

**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	)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive	)	
Auctions	)	
	)	
Petition of DIRECTV Group, Inc. and EchoStar	)	RM-11395
LLC for Expedited Rulemaking to Amend Section	)	
1.2105(a)(2)(xi) and 1.2106(a) of the	)	
Rules and/or for Interim Conditional Waiver	)	
	)	
Implementation of the Commercial Spectrum	)	WT Docket No. 05-211
Enhancement Act and Modernization of the	)	
Commission's Competitive Bidding Rules and	)	
Procedures	)	

**REPLY COMMENTS OF VERIZON**

Verizon<sup>1</sup> agrees with other commenters that the Commission should restrict joint bidding arrangements in a spectrum auction. The Commission's orders already expressly provide that all bidders remain fully subject to the antitrust laws, which prohibit collusion and other forms of bid rigging in an auction context. Despite that prohibition, in the recent AWS-3 auction, three applicants closely coordinated their bids and bidding strategies on hundreds of licenses. Commenters explain how this coordination gave those applicants advantages, deterred other bidders, and undercut the integrity of that auction. To prevent a recurrence in future auctions, the Commission at a minimum should reinforce the existing prohibition against collusion by prohibiting all joint bidding arrangements or other communications about bids or bidding

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<sup>1</sup> In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated wholly-owned subsidiaries of Verizon Communications Inc.

strategies among two or more applicants for the same licenses. The only exception should be that bidders may pool their resources to bid on licenses through a single consortium, subject to advance disclosure requirements.

**I. AWS-3 AUCTION DATA REVEAL THAT DISH AND ITS DESIGNATED ENTITY PARTNERS CLOSELY COORDINATED THEIR BIDDING.**

T-Mobile and AT&T document the ways that DISH and its two 85 percent-owned designated entities, Northstar Wireless LLC and SNR Wireless LLC, coordinated their bids throughout the auction. T-Mobile concludes that their coordinated bidding “had the effect of unfairly disadvantaging other bidders and of jeopardizing the Commission’s mandate to maximize the efficient use of valuable spectrum resources.”<sup>2</sup> AT&T draws from auction data to show that DISH and its DEs were “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.”<sup>3</sup> Other commenters explain that the scheme also reduced auction revenues to the Government by \$3.3 billion, by ensuring that the two DEs rather than DISH won licenses and structuring the DEs to claim a “very small business” bidding credit of 25 percent. This enabled the DEs to pay only \$10.0 billion for spectrum they had won for \$13.3 billion – even though the DEs were almost entirely funded by DISH.<sup>4</sup> In fact, according to DISH’s recent Form 8-K, it provided approximately 98 percent of the funding for the licenses won by its DEs.<sup>5</sup>

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<sup>2</sup> Comments of T-Mobile at 2-3.

<sup>3</sup> Comments of AT&T at 2.

<sup>4</sup> Comments of Americans for Tax Reform at 3-5; Comments of Citizens Against Government Waste at 3; Comments of MediaFreedom.org at 2-3. *See* Comments of the Blooston Rural Carriers at 4 (credits were used by the DISH DEs “to outbid rural carriers and overwhelmingly dominate the auction.”).

<sup>5</sup> The DEs’ short-form applications to participate in the auction stated that DISH held an 85 percent ownership interest in both DEs. DISH’s February 20, 2015 Form 8-K filing to the Securities and Exchange Commission, however, states that of the approximately \$10.0 billion that the DEs paid to the

Round-by-round auction data show that collusion among DISH and its DEs occurred on literally thousands of bids, for hundreds of different licenses, throughout the auction.<sup>6</sup> Their bidding patterns indicate this coordinated conduct went well beyond the activity engaged in by bidders that participate in typical bidding agreements or bidding consortia, in which smaller bidders pool their money and form a single entity to buy spectrum. Instead, the data show that DISH and the DEs frequently placed *identical* bids for the *same* amount on the *same* licenses. These patterns are unlikely to have occurred by chance (if, for example, they were making independent decisions as to when, where and how much to bid). The data also reveal that coordinated bidding allowed DISH to exit the auction abruptly once bidding reached a certain level without risk, because the DEs bid on top of it. Switching licenses from DISH to its DEs not only relieved DISH of liability for any payments – it also reduced the group’s overall payment liability through the use of DE bidding credits, which ultimately saved it (but cost taxpayers) \$3.3 billion. The bidding data raise significant questions as to whether the small business owners of the DEs exercised the requisite independence or whether DISH exercised *de facto* control over their bidding conduct.<sup>7</sup>

The Commission’s auction data also suggest that this extensive coordinated bidding may have deterred competition and reduced the diversity of winning bidders. AT&T notes that DISH and its DEs’ double and triple bidding may have created the false signal that there was more competition for certain licenses than was actually the case, distorting the bidding of others in

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FCC, DISH provided them a total of approximately \$9.8 billion through loans and equity contributions. <http://dish.client.shareholder.com/secfiling.cfm?filingID=1104659-15-12633>.

<sup>6</sup> See Letter from Joan Marsh, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 12-268, WT Docket No. 14-170 (filed Feb. 20, 2015) (“AT&T *Ex Parte* Letter”), Attachment at 5-11.

response.<sup>8</sup> T-Mobile concludes that small bidders dropped out of the auction when faced with this pattern.<sup>9</sup> Frequent “bid stacking” also enabled DISH and its DEs to engage in “free parking” of bidding eligibility, an advantage no other bidder enjoyed. By submitting triple bids, for example, they knew that only one of the three would risk ending up with the license – reducing their risk by two-thirds. They also gained advantages over other bidders through the Commission’s random tie-breaking procedure.<sup>10</sup> Data suggest the DEs later used that eligibility to bid jointly and simultaneously on dozens of long-inactive licenses, which may have further deterred competitors. And the data indicate that the DEs’ coordinated bidding enabled them to ensure that, between them, they acquired licenses in every market nationwide.

## **II. THE COMMISSION SHOULD BAN ALL JOINT BIDDING ARRANGEMENTS EXCEPT THOSE THAT BID THROUGH A SINGLE ENTITY.**

T-Mobile and AT&T ask that the Commission amend its rules to prohibit collusive joint bidding arrangements in order to ensure that the abuses in the AWS-3 auction do not reoccur.<sup>11</sup> Verizon agrees. There is a simple way to do so. The core anti-collusion rule, Section 1.2105(c), prevents applicants from discussing and coordinating their bids and bidding strategies during the auction, unless they have disclosed their intent to do so. It provides:

All applicants for licenses in any of the same geographic licenses areas are prohibited from cooperating or coordinating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s or any other competing applicants’ bids or bidding strategies or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application.

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<sup>8</sup> Comments of AT&T at 6-7.

<sup>9</sup> Comments of T-Mobile at 7.

<sup>10</sup> Comments of T-Mobile at 7; Comments of AT&T at 6-8; AT&T *Ex Parte* Letter at 5-11.

<sup>11</sup> Comments of T-Mobile at 8-10; Comments of AT&T at 3.

The Commission should add a new sentence to Section 1.2105(c) to make clear that the only exception to the prohibition on joint bidding arrangements would be for arrangements that use *one applicant* to place bids:

All members of any such bidding consortium or other joint bidding arrangement must submit bids through a single applicant that is identified on their short-form application, and cannot bid themselves during the auction.

Prohibiting joint bidding arrangements in this way will achieve three objectives:

**1. *Prevent Anticompetitive Behavior.*** The Commission's orders already expressly provide that all bidders remain fully subject to the antitrust laws, which prohibit collusion and other form of bid rigging in the auction context. But the bidding data here suggest that, despite this prohibition, extensive collusion skewed the results of the AWS-3 auction. In addition to investigating and addressing the conduct that occurred here, the FCC can prevent a recurrence by restricting joint bidding arrangements.

Although the anti-collusion rule allows applicants to enter into bidding agreements as long as those agreements are described in their applications, the Commission has made clear that its rule is a *disclosure* requirement, to inform applicants prior to the auction which among them have entered into bidding agreements. But the Commission has expressly warned applicants who enter into such agreements that they still must comply with the antitrust laws – and that collusive conduct can trigger *Commission* sanctions. Thus, in its Public Notice announcing procedures for the AWS-3 auction, the FCC advised bidders:

Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. Compliance with the disclosure requirements of section 1.2105(c) will not insulate a party from enforcement of the antitrust laws. For instance, a violation of the antitrust laws could arise out of actions taking place well before any party submitted a short-form application. The Commission has cited a number of examples of potentially anticompetitive actions that would be

prohibited under antitrust laws: for example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another market for the other.

To the extent the Commission becomes aware of specific allegations that suggest that violations of the federal antitrust laws may have occurred, the Commission may refer such allegations to the United States Department of Justice for investigation. If an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions, among other sanctions.<sup>12</sup>

The antitrust laws explicitly prohibit collusion on price or other forms of bid rigging, market allocation, and other forms of collusion. As the Commission noted in a 1994 order (which was cited in the AWS-3 Public Notice), the FCC made clear that applicants remain subject to these prohibitions in the antitrust laws:

Of course, applicants will also be subject to existing antitrust laws. For example, we would expect that this would *prohibit discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market...* In addition, agreements between two or more actual or potential competitors to submit *collusive, non-competitive or rigged bids are per se violations of Section One of the Sherman Antitrust Act...* Similarly, agreements between actual or potential competitors to *divide or allocate territories horizontally* in order to minimize competition are per se violations of the Sherman Act ... and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely *reserve one market for one and another for the other*.<sup>13</sup>

The bidding data raise serious questions as to whether the conduct of DISH and its DEs violated each of the prohibitions highlighted above and warrant careful investigation. In addition, the

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<sup>12</sup> *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, Public Notice, DA 14-1018 (2014), at ¶¶ 36-37 (footnotes omitted); *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, Notice of Proposed Rulemaking, 26 FCC Rcd 12426 (“Notice”) at ¶ 113 (2014).

<sup>13</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, ¶ 59 n. 134 (1994) (citations omitted) (emphasis added).

Commission should reinforce its existing prohibition on collusive bidding by modifying its rules to expressly restrict joint bidding arrangements in order to prevent a recurrence of this conduct.

**2. *Preserve Auction Integrity.*** Prohibiting joint bidding arrangements will promote the Commission’s longstanding goal of ensuring auction integrity – that is, that no bidders have advantages over others and that spectrum is won by the parties that value it the most rather than by those who game the system. The Commission has recognized that if bidders do not have confidence in the information they derive during the auction, they are less willing to bid or bid robustly. Here, however, DISH and its DEs hid behind anonymous bidding to mask their behavior from other applicants, causing false signals to be sent, a result that, as T-Mobile notes, “not only compromised the efficiency of the auction outcome, they lessened confidence in the auction process itself.”<sup>14</sup>

**3. *Continue to Enable Bidding Consortia in Specific Circumstances.*** The change in the rules described above would *not* prohibit bidding “consortia,” in which companies pool their dollars by forming a joint venture or other entity to bid. The Commission has recognized that, subject to advance disclosure requirements, bidding consortia can promote diversity of spectrum ownership, by enabling smaller firms to pool their resources in order to compete with larger, better financed firms, giving them a greater opportunity to obtain spectrum.<sup>15</sup> A bidding consortium offers the benefits of joint bidding arrangements without collusive activity, since only one entity is bidding. But there is no reason why multiple companies should be able to file their own applications, and then agree to place multiple bids on the same licenses, collude on the price at which to place those bids, or divide geographic markets between them, as the bidding

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<sup>14</sup> Comments of T-Mobile at 3.

<sup>15</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 at ¶ 221 (1994); *Notice* at ¶ 125.

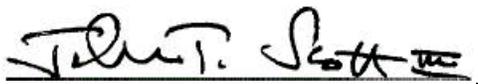
data suggest as DISH and its DEs did. The rule proposed above would permit pro-competitive consortia, while stopping anti-competitive collusion by multiple bidders.

**CONCLUSION**

For the reasons advanced in the initial comments and set forth above, Verizon urges the Commission to prohibit joint bidding arrangements among two or more applicants, unless those arrangements require those applicants to bid through as single bidder.

Respectfully submitted,

**VERIZON**

By: 

John T. Scott, III  
VERIZON  
1300 I Street, N.W., Suite 400-W  
Washington, D.C. 20005  
(202) 515-2412

Its Attorneys

Kathleen M. Grillo  
*Of Counsel*