

**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 T-MOBILE USA, INC.**

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**COMMENTS OF T-MOBILE USA, INC.**

**I. INTRODUCTION AND SUMMARY**

T-Mobile USA, Inc. (“T-Mobile”)<sup>1</sup> respectfully submits its comments in response to the Federal Communications Commission (“Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.<sup>2</sup> The NPRM seeks to revise certain of the Part 1 competitive bidding rules in advance of the upcoming 600 MHz incentive auction. Among other things, the NPRM proposes to update the Commission’s designated entity program, codify

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<sup>1</sup> T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

<sup>2</sup> *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014) (“NPRM”).

existing and new competitive bidding procedures for commonly-controlled entities, and revise longstanding rules governing joint bidding arrangements. The stated goal of these proposals is to ensure that the Part 1 rules continue to advance the Commission’s fundamental statutory objectives.

The upcoming 600 MHz incentive auction represents a “once-in-a-generation opportunity” for the Commission to ensure that all carriers—not just the dominant two—are able to secure much-needed low-band spectrum for the benefit of wireless competition and the well-being of every American consumer.<sup>3</sup> As illustrated by the recently-concluded AWS-3 auction, Auction No. 97, there is a pressing need to reform the Commission’s competitive bidding rules in advance of that auction. In this filing, T-Mobile proposes key rule changes that are necessary to prevent some of the problems and missed opportunities that emerged from Auction No. 97 and to otherwise ensure a successful incentive auction.

The lynchpin of the Commission’s competitive bidding rules is that spectrum auctions should place licenses in the hands of those who value them most highly and will put them to use. Among the Commission’s tactics to achieve efficient allocation of spectrum licenses is that bidders not be unfairly advantaged or disadvantaged during the bidding process as a result of agreements between participants. However, in Auction No. 97, some bidders were able to successfully exploit certain loopholes in the Commission’s auction design and anti-collusion rules to the detriment of other bidders and the public interest. Bidding patterns in Auction No. 97 make clear that, at a minimum, certain parties that shared common, non-controlling interests agreed in advance to bidding strategies that had the effect of unfairly disadvantaging other

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<sup>3</sup> *Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6311, ¶ 153 (2014) (“*Mobile Spectrum Holdings R&O*”).

bidders and of jeopardizing the Commission's mandate to maximize the efficient use of valuable spectrum resources. The auction rules apparently permitted these entities to communicate throughout the auction, while single bidders were subject to the Commission's strict blind auction rules.

Rules that permitted such bidding activity not only compromised the efficiency of the auction outcome, they lessened confidence in the auction process itself. In many cases, these rules had the effect of keeping licenses out of the hands of smaller nationwide, regional, and rural service providers that valued them most. As a result, many AWS-3 licenses were not won by those parties most likely to deploy new technologies and services rapidly, promote the development of competition, and foster economic growth. This kind of bidding conduct must not be permitted to occur again or it will undermine the rightful goals of the historic incentive auction.

As discussed herein, T-Mobile supports measures proposed in the NPRM designed to tighten the competitive bidding rules to prevent bidding conduct that may distort or delay the auction process. Although the NPRM proposes certain rule changes that are a step in the right direction, in light of Auction No. 97, T-Mobile believes the proposed rules do not go far enough and, in some cases, would exacerbate the problem. For example, while new rules proposed in the NPRM regarding commonly-controlled entities take a meaningful step toward addressing potentially unfair bidding conduct, T-Mobile believes it is critical that the Commission also address the potential for coordinated behavior by bidders that are linked by common attributable interests. Without such rule changes, these entities have unfair advantages in an auction and can manipulate bidding to the detriment of other participants and the public, as evidenced in Auction No. 97. Given that entities already are able to form pre-auction consortia, there are no tangible

public interest benefits to allowing entities to participate in an auction through multiple vehicles bidding under a common strategy. The Commission should prevent such behavior by requiring individuals and entities that are listed as disclosable interest holders on more than one short-form application to expressly certify that they are not privy to, or involved in, the bidding strategy of more than one auction participant.

It also is critical that the rules governing the designated entity program not be allowed to harm the goals of the auction process. A strong and effective designated entity program is essential to comply with Congress's mandate that the Commission design and conduct spectrum auctions in a manner that "promote[s] economic opportunity and competition . . . [and] avoid[s] excessive concentration of licenses by disseminating licenses among a wide variety of applicants, including small businesses."<sup>4</sup> As the dust settles on the AWS-3 auction, however, it is clear that the current rules are inadequate to ensure that only *bona fide* small businesses interested in deploying their spectrum are the recipients of discounted pricing.

Accordingly, as discussed in greater detail below, the Commission should revise its designated entity rules to: (i) not only preserve the attributable material relationship ("AMR") rule, but also strengthen it to prohibit designated entities from leasing more than 25 percent of their spectrum in the aggregate, across one or more lessees; (ii) require designated entities to demonstrate in their annual filings some evidence of build-out activity within a year of being licensed (or within a year of clearing out incumbent users, if appropriate); (iii) adopt a rebuttable presumption that equity investments of 50 percent or more constitute *de facto* control for purposes of the designated entity attribution rules; (iv) require a 25 percent minimum equity threshold to ensure that controlling interests are properly invested in the company; and (v)

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

strengthen unjust enrichment rules to require full repayment of the bidding credit, plus interest, as well as a penalty equal to the sales price above and beyond the auction bid price, plus interest, if a license acquired with designated entity benefits is transferred at any time during the ten-year license term. These rules will better promote the objectives of the Commission's designated entity program by preventing speculation by non-*bona fide* small business entities.

Further, the Commission should not reverse its longstanding policy of permitting joint bidding arrangements between auction participants, including such agreements among the nationwide providers. Rather, the Commission should continue to consider joint bidding arrangements on a case-by-case basis, based on their own merits and not pursuant to a blanket prohibition. As the Commission consistently has recognized, joint bidding arrangements have the potential to provide immense public interest benefits—they can stimulate investment, promote competition, and accelerate broadband deployment. For companies like T-Mobile—which lacks the deep pockets of the largest two nationwide service providers—joint bidding arrangements offer a potential means of bolstering purchasing power and scale to compete effectively in the wireless marketplace against the two largest nationwide providers. The option of such arrangements is even more important for companies like T-Mobile in the aftermath of Auction No. 97, where the largest two nationwide service providers acquired 63 percent of all paired AWS-3 spectrum on a MHz-POP basis, or roughly 91 percent of the value of the spectrum won by wireless service providers in that auction. It would be ironic indeed if the proposals advanced in the NPRM, which ostensibly are designed to increase competition in the auction process and in the wireless services market, were to handicap an entity—like T-Mobile—that might be best poised to deliver meaningful competition.

Finally, in addition to competitive bidding rules that ensure a fair and transparent auction for all auction participants, it is critical that the Commission's consideration of competitive bidding rules not be allowed to delay the 600 MHz incentive auction or to result in auction design rules that further concentrate valuable low-band spectrum resources in the hands of only a few entities. The 600 MHz incentive auction represents a historic opportunity for the Commission to ensure that competitors like T-Mobile obtain access to much-needed low-band spectrum that is necessary to challenge effectively the two largest nationwide providers. Given the importance of low-band spectrum for a wide array of wireless services, it is important to competition and consumers to keep the auction on track and to give American consumers the benefit of such spectrum as soon as possible. For the same reasons, it also is important that auction rules not permit further concentration of valuable low-band spectrum resources in the hands of only a few entities. As T-Mobile raises and discusses more fully in the Commission's incentive auctions proceeding, a cap of 20 MHz on a market-by-market basis on the amount of reserve spectrum that can be won in the incentive auction would ensure efficient allocation of 600 MHz spectrum.

Careful consideration and articulation of the competitive bidding rules in advance of the incentive auction is critical to ensuring its success. Competitive bidding rules consistent with the framework proposed herein will ensure a fair, transparent, and timely auction for all bidders.

## **II. THE COMMISSION MUST ADDRESS POTENTIALLY COORDINATED BEHAVIOR BY ENTITIES THAT SHARE COMMON INTERESTS**

The Commission's recently concluded AWS-3 auction illustrates the pressing need to revisit the competitive bidding rules. While the auction raised a record \$44.9 billion (\$41.3 billion after bidding credits), the rules permitted some bidding behavior in that auction that did

not advance the public interest.<sup>5</sup> Rather, bidding conduct by some entities disadvantaged other bidders and was directly contrary to the fairness and efficiency goals of the Commission’s blind auction format. It is clear, for example, that some bidders that shared common interests coordinated their bidding in ways that allowed them to protect their eligibility throughout the auction by bidding on the same markets and then hiding behind each other’s bids. Coordinated use of activity units also allowed some bidders to ensure that the auction remained open, resulting in an auction consisting of 341 rounds. By bidding aggressively on many licenses across the country, coordinated entities created the impression that there were more bidders than there actually were, since the identities of bidders were not known to participants.<sup>6</sup> In addition, by increasing bidding activity on specific licenses, these bidders raised minimum acceptable bids more quickly and successfully forced out smaller competitors that could no longer compete.<sup>7</sup> Finally, through coordinated activity, bidders gained advantages in the context of the Commission’s random tie-breakers. Multiple, coordinated entities have a clear advantage over single bidders in the Commission’s random selection processes. While these types of bidding conduct may have been lawful under the Commission’s existing rules, they diverted spectrum resources from bidders with genuine needs into the hands of those who were able to gain unfair advantages during the auction process.

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<sup>5</sup> Thomas Gryta, The Wall Street Journal, “FCC Raises \$44.9 Billion in U.S. Wireless Spectrum Sale” (Jan. 29, 2015) available at <http://www.wsj.com/articles/fcc-raises-44-9-billion-in-u-s-wireless-spectrum-sale-1422548474?tesla=y>.

<sup>6</sup> See, e.g., Thomas Gryta and Ryan Knutson, The Wall Street Journal, “Behind Dish Network’s Race for Wireless Spectrum” (Feb. 12, 2015) available at <http://www.wsj.com/articles/behind-dish-networks-race-for-wireless-spectrum-1423786487>.

<sup>7</sup> One analysis suggests that certain bidding conduct that is currently lawful under the Commission’s rules may have boosted the price of AWS-3 spectrum by more than \$20 billion. *Id.*

Notably, the NPRM takes a meaningful step toward addressing this kind of bidding conduct that could distort the auction process. Noting that the Commission’s rules already preclude multiple short-form applications from the same entity for a specific auction,<sup>8</sup> the NPRM proposes to establish a new rule that would prevent commonly controlled entities from qualifying to bid on licenses in the same or overlapping geographic areas on more than one short-form application.<sup>9</sup> These proposed revisions rightfully aim to address the inherent risks in allowing commonly controlled bidders to participate in an auction. As the NPRM notes, “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.”<sup>10</sup> In addition, “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.”<sup>11</sup>

The potentially problematic behaviors highlighted in the NPRM, however, also could extend to entities that are not under common control but that nonetheless share cognizable interests. These entities may derive benefits from their shared interests not available to other bidders. Individuals or entities with a controlling interest in one bidder and a cognizable, non-controlling interest in another, or with cognizable, non-controlling interests in more than one auction participant, potentially could be privy to, or involved in, the bidding strategy of more

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<sup>8</sup> *NPRM* at ¶ 99 (“The Commission’s competitive bidding procedures have long prohibited the same individual or entity from submitting multiple short-form applications in any auction.”).

<sup>9</sup> *Id.* at ¶ 103.

<sup>10</sup> *Id.* at ¶ 104.

<sup>11</sup> *Id.* at ¶ 105.

than one bidder. This plainly was the case in Auction No. 97, and it resulted in clear harm to the public interest. Entities that shared common interests in that auction coordinated their bidding actions to the detriment of other auction participants and the public.

While the NPRM addresses the potential for collusive behavior by commonly controlled entities, it ignores the now-demonstrated potential for such behavior where some or all of the shared interests are non-controlling. In revising its rules, the Commission should close this unfortunate loophole that some entities may use again to undermine future auctions. Indeed, rules that allow some bidders that share non-controlling interests to skew the auction process by coordinating their bidding actions while subjecting other auction participants to a strict blind auction make little sense and are patently unfair.

To address this gap and better ensure evenhandedness and transparency in the auction process, the Commission should adopt a requirement in addition to its existing anti-collusion rules that individuals or entities listed as disclosable interest-holders on more than one short-form application certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant. The Commission's existing ownership disclosure rules offer a reasonable benchmark and practical guidance for establishing when the proposed certification would be required: consistent with Section 1.2112(a), any individuals or entities that have a 10 percent or greater interest in more than one applicant would be required to submit the certification with each of these applicants' short-form applications.<sup>12</sup> The Commission also should require that authorized bidders on a short-form application be unique to that applicant—meaning that an individual should be prohibited from serving as an authorized bidder for more than one auction participant. To ensure effective and meaningful compliance, the Commission

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<sup>12</sup> 47 C.F.R. § 1.2112(a).

should adopt harsh penalties for violations of such certifications, including revocation of the licenses won at the auction. These proposed modifications will improve the transparency of the auction process and ensure that entities that share cognizable interests—whether controlling or non-controlling—do not derive some advantage in the auction process by coordinating their bidding actions. These rules also will ensure that the coordinated behavior that undermined the fairness and transparency of Auction No. 97 will not impair future auctions.

### **III. THE PROPOSED CHANGES TO THE DESIGNATED ENTITY RULES COULD HARM THE INTEGRITY OF THE AUCTION AND DAMAGE COMPETITION; THE DESIGNATED ENTITY RULES REQUIRE STRENGTHENING**

The NPRM seeks comment on a variety of proposals related to the designated entity program, including whether to repeal the AMR rule and whether to strengthen the Commission’s rules to prevent the unjust enrichment of ineligible entities.<sup>13</sup> The Commission’s designated entity program was created to promote the participation of small businesses in competitive bidding and in the provision of wireless services. Indeed, using spectrum licenses acquired with designated entity benefits, several small businesses and entrepreneurs have built out competitive wireless networks in areas where they did not previously exist and introduced creative and valuable service offerings, including for low-income and minority consumers.

The Commission’s challenge in providing opportunities to small businesses has always been to ensure that only *bona fide* small operators reap the benefits of the designated entity program. To that end, the Commission has periodically modified its designated entity rules to achieve the right balance between encouraging small business participation in spectrum auctions and deterring speculation, unjust enrichment, or usurpation of designated entity benefits by

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<sup>13</sup> NPRM at ¶¶ 8, 42.

ineligible entities.<sup>14</sup> In determining whether to award designated entity benefits, for example, the Commission uses a strict eligibility standard that focuses on whether the applicant maintains control of the corporate entity.<sup>15</sup> The Commission’s objective in employing such a standard is “to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings.”<sup>16</sup> In addition, pursuant to a decade-old policy underlying the AMR rule, the Commission requires that a licensee receiving designated entity benefits be an entity that actually provides service under the license.<sup>17</sup>

Accordingly, the AMR rule requires a designated entity to attribute to itself the gross revenues of any entity with which it has an agreement for the lease or resale of more than 25 percent of the spectrum capacity of any one of its licenses.<sup>18</sup> Finally, the Commission also requires a small business to pay back the designated entity benefits it accrued if it seeks to assign or transfer control of any license obtained with bidding credits to a non-eligible party for a period of up to

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<sup>14</sup> See *id.* at ¶ 5, fn. 10.

<sup>15</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, ¶ 277 (1994) (“*Competitive Bidding Second R&O*”).

<sup>16</sup> *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753, ¶ 6 (2006).

<sup>17</sup> See 47 C.F.R. § 1.2110(b)(3)(iv)(A); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, ¶ 71 (2004).

<sup>18</sup> 47 C.F.R. § 1.2110(b)(3)(iv)(A) (“An applicant or licensee must attribute the gross revenues (and, if applicable the total assets) of any entity, (including the controlling interests, affiliates, and affiliates of the controlling interests of that entity) with which the applicant or licensee has an attributable material relationship. An applicant or licensee has an attributable material relationship 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 individual license held by the applicant or licensee.”).

five years from the initial issuance of the license.<sup>19</sup> The Commission currently reduces the percentage value of the bidding credit depending on the year of the license term that the transfer or assignment is requested. After five years, the Commission does not require repayment of any of the value of the bidding credit.<sup>20</sup>

While these rules are well intended, to effectively prevent manipulation or abuse of the designated entity program, the Commission must strengthen its existing rules in a number of respects to ensure that designated entity benefits are preserved for legitimate small businesses that will bring limited spectrum resources to the marketplace. First, in preserving the AMR rule, the Commission should revise the rule to prohibit designated entities from leasing more than 25 percent of their spectrum in the aggregate, across one or more lessees. Second, the Commission should adopt rules requiring designated entities to show in annual filings some level of build-out activity that is consistent for the provision of timely, facilities-based service. Third, to avoid sham arrangements that could undermine spectrum auctions, the Commission should adopt minimum equity requirements for designated entities. Fourth, the Commission should adopt a rebuttable presumption that equity investments of 50 percent or more constitute *de facto* control for purposes of attribution rules. Finally, to better deter speculation, the Commission should revise its unjust enrichment rules to require full repayment of the bidding credit, plus interest, throughout the entire ten-year license term as well as a penalty equal to the sales price above and beyond the auction bid price, plus interest.

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<sup>19</sup> See 47 C.F.R. § 1.2111(d).

<sup>20</sup> *Id.*

### **A. The Commission Should Preserve and Strengthen the AMR Rule**

The NPRM proposes to repeal the AMR rule and to re-examine the need for the related policy that has limited small businesses seeking bidding credits to providing retail, facilities-based service to the public with each of their licenses.<sup>21</sup> Such a proposal would allow designated entities to lease up to 100 percent of their spectrum to one or more companies, thereby increasing the likelihood that designated entity benefits unfairly flow to ineligible entities or to speculators that acquire and warehouse spectrum at the expense of actual service providers that need it. This proposal is a clear step in the wrong direction and should not be adopted.

The NPRM's proposal contravenes clear Congressional and Commission intent that designated entities be independent, facilities-based providers that provide service to the public with each of their licenses acquired with taxpayer-funded bidding credits. As part of the grant of auction authority under Section 309(j) of the Communications Act, Congress directed the Commission to develop its auction program in a manner that promotes the dissemination of "licenses among a wide variety of applicants, including small businesses . . ." and "ensure[s] that small businesses . . . are given the opportunity to *participate in the provision of spectrum-based services . . .*"<sup>22</sup> In adopting Section 309(j), Congress also explained that the reason for imposing unjust enrichment payment obligations on entities that receive small business benefits was to deter "participation in the licensing process by those who have no intention of offering service to the public."<sup>23</sup>

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<sup>21</sup> NPRM at ¶ 8.

<sup>22</sup> 47 U.S.C. § 309(j)(3)-(4) (emphasis added).

<sup>23</sup> H.R. Rep. No. 103-111, at 257-58 (1993).

Consistent with Congress's clear directive, the Commission's most vital public interest objective here should be to ensure that essential spectrum resources are introduced into the marketplace in a timely fashion. Accordingly, the Commission should preserve the AMR rule so that designated entities are incented to become independent, facilities-based providers. In addition, consistent with Congress's intent, the Commission should strengthen the AMR rule by prohibiting designated entities from leasing more than 25 percent of their spectrum obtained with bidding credits to one or more lessees.<sup>24</sup>

**B. The Commission Should Require Designated Entities to Demonstrate Build-Out Activity Within One Year**

To further ensure that Congress's mandate is fulfilled and that valuable spectrum resources are made available to the public in a timely manner, the Commission also should seek to ensure that designated entities take concrete and timely steps toward constructing their licenses. Specifically, the Commission should require designated entities to show some evidence of build-out activity in annual filings within one year of acquiring the license. In the case of 600 MHz spectrum, the Commission should require such showings within one year of clearing broadcast users. Build-out demonstrations in the first year should include tangible steps toward deployment such as engaging in due diligence activities, hiring employees or contractors, conducting site acquisition surveys, entering into lease agreements, or negotiating with vendors, among others. Above all, the demonstrations should provide the Commission with adequate

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<sup>24</sup> Indeed, some press reports speculate that some entities that acquired spectrum in Auction No. 97 using designated entity benefits may lease that spectrum to large, nationwide providers that are ineligible for such benefits. See Phil Goldstein, FierceWireless, "Verizon: With AWS-3, We Have at Least 40 MHz of AWS Spectrum in 92 of the top 100 Markets" (Feb. 17, 2015) available at <http://www.fiercewireless.com/story/verizon-aws-3-we-have-least-40-mhz-aws-spectrum-92-top-100-markets/2015-02-17>.

confidence that the licensee is taking meaningful steps toward constructing the license and providing service to consumers.

**C. The Commission Should Adopt New Requirements to Ensure that Designated Entities are *Bona Fide* Small Businesses**

To more effectively prevent sham arrangements, the Commission should adopt rules to better ensure that designated entities are *bona fide* small businesses. Such rules would lessen the likelihood that a designated entity is simply a front for an ineligible person to acquire spectrum at a discount. Specifically, the Commission should adopt the following two requirements to better ensure that designated entities are legitimate small businesses.

First, the Commission should revise its control standard under the designated entity attribution rules by adopting a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of the company. Such a rule would require attribution of the equity interestholder's revenues for purposes of qualifying for designated entity benefits. This would prevent sham arrangements that allow ineligible entities to provide substantial equity in a designated entity without attributing its revenues for purposes of determining the designated entity's eligibility for benefits.

Second, in addition to the existing 50 percent voting requirement, the Commission should adopt a 25 percent minimum equity requirement for designated entities to ensure that controlling interests are properly invested in their companies. In doing so, the Commission should make clear that any loans to achieve minimum equity thresholds be negotiated at arms-length. Such a requirement would ensure that designated entities are not simply vehicles for ineligible entities to abuse the designated entity program.

#### **D. The Commission Should Adopt Stricter Unjust Enrichment Rules**

The Commission should strengthen its unjust enrichment requirements by adopting stricter rules against the transfer of licenses acquired with bidding credits to ineligible entities. As the NPRM appreciates, the challenge of the designated entity program lies in “find[ing] a reasonable balance between the 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.”<sup>25</sup> In fact, one economist has noted that bidding credits inherently carry perverse incentives: they encourage companies to create eligible bidders that are “carefully constructed to satisfy the rules but circumvent their intent.”<sup>26</sup> Some entities, facing the prospect of a large payout if they sell or lease spectrum acquired with bidding credits, could be encouraged to circumvent the spirit of the Commission’s rules by creating designated entities that facially meet the Commission’s eligibility criteria but hold the licenses for only a brief period of time without any intent to build networks of their own or otherwise provide services.

Although the Commission’s current unjust enrichment rules ostensibly seek to combat these incentives, in practice they have failed to do so. Many entities may view the monetary penalty in the current rules as a mere cost of doing business and not as a meaningful deterrent. In fact, an entity that acquires a license with bidding credits and later sells that license at the full market price often stands to make a significant profit even after making the required unjust enrichment payment. As such, the Commission’s existing unjust enrichment rules do not provide an effective safeguard against abuse. Furthermore, in cases where spectrum is not

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<sup>25</sup> NPRM at ¶ 5.

<sup>26</sup> Peter Cramton, Prepared Testimony before the Senate Budget Committee, “Lessons from the United States Spectrum Auctions” at 4 (Feb. 10, 2000).

available for use in the near term due to Federal Government or commercial incumbents, the Commission's existing holding periods for licenses acquired with bidding credits do not correspond with any rational benchmark for licensees to engage in a legitimate business.

To better reflect market realities and to provide a more meaningful deterrent to speculation and abuse, the Commission should adjust its unjust enrichment rules to: (i) encompass the entire license term; and (ii) require licensees that profit from a sale of a license obtained at a discount to repay that windfall profit, plus interest. Specifically, the Commission should consider an unjust enrichment obligation that requires full repayment, plus interest, until the end of a standard 10-year lease term. Such a rule would ensure that licensees do not unfairly benefit from an award of bidding credits at any time during the license term. To better deter speculation, the Commission also should require repayment of not only the bidding credit plus interest, but also the sales price of the licenses above and beyond the auction bid price plus interest. The spectrum at issue is critically important, and only harsh penalties for the transfer of designated entity licenses will ensure that speculators do not deny valuable spectrum resources to the public.

The adoption of stricter penalties for the transfer of licenses acquired with bidding credits to non-eligible entities, coupled with proper enforcement of the rules, will better promote the objectives of the designated entity program. Stricter rules and penalties will better deter speculation and auction participation by those who do not intend to offer service to the public as well as by those who intend to use bidding credits to obtain a license at a discount and later sell that license at the full market price for a windfall profit. Stricter unjust enrichment rules also will ensure that the U.S. Treasury is made whole in the event that a designated entity turns out to be a "sham company" organized to secure bidding credits for an ineligible entity.

#### **IV. THE COMMISSION SHOULD NOT REVERSE ITS LONGSTANDING POLICY OF PERMITTING JOINT BIDDING ARRANGEMENTS, INCLUDING THOSE BETWEEN NATIONWIDE CARRIERS**

In a stark reversal of longstanding Commission policy, the NPRM tentatively concludes to broadly prohibit joint bidding arrangements among nationwide providers.<sup>27</sup> The NPRM bases its proposed restriction on an unsupported claim that joint bidding arrangements among nationwide providers “would have the potential to serve as a vehicle for anticompetitive conduct by altering post auction incentives to compete.”<sup>28</sup> To the contrary, spectrum auctions and the public interest would benefit more from allowing all service providers the freedom to explore the full range of business arrangements available to them to compete effectively both at auction and in the market. The upcoming 600 MHz incentive auction presents a “once-in-a-generation opportunity” to access low-band spectrum.<sup>29</sup> The Commission should not adopt auction rules limiting the ability of those who need such spectrum—and who lack the deep pockets of the largest two nationwide providers—to be able to acquire it or put it to use. For companies like T-Mobile that lack the vast resources of its larger competitors, joint bidding arrangements can serve as a means of bolstering purchasing power and scale to achieve more extensive network expansion and upgrades that are necessary to compete successfully in the wireless industry.

The NPRM’s proposal would arbitrarily reverse longstanding Commission policy of permitting joint bidding arrangements, including those involving some of the largest communications companies. The Commission carefully crafted its current anti-collusion rules to

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<sup>27</sup> *NPRM* at ¶ 131.

<sup>28</sup> *Id.*

<sup>29</sup> *Mobile Spectrum Holdings R&O*, at ¶ 153.

take care that they not preclude the creation of bidding consortia.<sup>30</sup> Since adopting those rules, the Commission has been clear that it does “not wish to restrict unreasonably the formation of non-collusive bidding consortia.”<sup>31</sup> In fact, the Commission repeatedly has permitted large providers of nationwide wireless services to participate in spectrum auctions under joint bidding agreements, and these participants have been significant drivers of auction revenue.<sup>32</sup> The Commission also has repeatedly and specifically emphasized the benefits of joint bidding

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<sup>30</sup> See 47 C.F.R. § 1.2105.

<sup>31</sup> *In re Implementation of Section 309(j) of the Communications Act Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, ¶¶ 10, 11 (1994).

<sup>32</sup> In the 2006 AWS-1 Auction, for example, SpectrumCo, a joint venture of Sprint Nextel, Comcast, Time Warner Cable, Cox Wireless, and Bright House Networks, represented 17 percent of the auction revenues. See *SpectrumCo LLC*, Application File No. 0002605298; see also Public Notice, *Auction of Advanced Wireless Services Licenses Closes, Winning Bidders Announced for Auction No. 66*, DA 06-1882, Attachment A (rel. Sep. 20, 2006). In the 1996 PCS, D, E, and F-Block Auction, five of the nine most-winning bidders (SprintCom, OPSCE-Galloway Consortium, US West, Northcoast Operating Co., and Western PCS BTA) each had their own joint-bidding arrangements. These bidders represented almost 40 percent of total net bidding. Reily Gregson, RCR Wireless, *PCS Auction Over, Nets \$2.5 Billion* (Jan. 20, 1998), available at <http://bit.ly/WcItqT>; *Auction 11: Broadband PCS D, E, & F Block – Results for All Bidders*, available at <http://fcc.us/Udbe5e>. In the 1995 PCS A and B-Block Auction, two joint ventures, Wireless Co. (a joint venture of Sprint, Comcast, Cox, and TCI) and PCS PRIMECO (a joint venture of Nynex, Bell Atlantic, AirTouch, and US West) represented approximately 30 percent and 15 percent of total net bidding, respectively. See *PCS A & B-Block Auction – Bidder Activity by Dollar Value of High Bids*, available at <http://fcc.us/1mWfCRb>.

arrangements.<sup>33</sup> Even the NPRM recognizes that “joint bidding and other arrangements . . . have the potential to result in procompetitive benefits.”<sup>34</sup>

Despite the Commission’s established policy of permitting joint bidding arrangements, the NPRM now tentatively concludes that “it would best serve the public interest to prohibit joint bidding arrangements among nationwide providers.”<sup>35</sup> Although the Commission abstractly bases its tentative conclusion on “the changes in the mobile wireless marketplace since the Commission adopted the current joint bidding rules 20 years ago,”<sup>36</sup> the NPRM presents no evidence of market failure, or even change in market structure, that the Commission must remedy to justify a reversal of policy. While the wireless industry may no longer be “nascent,” as the NPRM suggests,<sup>37</sup> it remains extremely capital intensive, with very high spectrum acquisition costs and continual substantial investment required to deploy new technologies,

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<sup>33</sup> See, e.g., *Competitive Bidding Second R&O* at ¶ 221 (“efficiency enhancing” bidding arrangements “pool capital and expertise and reduce entry barriers for small firms and other entities who might not otherwise be able to compete in the auction process”); see also *id.* at ¶ 223 (these arrangements “improve [carriers’] ability to compete in the auction process” and in “the provision of service” after the auction is over); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245, ¶¶ 51-52 (1994) (“[E]ntering into consortium arrangements or adding equity partners during an auction may have a useful effect in enabling bidders to acquire the capital necessary to bid successfully for licenses.”).

<sup>34</sup> *NPRM* at ¶ 125. In very rare circumstances where the Commission did prohibit joint bidding arrangements as a general matter, it was due to facts unique to the auction in question. In the Digital Audio Radio Satellite (“DARS”) Service auction, for example, joint bidding was prohibited on the basis that only two licenses were available and only four applicants were eligible to bid. Such circumstances are not relevant to the broad prohibition proposed in the NPRM. See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 (1997).

<sup>35</sup> *NPRM* at ¶ 131.

<sup>36</sup> *Id.* at ¶ 107.

<sup>37</sup> See *id.* at ¶ 116.

address tremendous growth in demand for data services, and expand coverage to the many areas of the United States that still lack sufficient mobile service options.

To keep up with exploding demand for wireless services, for example, service providers must acquire more spectrum, which requires billions of dollars in investment capital. As has been the trend for several years, the demand for wireless is rapidly and continuously surging.<sup>38</sup> Opportunities to acquire spectrum in the secondary market today are limited, however, which make spectrum auctions all the more important. Auction No. 97 illustrates the substantial costs of spectrum and the need for deep pockets to acquire it at auction. Winning gross bids for paired spectrum in that auction averaged over \$2.70 per MHz-POP. Thus, a 10 MHz nationwide footprint of AWS-3 spectrum cost \$8.4 billion. In all, the auction raised a record \$44.9 billion, with AT&T spending more than \$18 billion to acquire 251 AWS-3 licenses and Verizon Wireless spending almost \$10.5 billion to acquire 181 licenses. Collectively, the two largest carriers won 63 percent of all paired AWS-3 spectrum. In contrast, T-Mobile bidding on its own was able to secure only 7 percent of such spectrum. The 600 MHz incentive auction will offer carriers an opportunity to acquire low-band spectrum, which is perceived as even more valuable spectrum for a wide range of wireless applications.

In addition to acquiring much-needed spectrum, service providers also must continually invest in necessary network infrastructure to deploy new technologies and expand coverage

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<sup>38</sup> See, e.g., *Seventeenth Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, DA 14-1862, ¶¶ 71-74 (2014) (“*Seventeenth Report*”). A recent CTIA survey found that domestic carriers handled 3.2 trillion megabytes of data traffic in 2013, up 120 percent from 2012. From 2010 to 2013, mobile data traffic has increased by 732 percent. CTIA, *Wireless Industry Survey* (2014), available at [http://www.ctia.org/docs/default-source/Facts-Stats/ctia\\_survey\\_ye\\_2013\\_graphics-final.pdf?sfvrsn=2](http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2) (showing reported annual data traffic grew 120 percent from 2012 to 2013) (“CTIA 2014 Survey”).

areas. The magnitude of investment can be staggering—in 2013, carriers spent \$33.1 billion in annual capital expenditures (“CapEx”), an all-time high.<sup>39</sup> One report estimates that U.S. wireless carriers spent roughly \$109.58 per U.S. citizen to upgrade wireless infrastructure in 2013.<sup>40</sup> Another report estimates the industry will spend \$37.5 billion by 2017 solely on LTE upgrades.<sup>41</sup> Yet, as the Commission recently observed, “capital expenditures have continued to vary significantly amongst providers. AT&T and Verizon Wireless continued to invest more than Sprint or T-Mobile by wide margins.”<sup>42</sup>

Joint bidding arrangements offer a potential mechanism for carriers like T-Mobile that lack the deep pockets of the two largest nationwide providers to meet the substantial capital costs required to acquire spectrum, invest in network infrastructure, and expand service coverage. By allowing T-Mobile to pool capital and resources to acquire spectrum and build out its networks, joint bidding arrangements may allow the company to more economically address these costs and thus achieve more extensive network expansion or upgrades than it might be able to undertake on its own, all of which would benefit the American wireless consumer. Joint bidding arrangements also may facilitate the attainment of scale or scope economies beyond the reach of

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<sup>39</sup> CTIA, Annual Wireless Industry Survey, Year-End Figures from CTIA’s Annual Survey Report (2014), *available at* <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

<sup>40</sup> Roger Entner, Recon Analytics, “Every Way You Look At It: “US Carriers Spend More in CAPEX than their EU Peers” (Jun. 9, 2014), *available at* <http://reconanalytics.com/2014/06/every-way-you-look-at-it-us-carriers-spend-more-in-capex-than-their-eu-peers/>.

<sup>41</sup> Jeff Mucci, *2013 LTE Capex and Opex Predictions*, RCR Wireless (Aug. 10, 2013) *available at* <http://www.rcrwireless.com/article/20130810/analyst-angle/2013-lte-capex-and-opex-predictions/>.

<sup>42</sup> *NPRM* at ¶ 170. To illustrate, for 2Q14, AT&T’s CapEx exceeded \$3.4 billion and Verizon Wireless’ CapEx was more than \$2.7 billion. T-Mobile’s CapEx for the same period was \$940 million. *Id.* at Appendix VI.A.i.

any single participant to the agreement. Consumers could benefit from these collaborations, as the participants are able to lower prices, improve quality, and/or bring new products or services to market faster. By automatically prohibiting T-Mobile and other carriers from pursuing such opportunities, the Commission is unnecessarily eliminating a potentially key tool for advancing wireless offerings to consumers and overall marketplace competition. Indeed, considering the current state of the wireless industry, there does not appear to be a justification for permitting companies like DISH—which, after the issuance of AWS-3 licenses, will have attributable interests in an amount of spectrum nationwide comparable to T-Mobile—to participate in a joint bidding arrangement while precluding T-Mobile from doing so. Thus, the Commission should consider joint bidding arrangements, including those among nationwide providers, on a case-by-case basis on their own merits, rather than imposing a blanket prohibition on such arrangements.

**V. EVALUATION OF THE COMPETITIVE BIDDING RULES SHOULD NOT DELAY THE INCENTIVE AUCTION OR FURTHER CONCENTRATE LOW-BAND SPECTRUM HOLDINGS**

Above all, consideration of the issues raised in this proceeding must not be permitted to delay the upcoming incentive auction. The planned 600 MHz incentive auction will make significant amounts of low-band spectrum available for mobile wireless service. T-Mobile cannot emphasize enough the importance of low-band spectrum both to consumers and service providers. Access to spectrum is perhaps the most important input for the provision of mobile wireless services. And, it is well established that lower frequency bands possess certain more favorable spectrum propagation characteristics than spectrum in higher bands that make them particularly suitable for the provision of wireless services. As the Commission has recognized, “[s]pectrum below 1 GHz (‘low-band spectrum’) has distinct propagation advantages for network deployment over long distances, while also reaching deep into buildings and urban

canyons.”<sup>43</sup> “[W]ithout access to low-band spectrum, service providers would have to rely on alternative, less cost-effective methods to increase rural and in-building coverage to serve additional customers.”<sup>44</sup>

Currently, low-band spectrum is consolidated in the hands of a few large wireless carriers, and T-Mobile is not among them. In fact, the two largest nationwide providers alone hold approximately 73 percent of the low-band spectrum available today.<sup>45</sup> These carriers enjoy a substantial spectrum advantage over their competitors, and any delay in the incentive auction would only serve to further benefit these providers by keeping low-band spectrum out of the hands of competitive rivals. Accordingly, the public interest requires that the incentive auction not be delayed by consideration of the competitive bidding rules and that the 600 MHz spectrum is introduced into the marketplace in a timely fashion. As T-Mobile discusses more fully in the Commission’s incentive auction proceeding, to prevent further concentration of valuable low-band spectrum—particularly in the hands of speculators—the Commission also should cap the amount of 600 MHz reserve spectrum that can be won at auction at 20 MHz on a market-by-market basis.

## **VI. CONCLUSION**

T-Mobile supports the Commission’s reevaluation of the Part 1 competitive bidding rules in advance of the 600 MHz incentive auction. A successful auction will require carefully articulated rules that ensure fairness and transparency in the auction process for all participants.

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<sup>43</sup> *Seventeenth Report* at ¶ 90.

<sup>44</sup> *Id.* at ¶ 92.

<sup>45</sup> *See Letter from Kathleen O’Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, to Marlene H. Dortch, Secretary, Federal Communications Commission, Ex Parte Notification, GN Docket No. 12-268, at 2 (filed Jan. 23, 2015).*

To that end, and to prevent a repeat of the bidding conduct in the AWS-3 auction, the Commission should require additional safeguards against bidders that share common interests, even if they are not commonly-controlled. Such safeguards could take the form of a certification from individuals listed as disclosable interest holders in more than one short-form application that they are not, and will not be, privy to or involved in the bidding strategy of more than one auction participant. The Commission also should ensure appropriate safeguards in its designated entity program, including preservation of the AMR rule, build-out monitoring, minimum equity requirements, and stricter penalties for transfers of licenses acquired with bidding credits. Finally, the Commission should not adopt a blanket prohibition on joint bidding arrangements among the nationwide providers. Instead, the Commission should permit all auction participants the flexibility to explore the full range of business arrangements available to them to compete successfully at auction and in the wireless services market. Competitive bidding rules consistent with this framework will help ensure a successful incentive auction for all bidders. Whatever course the Commission chooses, its consideration of the competitive bidding rules should not delay the upcoming 600 MHz incentive auction or permit excessive concentration of 600 MHz spectrum.

Respectfully submitted,

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