

**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 T-MOBILE USA, INC.

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REPLY COMMENTS OF T-MOBILE USA, INC.

I. INTRODUCTION AND SUMMARY

T-Mobile USA, Inc. (“T-Mobile”)¹ respectfully submits its reply comments in response to the Federal Communications Commission (“Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.² The record in this proceeding reflects widespread agreement that the Commission must reform its Part 1 competitive bidding rules in advance of the upcoming 600 MHz incentive auction, and can easily do so without jeopardizing

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

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

delay of the bidding. Commenters appropriately emphasize the importance and watershed nature of that auction both to consumers and service providers. As Sprint explains in its opening comments, the incentive auction “will be the last low-band spectrum auction for the foreseeable future and thus the last chance for competitive carriers to obtain the low-band spectrum they need to compete with the largest carriers on cost structure.”³ The Auction Reform Coalition observes that the incentive auction “will be the most complex spectrum auction ever held, with the potential to raise more revenues than any single prior auction.”⁴ T-Mobile’s opening comments similarly emphasize the importance of the incentive auction, and of the low-band spectrum that will be made available there, to the public interest.⁵

With this in mind, the Commission should carefully heed commenters’ warnings that the current competitive bidding rules are not sufficient to prevent certain unfair bidding conduct that could undermine the important goals of the incentive auction. Indeed, highlighting the results of the recently-concluded AWS-3 auction as a cautionary tale, several commenters support tightening the competitive bidding rules. AT&T, for example, notes that the “AWS-3 auction made clear that bidders can circumvent auction rules in ways that the Commission could not have anticipated.”⁶ The record, replete with specific examples of how the current rules allowed some bidding entities to gain unfair advantages in the otherwise successful AWS-3 auction, supports this assertion. The Blooston Rural Carriers, for example, recount that while “more than

³ Comments of Sprint Corporation, WT Docket No. 14-170, at 2 (filed Feb. 20, 2015) (“Sprint Comments”).

⁴ Comments of Auction Reform Coalition, WT Docket No. 14-170, at 6 (filed Feb. 20, 2015) (“ARC Comments”).

⁵ Comments of T-Mobile USA, Inc., WT Docket No. 14-170, at 23 (filed Feb. 20, 2015) (T-Mobile Comments”).

⁶ Comments of AT&T, Inc., WT Docket No. 14-170, at 2 (filed Feb. 20, 2015) (“AT&T Comments”).

half of the eligible bidders were rural telephone companies, rural telco affiliates, or groups comprised of these entities...only a miniscule number of these bidders were successful in obtaining any licenses.”⁷

Rules that enabled unfair bidding practices or that skewed AWS-3 auction results must not be allowed to also undermine the incentive auction. As T-Mobile explained in its opening comments, and as commenters largely agree, to ensure that the incentive auction avoids the pitfalls and missteps of the AWS-3 auction, the Commission must revise its competitive bidding rules to better ensure fairness and transparency in the auction process for all auction participants. As discussed below, the Commission can achieve this goal by adopting commenters’ proposals to: (i) require certifications from entities that share common, non-controlling interests that they will not coordinate their bidding actions; (ii) strengthen the designated entity rules to better safeguard against manipulation and abuse; and (iii) continue existing Commission policy of evaluating joint bidding arrangements, including those among nationwide providers, on a case-by-case basis. These rule changes will ensure a fair and transparent incentive auction for all auction participants. The Commission should not adopt proposals in the NPRM or from commenters that could delay the incentive auction or that do not give all participants a full and fair opportunity. T-Mobile also reiterates its support for a 20 MHz market-by-market cap on the amount of 600 MHz reserve spectrum that can be won at auction.

⁷ Comments of Blooston Rural Carriers, WT Docket No. 14-170, at 1-2 (filed Feb. 20, 2015) (“Blooston Rural Carriers Comments”).

II. COMMENTERS URGE THE COMMISSION TO ADOPT A CERTIFICATION REQUIREMENT FOR ENTITIES THAT SHARE COMMON, NON-CONTROLLING INTERESTS

In the aftermath of the AWS-3 auction, commenters agree that the NPRM's proposals to reform the competitive bidding rules, although a step in the right direction, do not go far enough to prevent bidding conduct that could distort or delay the auction process. While the NPRM proposes rules to address the potential for coordinated bidding activity by commonly controlled entities during an auction,⁸ T-Mobile details in its opening comments how entities that are not commonly controlled, but that nonetheless share certain attributable non-controlling interests, also can engage in unfair coordinated behavior to the detriment of other bidders.⁹ To be fair, the NPRM was adopted prior to the AWS-3 auction and before these glaring loopholes came to light. However, given the far-reaching consequences for the incentive auction, the Commission must foreclose further behavior exploiting the use of commonly-owned entities to coordinate bidding activity and to game the auction process.

Other commenters raise the same concerns regarding auction participation by entities that share common, non-controlling interests. CCA, for example, explains that "strategic behavior among multiple applicants coordinating bidding actions is not limited to scenarios involving commonly controlled applicants. For example, an applicant that bids on a standalone basis but

⁸ *NPRM* at ¶ 103. Noting that the Commission's rules already preclude multiple short-form applications from the same entity for a specific auction, 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.

⁹ T-Mobile Comments at 7. To illustrate, 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 than one bidder. This plainly was the case in Auction No. 97, and, as explained in T-Mobile's comments, it resulted in clear harm to the public interest. *Id.* at 8.

also has multiple non-controlling investments in other applicants may be privy to and participate in the financing and bidding strategy of multiple applicants.”¹⁰ AT&T argues that the Commission’s auction rules allowed entities that share common, non-controlling interests in the AWS-3 auction to “circumvent the Commission’s activity rules to stockpile bidding units to deploy in later stages of 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 real price discovery.”¹¹

The record, therefore, demonstrates strong support for new rules to address the potential for coordinated bidding activity by entities that are not under common control but that share common interests. In its opening comments, T-Mobile proposed that the Commission adopt a certification requirement that would require individuals or entities listed as disclosable interest-holders on more than one short-form application to certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant.¹² The proposed certification would be an appropriate incremental step to reassure bidders that all auction participants are adhering to the Commission’s blind auction format, thereby addressing commenters’ stated concerns and ensuring fairness and transparency in the auction process. As AT&T submits, “requiring an anti-collusion certification is another way to prevent the sort of gamesmanship seen during Auction 97.”¹³ Accordingly, T-Mobile reiterates that the Commission should adopt rules requiring any individuals or entities with a 10 percent or greater

¹⁰ Comments of Competitive Carriers Association, WT Docket No. 14-170, at 13 (filed Feb. 20, 2015) (“CCA Comments”).

¹¹ AT&T Comments at 5-6.

¹² T-Mobile Comments at 9-10.

¹³ AT&T Comments at 10.

interest in more than one auction applicant to submit the certification proposed in its opening comments and described above.

III. THE RECORD EVIDENCE SUPPORTS STRENGTHENING THE DESIGNATED ENTITY RULES

As T-Mobile and other commenters explain in their opening comments, the designated entity program has been and can continue to be an effective way to ensure that small businesses participate in spectrum auctions for wireless communications licenses. Commenters were virtually unanimous, however, in recommending that the Commission modify aspects of the designated entity rules. Although some parties propose stronger rules, and others propose loosening existing restrictions, there is widespread recognition that the current rules do not effectively balance the objectives of the designated entity program against the vital need to safeguard against manipulation and abuse.

In its opening comments, T-Mobile advanced a comprehensive framework for reforming the designated entity rules to better strike this balance. T-Mobile proposed rules that not only would ensure that ineligible entities are not permitted to unfairly acquire spectrum at a discount through designated structures, but that would preserve flexibility for *bona fide* small businesses so that they can continue to compete successfully in the provision of facilities-based wireless services, as Congress intended. Specifically, T-Mobile proposed that the Commission should: (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); (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) 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.

The Commission has strong support in the record to adopt these proposals. First, several commenters agree with T-Mobile that the Commission should preserve and strengthen the AMR rule.¹⁴ MediaFreedom.org submits that the AMR rule is necessary because the “[designated entity] program can be captured by arbitrageurs, casting the legitimacy of the entire DE program into doubt.”¹⁵ The Taxpayers Protection Alliance rightfully explains that “repealing the AMR rule would do little to discourage a DE from acquiring spectrum at a taxpayer-funded discount and flipping it to someone else at full market value. Indeed, repealing it would likely create huge incentives for DEs to engage in this type of behavior, increasing the chances that future auctions would proceed in much the same way as the AWS-3 auction played out.”¹⁶

While some commenters support repealing the AMR rule,¹⁷ such proposals contradict clear Congressional intent that designated entities be facilities-based competitors.¹⁸ The better

¹⁴ See, e.g., Blooston Rural Carriers Comments at 7; Comments of the Taxpayers Protection Alliance, WT Docket No. 14-170, at 9-10 (filed Feb. 20, 2015) (“TPA Comments”); Comments of MediaFreedom.org, WT Docket No. 14-170, at 1-2 (filed Feb. 20, 2015) (“MediaFreedom.org Comments”).

¹⁵ MediaFreedom.org Comments at 2.

¹⁶ TPA Comments at 9-10.

¹⁷ See CCA Comments at 9; ARC Comments at 17; Comments of NTCA – the Rural Broadband Association, WT Docket No. 14-170, at 7 (filed Feb. 6, 2015) (“NTCA Comments”); Comments of the DE Opportunity Coalition, WT Docket No. 14-170, at 16 (filed Feb. 20, 2015) (“DE Opportunity Coalition Comments”); Comments of the Wireless Internet Service Providers Association, WT Docket No. 14-170, at 10 (filed Feb. 20, 2015) (“WISPA Comments”).

approach, therefore, would be for the Commission to retain, strengthen, and clarify the contours of the AMR rule. As T-Mobile suggested in its opening comments, the Commission should strengthen the AMR rule to better fulfill Congress's mandate by prohibiting designated entities from leasing more than 25 percent of their spectrum across one or more lessees.¹⁹

Second, the record also supports the adoption of new rules requiring designated entities to demonstrate meaningful build-out activity in their annual reports within one year of being licensed or, if applicable, within one year of clearing incumbent users. As described above, commenters emphasize Congress's intent that designated entities actually operate as facilities-based providers, "not merely [with] passive ownership of a license to spectrum used by others to provide service."²⁰ The Commission cannot ensure that Congress's mandate is being fulfilled, however, unless it ensures that designated entities are taking concrete and timely steps toward constructing their licenses.

The Commission's existing rules do not provide an effective mechanism for ensuring that licenses acquired with designated entity benefits are constructed in a timely manner. The rules impose construction requirements on licensees, but they require little else from designated entities in terms of construction from the time the license is acquired until the build-out deadline. Under this framework, a designated entity can warehouse spectrum for years and then sell it,

¹⁸ See, e.g., T-Mobile Comments at 13 ("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.'") (quoting H.R. Rep. No. 103-111, at 257-58 (1993); Comments of MediaFreedom.org at 1-2 ("Key to the [designated entity] program is the requirement that designated entities actually operate as facilities-based providers...Importantly, this requirement...seeks to remove speculating middlemen and others whom Congress did not intend to qualify for [designated entity] status.")).

¹⁹ T-Mobile Comments at 14.

²⁰ MediaFreedom.org comments at 1-2 (internal quotations removed).

without ever having taken any steps to construct the license or offer facilities-based service to the public. Such rules clearly do not fulfill Congress's mandate and also do not serve the public interest.

In revising its designated entity rules, the Commission's primary objective should be ensuring that valuable spectrum resources are brought to the marketplace in a timely manner. Annual filing requirements provide a convenient mechanism for ensuring that designated entities are taking meaningful steps toward this goal throughout the license term. Commenters in this proceeding uniformly complain that the annual reports currently do not yield useful information to the Commission.²¹ Accordingly, the Commission should expand the annual reporting requirements to require designated entities to show some evidence of meaningful build-out activity within one year of acquiring a license or, if applicable, of clearing incumbent users. Such demonstrations would provide the Commission with adequate confidence that the licensee actively is moving toward providing facilities-based service that would benefit consumers and increase competition. The proposed requirement also would provide the Commission with greater opportunities to intervene on behalf of the public interest in situations where valuable spectrum is being warehoused.

Third, the record in this proceeding demonstrates support for stronger unjust enrichment rules, including extension of the five-year unjust enrichment period. As T-Mobile explains in its comments, the five-year unjust enrichment rules do not provide a meaningful deterrent to entities

²¹ See, e.g., Blooston Rural Carriers Comments at 10 (“[annual reports] have yielded minimum useful information beyond that which licensees must disclose in long forms, transfer of control applications, and/or spectrum lease applications”); Comments of the Rural Wireless Association, WT Docket No. 14-170, at 11 (filed Feb. 20, 2015) (“RWA Comments”) (RWA...agrees that the required information is duplicative of information that [designated entities] have already disclosed in their auction and license applications.”).

that view the monetary penalty in the current rules as a mere cost of doing business. Moreover, in cases, such as the AWS-3 auction and the incentive auction, where spectrum acquired with bidding credits will not be available for use in the near term due to incumbent users, the five-year holding period makes little sense and does not reflect market realities. Those few commenters who oppose extending the unjust enrichment period fail to offer any reasoning—beyond maintaining designated entities’ flexibility—for preserving the current rules. While flexibility is important, T-Mobile agrees with RWA that, as prior experience has confirmed, “too much flexibility can encourage [designated entity] program abuse and unjust enrichment.”²² As stated in T-Mobile’s comments, a better policy would be 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.

Finally, commenters agree with T-Mobile that the Commission should consider ways in which it can further develop the existing analysis it applies to designated entity applicants under the “controlling interest” standard to better ensure that only *bona fide* small businesses receive benefits under the program. AT&T, for example, suggests that the Commission should “consider changing the attribution rules to attribute to a [designated entity] 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.”²³ NTCA urges the Commission to consider “restricting larger nationwide and regional carriers from providing a material portion of the total capitalization of [designated

²² RWA Comments at 11.

²³ AT&T Comments at 17.

entity] applicants or otherwise exercising control over such applicants as part of the definition of ‘material relationship.’”²⁴

To ensure fairness, NTCA’s proposed requirement would need to cover all large companies—not just the carriers. AT&T’s proposal, while a step in the right direction, may be too restrictive. T-Mobile advanced two requirements in its comments that would address commenters’ concerns and better ensure that designated entities are legitimate small businesses. First, the Commission should adopt a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control. Second, the Commission should adopt a 25 percent minimum equity requirement that would require any loans used to achieve minimum equity thresholds to be negotiated at arms-length. Such rules would lessen the likelihood of sham arrangements under the designated entity program and of arrangements, such as those in the AWS-3 auction, under which ineligible entities provide substantial equity to designated entities without having their revenues distributed.

IV. THERE IS NO SUPPORT IN THE RECORD FOR THE COMMISSION’S TENTATIVE CONCLUSION TO PROHIBIT JOINT BIDDING ARRANGEMENTS AMONG NATIONWIDE PROVIDERS

The comments filed in response to the NPRM resoundingly confirm that the Commission struck the right balance in its existing policy of permitting joint bidding arrangements, including those among the nationwide providers. In fact, not a single commenter expresses support for the Commission’s tentative conclusion to prohibit joint bidding arrangements only among the nationwide providers. Rather, the record reflects a widely shared view that joint bidding arrangements can have pro-competitive benefits, and, for that reason, a blanket prohibition on such arrangements—no matter how narrow—is inappropriate. T-Mobile reiterates that joint

²⁴ NTCA Comments at 7.

bidding arrangements offer smaller nationwide carriers a potential means of bolstering scale to compete more effectively at auction and in the wireless marketplace, particularly against the largest carriers.²⁵ For these reasons, and to better ensure that all entities are given a full and fair opportunity to acquire much-needed low-band spectrum in the upcoming incentive auction, the Commission should continue its existing policy of permitting joint bidding arrangements on a case-by-case basis.

Commenters recognize that joint bidding arrangements potentially can produce pro-competitive collaborations that result in consumer benefits.²⁶ CCA, for example, appreciates that “providing a tool to pool resources at auction is pro-competitive.”²⁷ Sprint submits that joint bidding arrangements can “promote competition and thus spur innovation and consumer welfare.”²⁸ And although RWA states that joint bidding arrangements are not a “silver bullet,” it nonetheless acknowledges that “joint bidding arrangements have been a useful – and necessary – tool” in the wireless industry.²⁹

This consensus is based on real-world evidence that competition, investment, and innovation flourished throughout the wireless industry under the Commission’s existing policy of permitting joint bidding arrangements. As T-Mobile notes in its opening comments, wireless service providers made record investments in upgrading and expanding their networks in recent years under the Commission’s existing policy—\$33.1 billion in annual capital expenditures in

²⁵ T-Mobile Comments at 22-23.

²⁶ Sprint Comments at 2-3; CCA Comments at 13-14; RWA Comments at 12; ARC Comments at 26.

²⁷ CCA Comments at 14.

²⁸ Sprint Comments at 2.

²⁹ RWA Comments at 12.

2013 alone, an all-time high.³⁰ These investments have propelled innovation throughout the wireless industry and enabled consumers to access an ever-growing array of content, services, and applications.

Given the proven track record of the current joint bidding rules, and the support for them in the record, there is no justification for the Commission to pursue a different path now. Indeed, neither the Commission, nor commenters, have identified any changes in the wireless market that would warrant a blanket prohibition on joint bidding arrangements among nationwide providers. As T-Mobile explains in its comments, the Commission instead bases its tentative conclusion 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.”³¹ This kind of speculation and rhetoric about implausible, theoretical harms to competition that have never occurred—and that bear no relationship to what is actually happening and has happened in the marketplace—provide no basis for abandoning tried and true rules that have a demonstrated record of success. The Commission, therefore, has no grounds for reversing its existing policy of permitting joint bidding arrangements that has worked so well.

The Commission instead should continue to apply its existing balanced and targeted approach that permits pro-consumer collaborations between competitors on a case-by-case basis. As Sprint notes, such an approach is better suited to address “the actual circumstances of individual local geographic markets.”³² In addition, T-Mobile agrees that, to the extent the

³⁰ T-Mobile Comments at 22 (quoting 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>).

³¹ T-Mobile Comments at 18 (quoting *NPRM* at ¶ 131).

³² Sprint Comments at 11.

Commission has competitive concerns, they can be addressed through existing regulatory and antitrust mechanisms, as some commenters suggest.³³ At a minimum, the Commission should consider Sprint’s proposal to allow joint bidding arrangements in Partial Economic Areas (“PEAs”) where the agreeing parties collectively hold less than 45 MHz of low-band spectrum on a population-weighted basis.³⁴ In doing so, the Commission can ensure that its joint bidding rules do not deny smaller nationwide carriers flexibility to pursue all available business arrangements and collaborations available to them to compete successfully in the incentive auction and to acquire much-needed low-band spectrum resources.

V. T-MOBILE REITERATES, AND COMMENTERS AGREE, THAT EVALUATION OF THE COMPETITIVE BIDDING RULES SHOULD NOT DELAY THE INCENTIVE AUCTION

There is a universal sentiment expressed in the record that whatever rule changes are adopted in connection with the Commission’s review of the Part 1 competitive bidding rules, they not be allowed to delay the upcoming incentive auction, which should occur in early 2016. As described above, commenters overwhelmingly emphasize the importance of that auction to competition and the public interest. In fact, T-Mobile cannot overstate the harms that would result from any delays in bringing much-needed 600 MHz spectrum to the marketplace.³⁵ For this reason, T-Mobile again urges the Commission to complete its evaluation of the competitive bidding rules in a timely manner so that the incentive auction can proceed on schedule and

³³ *Id.* at 13.

³⁴ *Id.* at 11-13.

³⁵ As T-Mobile explains in its comments, the two largest nationwide providers hold approximately 73 percent of the low-band spectrum available today. 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. T-Mobile Comments at 24.

participants can have sufficient time to ensure compliance with any rule modifications. T-Mobile also reiterates its support for a 20 MHz market-by-market cap on the amount of 600 MHz reserve spectrum that can be won at auction.³⁶ Especially in light of the AWS-3 auction results, as T-Mobile underscores in the incentive auctions proceeding, such a cap will benefit competition by ensuring a fair distribution of valuable low-band spectrum to carriers most likely to deploy service as well as benefit American consumers.

VI. CONCLUSION

The Commission should act swiftly in reevaluating the Part 1 competitive bidding rules in preparation for the upcoming incentive auction. The policies described above will ensure a fair and transparent incentive auction for all auction participants. As noted above, none of the comments filed in this proceed offer any serious opposition to T-Mobile's proposals. Rather, many comments indicate support for reforming the Part 1 rules consistent with the framework set forth in T-Mobile's opening comments. For these reasons, the Commission should proceed promptly to revise the Part 1 competitive bidding rules so as not to delay the upcoming incentive auction.

³⁶

Id.

Respectfully submitted,

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