

**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 KING STREET WIRELESS, L.P.**

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March 6, 2015

## SUMMARY

The over-arching goal of the Commission in the proceeding should be to better an already generally sound auction process, and to improve its compliance with Congressional mandates involving designated entities.

Auction 97 was unquestionably a financial success. Unfortunately, that success does not appear to have extended to compliance with the Commission's statutory mandate to disseminate licenses among a wide variety of applicants, including small businesses. In addition, the auction has been clouded by controversy over the activities of one group of related DE applicants.

As a threshold matter, at the root of the Auction 97 controversy is collusive bidding, not the DE program. Existing Commission rules effectively authorize collusion where bidding agreements exist and are reported in advance to the Commission, whether the applicants at issue of DEs or not. And Commission rules permit parties to hold equity in multiple applicants, thereby further inviting collusion. The Commission should prohibit bidding agreements among applicants, and prohibit parties from holding equity in multiple applicants, other than where the equity is below a reasonable threshold and where the party at issue is pulled into the auction and has no awareness or participation of bidding strategies

The Commission's core DE program needs strengthening, not added limitations. The suggestions from two nationwide carriers to expand attribution to non-controlling entities, to limit DE potential auction winnings and to extend the DE holding period have one thing in common: they would undermine the existing program without providing any counter balancing benefits. As such, they should be summarily rejected.

The Commission's proposals for strengthening the DE program would do just that. By increasing the DE credit percentages and modifying revenue eligibility thresholds to catch up with cost of living increases over the past two decades, they would both make more capital

available to more DEs in need of such capital. As such, the revenue eligibility thresholds proposed by the Commission should be adopted, and the Commission's bid credit program should be expanded to provide credits of 40% for entities having average revenues of not more than \$15 Million per year.

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**REPLY COMMENTS OF KING STREET WIRELESS, L.P.**

King Street Wireless, L.P. (“King Street”), by counsel, hereby replies to comments filed in response to the Commission’s notice of proposed rulemaking in the above-captioned rulemaking proceeding. *See Updating Part 1 Competitive Bidding Rules*, 29 FCC Rcd 12426 (2014) (“*NPRM*”).

**I. INTRODUCTION**

King Street joins in the chorus of commenters that sing the praises of Auction 97.<sup>1</sup> In

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<sup>1</sup> See Comments of AT&T, WT Docket No. 4-170, at 2 (Feb. 20, 2015) (“AT&T”); Comments of the Blooston Rural Carriers, WT Docket No. 4-170, at 2 (Feb. 20, 2015) (“Blooston”); Comments of the Rural Wireless Association, Inc., WT Docket No. 4-170, at 15 (Feb. 20, 2015) (“RWA”); Comments of the Wireless Internet Service Providers Association, WT Docket No. 14-170, at 4-5 (Feb. 20, 2015) (“WISPA”); Comments of the DE Opportunity Coalition (Steven R. Bradley *et al.*), WT Docket No. 4-170, at 9-12 (Feb. 20, 2015) (“DE Opportunity”).

terms of generating Federal revenues, Auction 97 was an historic, record-setting success.<sup>2</sup> But the auction was much less successful in achieving the statutory objective of “promoting economic opportunity and competition ... by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3)(B). For example, one commenter reported that, collectively, rural telephone companies won only 1.55 percent (.0155) of the licenses auctioned, a result that has been described as being “dismal by anyone’s standards.”<sup>3</sup>

As Commissioner Pai saw it, the two DISH DEs made a “mockery of the DE program” when they spent over \$10 billion and claimed an additional \$3 billion in “taxpayer-funded discounts” in Auction 97.<sup>4</sup> Several commenters apparently share that view.<sup>5</sup> Unfortunately, some of them seem to have misdirected their ire to the DE program itself. They urge the Commission to “strengthen” its DE rules in ways that they claim will prevent a reoccurrence of the bidding gamesmanship displayed in Auction 97,<sup>6</sup> but which in reality will unfortunately substantially decrease the opportunities for small businesses to become spectrum licensees.<sup>7</sup>

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<sup>2</sup> See, e.g., AT&T at 2.

<sup>3</sup> Blooston at 3.

<sup>4</sup> *Statement of Commissioner Ajit Pai on Abuse of the DE Program*, 2015 WL 420230, at \*1 (Feb. 2, 2015).

<sup>5</sup> See Comments of MediaFreedom.org, WT Docket No. 14-170, at 2 ((Feb. 20, 2015) (agreeing with, and quoting, Commissioner Pai); AT&T at 15 (same); Comments of Americans for Tax Reform, WT Docket No. 14-170, at 5 (Feb. 20, 2015) (Auction 97 “ended up being among the least successful and most notorious in history” because the DISH DEs “flouted the FCC’s DE rules”); ARC at 14 (“T-Mobile President John Legere has characterized Auction 97 as ‘a disaster’ with three companies buying ‘a ridiculous 94 percent of the spectrum sold at auction’”); Blooston at 5 (charging that DISH abused the DE Program).

<sup>6</sup> T-Mobile at 12.

<sup>7</sup> See, e.g., *id.* (“First, in preserving the AMR rule, the Commission should revise the rule to prohibit designated entities from leasing more than 25 percent of their spectrum in the aggregate, across one or more lessees. Second, the Commission should adopt rules requiring designated entities to show in annual filings some level of build-out activity that is consistent for the provision of timely, facilities-based service. Third, to avoid sham arrangements that could undermine spectrum auctions, the Commission should adopt minimum equity requirements for designated entities. Fourth, the Commission should adopt a rebuttable presumption that equity investments of 50 percent or more constitute *de facto* control for purposes of attribution rules. Finally, to better deter speculation, the

Those who seek to penalize the DE program for the alleged misdeeds of DISH would have the Commission act inconsistently with its duties under the auction provisions of the Communications Act of 1934 (“Act”). This is because the greater mischief that allegedly transpired in Auction 97 resulted largely, not from abuse of the DE program, but rather from collusive bidding agreements and multiple auction entries by related parties. The DE program, while not perfect as presently constructed, has become a scapegoat for those who prefer to close off opportunities for small business competitors.

Holding aside whatever happened in Auction 97, the main task at hand is to revise the Part 1 competitive bidding rules in advance of the upcoming broadcast incentive auction. *See NPRM*, 29 FCC Rcd at 12427. In performing that task, the Commission is statutorily obliged to: (1) promote “economic opportunity for a wide variety of applicants, including small businesses,” 47 U.S.C. § 309(j)(4)(C); (2) ensure that small businesses are “given the opportunity to participate in the provision of spectrum-based services,” *id.* § 309(j)(4)(D); and (3) disseminate “licenses among a wide variety of applicants, including small businesses.” *Id.* § 309(j)(3)(B).<sup>8</sup> The Commission can fulfill its statutory duties, yet prevent future applicants from engaging in joint bidding tactics similar to those employed in Auction 97, by changing the competitive bidding rules and by strengthening somewhat the DE program. The first rule change would be to ban joint bidding, which is nothing more than authorized collusion. The second core change should be a reasonable prohibition on multiple auction entries by related parties.

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Commission should revise its unjust enrichment rules to require full repayment of the bidding credit, plus interest, throughout the entire ten-year license term as well as a penalty equal to the sales price above and beyond the auction bid price, plus interest”).

<sup>8</sup> *See* ARC at 11 (“Properly viewed, [§] 309(j)(3)(B) specifically requires the Commission to ensure that licenses are ‘disseminat[ed]’ to a wide variety of applicants, including small businesses. ‘Disseminated’ in this context can only mean ‘issued’ or ‘granted.’”).

## II. DISCUSSION

### A. ALL JOINT-BIDDING ARRANGEMENTS SHOULD BE PROHIBITED

#### 1. Joint-Bidding Arrangements Foster Collusion

AT&T was spot-on when it argued that “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.”<sup>9</sup> Under the cover of their joint-bidding arrangements, DISH’s wholly-owned subsidiary, American AWS-3 Wireless I L.L.C. (“American”);<sup>10</sup> Northstar; and SNR were reportedly able to freely collaborate in implementing a “bid-stacking” strategy in Auction 97 to further their strategic interests and disadvantage other bidders.<sup>11</sup>

Verizon recently reported that its investigation of the bidding patterns in Auction 97 supported the claims that AT&T and T-Mobile made in this proceeding.<sup>12</sup> Verizon also noted:

[T]he auction data show that DISH and its DEs frequently submitted two or three bids for the same amount on the same licenses in the same round. This pattern of double and triple bidding is unlikely to have occurred by chance (if, for example, DISH and each DE were bidding independently). The data also reveal that the pattern of coordinated bidding allowed DISH to exit the auction abruptly once bidding reached a certain level and be replaced by its DEs, . . . .

\* \* \* \* \*

The bidding data 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. The double and triple bidding by DISH and its DEs may have created the false impression that there was more competition for certain licenses than was actually the case, and may have caused small bidders to exit the auction. By jointly bidding on the same licenses, DISH and its DEs also were able to park their eligibility without incurring the risk of being the winning bidder on a larger number of licenses, which provided an inherent advantage over other bidders.

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<sup>9</sup> See AT&T at 3.

<sup>10</sup> See File No. 0006458188, Ex. A, at 1.

<sup>11</sup> AT&T at 7. See *id.* at 5-7 (describing the coordinated bidding activities of DISH and its DEs); T-Mobile at 7 (same).

<sup>12</sup> See Letter from Tamara Preiss to Marlene H. Dortch, WT Docket No. 14-170, at 1 (Feb. 27, 2015) (“Verizon Ex Parte”).

And the bidding data suggest the DEs later used that eligibility to allocate their bidding between different geographic markets.<sup>13</sup>

The harms alleged by AT&T, T-Mobile and Verizon were not the result of DISH's 85 percent ownership stake in the two DEs. Rather, they were the direct result of collusive conduct normally prohibited by the Commission's anti-collusion rule. *See* 47 C.F.R. § 1.2105(c)(1). American, Northstar and SNR were all applicants for licenses in the same "geographic license areas," and they were undoubtedly "cooperating or collaborating with respect to, ... or disclosing to each other in any manner the substance of their own, or each other's ... bids or bidding strategies" after the short-form filing deadline. *Id.* Apparently, they did not violate the anti-collusion rule simply because their short-form applications included disclosures that American and SNR were parties to the "SNR Bidding Protocol and Joint Bidding Arrangement"<sup>14</sup> and American and Northstar were parties to the "Northstar Bidding Protocol and Joint Bidding Arrangement."<sup>15</sup> Hence, the DISH-coordinated alleged collusion appears to have been conducted within the safe harbor of the joint-bidding-arrangement exception to the anti-collusion rule.<sup>16</sup>

Needless to say, a codified exception to a Commission rule prohibiting certain conduct works to legitimize such otherwise prohibited conduct. It was unsurprising, therefore, that the joint-bidding exception to the anti-collusion rule permitted DISH to act in the manner that others

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<sup>13</sup> Verizon Ex Parte at 1-2.

<sup>14</sup> *See* File Nos. 0006458188 & 0006458318.

<sup>15</sup> *See* File Nos. 0006458188 & 0006458325.

<sup>16</sup> *See* 47 C.F.R. § 1.2105(c)(1) (applicants for the same licenses cannot collude "unless such applicants are members of a bidding consortium or other joint-bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii)).

claim to have been problematic.<sup>17</sup> The exception is a loophole that must be closed because it needlessly invites bidders to collude for no benefit to the auction process.

## 2. RULES PERMITTING JOINT-BIDDING RULES ARE UNNECESSARY

The anti-collusion rule was intended “to protect the integrity and robustness of [the] competitive bidding process.” *Implementation of § 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 7665, 7688 (1994) (“*First Reconsideration Order*”). Given its “statutory obligation to utilize auctions as a primary licensing tool,” the Commission considered the protection of the integrity of the auction process to be of “paramount importance,” and it was consequently concerned about collusive conduct that compromised the integrity of the process. *Second Reconsideration Order*, 14 FCC Rcd at 8755. It “adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and post-auction market structure.” *Second Reconsideration Order*, 14 FCC Rcd at 8753.

At the same time, the Commission did not want to “restrict unnecessarily the formation of non-collusive bidding consortia.” *First Reconsideration Order*, 9 FCC Rcd at 7688. Therefore, it permitted joint-bidding arrangements, because they “have the potential to result in precompetitive benefits if they enable participation in auctions by those otherwise without sufficient financial resources to bid.” *NPRM*, 29 FCC Rcd at 12471 (¶ 125). It determined that in the absence of the joint-bidding exception, the anti-collusion rule “could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities that might not otherwise be able to compete in the auction process.” *Id.* at 12466 (¶ 110) (footnotes omitted). As AT&T put it, “[t]he purpose of

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<sup>17</sup> The Commission adopted the anti-collusion rule for the purpose of “preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.” *NPRM*, 29 FCC Rcd at 12466 (¶ 110) (quoting *Implementation of § 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2386 (1994)). The rule was deemed of paramount importance “in preventing and facilitating the detection of collusive conduct.” *Implementation of § 309(j) of the Communications Act – Competitive Bidding*, 14 FCC Rcd 8724, 8755 (1999) (“*Second Reconsideration Order*”). *petition for review denied, Orion Communications Limited v. FCC*, 213 F.3d 761 (D.C. Cir. 2000) (per curiam).

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 [by being] on par with other, larger or better financed applicants.”<sup>18</sup>

Joint-bidding arrangements are not necessary to allow entities to compete in the auction process with larger or better financed applicants. Entities can just as easily pool their resources and share risk by jointly forming a partnership, company, or corporation to apply for spectrum licenses and compete effectively and transparently in the auction process. By prohibiting joint-bidding arrangements altogether in favor of joint-venture applicants, the Commission would protect the transparency and integrity of the auction process, simplify its auction procedures, prevent the reoccurrence of the collusion that marred Auction 97, and obviate the purported need to “strengthen” its DE rules. For these reasons, King Street urges the Commission to ban joint-bidding arrangements.<sup>19</sup>

#### B. THE COMMISSION SHOULD REINSTATE THE ONE-TO-A-MARKET RULE

In 1994, the Commission acted on its own motion, and without the benefit of public notice and comment,<sup>20</sup> to amend its just-adopted competitive bidding rules to allow holders of non-controlling attributable interests in one applicant to obtain an ownership interest in a second applicant for licenses in the same geographic area. *See First Reconsideration Order*, 9 FCC Rcd at 7688. At the same time, it recognized that “some potential for collusion” exists whenever an entity is permitted to hold interests in multiple applicants for the same license. *Id.* at 7689. Thus, the Commission promised to “scrutinize carefully any instances in which bidding patterns

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<sup>18</sup> AT&T at 6.

<sup>19</sup> *See* AT&T properly observed that “[r]ather than simply banning joint bidding arrangements among national carriers, [the Commission] should ban them altogether”).

<sup>20</sup> *See First Reconsideration Order*, 9 FCC Rcd at 7690 n.19.

suggest that collusion may be occurring.” *Id.*

DISH held a controlling interest in American and non-controlling 85 percent ownership interests in Northstar and SNR.<sup>21</sup> Their bidding patterns unmistakably show that collusion occurred. *See supra* pp. 4-5. DISH’s ownership interests in the three applicants appear to have put it in a position to orchestrate a bidding strategy that allowed it “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.”<sup>22</sup>

The Commission enabled parties to make investments in multiple entities that will bid for the same license only to “facilitate the flow of capital to applicants.” *First Reconsideration Order*, 9 FCC Rcd at 7689. There is no evidence to suggest that prohibiting deep-pocket investors such as DISH from funding multiple bidders for the same license would prevent applicants from being adequately capitalized. But now there is conclusive evidence that collusion may occur if an entity is allowed to hold interests in multiple applicants for the same license. To prevent collusion, the Commission should return to the one-to-a-market rule that served to safeguard cellular licensing from abuse in the past. The Commission should adopt a rule that reasonably prohibits a person from electing to have an interest, direct or indirect, in more than one applicant for a license in a geographic license area. Specifically, participation in multiple applicants would be permissible only where a party has a passive interest in an applicant (“Applicant A”), and thus does not control the decision of Applicant A to participate in the auction, or have any knowledge or involvement in the bidding strategy of Applicant A. Such

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<sup>21</sup> *See supra* note 13 and accompanying text.

<sup>22</sup> AT&T at 5-6.

minority investor could also have an interest in a second application where it did have knowledge of such second applicant, provided, of course, that its involvement was duly reported in applicable applications.

C. THE CORE STRUCTURING REQUIREMENTS FOR THE DE PROGRAM SERVE THE PUBLIC INTEREST, AND NO FUNDAMENTAL CHANGES ARE WARRANTED OR APPROPRIATE

In the wake of the Commission's Auction 97 experience, certain of the nation's largest carriers are regrettably calling for a dismantling of the Commission's existing DE program. For example, AT&T urges the Commission to apply an artificially low dollar cap on DE benefits, and to attribute to each DE revenues of any investor holding 10% or more equity in the DE. AT&T at 4-5. Similarly, T-Mobile argues that DEs should be required to meet more stringent build out requirements than all other licensees; that minimum DE investment levels should be re-instituted; that any equity investment of 50% or more, even non-controlling, should be deemed to convey *de facto* control; and that the DE holding period should be increased from five to ten years, with full repayment of unjust enrichment being required throughout that entire period. T-Mobile at 12.

Each of the above urgings is nothing more than a thinly veiled attempt to undermine the Commission's existing DE program. As such, each would dis-serve the public interest and undermine Commission compliance with its Congressional mandates. Below, each is examined, and rebuffed, individually. But first it would appear to be instructive to examine briefly how and why the Commission established its DE program.

Virtually from the onset of auctions, the Commission understood that “the primary impediment to participation by designated entities is lack of capital.”<sup>23</sup> The Commission then addressed the issue of how to encourage larger companies to provide much needed capital to smaller entities. It determined that the best way would be to “encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions [by making] bidding credits available to designated entities.”<sup>24</sup> The Commission next had to establish attribution rules, and did so in a manner that was “designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules.”<sup>25</sup> Given that the key to DE eligibility would be control, the Commission had to decide whether there would also be minimum required equity by the eligible DE entity, and it determined that there should not be any. In so doing, the Commission explained that:

“We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing. A minimum equity requirement would require any person or entity identified as a controlling interest to retain some level of equity in the applicant, thereby reducing the amount of equity the applicant could offer to non-controlling interests in exchange for financing. This policy would thus limit a small business’ ability to raise capital and undermine our intention of promoting small business participation in the highly competitive telecommunications marketplace.”<sup>26</sup>

“Further, we do not believe that the adoption of a minimum equity requirement is necessary to ensure appropriate identification of an applicant’s controlling interests if the principles of *de jure* and *de facto* control are applied. These principles are, in effect, broader than the

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<sup>23</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5537 (1994). (“*Fifth R&O*”)

<sup>24</sup> *Id.* at 5539.

<sup>25</sup> *Id.* At 1560.

<sup>26</sup> *Fifth R&O*, 9 FCC Rcd at 15325-26.

minimum equity requirement because they look to actual control irrespective of the amount of equity held in an applicant.”<sup>27</sup>

Turning to the specific proposals by AT&T and T-Mobile, we first examine AT&T’s urging for an arbitrary cap on DE benefits. It runs absolutely counter to all that the Commission recognized in the NPRM and what we have learned in Auctions 1 - 97: that the wireless world is changing rapidly; that auction prices are rising generally and that effectively no one can accurately predict prices at a yet-to-be-held auction. Under such circumstances, rigid, arbitrary caps make absolutely no sense.

It is also difficult to imagine that a cap as low as that proposed by AT&T could help the FCC meet its statutory mandate of “providing opportunity and competition” given the very limited number of licenses a DE could acquire under AT&T’s proposal. With all of the consolidation that has occurred in the industry in the past decade, it should be clear to all that this is a scale business and that limitations on the amount of spectrum a DE can acquire with bidding credits retards rather than advances the competitive goal of the statute.

A far superior way to address any sincere desire to reasonably limit how much spectrum any single DE can acquire in an auction would be to limit permissible spectrum acquisition with permissible spectrum acquisition measured as a percent of overall auction revenues, those revenues that it would pay.

AT&T’s proposal to attribute to a DE applicant the revenues of any entity holding a 10% or greater interest in the applicant would conflict directly with Commission determinations when it established the DE program as discussed above, and strike at the very heart of the DE program. As discussed above, and as the Commission has repeatedly recognized, the single greatest obstacle confronting small businesses that desire to participate in

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<sup>27</sup> *Id.* at 15326.

an auction is access to capital. The 10% attribution cap that AT&T proposes would make an existing core problem insurmountable. For this reason, it must be summarily rejected.

The T-Mobile proposals are equally nonsensical. Its 50% equity attribution threshold proposal suffers from the same core failings as AT&T's 10% proposal: It makes it more difficult, not less difficult, for DEs to access capital – and in an auction environment there can be no success without capital. That is why the Commission determined to eliminate, rather than increase any minimum equity requirement when it revised DE rules two decades ago. T-Mobile's proposal to saddle less-well-financed DE entities with more stringent build requirements makes no sense on its face. It would make capital acquisition more difficult, and would require those who have the least negotiating leverage to be the first to wrestle with vendors before equipment for a new band of spectrum may even develop. Lastly, the T-Mobile proposal to increase the DE holding period from five to ten years -- which was rejected by the Third Circuit the last time it was adopted in a rulemaking aimed at helping DEs -- would have a considerable chilling effect on capital becoming available to DEs. This is because ten years is a lifetime in wireless, and financial institutions are far less willing to provide money for a ten-year period.

For all of these reasons, the Commission should reject the AT&T and T-Mobile DE proposals, all of which appear to be designed to undermine the DE program and benefit these large entrenched carriers.

#### D. BID CREDITS FOR DESIGNATED ENTITIES SHOULD BE INCREASED

In its comments in this proceeding, King Street urged the Commission to increase the maximum bid credit available in significant wireless auctions to 40%.<sup>28</sup> In support, King

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<sup>28</sup> King Street at 4.

Street explained that such an increase is badly needed to pump life into a DE program that is only marginally achieving Congressional mandates.<sup>29</sup> Bidding credits are a form of capital and, as the Commission properly observed in its NPRM at 12429:

“access to capital for acquiring licenses is critical for [small and new entrant] providers to take advantage of different opportunities to participate in the provision of spectrum-based services, including through facilities-based deployment, spectrum leasing, and mobile virtual network operator arrangements.”

The issue of increasing the bid credit percentages is in addition to, and different from, the issue of increasing revenue thresholds for bid credit eligibility (discussed below). For the past decade, in the major wireless auctions there have been only two levels of bid credits: 25% for “very small business” applicants having annual average gross revenues not exceeding \$15 Million and 15% for “small business” applicants having average gross revenues not exceeding \$40 Million. King Street urges the Commission to increase very small business credits to 40% and the small business credits to 25%.<sup>30</sup>

A number of other parties provided comments that were supportive of King Street’s position in its comments.<sup>31</sup> King Street agrees with those commenters and renews its urging to increase bid credits, as set forth above.

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<sup>29</sup> *Id.* at 2-4.

<sup>30</sup> Although the top tier of bidding credit, for entities with average revenues below \$3 Million has not been made available in major wireless auctions over the last decade, King Street urges also to increase the bidding credit percentage for that grouping, from 35% to 50%.

<sup>31</sup> See DE Opportunity Coalition at 33 (“the top level of bidding credits [should] increase to at least 40 percent, with proportionate increases in the lower levels”); Auction Reform Coalition (“ARC”) at 23 (“ARC recommends that bidding credits for the three revenue tiers be increased to 25%, 35% and 50%, respectively”); Wireless Internet Service providers Association at 6 (proposing bidding credits of up to 40-45%).

**E. THE REVENUE THRESHOLDS FOR ELIGIBILITY FOR DE BID CREDITS SHOULD BE INCREASED**

In its NPRM, at 12446, the Commission proposed to increase the revenue thresholds for eligibility for DE bid credits. The Commission recognized such increases to be appropriate both to reflect the “changing nature of the wireless industry, including the overall increase in the size of wireless networks”, and the fact that such thresholds have not been increased since the inception of the DE program two decades ago.

King Street agrees with a number of commenters, as set forth in Section II.D., n. 30 supra., in support of that proposal.<sup>32</sup> Such a change would strengthen a DE program that is in need of strengthening in any reasonable way that is possible.

**F. THE COMMISSION SHOULD CONTINUE TO BASE ELIGIBILITY FOR DE BID CREDITS ON SMALL BUSINESS STATUS**

When the Commission’s auction program commenced two decades ago, the Commission had before it a strategic choice: either establish a pragmatic program that would respond fully to its statutory mandates or piece together a labyrinth that would address with particularity each of the subset groups that collectively constitute the “small businesses” that the statute sought to protect. The Commission then wisely determined that it would make no sense to carve out a series of smaller protected groups. In so doing, the Commission recognized that an elaborate record would need to be created to justify, and safeguard against legal challenge, certain group-specific preferences. The Commission also realized that all of the subgroups who may warrant special protection could appropriately be grouped under the heading of small businesses. Accordingly, it based its DE bid credit program on small business status.

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<sup>32</sup> See also RWA at 8.

Various commenters have continued to urge for special benefits for their favored groups, be they rural telephone companies, “local” service providers or persons who have “overcome (unspecified) disadvantages.” But no such urgings have been able to address reasonably, or are likely to overcome, the many hurdles that caused the Commission to fall back on the broad protected class of small businesses. In some instances, the record is woefully inadequate to support new preferences, and time does not exist prior to the incentive auction to strengthen the record. In others, small business status appears to be generally sufficient.<sup>33</sup> And still others appear to be carryovers from a bygone era that either the Commission or reviewing courts have rejected.<sup>34</sup>

For all of these reasons, King Street urges that the focus of the Commission’s DE program remain with small businesses, and that such core program be strengthened.

### III. CONCLUSION

There are several changes that the Commission should make to strengthen its overall competitive bidding and DE programs. The Commission should ban bidding agreements between or among different applicants, and establish a reasonable one-to-a-market rule as set forth herein. In order to strengthen its DE program, the Commission should increase its bid credit percentages and its bid credit eligibility thresholds.

There are also many actions that the Commission should not take. Specifically, the Commission should refrain from making any of the changes to its DE program proposed by nationwide carriers in this proceeding because the practical effect of such proposals would be to

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<sup>33</sup> If the Commission were to grant bidding credits to any subgroup of small businesses, it should be careful not to permit such credits to be cumulative. For to permit cumulative credits would be to effectively prejudice small businesses.

<sup>34</sup> At one time, certain cellular licenses were awarded solely to “local” telephone companies. The Commission wisely abandoned that scheme when it commenced auctions. Reviewing courts have done largely the same. In *Bethel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit held that the continued use of the Commission’s preference for the “integration” of ownership and management of broadcast stations was arbitrary and capricious. That preference was based on the theory that on-site owner-managers are “more likely to respond to community needs.” *Id.* At 879. That theory underlies the localism preference advocated by some commenters. See ARC at 23.

weaken, not strengthen, the DE program by expanding revenue attribution and artificially limiting the scope of the program or shortening the DE holding period.

Respectfully submitted,

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March 6, 2015