit. One additional issue raised by the NPRM is whether or how to aggregate bidding credits where multiple credits apply. NTCH believes there is no reason to offer one credit at the expense of another credit when both are intended to serve a distinct worthwhile goal. All credits should therefore be cumulative up to 80%. Any payment of less than 20% of the bid amount would too severely limit the stake of the bidder in the licensing process.

Reforms adopted here should be applied in the Incentive Auction. Whatever revisions to the bidding credit, attribution, default rules are adopted in this proceeding should certainly apply to the Incentive Auction. Since that auction is likely to be one of the last auctions of a large

quantity of unencumbered spectrum below 1 GHz, it is especially important that Designated Entities have the fullest possible opportunity to acquire that spectrum using any available credits. This means that the Commission should conclude this Docket without delay.

### **3. Treatment of Defaulters and Former Defaulters**

Former defaulter rule should be eliminated in toto. The NPRM seeks comment of the treatment of former defaulters for purposes of auction participation. NTCH supports generally the Commission's proposal to limit the stigma of "former defaulter" but believes the revisions do not go far enough. Initially, one must question whether requiring a larger upfront payment from a former defaulter actually serves any purpose in the real world. Has the Commission's actual experience shown that former defaulters are more likely to default on future auctions than any other auction participants? This factual predicate to the entire former defaulter policy should be examined to see if it holds water. And if former defaulters do have a higher propensity to default, does increasing the upfront payment actually deter them from defaulting again? These propositions are not at all self-evident, and it may be that the policy serves no useful purpose whatsoever while deterring otherwise perfectly qualified bidders from participating in the auction. A better prediction of future behavior would be that former defaulters are *less* likely than others to default in the future because they have known and suffered the consequences of defaulting on their FCC debts and have paid their debt (including all related penalties) to society. Our suggestion is that the former defaulter rule be abandoned altogether as ineffective, unneeded and counterproductive.

One issue that requires clarification in this regard is whether a company which has deferred payment of debts to the FCC under the bankruptcy laws is a "former defaulter." Typically, a company which owes the FCC money (such as Nextwave in the installment payment situation)

and which seeks protection under the bankruptcy laws to avoid foreclosure on its debt, is in default because it has not paid its debt within the grace period established by the FCC's rules and debt instrument. The bankruptcy laws shield the debtor from the effects of default but do not change the fact of default. If it retains the former defaulter rule, the Commission should make this clear, since there are numerous entities participating in FCC auctions which at one time went through bankruptcy proceedings yet are not deemed by the Commission to be former defaulters.

Application of former defaulter rule should be limited to the responsible parties. In the same vein, the Commission is seeking to clarify which people associated with former defaulters are to be tarred with the former defaulter label. If the Commission chooses to keep the former defaulter rule, its application should be limited in the corporate context to controlling shareholders or executive officers (presidents, CEOs CFOs and COOs) of the formerly defaulting applicant who hold similar positions in a current auction applicant that is, or is affiliated with, the former defaulting company. This approach is consistent with the argument presented above that non-executive officers and directors should not be deemed to be in "control" of an entity. It also appropriately limits the application of the rule to those responsible for the original default and companies affiliated with the original defaulter. Otherwise, again, the net of the rule is cast far more widely than necessary.

Default determinations should not be counted until they are finally adjudicated. Finally, the Commission does not tentatively propose to exclude from the former defaulter category parties who have pending requests for waiver of a rule requiring payment of a debt or delinquency. (NPRM at Para. 93). In this regard, NTCH suggests that the Commission apply the same policy here as it uses in application of the "red light" rule. (1.1910(b)(3)). Under that rule, which is also intended to enforce the Commission's debt payment requirements, an applicant is not deemed to

be in default until the matter is finally resolved through normal administrative and judicial processes. Because the consequences are so great to a person or company in default, the Commission wisely does not impose the death penalty on the putative defaulter until a default has been finally adjudged. To do otherwise would potentially do a grave injustice to a party who was not actually in default but would have been treated as such for FCC purposes.

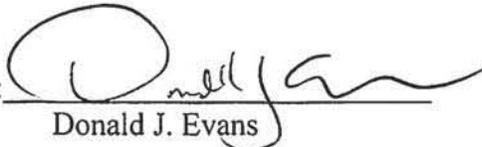
There is no reason why the sensible and just approach taken by the red light rule should not also apply to auction participation. Both rules are intended to serve the same goal, and indeed the red light rule more directly punishes a defaulter by denial of rights to conduct any FCC business. The Commission should not in either case penalize an applicant whose initial adjudication as a defaulter is still subject to appeal. This policy should obviously apply not only to former defaulters but putative *current* defaulters whose cases have not been fully adjudicated. NTCH is aware of many cases where entities were deemed to be in default as much as ten years ago, but the Commission's review process has left them in limbo for a decade or more. While the review process goes on, these hapless entities are deemed to be in default for auction purposes and they cannot even realistically pay their debt so as to become former defaulters because their status as defaulters in the first place remains unresolved. So the party loses an opportunity to participate in the auction and the Commission loses a potential bidder on grounds that may well be reversed after further consideration. Neither the scarlet label of "defaulter" nor "former defaulter" should be branded on a party until its default has been finally adjudged.

## Conclusion

NTCH believes that the reforms proposed here will go a long way to fostering the diversity of spectrum ownership which Congress has ordained while maintaining the integrity of the limits that the Commission has traditionally used to ensure that the process is not abused. The reforms should be adopted.

Respectfully submitted,

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