

**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 Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules And Procedures	)	WT Docket No. 05-211
	)	

To: The Commission

**COMMENTS OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

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## SUMMARY

In these Comments, the Wireless Internet Service Providers Association (“WISPA”) supports the Commission’s proposals to enable more meaningful participation in spectrum auctions by small businesses, and agrees that an evaluation of these rules is particularly timely and important in advance of the upcoming incentive auction.

WISPA is the trade association that represents the interests of fixed wireless Internet service providers (“WISPs”) that, without the benefit of federal universal service fund subsidies, provide broadband service in many rural areas that would otherwise be unserved or underserved. WISPs primarily rely upon unlicensed spectrum to deliver their services, and like other small businesses face significant challenges in acquiring licensed spectrum through competitive bidding to retain and grow their businesses.

The Commission’s proposals intend to advance the statutory directive of Section 309(j)(4)(D) of the Communications Act of 1934, as amended (the “Act”), to ensure that small businesses (“designated entities” or “DEs”) are given the opportunity to participate in the provision of spectrum-based services. WISPA supports the Commission’s proposed updates to its bidding credit revenue tiers and increases in bidding credits to encourage greater participation by small businesses in spectrum auctions. WISPA also urges the Commission to extend bidding credits to auctioned areas designated as “unserved” and “underserved” as determined on an auction-by-auction basis. This bidding credit could be modeled on the rules for the Tribal bidding credit, which are based on actual deployment and not just a promise to deploy.

The Commission also should eliminate its “attributable material relationship” rule, which has inhibited investment in small businesses and network buildout. The Commission can instead rely on its existing secondary market rules and processing review to govern spectrum transactions involving DEs.

The Commission should not, however, extend the unjust enrichment period beyond five years. A longer period for unjust enrichment payments is beyond the standard investment horizon for private equity providers and will deter investment by small businesses and others in wireless deployment.

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THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules,<sup>1</sup> hereby comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.<sup>2</sup> WISPA supports the Commission’s proposals to enable more meaningful participation in spectrum auctions by small businesses and other designated entities (“DEs”), and agrees that an evaluation and adoption of rules is particularly timely and important in advance of the upcoming broadcast

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<sup>1</sup> See 47 C.F.R. §§ 1.415 and 1.419.

<sup>2</sup> *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014) (“*NPRM*”). See also *Updating Part 1 Competitive Bidding Rules*, Order, DA 14-1784, WT Docket No. 14-170 (rel. Dec. 8, 2014) (extending the deadline for filing initial comments to Jan. 23, 2015); *Updating Part 1 Competitive Bidding Rules*, Order, DA 15-52, WT Docket No. 14-170 (rel. Jan. 13, 2015) (extending the deadline for filing initial comments to Feb. 6, 2015); *Updating Part 1 Competitive Bidding Rules*, Order, DA 15-542, WT Docket No. 14-170 (rel. Jan. 30, 2015) (extending the deadline for filing initial comments to Feb. 20, 2015).

incentive auction. In particular, WISPA supports modifications to the Commission's bidding credit rules, extension of bidding credits to auctions for underserved areas, elimination of the attributable material relationship ("AMR") rule, and retention of the five-year unjust enrichment period. By incorporating these rules into the competitive bidding regulatory regime, the Commission can facilitate increased participation by small businesses in spectrum opportunities, consistent with Congressional mandate.

### **BACKGROUND**

WISPA is the trade association that represents the interests of wireless Internet service providers ("WISPs") that provide fixed IP-based broadband services to consumers, businesses, first responders and anchor institutions across the country. WISPA's rapidly growing membership consists of more than 850 WISPs, vendors, equipment manufacturers, distributors, system integrators and others interested in promoting the growth and delivery of fixed wireless broadband services.

WISPA estimates that more than 3,000 WISPs provide fixed wireless broadband services to more than 3,000,000 people in residences, businesses, hospitals, public safety locations and educational facilities. WISPs primarily rely on the 900 MHz, 2.4 GHz and 5 GHz unlicensed frequencies authorized under Part 15, the unlicensed spectrum in the 600 MHz band (TV white space), and the non-exclusive "lightly licensed" 3650-3700 MHz band for last-mile service, although some WISPs have acquired licensed point-to-multipoint spectrum from the secondary market. The majority of WISPs are self-financed small entities that, as standalone broadband providers, are ineligible to receive federal universal support subsidies that its larger telecommunications and cable competitors often obtain.

Many WISPs operate small broadband Internet access systems consisting of a few hundred or a few thousand subscribers. Often, especially in small and rural communities that

would be otherwise unserved or underserved, the local WISP is the only terrestrial source of fixed broadband service because wired technologies like fiber-to-the-home (“FTTH”), digital subscriber line (“DSL”) and cable Internet access services are often not cost-efficient to deploy.

For a number of reasons, WISPs have been frustrated in their ability to meaningfully participate in Commission auctions. First, bidding credit amounts have proved to be insufficient to enable WISPs and other small businesses to compete in auctions that include, and are dominated by, incumbent large mobile wireless carriers. Second, the geographic areas the Commission auctions are often too large for WISPs, and would force them to buy areas larger than the smaller areas that correspond more closely to their geographic service areas. Third, the Commission’s “substantial service” build-out rules are often so lenient that licensees can preserve their licenses by constructing minimal facilities. The population-based “substantial service” standard creates “legal warehousing” that encourages initial build-out to urban areas, not rural areas, where service can be delayed for many years. Moreover, the rules have acted as a disincentive to secondary market transactions because licensees can simply hold on to their licenses without making any real investment. Taken together, the outdated competitive bidding rules and lenient “substantial service” standards have kept WISPs and other small businesses on the licensed spectrum sidelines.

The Commission has acknowledged that “over the last decade small businesses have faced various increased difficulties in becoming wireless licensees.”<sup>3</sup> In fact, as WISPA has documented in previous Commission proceedings, existing rules have deterred participation by small businesses, leading to greater concentration of licensed spectrum in the large incumbent mobile wireless companies.<sup>4</sup> Given the small business challenges WISPs and other small

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<sup>3</sup> *NPRM* at 12428.

<sup>4</sup> For example, in Auction 66 DEs won 26.4% of the A (RSA) block, 15% of the A (MSA) block, 14.5% of the B and C block, and 13.9% of the D, E, and F block. Also in Auction 73, DEs won 46% of the A block, 48.1% of the B (RSA) block, 27.8% of the B (MSA) block, 25% of the C block, and 1.1% of the E block. See *Expanding the*

businesses face and the critical role they play in delivering fixed broadband service to rural and other underserved areas, the Commission must ensure that small businesses are given a fair and meaningful opportunity to participate in the Commission’s competitive bidding process.

## DISCUSSION

Section 309(j)(4)(D) of the Communications Act of 1934, as amended (the “Act”), requires the Commission to ensure that small businesses are given the opportunity to participate in competitive bidding for spectrum and to consider the use of bidding preferences.<sup>5</sup> The Act also directs the Commission to design its competitive bidding so as to avoid excessive concentration of licenses,<sup>6</sup> and to avoid unjust enrichment through methods employed to issue licenses.<sup>7</sup> In the *NPRM*, the Commission proposes to provide small businesses with a greater opportunity to participate in the provision of a wide range of spectrum-based services by modifying eligibility requirements and updating the standardized schedule of small business sizes, while also seeking comment on whether to modify its unjust enrichment rules.<sup>8</sup>

The recent Auction 97 AWS-3 Auction<sup>9</sup> was a success for both the American public, because the net winning bids were over \$41 billion, as well as small businesses, which were able to participate as a result of DE competitive bidding rules.<sup>10</sup> Pre-auction estimates of the total winning bid amount were in a range between \$10 and \$25 billion.<sup>11</sup> However, post-auction analysis showed that the presence of the DE bidder pool increased competition and drove up the

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*Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Comments of the Wireless Internet Service Providers Association, Docket No. 12-268, at 32 (Jan. 25, 2013).

<sup>5</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>6</sup> *Id.* § 309(j)(4)(C)(i).

<sup>7</sup> *Id.* § 309(j)(3)(C).

<sup>8</sup> See *NPRM* at 12428-9.

<sup>9</sup> See FCC Auction 97 AWS-3 website, available at:

[http://wireless.fcc.gov/auctions/default.htm?job=auCTION\\_summary&id=97](http://wireless.fcc.gov/auctions/default.htm?job=auCTION_summary&id=97) (last visited Feb. 18, 2015).

<sup>10</sup> In Auction 97, 15 DE bidders obtained just over 59 percent of all of the licenses auctioned. *Id.*

<sup>11</sup> See Alina Selyukh, “Big U.S. Wireless Carriers, Dish Plan Bids in Airwaves Auction,” Reuters, Oct. 1, 2014, available at <http://www.reuters.com/article/2014/10/02/us-usa-fcc-auction-idUSKCN0HQ57T20141002> (“the auction is expected to raise at least \$10 billion”) (last visited Feb. 18, 2015) (“Reuters Article”).

winning bid amount.<sup>12</sup> Without small business participation, fewer companies would have made winning bids, the amounts of those bids would have been for lesser amounts and more licenses would have been acquired by large incumbent wireless carriers. The success of the auction proves that bidding credits and small business participation allow for the creation of strategic alliances,<sup>13</sup> greater participation by small businesses and increased overall bid amounts. The Commission's rules should continue to encourage such meaningful participation by small businesses in future auctions.

**I. THE COMMISSION SHOULD ADOPT ITS PROPOSED CHANGES TO THE BIDDING CREDIT RULES.**

**A. The Commission Should Raise the Small Business Revenue Floor and Increase the Size of Bidding Credits.**

WISPA supports the Commission's proposal 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. Over this period of time, the wireless landscape and economic environment have drastically changed, and in order for the credits to remain effective, for all types of DEs the small business revenue floor and bidding credit sizes should be adjusted to reflect those changes.

First, the need for spectrum has increased dramatically. In the *NPRM*, the Commission recognizes that in the past decade alone the combination of the rapid adoption of smart phones and tablet computers, the widespread use of mobile applications, and the increased deployment of 3G and 4G technologies has "driven significantly more intensive use of mobile networks."<sup>14</sup>

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<sup>12</sup> See Phil Goldstein, "Analysis: Dish's AWS-3 Partners Bid Against Each Other, Potentially Pushing Up Prices by \$20 B," *FierceWireless*, Feb. 13, 2015, <http://www.fiercewireless.com/story/analysis-dishs-aws-3-partners-bid-against-each-other-potentially-pushing-pr/2015-02-13> (last visited Feb. 18, 2015).

<sup>13</sup> Two of the auction DE winners, Northstar Wireless LLC and SNR Wireless LicenseCo LLC entered into bidding agreements with Dish Network Corp. *See id.*; Reuters Article.

<sup>14</sup> *NPRM* at 12429 (citations omitted).

The Commission also states that the “progression from the provision of mobile voice services to mobile broadband services has increased the need for access to spectrum.”<sup>15</sup>

Second, while the need for spectrum has increased, “the costs of spectrum and network deployments especially for small and new entrants have increased in the last 20 years.”<sup>16</sup> In the *NPRM*, the Commission reports that during the last ten years, the number of small and regional mobile wireless service providers that offer additional choices in the areas they serve has significantly decreased.<sup>17</sup> The Commission concludes that:

access to capital for acquiring licenses is *critical* for [small and new entrant] 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.<sup>18</sup>

In light of these changed market factors, the Commission’s 17-year-old bidding credit rules should be examined and adjusted to ensure that they accommodate the *current* financial needs of small businesses. The timing of this review is critical, in light of the upcoming broadcast incentive auction and future spectrum auctions.

The Commission proposes to amend Section 1.2110(f) to increase the general size standards, measured in gross revenue, to determine an entity’s eligibility for bidding credits, as follows:<sup>19</sup>

Bidding Credit	<u>Current Rule:</u> Businesses with Average Gross Revenue for preceding 3 years	<u>Proposed Rule:</u> Businesses with Average Gross Revenue for preceding 3 years
35%	Not exceeding \$3 million	Not exceeding \$4 million
25%	Not exceeding \$15 million	Not exceeding \$20 million
15%	Not exceeding \$40 million	Not exceeding \$55 million

WISPA strongly supports the adoption of these proposed rules. WISPA agrees with the Commission that the proposed increase in the gross revenue thresholds reflect the changing

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> *See id.*

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *See id.* at 12445.

nature of the wireless industry, including the overall increase in the size of wireless networks and the increase in capital costs to deploy them.

WISPA agrees that increasing the gross revenue thresholds that define small businesses to make bidding credits available to a larger number of entities will facilitate a higher rate of participation by entities that might otherwise find it difficult to obtain the necessary capital to participate in an auction.<sup>20</sup> WISPA also supports an increase in the bidding credit percentages that apply to small business definitions.<sup>21</sup> As the Minority Media and Telecommunications Council (“MMTC”) White Paper concluded, the equity and debt markets have become far more challenging since 2006.<sup>22</sup> WISPA asks the Commission to review MMTC’s recommendation and to consider increasing the maximum bidding credit from 35 percent to 40-45 percent and increase the lower bidding credit levels proportionately.<sup>23</sup>

The Commission also seeks comment on its practice of determining which small business definitions will apply on a service-by-service basis, based on the associated capital requirements for a particular service, taking into consideration the characteristics and capital requirements of each service.<sup>24</sup> WISPA supports the Commission’s alternative proposal to apply all three small business definitions and bidding credit tiers in every spectrum auction. If the Commission applies the highest bidding credit in each tier for every auction, more small businesses are likely to participate in spectrum auctions. For the broadcast incentive auction, all three tiers of bidding credits should be used,<sup>25</sup> as discussed in WISPA’s previously filed comments.<sup>26</sup>

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<sup>20</sup> See *id.* at 12447.

<sup>21</sup> In the *NPRM*, the Commission seeks comments on increasing the bidding credit percentages. *NPRM* at 12448.

<sup>22</sup> S. Jenell Trigg, Esq., and Jeneba Jalloh Ghatt, Esq., Minority Media and Telecommunications Council, *Digital Déjà vu: a Road Map for Promoting Minority Ownership in the Wireless Industry* (Feb. 25, 2014) at 32-33 (arguing the negative and harmful regulatory impact), [http://mmtconline.org/wp-content/uploads/2014/02/Web-Unembargo-MMTC-WHITE-PAPER\\_WIRELESS-OWNERSHIP\\_2.24.14\\_FINAL-2.pdf](http://mmtconline.org/wp-content/uploads/2014/02/Web-Unembargo-MMTC-WHITE-PAPER_WIRELESS-OWNERSHIP_2.24.14_FINAL-2.pdf) (“MMTC White Paper”). MMTC changed its name effective January 21, 2015 to Multicultural Media, Telecom and Internet Council.

<sup>23</sup> See MMTC White Paper at 32 and nn.113 and 114.

<sup>24</sup> See *NPRM* at 12448.

<sup>25</sup> See *id.* at 12249.

## **B. The Commission Should Auction Spectrum in Smaller Geographic Units.**

The Act requires the Commission to prescribe area designations and bandwidth assignments that promote “an equitable distribution of licenses and services among geographic areas.”<sup>27</sup> In order to be consistent with these statutory requirements, the Commission can ensure greater participation by small entities by auctioning smaller geographic areas.<sup>28</sup> Many small businesses do not have the financial wherewithal to compete in auctions for Economic Areas (“EAs”) or Regional Economic Area Groups (“REAGs”), and have no desire to acquire large geographic areas when they only want the spectrum to cover a small area such as a county or small group of counties.<sup>29</sup> Moreover, by auctioning smaller areas, the Commission would invite more participation in auctions, not less, which would tend to drive up auction revenues and potentially increase competition.<sup>30</sup>

Past auctions indicate that smaller units yield more small business winners.<sup>31</sup> For instance, in both Auction 66 and Auction 73, the blocks auctioned with the smallest service area sizes rendered the highest percentage of DE winners in comparison to blocks auctioned with larger service areas.<sup>32</sup> In addition, in both of those auctions, there was a higher percentage of DE auction winners in the rural markets as compared to the high bidders for the other licenses.<sup>33</sup> WISPA is pleased that the Commission will auction some licenses in the broadcast incentive

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<sup>26</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Comments of the Wireless Internet Service Providers, Docket No. 12-268 at 32 (Jan. 25, 2013) (“*WISPA Incentive Auction Comments*”).

<sup>27</sup> 47 U.S.C. § 309(j)(4)(c)(i).

<sup>28</sup> See *WISPA Incentive Auction Comments*.

<sup>29</sup> See *id.* at 31.

<sup>30</sup> See *id.* at 33.

<sup>31</sup> See *id.* at 32.

<sup>32</sup> See *id.* The percentage of DE winners were generally larger when the service areas were auctioned as Cellular Market Areas (“CMAs”) versus larger EAs and REAGs. *Id.*

<sup>33</sup> See *id.*

auction according to Partial Economic Areas (“PEAs”), and encourages the use of smaller geographic areas going forward.<sup>34</sup>

**C. The Commission Should Adopt Bidding Credits for Auction Winners Serving Unserved and Underserved Areas.**

WISPA supports the extension of bidding credits to unserved and underserved areas, as such areas are determined on an auction-by-auction basis.<sup>35</sup> In establishing service-specific rules and procedures for each auction, the Commission should invite comment on the criteria that would be required to meet a definition of “unserved” or “underserved” based on the spectrum and type of service to be offered. Those areas determined to be “unserved” or “underserved” would be eligible for a bidding credit. In order to obtain the bidding credit, auction winners would be required to meet certain deployment criteria to ensure that the auction winner was actually constructing and operating facilities within a reasonable time period and not simply warehousing the spectrum under some loose definition of “substantial service.” In this manner, bidding credits would not require the immediate reduction in the winning bid amount, but would instead operate much like Tribal bidding credits under Section 1.2110(f)(3), which are based on actual deployment and not just the promise to deploy.<sup>36</sup> For example, Tribal bidding credits contain post-auction performance requirements, deadlines and penalties for performance failures,<sup>37</sup> as well as bidding credit certification and construction requirements.<sup>38</sup>

The Commission asks whether bidding credits for unserved and underserved areas should be available only to small businesses and/or other DEs, or to any applicant.<sup>39</sup> Because service to unserved and underserved areas is not dependent on the size of the entity but rather its

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<sup>34</sup> See generally William Lehr and J. Armand Musey, Summit Ridge Group, *Right-sizing Spectrum Auction Licenses: The Case for Smaller Geographic License Areas in the TV Broadcast Incentive Auction* (Nov. 20, 2013), available at: <http://apps.fcc.gov/ecfs/document/view?id=7520959686> . Lehr and Musey explain that the choice of smaller territories in spectrum auctions, such as CMAs offer the best prospects for incentive auctions. See *id.* at 28.

<sup>35</sup> *NPRM* at 12450.

<sup>36</sup> See 47 C.F.R. § 1.2110(f)(3).

<sup>37</sup> 47 U.S.C. § 309(j)(4)(B).

<sup>38</sup> 47 C.F.R. §1.2110(f)(3)(ii).

<sup>39</sup> *NPRM* at 12450.

willingness to deploy in generally higher-cost, sparsely populated areas, WISPA believes that the bidding credit should be available to any entity that meets the deployment obligations in unserved or underserved areas established for the particular service and auction. However, bidders receiving Connect America Fund (“CAF”) support for the area in question should not be eligible for small business bidding credits as well.

## **II. THE COMMISSION SHOULD ELIMINATE THE ATTRIBUTABLE MATERIAL RELATIONSHIP RULE.**

WISPA supports the Commission’s proposal to repeal the AMR rule,<sup>40</sup> which eventually eliminates DE status for a small business that enters into an agreement with any entity to lease, wholesale or resell more than 25 percent its spectrum capacity by making the revenues of the other party attributable to the DE and requiring the DE to make an unjust enrichment payment.<sup>41</sup> In the *NPRM*, the Commission recognizes that its AMR rule, which was hastily adopted in 2006, may have led to unintended consequences by hindering wireless entry by small businesses.<sup>42</sup> The Commission also acknowledges that the rule 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 agreements, “even in circumstances where they retain control over their business venture.”<sup>43</sup> Although the 2006 AMR rule was ultimately upheld in *Council Tree vs. FCC*, the Third Circuit Court of Appeals noted that the question of whether the rule was arbitrary and capricious was a “close one” and that “the FCC made few factual findings on the impact of the new rules on DE financing.”<sup>44</sup>

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<sup>40</sup> 47 C.F.R. §1.2110.

<sup>41</sup> *NPRM* at 12434, 12436.

<sup>42</sup> *Id.* at 12436.

<sup>43</sup> *Id.*

<sup>44</sup> *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 251 (2010) (subsequent history omitted).

WISPA also recognizes the need for the Commission to adopt rules that prevent sham relationships that use small businesses as fronts for large businesses. In lieu of the AMR rule, the Commission proposes to determine small business eligibility on a license-by-license basis using a two-pronged test.<sup>45</sup> Under this proposal, the Commission would use its existing controlling interest and affiliation rules to determine whether the applicant (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the licenses for which it seeks benefits.<sup>46</sup>

WISPA supports adoption of this approach. It relies on existing standards that consider both *de jure* and *de facto* control of the applicant's overall business and corresponding case law to determine whether and to what extent, on a license-by-license basis, the licensee should retain DE status. This approach recognizes the Commission's conclusions that the mere existence of a spectrum use agreement (*e.g.*, leasing, reselling or wholesaling) between a small business and another party does not, standing alone, cause the other party to become an attributable interest holder in a DE. Small businesses would be able to structure relationships in ways that are understood and predictable, and the Commission would have an opportunity to pass on transactions just as it does in other cases. WISPA agrees with the Commission that the proposed approach would allow small businesses the flexibility to adopt individualized business models for each license it holds while ensuring that the small business licensee still retains control of all the licenses for which it seeks bidding credits.<sup>47</sup>

In the alternative, the Commission seeks comment on whether it should retain the AMR rule and the related policy that small businesses primarily provide facilities-based service, but stipulate that neither would apply for a set number of years.<sup>48</sup> WISPA does not support this

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<sup>45</sup> See *NPRM* at 12437.

<sup>46</sup> See *id.* 12437-9.

<sup>47</sup> See *id.* at 12435.

<sup>48</sup> See *id.* at 12437.

proposal; small business funding would become more complicated and the stipulation would create a disincentive for potential long-term growth and create regulatory uncertainty. Retaining the AMR rule is also an impediment to new entrants, especially those facilities-based DEs that wish to provide wholesale service.

The Commission also proposes to modify its secondary market leasing rules<sup>49</sup> to make clear that DE lessors may fully engage in spectrum manager leasing under the same *de facto* control standard as non-DE lessors.<sup>50</sup> Under a spectrum manager lease, the licensee is considered to maintain *de facto* control of its spectrum if it (1) maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules, (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 policies and rules.<sup>51</sup>

WISPA supports adoption of this proposal and agrees with the Commission that the modification clarifies that there is “one *de facto* standard to determine if the licensee has *de facto* control of the spectrum in the context of a spectrum manager lease.”<sup>52</sup> This clarification will help enable small businesses to enter into leasing arrangements that are well understood and utilized within the marketplace. In addition, the uniform standard makes the application process for spectrum leases more predictable, eliminates any need for special filings and reduces administrative burdens. Finally, this proposal will ensure that small business licensees will retain control over certain obligations, preventing any sham arrangements or unjust enrichment for non-small business entities.

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<sup>49</sup> See 47 C.F.R. §1.9020.

<sup>50</sup> See *NPRM* at 12440. Specifically, the Commission proposes to remove conflicting language in 47 C.F.R. §1.9020 found in §1.9020(d)(4). See *id* at 12441.

<sup>51</sup> See *id.* at 12439-40. See also 47 C.F.R. § 1.9010.

<sup>52</sup> *NPRM* at 12442.

### III. THE COMMISSION SHOULD NOT EXTEND THE FIVE-YEAR UNJUST ENRICHMENT PERIOD.

WISPA opposes any extension of the existing five-year unjust enrichment payment schedule specified in Section 1.2111(b).<sup>53</sup> The five-year unjust enrichment period provides a sufficient safeguard to ensure that bidding credits are provided only to qualifying entities. By contrast, extending the unjust enrichment payment period beyond five years would restrict small businesses from participating in the provision of spectrum-based services and deter small business participation, as it will be more difficult for small businesses to find funding for a larger investment horizon. Investors in the telecommunications space typically look to recover their investments within five years.<sup>54</sup> In fact, in the Third Circuit *Council Tree* case, the Court found that, in adopting Section 1.2111(b), the Commission had not considered the impact of extended repayment schedules on DEs' ability to obtain financing, and that the Commission confused the "the maximum period investors are willing to lock up their capital...with the minimum period necessary for financiers to turn a profit on a successful investment..."<sup>55</sup> WISPA supports the Commission's efforts to prevent abuse, but any time period longer than five years would hinder the investment in and long-term growth potential of small businesses in spectrum-based businesses, especially new entrants.

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<sup>53</sup> See 47 C.F.R. §1.2111(b). To safeguard against abuse, the Commission has required DEs to pay back all or some of the bidding credit it received as a high bidder if it loses that status. The amount of the payment – known as "unjust enrichment" – depends on the time that has passed since the license was issued to the DE. Current rules use a sliding scale, where the entire amount of the bidding credit would be paid if the DE loses its DE status, through sale, internal ownership changes or an AMR, in the first two years, with lesser amounts paid in years three through five. No unjust enrichment is due after year five. *Id.*

<sup>54</sup> The former Telecommunications Development Fund, an investment fund established by the Telecommunications Act of 1996, established investment guidelines that set its investment horizon between three and six years *Implementation of the Commercial Spectrum Enforcement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Council Tree Communications, Inc. Supplement to Petition for Expedited Reconsideration/Motion for Expedited Stay Pending Reconsideration or Judicial Review, WT Dkt. No. 05-211 (May 17, 2006) at 13 n.49 (citing to TDF's website, [http://www.tdfund.com/entrepreneurs/courses/equity-financing/efc\\_21.html](http://www.tdfund.com/entrepreneurs/courses/equity-financing/efc_21.html)).

<sup>55</sup> *Council Tree*, 619 F.3d at 256-57 n.10.

## **CONCLUSION**

Consistent with the Act, the Commission should adopt the proposals set forth in the *NPRM* to provide small businesses with a greater opportunity to participate meaningfully in the provision of spectrum-based services by modifying eligibility requirements and updating the standardized schedule of small business size standards. The Commission should establish credits for deployment of auctioned services to unserved and underserved areas. The Commission also should eliminate the AMR rule, but should not lengthen the five-year unjust enrichment time period.

Respectfully submitted,

### **WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

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