

**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 AT&T

Michael Goggin
Gary L. Phillips
Lori A. Fink
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
(202) 457-2040
Counsel for AT&T Services, Inc.

February 20, 2015

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION AND SUMMARY | 1 |
| II. AUCTION APPLICANTS NEEDING TO COORDINATE THEIR BIDDING SHOULD BE REQUIRED TO FORM BIDDING CONSORTIA..... | 5 |
| III. THE COMMISSION ALSO SHOULD SIMPLIFY AND STRENGTHEN ITS ANTI-COLLUSION RULES | 9 |
| IV. THE AWS-3 AUCTION RESULTS SHOW THAT THE COMMISSION MUST REFOCUS ITS DESIGNATED ENTITY RULES | 15 |
| V. AT&T SUPPORTS CODIFYING THE “FORMER DEFAULTER” WAIVER POLICIES RECENTLY ADOPTED FOR THE AWS-3 AUCTION..... | 18 |
| VI. CONCLUSION..... | 22 |

**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 AT&T

I. INTRODUCTION AND SUMMARY

AT&T Services Inc. (“AT&T”), on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, “AT&T”) hereby submits the following comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking (“*NPRM*”) in the above captioned proceeding.¹ Through the *NPRM*, the Commission has sought comment on proposed revisions to the Commission’s Part 1 rules governing competitive bidding to reflect

¹ *Updating Part 1 Competitive Bidding Rules, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 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, and Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Notice of Proposed Rulemaking, FCC 14-146 (Oct. 10, 2014) (“*NPRM*”).

recent changes in the marketplace. AT&T welcomes the opportunity to comment on the complex legal and policy issues raised by the Commission in the *NPRM*.

As explained below, AT&T commends the Commission for launching this proceeding to reevaluate and revise its Part 1 competitive bidding rules in advance of the upcoming broadcast incentive auction. The Commission's success in devising auction rules to efficiently allocate wireless spectrum is undeniable. The recently completed AWS-3 auction raised \$44.9 billion, making it by far the highest earning spectrum auction in history. In addition to providing needed spectrum to keep up with mobile broadband demand, Auction 97 raised funds for vital public policy priorities such as funding FirstNet and contributing to deficit reduction. But while the AWS-3 auction may have been a historic success, it also revealed some short-comings in the Commission's auction rules and policies that must be addressed to ensure that future auctions achieve even better results. Most notably, the AWS-3 auction made clear that bidders can circumvent auction rules in ways that the Commission could not have anticipated. For example, DISH, together with two other auction applicants (in each of which DISH holds an 85 percent, non-voting interest), was able to coordinate bidding in a way that effectively accorded them advantages in terms of buying power, bidding eligibility and reduced exposure risk that no other bidder could achieve. In addition, by "stacking" bids from two or three entities on the same licenses, these joint bidders were able to introduce shadow demand into the marketplace, confounding the purpose of the activity rules and undermining the auction's transparency and integrity. What is more, despite spending over \$10 billion in the auction, two of the three DISH entities were participating as "small business" designated entities ("DEs"), a status that allowed them to claim to over \$3 billion taxpayer provided spectrum subsidies.

With another potentially historic spectrum auction on the horizon, the Commission must carefully consider the results of the AWS-3 auction and act swiftly to strengthen its policies and procedures to eliminate such gamesmanship. Guided by the touchstones of transparency and integrity, the Commission should scrutinize its existing rules and any proposed revisions to ensure that they will promote competition and fairness in auctions to come. Indeed, preserving auction integrity and transparency will be key to maximizing participation in the Commission's upcoming broadcast incentive auction.

First, to prevent the sort of gamesmanship that DISH and its DEs were able to employ to get around the Commission's bidding eligibility and activity rules, joint bidding agreements should be prohibited. To the extent that entities wish to coordinate their activities in the auction, they should be required to form a joint venture or consortium, and file for the approval of such a combined bidding entity well in advance of the short-form deadline. Banning joint bidding arrangements in favor of bidding consortia would still allow small bidders to combine their resources, share risk, and bid in a coordinated manner, but they would participate as a single bidding entity, preventing the bid stacking, eligibility parking, and shadow demand that DISH and its DEs employed to gain an unfair advantage in Auction 97.

Similarly, AT&T supports the Commission's proposal to prohibit commonly-controlled entities from participating in Commission auctions. With the benefit of the AWS-3 auction results, however, it becomes clear that this proposed prohibition does not go far enough. By also barring any joint bidding arrangements that do not involve the formation of a single joint bidding entity, these two rules would effectively prevent the sort of gamesmanship and auction distortions DISH and its DEs were able to inflict. In addition to a requirement that any entities that wish to coordinate their bidding form a joint bidding entity, the Commission should require

each applicant to file an anti-collusion certification stating that it is not colluding with *any* other applicant regarding bids or bidding strategy. Consistent with the need for simple auction procedures, the anti-collusion certification would also supplant the need for the existing requirement that applicants must disclose a wide-range of agreements on short-form applications—disclosures that are ultimately uninformative and do not directly address collusive behavior.

The AWS-3 auction results also make clear that the Commission’s designated entity (“DE”) policies should be changed to ensure that they benefit the small businesses they are designed to benefit. The Commission’s DE rules serve an important purpose by making it easier for small businesses to purchase spectrum and compete with larger, established corporations during an auction. However, in Auction 97, two DEs in which DISH holds an 85 percent interest, were able to spend over \$10 billion in the auction, jointly acquired more spectrum licenses than any other bidder, and will likely make off with over \$3 billion in subsidies from American taxpayers. This suggests that the benefits of the DE program are not flowing to the small businesses that the program was designed to benefit. AT&T proposes two possible reforms to strengthen the existing DE rules. First, the Commission should cap the total dollar amount of subsidies that any single DE (or group of affiliated DE’s) can receive in a single auction. The staggering size of the subsidy—\$3.3 billion—that DISH’s DEs have claimed suggests that bidding credits should be more aligned with the size of small businesses themselves. A limit of \$32.5 million in bidding credits, which is derived from the Small Business Administration’s size limits for telecommunications companies, would provide appropriate symmetry between the scale of DEs and the benefits that they may claim. Second, the FCC should change the attribution rules to attribute to the DE the revenues and spectrum

holdings of any spectrum holding investor with an interest (debt or equity, voting or non-voting) of 10 percent or more.

Finally, AT&T agrees that the Commission should codify the AWS-3 auction's limited waiver of the former defaulter rule. The "former defaulter" rule is an anachronism that has been applied far too broadly, imposing unnecessary costs on applicants and ultimately discouraging robust auction participation. That so many auction applicants claimed the benefits of the waiver during the AWS-3 auction reinforces the public interest benefits that flow from narrowing the scope of the former defaulter rule. In codifying the waiver, AT&T submits that the Commission should also include an exemption based on an applicant's credit-rating. Applicants with an investment grade credit rating pose no meaningful risk of defaulting on a Commission obligation and thus should not be required to submit an additional 50 percent upfront payment penalty.

The Commission should be commended for the success of the recent AWS-3 auction. Still, there is much work left to be done to ensure success in the far more complex broadcast incentive auction. By taking the measures set forth by AT&T in these comments, the Commission will improve the transparency, simplicity, and integrity to its auction procedures. In so doing, the Commission will help ensure that the broadcast incentive auction—and future auctions to come—are marked by robust participation, strong competition, and efficient outcomes.

II. AUCTION APPLICANTS NEEDING TO COORDINATE THEIR BIDDING SHOULD BE REQUIRED TO FORM BIDDING CONSORTIA

Although Auction 97 was wildly successful, it also highlighted an aspect of the auction rules that permitted DISH and its related entities to circumvent the Commission's activity rules to stockpile bidding units to deploy in later stages of the auction, to amass more buying power than any other applicant, to limit its bid exposure to a degree no other applicant could match, and

to create “shadow demand” that distorted market signals and prevented price discovery.² In the *NPRM*, the Commission proposes prohibiting joint bidding arrangements among nationwide carriers.³ The fact that DISH and its related entities were able to exploit the existing rules as they did indicates that the Commission’s proposal does not go far enough. Rather than simply banning joint bidding arrangements among national carriers, it should ban them altogether.

The purpose of the joint bidding rules is to permit applicants to combine resources and to share risk, so that together they might be able to better accomplish their objectives in the auction, to be on par with other, larger or better financed applicants. What DISH and its related entities accomplished was to put themselves in a position of unassailable advantage through their coordinated bidding activity. First, they were able to combine their aggregate bidding eligibility, giving them 400 million more bidding units than any other applicant was permitted to hold.⁴ Second, by placing bids from two or three of the entities on the same licenses, they were able to present a distorted picture of competition to their competitors in the auction. For example, at one point in the auction, DISH and its related entities had almost \$30 billion in bids in play, with multiple bids on many of the most expensive markets. Still, because only one of the entities

² DISH appears to have been able to successfully coordinate bidding amongst three different entities: DISH, Northstar Wireless (“Northstar”), and SNR Wireless LicenseCo (“SNR”) (collectively, “the DISH entities”). See Application of American AWS-3 Wireless I LLC, Auction 97, FCC File No. 0006458188 (“DISH Short-Form”); Application of Northstar Wireless, LLC, Auction 97, FCC File No. 0006458325 (“Northstar Short-Form”); Application of SNR Wireless LicenseCo, LLC, Auction 97, FCC File No. 0006458318 (“SNR Short-Form”). DISH holds an 85% ownership interest in Northstar and SNR, both of which claimed designated entity status. See Northstar Short-Form; SNR Short-Form.

³ The *NPRM* proposes retaining the existing rules governing joint bidding arrangements among non-nationwide providers while prohibiting such arrangements altogether among nationwide providers. *NPRM* ¶ 109.

⁴ See Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (Feb. 20, 2015) (“AT&T February *Ex Parte*”).

could be the “provisional winning bidder,” the DISH entities’ actual financial exposure at this point in the auction was just over one third of that amount. Meanwhile, other bidders in the auction were unable, under the anonymous bidding rules, to see that some of the bids on these licenses were “insincere,” or mere “shadow demand.”⁵

This bid-stacking activity also effectively lowered the activity requirement for the DISH entities. By placing double and triple bids on the same licenses, the DISH entities were able to “park” eligibility freely—*i.e.* without the risk of being left in the position of potentially winning the licenses two or three times. During stage one, when applicants were required to deploy 80 percent or more of their eligibility, the DISH entities, using this “free parking” stratagem, were able to achieve an activity level of closer to 50 percent throughout the stage, while nominally complying with the 80 percent activity rule.⁶ This gave them an advantage that no other bidder could match—stockpiling eligibility until later stages of the auction, when prices began to settle.

The use of the joint bidding rules to game the auction, as the DISH entities were able to do, would be impossible if the Commission were to simply disallow joint bidding agreements. Instead, to the extent that parties wish to coordinate their bidding, they could apply to form a bidding joint venture or consortium. The bidding joint venture would bid as a single applicant, using the combined resources of the entities that formed it. However, the joint venture would not be allowed to hold more bidding units than other applicants were permitted to hold, and it could

⁵ See *id.* at 9.

⁶ See *id.* at 8.

only place one bid on a license. The sort of multiple bidding the DISH entities used to distort price signals and stash bidding units would no longer be possible.⁷

The purpose behind the joint bidding rules is to “promote competition in the mobile wireless marketplace” and “facilitate competition among bidders at auction.”⁸ These underlying policies are best served through existing rules that permit entities to apply to form a bidding joint venture.⁹ To the extent that two entities desire to coordinate their bidding activities they may form a bidding consortium and divide the licenses acquired after the auction is over.¹⁰ A bidding consortium offers the benefits associated with joint bidding arrangements without jeopardizing the integrity or transparency of an auction. Specifically, bidding consortia allow applicants to “pool capital and expertise” to “reduce entry barriers for small firms and other entities who might not otherwise be able to compete in the auction process.”¹¹ The only aspect of a bidding consortium that is markedly different than broader joint bidding arrangements is that a consortium appropriately channels joint bidding activity through a single entity.

Through the rule changes proposed in the *NPRM*, the Commission appears to attempt to protect against bidding arrangements that would “alter[] post auction incentives to compete” or

⁷ As noted in AT&T’s comments in the Auction Procedures PN, for purposes of the clock auction, changes to the bidding rules should also prohibit “bid stacking” by individual bidders. *See* Comments of AT&T, AU Docket No. 14-252, GN Docket No. 12-268 (Feb. 20, 2015).

⁸ *NPRM* ¶ 107.

⁹ *See* 47 C.F.R. §§ 1.2107(g), 1.2110(b)(3)(i), (c)(6).

¹⁰ *See id.*

¹¹ *See Implementation of Section 309(j) of the Communications Act Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2387¶ 221 (1994) (“Competitive Bidding Second Report and Order”).

that would “reduce . . . participants’ ability or incentive to compete independently.”¹² For this reason, proposed entities that propose to form a bidding consortium or bidding joint venture should be required to file an application seeking approval to form the bidding joint venture well in advance of the short form deadline, to allow the FCC to evaluate the likely impact of the proposed joint venture on competition in the auction and in the downstream market.

III. THE COMMISSION ALSO SHOULD SIMPLIFY AND STRENGTHEN ITS ANTI-COLLUSION RULES

Apparently anticipating the possibility of the sorts of problems posed by the conduct of the DISH entities in Auction 97, the Commission in this proceeding proposed that entities under “the common, exclusive control” of a single individual or set of individuals be prohibited from qualifying to bid on licenses in the same or overlapping geographic areas.¹³ AT&T agrees that commonly controlled entities should not be permitted to participate in Commission auctions. Informal auction policies have barred the same applicant from filing more than one short-form application to participate in an auction.¹⁴ There is no reason to treat entities with common, exclusive ownership differently. Further, as the Commission correctly notes, there appear to be no legitimate benefits to allowing commonly controlled entities to participate and no hardships are created by prohibiting such arrangements.¹⁵

¹² NPRM ¶¶ 131-32.

¹³ *Id.* ¶ 103. The Commission further proposes using the concepts of “control” and “controlling interest” from Section 1.2110 of the Commission’s rules. *Id.* A “controlling interest” includes individuals or entities with either *de jure* or *de facto* control of the applicant. 47 C.F.R. § 1.2110(c)(2). *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation. *Id.* *De facto* control, on the other hand, is evaluated on a case-by-case basis. *Id.*

¹⁴ See NPRM ¶¶ 98-99.

¹⁵ See *id.* ¶¶ 104-106.

While AT&T supports the Commission’s proposed commonly-controlled entities prohibition, the proposed rule does not go far enough to prohibit the kind of auction-distorting, coordinated conduct that occurred during the AWS-3 auction. Under the Commission’s existing rules, DISH appears to have successfully coordinated bidding alongside two designated entities throughout the AWS-3 auction.¹⁶ These designated entities were largely financially dependent on DISH—indeed, DISH holds an 85 percent ownership interest in each entity.¹⁷ Nevertheless, DISH may not have had “exclusive control” of the designated entities within the meaning of the Commission’s proposed rule.

To go along with a rule requiring any that any separate entities seeking to coordinate their bidding activity must apply to form a bidding joint venture, AT&T urges the Commission to require that each auction applicant certify that it has not entered into *any* agreements with other applicant regarding their bids or bidding strategy, and that they are not privy to any other applicant’s bids or bidding strategy. Such an approach would preclude entities from engaging in anti-competitive behavior during Commission auctions while also obviating the need for burdensome agreement disclosures on short-form applications. Indeed, requiring an anti-collusion certification is a another way to prevent the sort of gamesmanship seen during Auction 97.

The Commission’s existing anti-collusion rules currently are *disclosure* requirements – obligating applicants to provide the Commission with information about “agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including

¹⁶ See Northstar Short-Form; SNR Short-Form.

¹⁷ See *id.*

any such agreements relating to the post-auction market structure.”¹⁸ However, these disclosure rules do not actually prohibit collusive activity. For example, a bidder that enters into an agreement with another bidder to rig bids in the auction—a plain violation of antitrust laws—would not run afoul of the Commission’s anti-collusion rules so long as the agreement is disclosed on the bidder’s short-form application.¹⁹ Further, because the rules only require applicants to disclose limited information about each agreement, it would be virtually impossible for the Commission to recognize that a particular agreement poses a competitive threat to an auction prior to the commencement of bidding.²⁰ What is more, even if the Commission were able to identify anti-competitive conduct based on an applicant’s agreement disclosures, the rules do not provide any procedures for the Commission to intervene and stop the collusive conduct.

To address these shortcomings, AT&T submits that the Commission should eliminate the agreement disclosure obligation and instead require a stronger anti-collusion certification from auction applicants. Importantly, the proposed certification directly targets the anti-competitive

¹⁸ 47 C.F.R. § 1.2105(a)(viii).

¹⁹ Indeed, the Commission’s rules only require a certification that the applicant “has not entered and will not enter into any explicit or implicit agreements, arrangements, or understandings of any kind with any parties *other than those identified* [on the short-form application] regarding the amount of their bids, bidding strategies, or the particular licenses on which they will or will not bid.” 47 C.F.R. § 1.2105(a)(ix) (emphasis added). As the Commission readily acknowledges, “conduct that is permissible under the Commission’s rules may be prohibited by the antitrust laws.” *NPRM* ¶ 113.

²⁰ See 47 C.F.R. § 1.2105(a)(viii) (requiring applicants to identify “all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure”). Applicants are instructed to simply “disclose the existence of agreements” and the names of the parties thereto. *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, Public Notice, AU Docket No. 14-78, at ¶¶ 23-24 (rel. Jul. 23, 2014) (“AWS-3 Procedures PN”).

behavior that the Commission seeks to prevent. And, unlike the current disclosure requirements, a certification rule would empower applicants to “control their own destiny” when it comes to the completeness of their short-form application. For example, applicant A may correctly disclose an agreement with applicant B on its short-form application under the existing rules. Nevertheless, applicant A’s short-form application may be deemed incomplete under the current policies if applicant B inadvertently omits the agreement from its short-form application or even if it simply describes the agreement differently. This *de facto* parallelism requirement can result in short-form applications being deemed incomplete for what is ultimately a correct and appropriate disclosure.²¹ It also makes compiling the agreement disclosures unnecessarily laborious as applicants often need to communicate with many different parties to agree on precise disclosures. A certification requirement would free applicants from this burdensome process of closely matching their short-form agreement disclosures. At the same time, the certification would promote auction integrity by foreclosing the possibility of anti-competitive conduct during auctions.

Requiring an anti-collusion certification in lieu of the current agreement disclosures would also eliminate existing concerns about the overly broad and uncertain application of the current rule.²² Although the Commission has issued considerable guidance on what types of agreements must be disclosed,²³ wide-spread confusion still lingers as to whether applicants must

²¹ See Application of AT&T Wireless Services 3 LLC, Auction 97, FCC File No. 0006457291 (“AT&T Short-Form”); *Auction of Advanced Wireless Service (AWS-3) Licenses Status of Short-Form Applications to Participate in Auction 97*, Public Notice, AU Docket No. 14-78, at App. B (rel. Oct. 1, 2014) (“AWS-3 Participation PN”).

²² See 47 C.F.R. § 1.2105(a)(2)(viii).

²³ See, e.g., *Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules*, Public Notice, DA 95-2244, 11 FCC Rcd 9645, 9646 ¶ 4 (1995) (“Anti-Collusion PN”); *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding*

disclose certain kinds of agreements.²⁴ For example, applicants tend not to disclose roaming agreements. This non-disclosure is logical because most roaming agreements do not require market-specific discussions during the pendency of an auction. However, it is conceivable that a substantive roaming negotiation *could* require disclosure under the rule. The Commission has not provided concrete guidance on whether the rule requires such roaming agreements to be disclosed, which can lead to disagreements between applicants as short-form applications are prepared.

Similarly, applicants sometimes disagree about whether leases must be disclosed. Some leases may require discussions by the parties during an auction—for example, if a party wishes to deliver a lease cancellation notice. Lease re-negotiations or cancellations during the quiet period may arguably affect “post-auction market structure,”²⁵ and there is no way of knowing, in advance, whether such clauses may or may not be invoked during the auction. In addition, the standard Commission deficiency letter notifying an applicant that its short-form application is “incomplete” references leases, which further suggests that leases must be disclosed.²⁶

Nevertheless, experience shows that some applicants do not believe that leases should be disclosed and will not cooperate in developing parallel disclosures. There is also considerable uncertainty as to how the anti-collusion disclosure rules apply to “agreements not to agree.” The Commission requires applicants with common directors or ownership to have an agreement of

Procedures, Third Report & Order & Second Further Notice of Proposed Rulemaking, FCC 97-413, 13 FCC Rcd 374, 465-467 ¶¶ 160-162 (1997) (“Part 1 Third Report & Order”).

²⁴ See Comments of Verizon and Verizon Wireless, Docket No. 12-268, at 51-54 (Jan. 25, 2013) (“Verizon Incentive Auction Comments”) (noting uncertainty surrounding the scope of the anti-collusion rules).

²⁵ 47 C.F.R. § 1.2105(a)(2)(viii).

²⁶ See generally AWS-3 Participation PN ¶ 5 (describing deficiency letters).

some form in place—in many cases this is resolved by the two applicants’ agreement not to collude. In other words, applicants have satisfied this requirement by creating information controls to ensure that the common director or investor is privy only to the bidding strategy of one applicant. The agreement to insulate the common director or investor from the bidding strategies of both applicants is, in essence, an “agreement not to agree.” Even though these kinds of agreements are designed to *avoid* affecting “bids or bidding strategy,” they must be construed—counter-intuitively—as agreements that must be disclosed.²⁷ Gray areas and complex questions such as these highlight the burdens and uncertainty that pervade the Commission’s current disclosure requirements.

Navigating the uncertainty and overcoming the burdens associated with the disclosure rule does not come with any corresponding benefit. Indeed, pre-auction disclosure of bidding agreements provides no useful information to other bidders or the Commission. Given the overbreadth of the disclosure requirements, auction applicants typically disclose vast numbers of agreements.²⁸ The disclosures themselves contain simplistic information from which there is no way to discern whether a particular agreement will have a meaningful impact on auction bidding. In fact, the Commission has previously emphasized that applicants should only include non-substantive information in their disclosures, specifically instructing applicants to avoid disclosing any information regarding potential license selection or market interest.²⁹ As a result, the agreement disclosures do not provide the Commission with a sufficient factual basis to

²⁷ 47 C.F.R. § 1.2105(c).

²⁸ See, e.g., Application of Cellco Partnership d/b/a Verizon Wireless, Auction 97, FCC File No. 0006456073 (“Verizon Short-Form”); AT&T Short-Form.

²⁹ See *Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141, 18152 ¶ 25 (rel. Oct. 2007) (“700 MHz Procedures PN”).

intervene if two applicants did, in fact, intend to engage in actual anti-competitive conduct. In sum, the disclosure requirement does nothing to advance the Commission’s objective of preventing anti-competitive conduct.

Instead, the prospect of criminal enforcement by the Department of Justice serves as the primary deterrent of anti-competitive conduct in Commission auctions. Indeed, the threat of criminal prosecution under the antitrust laws serves as a serious and important deterrent to collusive auction activity.³⁰ With these laws firmly in place, the Commission should focus on emphasizing auction processes and procedures designed to ensure efficient auction outcomes, such as avoiding the gamesmanship and delay tactics invoked by bidders like the DISH entities who are placing bids through multiple applicants.³¹ AT&T submits that the best and simplest way of combatting this behavior is through a simple, yet definitive, anti-collusion certification requirement.

IV. THE AWS-3 AUCTION RESULTS SHOW THAT THE COMMISSION MUST REFOCUS ITS DESIGNATED ENTITY RULES

As a result of the Commission’s designated entity (“DE”) program, two designated entities in which DISH holds an 85% ownership stake spent over \$10 billion and claimed over \$3 billion in taxpayer-funded discounts when purchasing spectrum in the AWS-3 auction.³² With annual revenues of “almost \$14 billion, a market capitalization of over \$32 billion, and over 14 million customers,” DISH’s spectrum discounts “make a mockery of the DE program.”³³ While

³⁰ See *id.* at 18153-54 ¶¶ 28-29 (noting the panoply of antitrust laws that applicants remain subject to).

³¹ See Competitive Bidding Second Report and Order at 2387-88 ¶¶ 225-26.

³² See Commissioner Pai AWS-3 Statement; Northstar Short-Form; SNR Short-Form.

³³ Commissioner Pai AWS-3 Statement.

AT&T believes the DE program serves the important purpose of allowing small businesses to compete more effectively to purchase spectrum in Commission auctions, DISH's activity in the AWS-3 auction shows that the DE rules must be strengthened. Giant businesses, such as DISH, should not be able to creatively craft end-runs around the DE rules and lay claim to over \$3 billion in spectrum subsidies. Rather, the Commission's rules should be carefully crafted to fulfill the purpose of the DE program and ensure that DE benefits flow to their intended recipients: *bona fide* small businesses.

One of the first issues that requires review is the question of how the Commission determines whether an investor in a DE has "*de facto*" control (which would cause the investors revenues to be attributed for purposes of determining eligibility for DE benefits). To be sure, DISH appears to have taken pains to structure its related DE entities in a manner that leaves DISH with a "non-voting" interest. Still, it seems odd that an entity that holds an 85 percent interest in each of two other entities would allow those entities to spend \$10 billion in capital in a single auction without some significant control over how the \$10 billion was spent, how the \$13 billion worth of purchased spectrum would be used, and where the \$3 billion in federal subsidies would go. Indeed, it is difficult to imagine how any "small" business would be able to amass over \$10 billion in financing a few months after its formation.

AT&T has a few alternative reforms for the FCC's consideration. First, the FCC should limit small business benefits to small businesses. The Commission could cap the amount of DE benefits that a DE may claim during any given auction. The astounding amount of bidding credits that the DISH entities claimed (over \$3 billion) in the AWS-3 auction suggest that the benefits conferred on small businesses should be tethered to the size of small businesses themselves. In other words, if a business is truly "small," it should not be able to extract

subsidies worth billions of dollars from the Commission's DE program. Capping the bidding credits that a DE may receive during a given auction would prevent DEs with substantial financial backing from racking up billions in federal subsidies.

The Small Business Administration ("SBA") provides instructive guidance on the size of small telecommunications businesses that should form the basis of a DE benefit cap. Pursuant to the SBA's guidelines, the small business size limit for "all other telecommunications" is \$32.5 million in annual receipts.³⁴ In line with this well-established small business size limit, the Commission should not permit DEs to claim more than \$32.5 million in bidding credits in any given auction. This bidding credit cap would ensure that DEs cannot acquire spectrum in a manner that is wildly disproportionate to the concept of a small business.

The Commission also should consider changing the attribution rules to attribute to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than 10 percent. This would be similar to the spectrum attribution rules used to consider spectrum aggregation. Such an attribution rule would not diminish DE access to capital from institutional investors or investment banks. Rather, it would restrict carriers who would not, themselves, qualify as DEs from gaining access to discounted spectrum through "non-controlling" relationships with new entities whose financing, bidding strategy, business plans and spectrum license utilization are all subject to the carrier's approval.

The AWS-3 auction results send a powerful message. The Commission must strengthen its DE rules to prevent applicants capable of spending billions of dollars in the auction from thwarting the spirit of the DE program and extracting substantial tax-payer funded spectrum subsidies intended for small businesses.

³⁴ 13 C.F.R. § 121.201.

V. AT&T SUPPORTS CODIFYING THE “FORMER DEFAULTER” WAIVER POLICIES RECENTLY ADOPTED FOR THE AWS-3 AUCTION

AT&T applauds the Commission for recognizing that in its current form, the former defaulter rule “may be too far-reaching and impose unnecessary costs and burdens on auction participants.”³⁵ Under the Commission’s existing former defaulter rule, applicants who have previously been in default on *any* Commission license or delinquent on *any* non-tax debt owed to any federal agency are required to submit an extra 50 percent upfront payment before it can participate in an auction.³⁶ With prices for Commission wireless licenses sky-rocketing, upfront payments are already substantial – often well in excess of a hundred million dollars.³⁷ Accordingly, submitting an extra 50 percent in upfront payments poses a staggering additional cost for potential auction bidders, deterring robust auction participation and undermining total auction revenues.³⁸

In light of the extraordinary costs the former defaulter rule may impose on a number of auction applicants, the Commission recently granted a limited waiver of the rule for purposes of

³⁵ *NPRM* ¶ 86.

³⁶ *See* 47 C.F.R. § 1.2106(a).

³⁷ *See, e.g.*, Application of T-Mobile License LLC, Auction 97, FCC File No. 0006456539 (“T-Mobile Short-Form”) (\$417 million upfront payment); Application of Cellco Partnership d/b/a Verizon Wireless, Auction 97, FCC File No. 0006456073 (“Verizon Short-Form”) (\$920 million upfront payment); Application of SAAS License, LLC, Auction 97, FCC File No. 0006458149 “SAAS Short-Form”) (\$175 million upfront payment). *See also* Letter from Barry J. Ohlson, Counsel for DISH Network, L.L.C., to Marlene H. Dortch, FCC, RM No. 11395, at 9 (Aug. 13, 2010) (“August 2010 DISH Ex Parte”) (noting that Cellco Partnership submitted additional upfront payments totaling \$292,050,000 in Auction 73). Even with Auction 97’s former defaulter waiver, AT&T submitted an upfront payment of over \$920 million to participate. AT&T Short-Form.

³⁸ Indeed, under the rule, no interest is paid on upfront payments, even though such payments are typically held for a few months. 47 C.F.R. § 1.2106(a).

the AWS-3 auction (Auction 97).³⁹ Specifically, the Commission narrowed the scope of the former defaulter rule by excluding certain categories of debts and defaults when determining whether or not an applicant was a former defaulter, subject to the additional 50 percent upfront payment requirement.⁴⁰ The Auction 97 waiver served the public interest, as reflected in the large number of applicants that took advantage of the waiver.⁴¹ The Commission, in this proceeding, proposes codifying Auction 97's more tailored approach to the former defaulter rule to encourage robust participation in future auctions.⁴²

For the same reasons enumerated in the *Auction 97 Waiver Order*, AT&T supports adopting the proposed, more narrowly tailored former defaulter rule. As numerous commenters have explained, in its current iteration, the former defaulter rule is far too broad, penalizing many financially sound applicants with excessive upfront payment obligations.⁴³ The rule applies

³⁹ See *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 (Auction 97)*, Order, RM-11395, AU Docket No. 14-78, ¶ 16 (Aug. 29, 2014) (“Auction 97 Former Defaulter Waiver Order”).

⁴⁰ *Id.* ¶ 1.

⁴¹ For example, Verizon, an applicant that has previously certified to being a former defaulter avoided making an additional upfront payment of \$460,376,450 by virtue of the waiver. Compare Application of Cellco Partnership d/b/a Verizon Wireless, Auction 97, FCC File No. 0006456073 (“Verizon Auction 97 Short-Form”) with Application of Cellco Partnership d/b/a Verizon Wireless, Auction 73, FCC File No. 0003247162 (“Verizon Auction 73 Short-Form”).

⁴² *NPRM* ¶ 86. In particular, the Commission proposes that a debt or default would not trigger the former defaulter rule if any of the following criteria are met: (1) the notice of the final payment deadline was received more than seven years before the relevant short-form application deadline; (2) the default amounted to less than \$100,000; (3) the default was paid within two quarters after receiving the notice of final payment deadline; or (4) the default was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding. *Id.*

⁴³ See, e.g., Letter from Rebecca Murphy Thompson, CCA, Julie Kearney, CEA, Scott K. Bergmann, CTIA, and Jill Canfield, NTCA, to Marlene H. Dortch, FCC, RM-11395, GN Docket No. 13-185, AU Docket No. 14-78, GN Docket No. 12-268, at 2 (May 30, 2014) (“Associations

without regard to the size of an applicant’s past debt or the amount of time that has passed since the debt was paid. Moreover, the rule does not take into account an applicant’s overall creditworthiness. As such, an applicant with a strong record of timely satisfying non-tax debts may be forced to pay a 50 percent upfront payment penalty simply because of a trivial default, cured years ago.⁴⁴ With such a vast scope, the current former defaulter rule imposes substantial costs and burdens on a broad swath of applicants who pose no meaningful risk of defaulting on a Commission obligation.⁴⁵

Codifying the Auction 97 waiver would balance the Commission’s twin goals of “encouraging bidders to submit serious, qualified bids” with “simplify[ing] the bidding process and minimiz[ing] implementation costs for bidders.”⁴⁶ Importantly, adopting the proposed rule revisions will help the Commission distinguish minor defaults and delinquencies that have long since been resolved from those significant defaults that may legitimately warrant an additional upfront payment.⁴⁷ Moreover, the narrowly tailored rule will help ensure that applicants are not faced with an upfront payment penalty that is wildly disproportionate to a past debt.⁴⁸ Consistent

May 2014 AWS-3 Ex Parte”); Reply Comments of NTCA – The Rural Broadband Association, AU Docket No. 14-78, at 2-3 (Jun. 23, 2014) (“NTCA June 2014 Reply Comments”); Letter from Barry J. Ohlson, Counsel for DISH Network, L.L.C., to Marlene H. Dortch, FCC, RM No. 11395, at 5 (Aug. 13, 2010) (“August 2010 DISH Ex Parte”).

⁴⁴ See Comments of Verizon Wireless, AU Docket No. 14-78, at 3-4 (Jun. 9, 2014) (“Verizon June 2014 Comments”); see also DISH Ex Parte at 5.

⁴⁵ See Verizon June 2014 Comments at 3-4 (noting that under current auction procedures, applicants must pay for licenses in full before they are granted).

⁴⁶ Auction 97 Former Defaulter Waiver Order ¶ 16.

⁴⁷ See Verizon June 2014 Comments at 3.

⁴⁸ See *id.* Indeed, under the present rule, a \$5 past debt could cause an applicant to owe millions in additional upfront payments.

with the purposes underlying the former defaulter rule, the proposed rule will still ensure that bidders are capable of satisfying their financial obligations to the Commission.⁴⁹ As commenters have noted, small debts and defaults that were cured years ago do not reflect an applicant's present ability to pay for Commission licenses.⁵⁰ In short, codifying the waiver will promote the integrity of Commission auctions by encouraging wide-spread participation, unimpeded by costly and unnecessary extra upfront payment requirements.

While adopting the proposed revisions to the former defaulter rule will help foster broad auction participation, AT&T believes the Commission should also codify an exemption based on an applicant's credit rating. In particular, applicants that have an "investment grade" rating from Moody's, Standard & Poor's, or another widely-recognized credit rating agency should not be considered former defaulters.⁵¹ Further, applicants that can provide a letter of credit from a Federal Deposit Insurance Corporation ("FDIC") member institution or similar institution should not be considered former defaulters.⁵²

A credit rating exemption would fulfill the spirit of the former defaulter rule by providing the Commission with ample assurance that applicants can pay for auctioned licenses. At the same time, the exemption would promote participation and ensure that creditworthy applicants

⁴⁹ *NPRM* ¶ 86.

⁵⁰ *See, e.g.*, Reply Comments of CTIA – The Wireless Association®, AU Docket No. 14-78, at 5 (Jun. 23, 2014) ("CTIA June 2014 Reply Comments"). In any event, under the Commission's current policies, applicants must pay for their licenses in full before they are granted. *See Verizon June 2014 Comments* at 4.

⁵¹ "Investment grade" is a term that is well defined by each credit agency. *See, e.g.*, Moody's Investors Service, Rating Symbols & Definitions, at 10 (Aug. 2014), available at https://www.moody.com/researchdocumentcontentpage.aspx?docid=PBC_79004

⁵² For example, a "similar institution" would be an agricultural credit bank that serves rural utilities and is a member of the U.S. Farm Credit System.

are not unnecessarily penalized. Based on precisely defined and objective criteria, AT&T's proposed credit rating exemption would be a straightforward way of evaluating bidders' financial capabilities. Using credit ratings to confirm an applicant's financial wherewithal also aligns with Commission precedent as the Commission has previously accepted letters of credit as evidence of an applicant's creditworthiness.⁵³ Thus, a credit rating exemption offers a simple means of ensuring that applicants that have "demonstrated sufficient financial credibility" are not penalized with a larger upfront payment requirement.⁵⁴

VI. CONCLUSION

AT&T applauds the Commission for recognizing that its competitive bidding rules may need reform in light of the results of the AWS-3 auction results. To prevent the sort of auction-distorting gamesmanship the DISH entities were able to accomplish, the FCC should bar joint bidding agreements. Entities that wish to coordinate their bidding activity should be required to apply to form a bidding joint venture instead. To bolster the anti-collusion protections in the rules, the Commission should require applicants to file an anti-collusion certification as a prerequisite to auction participation. In addition, the Commission's DE policies must be strengthened to ensure that DE credits flow only to the small businesses they were intended to benefit. Finally, AT&T supports the Commission's proposal to codify the proposed former defaulter waiver. The Commission should also consider codifying an exemption based on an applicant's credit rating to ensure that financially sound applicants are not penalized with

⁵³ See *Mobility Fund Phase I Auction Scheduled for September 27, 2012 Notice and Filing Requirements and Other Procedures for Auction 901*, Public Notice, AU Docket No. 12-25, ¶ 169 (May 2, 2012) ("Auction 901 PN").

⁵⁴ *NPRM* ¶ 93.

unnecessary costs. With these improvements, the Commission will go a long way towards fostering a competitive ecosystem for future auctions.

Respectfully submitted,

By: /s/ Michael Goggin

Michael Goggin
Gary L. Phillips
Lori A. Fink
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
(202) 457-2040
Counsel for AT&T Services, Inc.

Dated: February 20, 2015