

**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
)	

REPLY COMMENTS OF AT&T

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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 reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking (“*NPRM*”) in the above captioned proceeding.¹ The *NPRM* proposed specific revisions to the Commission’s Part 1 rules governing competitive bidding to account for recent changes in the marketplace.

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*”).

With the potentially historic broadcast incentive auction on the horizon, AT&T commends the Commission for taking the initiative to review and reform its competitive bidding rules.

As the record in this proceeding illustrates, the Commission's recent AWS-3 auction results revealed several short-comings in the Commission's auction policies that need to be addressed to ensure the integrity of future spectrum auctions. First, commenters agree that certain bidders were able to circumvent the Commission's auction rules to coordinate bidding activity in a manner that unfairly disadvantaged other bidders. The record paints a clear picture. DISH, together with two other applicants in which DISH holds an 85 percent non-voting interest (collectively, "the DISH entities"), was able to tilt the auction scales in its favor. By stacking two or three bids on individual licenses, parking bidding eligibility, obscuring true market demand, and reducing their exposure risks, the DISH entities achieved unfair competitive advantages that skewed the auction's ultimate results. In doing so, the DISH entities showed that the key principles underlying the Commission's auction policies—transparency, integrity, and fairness—can be thwarted in unprecedented ways. As a result, the record is replete with strong calls to strengthen the Commission's anti-collusion rules to preclude such future abuses.

To prevent this gamesmanship in future auctions, the Commission should ban joint bidding agreements and require a strong anti-collusion certification from each applicant that it has not entered into any arrangements or understandings regarding joint bidding and has no knowledge of any other applicant's bidding strategy. As AT&T explained in its initial comments, in cases where entities wish to coordinate their bidding activity, they could apply to form a bidding joint venture or consortium. AT&T's proposal would prevent the use of joint bidding arrangements to game the auction process as the DISH entities were able to do in the AWS-3 auction while still allowing small bidders to pool resources, distribute risk, and

accomplish shared objectives through a bidding joint venture which would participate as a single bidding entity.

Second, commenters universally agree that the Commission’s DE program suffers from serious flaws. Even though the well-capitalized DISH entities spent over \$10 billion in the AWS-3 auction, both were participating as “small business” designated entities (“DEs”). With this status, the DISH DEs were able to lay claim to over \$3 billion in taxpayer-funded spectrum subsidies. Sparking outrage from members of Congress,² Commissioners, taxpayers, and legitimate small businesses alike, inappropriate usurpation of bidding credits by the DISH entities made clear that the DE program, as it is currently structured, is broken. Commenters universally agree that large conglomerates should not be permitted to masquerade as small businesses and extract substantial subsidies from the Commission’s DE program.

While the ultimate purpose of the DE program is commendable—enabling *bona fide* small businesses to compete effectively during spectrum auctions—the record shows that the current program may actually be harming its intended beneficiaries. Several commenters expressed frustration that the DISH entities, empowered with DISH’s financing and an additional \$3 billion in bidding credits, effectively bid *bona fide* small businesses out of the auction. The AWS-3 auction results themselves confirm that the DE rules did not succeed in helping legitimate small businesses acquire their desired spectrum licenses. To the contrary, the rules worked primarily to help DISH’s well-financed DEs amass unprecedented levels of spectrum subsidies. In the end, it is American consumers who are the losers when savvy speculators more interested in monetizing the spectrum rather than deploying new and innovative technologies

² See Letter from Senator Claire McCaskill (D-MO) to Chairman Wheeler (Feb. 26, 2015) (“McCaskill Letter”); Letter from Representative Frank Pallone Jr. (D-NJ) to Chairman Wheeler (Feb. 20, 2015) (“Pallone Letter”).

prevail over the Commission’s DE rules. The Commission should not allow its DE rules to suffer such abuse, particularly where, as here, the abuse directly contravenes the public interest. To this end, the record overwhelmingly supports reevaluating the Commission’s DE rules to ensure that the program is actually serving the needs of its intended beneficiaries: *bona fide* small businesses.

By crafting strong auction policies that reflect the hallmarks of successful auctions—transparency, simplicity, and integrity—the Commission will maximize participation and competition in the broadcast incentive auction. Adopting competitive bidding rules consistent with the framework advocated by AT&T in this proceeding will promote a fair, competitive, and transparent environment for future spectrum auctions.

II. THE COMMISSION’S AUCTION PROCEDURES SHOULD BE STRUCTURED TO PROMOTE SPECTRUM AUCTION INTEGRITY AND PRECLUDE ABUSE

The record in this proceeding reveals widespread support for preventing the kinds of abuses that occurred during the AWS-3 auction from recurring in future auctions.³ In particular, commenters have noted that some bidders, like DISH, “were able to successfully exploit certain loopholes in the Commission’s auction design and anti-collusion rules to the detriment of other

³ See, e.g., Comments of T-Mobile USA, Inc., WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 3 (Feb. 20, 2015) (“T-Mobile Comments”) (“Rules that permitted [DISH’s] bidding activity not only compromised the efficiency of the auction outcome, they lessened confidence in the auction process itself.”); Comments of Americans for Tax Reform, Center for Individual Freedom, National Taxpayers Union, Taxpayers Protection Alliance, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 7-8 (Feb. 20, 2015) (“Taxpayers Protection Alliance Comments”); Comments of Thomas A. Schatz, President, Citizens Against Government Waste, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 3 (Feb. 20, 2015) (“Citizens Against Government Waste Comments”); Comments of AT&T, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 9-10 (Feb. 20, 2015) (“AT&T Comments”).

bidders and the public interest.”⁴ For example, the Blooston Rural Carriers explain that the DISH entities were “an overwhelmingly dominant presence in the auction,” shutting out rural telephone companies while bidding for both unpaired and paired channel licenses.⁵ Likewise, Verizon has asserted that the AWS-3 auction results “suggest that the activities of DISH and its DEs may have deterred competition and reduced the diversity of winning bidders in a number of instances.”⁶

The record thus reflects the fact that “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.”⁷ In particular, coordinated bidding allowed DISH and its DEs to “protect their eligibility throughout the auction by bidding on the same markets and then hiding behind each other’s bids,” “create[] the impression that there were more bidders than there actually were,” and prolong the auction itself through “coordinated use of activity units.”⁸ As a result,

⁴ T-Mobile Comments at 2.

⁵ Comments of the Blooston Rural Carriers, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 4 (Feb. 20, 2015) (“Blooston Comments”).

⁶ Letter from Tamara Preiss, Vice President – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (Feb. 27, 2015) (“Verizon *Ex Parte*”).

⁷ T-Mobile Comments at 7. *See also id.* at 2; Taxpayers Protection Alliance Comments at 1; AT&T Comments at 7-8. At one point in the auction, DISH and its DEs had nearly \$30 billion in bids in play, with multiple bids on the most expensive markets in the auction. Yet because only one entity could be the “provisional winning bidder,” the DISH entities only faced \$12 billion in actual financial exposure. Other bidders, not privy to this coordinated activity, could not see that some of these bids were insincere “shadow demand.” *See* AT&T Comments at 6-7; Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268; WT Docket No. 14-170, at 2 (Feb. 20, 2015) (“AT&T *Ex Parte*”).

⁸ T-Mobile Comments at 7.

several commenters have joined AT&T in calling upon the Commission to strengthen its auction rules to foreclose the possibility of such future abuses.⁹

To prevent the gamesmanship that DISH and its DEs employed to exploit the Commission's bidding eligibility and activity rules, the FCC should ban joint bidding agreements and adopt a strong anti-collusion certification.¹⁰ To the extent that auction applicants have a legitimate, procompetitive purpose that would justify coordinated bidding, they would be able to apply to form a bidding joint venture or consortium, which should be filed well in advance of the short-form deadline.¹¹ With this advance filing requirement, the Commission would have the opportunity to evaluate the impact of the proposed consortium on competition in both the auction and the post-auction downstream market. Once approved by the Commission, the joint bidding consortium would participate in the auction as a single bidder. While the consortium would use the combined resources of the forming entities, the single applicant structure would not be able to warehouse additional bidding units.¹² Nor could it place multiple bids on the same license. In short, the kind of multiple bidding strategy that the DISH entities used to skew price signals and amass activity units would be precluded.

Requiring entities with common interests to form joint bidding consortia would best serve the policies underlying the joint bidding rules. Indeed, nothing in the record suggests that the

⁹ See, e.g., Citizens Against Government Waste Comments at 3 (arguing that the Commission should prohibit joint bidding agreements at least between DEs and non-DEs); Taxpayers Protection Alliance Comments at 11 (same); T-Mobile Comments at 3.

¹⁰ See AT&T Comments at 5-9.

¹¹ See generally 47 C.F.R. §§ 1.2107(g), 1.2110(b)(3)(i), (c)(6) (establishing procedures for bidding consortia to participate at auction as a single entity, dividing acquired licenses amongst participating entities post-auction).

¹² See AT&T Comments at 7-8.

objectives underlying joint bidding agreements cannot be fulfilled through bidding consortia arrangements. To the contrary, bidding consortia can be used to “promote competition in the mobile wireless marketplace” and “facilitate competition among bidders at auction.”¹³ Forming a bidding consortium would still allow applicants to combine resources, share risk, and accomplish shared objectives during an auction,¹⁴ but would require the joint bidders to act through a single bidding entity. As auction experts have emphasized, allowing multiple entities to coordinate their bidding activity can only produce problems – problems that will likely call auction integrity into question.¹⁵ Eliminating coordinated bidders’ ability to place multiple bidding vehicles in the auction marketplace would simply remove the potential that such entities have to create shadow demand and obscure true price discovery. By placing these nefarious tools out of reach, the Commission will save its auction rules from abuse and protect auction integrity.

A stronger anti-collusion certification as part of the short-form application process has other benefits as well. Commenters agree that the results of the AWS-3 auction highlight the

¹³ *NPRM* ¶ 107.

¹⁴ *See generally* Comments of Competitive Carriers Association, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 14 (Feb. 20, 2015) (“CCA Comments”) (maintaining that joint bidding agreements are beneficial because they allow “non-nationwide providers to maintain or increase their competitive position in auctions”).

¹⁵ *See AT&T Ex Parte*, Attachment at 3-7; *see also* CCA Comments at 13 (noting that scenarios where an investor may be privy to the bidding strategies of multiple applicants may prejudice other bidders); *Verizon Ex Parte* at 2. Indeed, under basic antitrust principles, a bidding joint venture, if properly vetted prior to the auction, would be viewed as a procompetitive partial integration accompanied by cost and risk sharing, whereas a joint bidding agreement between or among multiple bidders would be viewed as a naked agreement not to compete. The risk of anticompetitive “bid rigging” from such naked agreements among auction competitors is so plain that such agreements were historically viewed as *per se* violations of the Sherman Act.

need to simplify and strengthen the anti-collusion rules.¹⁶ T-Mobile, for example, agrees with AT&T that the Commission should require applicants to “certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant.”¹⁷ In addition to obviating the need for the burdensome short-form agreement disclosures, a definitive anti-collusion certification would foreclose the possibility that entities with common interests are able to gain an unfair advantage from coordinated bidding.¹⁸ Such a certification would “better ensure evenhandedness and transparency in the auction process.”¹⁹

III. AS THE RECORD DEMONSTRATES, THE COMMISSION’S DE PROGRAM IS DEEPLY IN NEED OF REFORM

If the record in this proceeding makes anything clear, it is that the Commission’s DE program is broken and must be reformed.²⁰ As commenters have explained, and as the AWS-3 auction results show, the Commission’s DE rules are no longer serving their intended purpose –

¹⁶ See T-Mobile Comments at 9; *see also* Taxpayers Protection Alliance Comments at 11; CCA Comments at 13 (“[T]he Commission should also consider whether further restrictions are necessary where an investor may be privy to the bidding strategy of multiple applicants, even in the absence of common control”).

¹⁷ T-Mobile Comments at 9.

¹⁸ *See id.*; *see also* AT&T Comments at 11-15 (documenting the problems associated with the Commission’s current agreement disclosure requirements).

¹⁹ T-Mobile Comments at 9.

²⁰ *See* Taxpayers Protection Alliance Comments at 4 (“[T]he FCC must act to update the DE program in a manner that allows the Commission to fulfill its Congressionally-mandated duties without jeopardizing the deployment of the country’s world-leading mobile broadband infrastructure.”); Blooston Comments at 2 (“[T]he current bid credit rule is failing rural telecom DEs”); Comments of Cerberus Communications LP, WT Docket No. 14-170, GN Docket No. 12-268, WT Docket No. 05-211, at 3 (Feb. 20, 2015) (“Cerberus Comments”) (noting that the DE rules must be changed given that “very small carriers who truly qualified for the credits” did not succeed in the auction); Comments of NTCA – The Rural Broadband Association, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 5 (Feb. 20, 2015) (“NTCA Comments”) (“[T]he recent controversy surrounding . . . bidding credits . . . is an issue that the Commission must confront.”).

promoting small independent business participation in competitive bidding.²¹ Rather than infusing *bona fide* small businesses with the resources they need to compete effectively at auction, the Commission’s DE rules are being abused to allow large conglomerates like DISH to seize over \$3 billion in taxpayer funded spectrum subsidies.²² Not only does this “make[] a mockery of the DE program,” but it may actually harm the small entities that the program is intended to uplift.²³

Commenters agree that the DISH DEs are not the type of entities that the Commission’s DE program is intended to benefit.²⁴ As AT&T and others have outlined, the DISH DEs were primarily financed by DISH and other institutional investors who are likely seeking to monetize rather than deploy AWS-3 spectrum. In turn, DISH holds an 85% ownership stake in each DE.²⁵ While these entities may have been structured such that DISH does not “control” the DEs within the meaning of the Commission’s current rules, the simple fact remains that the DEs reaped the benefits of \$10 billion in DISH financing.²⁶ Backed by DISH’s deep pockets, the DISH DEs are a far cry from the “small businesses, rural telephone companies, and businesses

²¹ See, e.g., Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program (rel. Feb. 2, 2015) (“Commissioner Pai Statement”); Blooston Comments at 2; NTCA Comments at 5.

²² See Commissioner Pai Statement; McCaskill Letter; Pallone Letter.

²³ Commissioner Pai Statement.

²⁴ See Blooston Comments at 4; Taxpayers Protection Alliance Comments at 4; T-Mobile Comments at 11-12.

²⁵ See AT&T Comments at 15; Commissioner Pai Statement; Taxpayers Protection Alliance at 4-5; Cerberus Comments at 2-3.

²⁶ See AT&T Comments at 16. As AT&T noted, the Commission also should revise its rules regarding what constitutes *de facto* control of a DE by attributing the revenues and spectrum holdings of any spectrum holding investor with an interest of 10 percent or more in an applicant to the applicant. *Id.* at 17.

owned by members of minority groups and women” that the Commission is statutorily directed to promote.²⁷

Indeed, the results of the AWS-3 auction and the record in this proceeding show that the current DE rules may have worked to the *disadvantage* of some of the legitimate small businesses that the DE program is supposed to help.²⁸ Rural telephone companies, for example, reported that DE bidding subsidies offered “little help to rural telephone companies” during the auction, instead empowering DISH’s carefully structured special purpose DEs to “outbid rural carriers and overwhelmingly dominate the auction.”²⁹ Of the \$3.57 billion in bidding credits allowed during the auction, only \$871,000 was allotted to small rural telephone companies.³⁰ When forced to compete at auction against DEs with \$10 billion to spend and an additional \$3.3 billion in bidding credits, “[b]ona fide small businesses and rural telephone companies . . . are losers.”³¹ In the end, the DISH DEs ran other, more legitimate DEs out of the auction, particularly in the G Block, which was licensed specifically to encourage small business participation.³² Moreover, as T-Mobile notes, the current DE rules failed to ensure that “*bona fide* small businesses interested in deploying their spectrum” were the recipients of the

²⁷ 47 U.S.C. § 309(j)(4)(D).

²⁸ See Taxpayers Protection Alliance Comments at 9. The Communications Act instructs the Commission to use bidding preferences specifically to promote opportunities for “small businesses, rural telephone companies, and businesses owned by members of minority groups and women” to provide spectrum-based services. 47 U.S.C. § 309(j)(4)(D).

²⁹ Blooston Comments at 4.

³⁰ Cerberus Comments at 3.

³¹ NTCA Comments at 5-6.

³² See Joan Marsh, *Lessons from Auction 97 for Future Auctions* (Feb. 20, 2015), available at <http://www.attpublicpolicy.com/fcc/lessons-from-auction-97for-future-auctions/> (“AT&T AWS-3 Blog”). See also Cerberus Comments at 2-3 (describing situation in which DISH DEs outbid rural carriers); Verizon *Ex Parte* at 2.

subsidies.³³ As a result, licenses were not won by parties “most likely to deploy new technologies and services rapidly.”³⁴ With these associated harms, some commenters have concluded that the Commission’s DE program has been “captured by arbitrageurs, casting the legitimacy of the entire DE program into doubt.”³⁵

The record thus reveals widespread support for reforming the Commission’s DE rules to ensure that the small business subsidies that the program offers flow to the *bona fide* small businesses they are intended to benefit.³⁶ Left unaddressed, the DE rules may further distort Commission spectrum holdings by prejudicing smaller bidders during the upcoming broadcast incentive auction.³⁷ If the DE program is to survive and thrive, the Commission should closely evaluate whether the current framework is helping or harming its intended beneficiaries. With the deep-rooted problems highlighted by the AWS-3 auction results, AT&T believes the Commission’s DE rules require zero-based review, including considering alternate frameworks for encouraging diversity in the telecommunications industry. While the Commission should consider whether the DE rules can be strengthened to close the loopholes that the DISH DEs leveraged to their advantage in the AWS-3 auction, it should also consider the alternatives to auction participation as mechanisms for DE participation in wireless markets. There may be alternate frameworks, in fact, that could prove more effective in achieving the diverse

³³ T-Mobile Comments at 4.

³⁴ *Id.* at 3.

³⁵ Comments of MediaFreedom.org, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 2 (Feb. 20, 2015) (“MediaFreedom Comments”).

³⁶ *See, e.g.*, T-Mobile Comments at 11-13; Taxpayers Protection Alliance Comments at 8-9; Blooston Comments at 6.

³⁷ *See* Taxpayers Protection Alliance Comments at 9 (cautioning that the DISH entities may have laid a blue print for skirting the DE rules that may be leveraged by larger businesses).

telecommunications ecosystem that the DE program is intended to foster. Indeed, with the cost of Commission spectrum licenses at auction soaring to new and unprecedented heights, and the generally capital-intensive nature of wireless networks, alternative frameworks, like incentives for secondary market transactions or virtual networks, may offer a more direct path to including more valuable small businesses in the telecommunications industry. Accordingly, the Commission should not be constrained in its analysis of the DE program, but rather it should evaluate the program wholesale to ensure that the rules are serving their intended beneficiaries.

Laden with the complex problems outlined herein, AT&T believes increasing bidding credits, as some commenters have called for, would be inappropriate at this juncture.³⁸ Increasing the scale of the DE program before it is reformed will only exacerbate existing problems. As such, AT&T submits that the Commission should first focus its efforts on repairing the existing DE framework before considering any proposed expansions.

IV. CONCLUSION

AT&T appreciates the opportunity to comment on the Commission's proposed competitive bidding rules in light of the recently completed AWS-3 auction. Although the AWS-3 results raise a complex set of issues, AT&T looks forward to working with the Commission to develop rules that will strengthen the transparency, simplicity, and integrity of future auctions. To ensure the fairness of future auctions and preclude the sort of gamesmanship that permeated the AWS-3 auction, the Commission should strengthen its anti-collusion certification and channel legitimate joint bidding agreements into bidding consortia. In addition, the AWS-3 results and the record in this proceeding show that the Commission's DE rules must

³⁸ See, e.g., NTCA Comments at 2-4 (calling for additional rural telephone company subsidies); Comments of the Wireless Internet Service Providers Association, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 7 (Feb. 20, 2015) ("WISPA Comments") (asking for increases in bidding credit percentages).

be reconsidered—consistent with their underlying purpose—to ensure that benefits flow only to the *bona fide* small businesses they were intended to assist. By taking the steps AT&T has advocated in this proceeding, the Commission will help foster a successful incentive auction environment marked by competition, transparency, and integrity.

Respectfully submitted,

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