

**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 COMPETITIVE CARRIERS ASSOCIATION

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Competitive Carriers Association (“CCA”) hereby replies to certain comments filed in the above-captioned proceedings regarding the Commission’s Notice of Proposed Rulemaking regarding the revision of the competitive bidding rules in Part 1 of the Commission’s rules.¹

I. INTRODUCTION AND SUMMARY

The opening comments in this proceeding reflect viewpoints from a wide range of carriers confirming that reforms to the Commission’s competitive bidding rules are needed to expand opportunities for competitive carriers to meaningfully participate in spectrum auctions while at the same time strengthening safeguards to maintain the integrity of the designated entity

¹ *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014) (“*Notice*”).

(“DE”) program and deter strategic bidding behavior. Significantly, the need to implement more effectively the mandates of Communications Act of 1934, as amended (the “Act”) to ensure opportunities for a diverse array of participants in spectrum auctions and to promote economic opportunity and competition through the competitive bidding process²—in particular through the use of bidding preferences—is evident from the record.³ The record supports CCA’s observation that spectrum has been acquired disproportionately by the nation’s two largest carriers in recent spectrum auctions, which exacerbates the high levels of concentration in the wireless market among and between the two largest carriers.⁴ Indeed, these commenters reiterate the challenges that competitive carriers continue to face in competing with the two largest carriers in winning spectrum at auction (and acquiring on the secondary market) and call for clearer access to the tools afforded by the Act to boost competitive entry and DE participation in the competitive bidding process.⁵ The upcoming Incentive Auction presents what is likely to be the last auction for a substantial amount of spectrum below 1 GHz for the foreseeable future, and thus,

² 47 U.S.C. § 309(j)(4)(D).

³ See Comments of King Street Wireless, L.P., WT Docket No. 14-170 at 3 (filed Feb. 20, 2015) (“King Street Wireless Comments”); Comments of Steven R. Bradley, *et al*, WT Docket No. 14-170 at 6 (filed Feb. 20, 2015) (“DE Opportunity Coalition Comments”).

⁴ See, e.g., King Street Wireless Comments at 3-4 (citing results of Auction No. 73, where nearly 90 percent of licenses went to only two bidders, leaving only the remaining 10 percent to be shared among all other bidders); Comments of Sprint Corporation, WT Docket No. 14-170 at 5-6 (filed Feb. 20, 2015) (“Sprint Comments”) (describing the dominance and concentrated spectrum holdings of AT&T and Verizon); see also Comments to the Blooston Rural Carriers, WT Docket No. 14-170 at 2 (filed Feb. 20, 2015) (“Blooston Rural Carriers Comments”) (although “more than half of the eligible bidders [in Auction No. 97] 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”).

⁵ See, e.g., King Street Wireless Comments at 4; Sprint Comments at 4-5.

commenters affirm the importance of ensuring that the competitive bidding rules facilitate broad participation by competitive carriers.⁶

To this end, and based on strong record support, CCA urges the Commission to continue the use of bidding credits to level the playing field for qualifying bidders. Moreover, CCA requests that the Commission give thoughtful consideration to innovative proposals to provide additional bidding credits and other incentives to qualifying carriers that deploy service to unserved or underserved areas, as well as other measures that increase diversity among bidders. And, like CCA, other commenters representing interests of small and competitive carriers advocate for the adoption of the proposed two-pronged standard for evaluating small business bidding credit eligibility. Applying the existing control analysis standards in lieu of the rigid attributable material relationship rule would accommodate pro-competitive business arrangements while allowing the Commission to more precisely identify DE structures that could result in anticompetitive behavior. Further, CCA supports consideration of certain proposals for additional measures to safeguard against abuse of DE benefits.

Many parties also agree that a balanced approach in the competitive bidding rules is warranted to mitigate the potential for strategic behavior. CCA supports the adoption of rules that will afford flexibility for pro-competitive joint bidding arrangements, but agrees with commenters that seek stronger safeguards to curb strategic bidding behavior. In this regard, CCA opposes *per se* limitations or restrictions on joint bidding arrangements involving designated entities, as certain commenters propose. Instead, CCA supports proposals to adopt effective restraints on anticompetitive behavior by prohibiting investors and other disclosable

⁶ See, e.g., Comments to T-Mobile USA, Inc., WT Docket No. 14-170 at 2 (filed Feb. 20, 2015) (“T-Mobile Comments”); Comments of NTCH, Inc., WT Docket No. 14-170 at 6-7 (filed Feb. 6, 2015) (“NTCH Comments”); Sprint Comments at 7.

interest holders from being privy to the bidding strategies of more than one bidder in any given PEA in a particular auction, much less directing the bidding of more than one bidder in a given PEA.

Finally, there is overwhelming support to narrow the applicability of the former defaulter rules, and thus CCA urges the Commission to codify the limited relief from those rules that the Commission granted, on a waiver basis, for Auction No. 97.⁷

II. MANY PARTIES HIGHLIGHT THE NEED TO MAKE BIDDING CREDITS AVAILABLE TO INCREASE OPPORTUNITIES FOR SMALL BUSINESSES AND TO PROMOTE BROADER DIVERSITY IN SPECTRUM OWNERSHIP

It is undisputed that bidding credits are a significant tool afforded by the Act to empower small businesses, rural telephone companies and a wide variety of potential bidders in spectrum auctions, and no commenter proposes to eliminate their use.⁸ Significantly, there is broad consensus regarding the benefits of small business bidding credits.⁹ While bidding credits made available in past auctions have enabled designated entities to attract investment, their use should

⁷ CCA also notes that certain commenters advocated for elimination of the rule, deeming it outdated given changing circumstances and other Commission rules that supplant the original rationale for the former default ruler. *See* Comments of CTIA – The Wireless Association, WT Docket No. 14-170 at 4 (filed Feb. 20, 2015) (“CTIA Comments”); Sprint Comments at 15; NTCH Comments at 7. CCA would support this approach as well.

⁸ *See* 47 U.S.C. § 309(j)(3). Even commenters that recommend more stringent limitations on bidding credit eligibility and other broad prohibitions acknowledge the importance of making bidding credits available to small businesses that have a legitimate need. *See, e.g.,* Comments of Taxpayers Protection Alliance, *et al.*, WT Docket No. 14-170 at 3-4 (filed Feb. 20, 2015) (“Taxpayers Protection Alliance Comments”); Comments of Citizens Against Government Waste, WT Docket No. 14-170 at 2 (filed Feb. 20, 2015) (“Citizens Against Government Waste Comments”).

⁹ *See, e.g.,* King Street Wireless Comments at 2; DE Opportunity Coalition Comments at 5-6; Comments of the Auction Reform Coalition, WT Docket No. 14-170 at 21 (filed Feb. 20, 2015) (“Auction Reform Coalition Comments”); Comments of the Rural Wireless Association, Inc., WT Docket No. 14-170 at 2 (filed Feb. 20, 2015) (“RWA Comments”).

be expanded to encourage more robust competitive participation and to improve the opportunities for success for competitive carriers in future auctions.¹⁰

Many commenters propose to increase the gross revenue thresholds to expand the number of entities eligible for bidding credits as small businesses.¹¹ CCA agrees that expanding the pool of competitive carriers that can qualify for small business bidding credits will help to broaden participation by a range of competitive carriers in spectrum auctions and ultimately will cultivate new sources of innovation in the wireless marketplace.

In its opening Comments, CCA suggested that the Commission consider implementing additional bidding credits for competitive carriers that deploy facilities to unserved or underserved areas. Several other commenters also proposed such credits, most notably for service to rural areas.¹² CCA agrees that increasing opportunities for rural providers is critical: only 11 rural entities were successful in acquiring spectrum in Auction No. 97, winning a mere 25 (out of 1,611) licenses in that auction.¹³ Based on this outcome, the Commission should carefully consider innovative proposals in the record that would promote rural deployment. For example, the Blooston Rural Carriers propose an auction mechanism that would encourage larger carriers to facilitate the deployment of wireless services in rural areas by permitting a larger carrier to partition a portion of the spectrum it wins at auction to a rural telephone company or

¹⁰ See DE Opportunity Coalition Comments at 8, 15.

¹¹ See Auction Reform Coalition Comments at 21-22 (proposing a metric to adjust gross revenue tiers based on increases over time in the cost of auction spectrum in a MHz per pop basis rather than on the GDP percentage increase); RWA Comments at 9 (proposing to expand bidding credit eligibility to carriers with average annual gross revenue not exceeding \$100 million).

¹² See, e.g., Comments of NTCA – The Rural Broadband Association, WT Docket No. 14-170 at 2-3 (filed Feb. 20, 2015) (“NTCA Comments”), RWA Comments at 3, Blooston Rural Carriers Comments at 9.

¹³ See Blooston Rural Carriers Comments at 3.

cooperative whose service area overlaps the licensed area.¹⁴ The larger carrier could deduct from its auction purchase price the *pro rata* value of the partitioned area. This proposal would cultivate opportunities for rural carriers to access spectrum and thereby promote deployment of wireless services in rural areas.

In addition, the Commission should evaluate other proposals that would encourage broad auction participation by a wide range of carriers and promote greater bidder and spectrum owner diversity. In particular, CCA supports proposals by DISH and T-Mobile to increase the size of the spectrum reserve in the Incentive Auction and to cap the amount of reserve spectrum available to any one reserve-eligible bidder at 20 MHz on a market-by-market basis.¹⁵ Adopting these proposals would be consistent with the Act’s mandates to design spectrum auctions in a manner that, among other things, would “avoid[] an excessive concentration of licenses” and “disseminat[e] licenses among a wide variety of applicants.”¹⁶

¹⁴ Blooston Rural Carriers Comments at 11-12. In this same vein, CCA supports legislation recently reintroduced by Senators Klobuchar and Fischer to encourage spectrum licensees to make unused spectrum available for use by rural and smaller carriers in order to expand wireless coverage. *See Rural Spectrum Accessibility Act of 2015*, S. 417, 114th Cong. (2015).

¹⁵ *See, e.g.*, DISH Network Corporation, Notice of *Ex Parte* Presentation, GN Docket No. 12-268, WT Docket No. 14-170, at 2-3 (filed Feb. 23, 2015); T-Mobile Comments at 24; *see also* Comments of Competitive Carriers Association, *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 100, Including Auctions 1001 and 1002, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, AU Docket No. 14-252, GN Docket No. 12-268, at 27-29 (filed Feb. 20, 2015).

¹⁶ 47 U.S.C. § 309(j)(3)(B).

III. IF PROPERLY STRUCTURED, THE COMMISSION’S PROPOSED TWO-PRONGED STANDARD FOR EVALUATING SMALL BUSINESS ELIGIBILITY WOULD ACCOMMODATE PRO-COMPETITIVE BUSINESS ARRANGEMENTS WHILE MAINTAINING THE INTEGRITY OF THE DESIGNATED ENTITY PROGRAM

Like CCA, other commenters representing the interests of small and competitive carriers express support for the adoption of the Commission’s proposed two-pronged approach for determining eligibility for small business credits, in lieu of the current attributable material relationship (“AMR”) rule.¹⁷ In tandem with the gross-revenue thresholds for small businesses, a *de facto* and *de jure* control analysis is preferable to the current inflexible AMR rules in evaluating unique DE structures and identifying arrangements that may be inconsistent with the goals of the DE program and the Commission’s competitive bidding policies. Revisions are required to accommodate pro-competitive business arrangements that allow designated entities to attract investment necessary to construct networks and provide service, while also allowing the Commission to ferret out abuse of small business benefits or arrangements that undermine the auction process.

Certain commenters ask the Commission to maintain the AMR rules, and in some cases, seek to strengthen the rules in various ways in an effort to curb the alleged abuse of small business benefits.¹⁸ CCA applauds the commitment of these commenters to preserving the legitimacy of the DE program and ensuring that DE benefits are made available to small businesses seeking to compete in the wireless industry. However, in some cases the current AMR rules may be too rigid and overbroad in scope and do not foster the most efficient

¹⁷ See, e.g., Auction Reform Coalition Comments at 15, 17; WISPA Comments at 11; DE Opportunity Coalition Comments at 16.

¹⁸ See, e.g., T-Mobile Comments at 13, Comments of AT&T, WT Docket No. 14-170 at 16-17 (filed Feb. 20, 2015) (“AT&T Comments”), Taxpayers Protection Alliance Comments at 10.

utilization of spectrum. The record confirms that the current AMR rule fails to provide enough certainty or opportunity for small businesses.¹⁹ Specifically, the current AMR rule restrictions on spectrum leasing and other arrangements have hindered the ability of some small businesses to access and secure capital, which ultimately inhibits participation by such entities in spectrum auctions and prevents them from becoming viable facilities-based competitors.²⁰ The low level of participation in Auction No. 97 by designated entities—and the even lower number of successful DE bidders—is indicative of these challenges. Of the 37 qualified Auction No. 97 bidders eligible to receive bidding credits, 15 won spectrum in the auction.²¹ Therefore, a more flexible approach is warranted; eliminating the AMR rule would enhance opportunities for expanded participation by designated entities in future auctions.

While CCA believes a close review of both *de facto* and *de jure* control in the context of the overall venture structure is the best way to strengthen the DE program and prevent potential anticompetitive behavior, the Commission should consider additional rule changes to ensure that small businesses that intend to compete in the provision of facilities-based wireless services are able to obtain DE benefits.²² As such, some of the measures proposed by commenters to deter exploitation of DE program benefits could and should be adopted even if the AMR rules are repealed. Such measures, in addition to the Commission’s unjust enrichment restrictions and

¹⁹ See, e.g., RWA Comments at 14; NTCA Comments at 7; WISPA Comments at 11; DE Opportunity Coalition Comments at 16.

²⁰ See, e.g., NTCA Comments at 5; DE Opportunity Coalition Comments at 18.

²¹ See Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97, DA 14-131, Exh. B (rel. Jan. 30, 2015).

²² See Letter from The Hon. Tom Wheeler, Chairman, FCC to The Hon. Frank Pallone, Ranking Member, H. Comm. on Energy & Commerce at 2 (Feb. 27, 2015) (expressing a commitment “to providing innovative, bona fide small businesses the opportunity to participate meaningfully in the incentive auction, and to spur additional competition, investment and consumer choice in the wireless marketplace” through the Commission’s competitive bidding rules).

other existing safeguards against abuse, could bolster the two-pronged analysis for evaluating DE eligibility. For instance, although the current restrictions on spectrum leasing incorporated into the AMR rules should be eliminated, CCA would support modifying the restriction to prohibit a DE from leasing all or substantially all of its spectrum acquired with bidding credits.²³ In addition, T-Mobile's proposal to require designated entities to demonstrate concrete progress toward utilizing the spectrum for the benefit of consumers within a set timeframe also could help to discourage speculation and arbitrage of licenses acquired with bidding credits.²⁴ There is strong support in the record for the Commission to pursue policies that promote development of facilities-based wireless service, as spectrum is intended to be used to serve consumers.²⁵

The Commission also should consider proposals to impose a cap on the amount of discounts a DE can receive.²⁶ A cap on DE benefits would help to ensure that the total amount that a DE bids at auction is commensurate with its qualification as a "small business." However, the size of any such cap should be set at a level that is adequate to afford DEs meaningful opportunities to compete with other bidders for a sufficient number of licenses to provide bidders with the necessary scale to be successful in the marketplace. Auction No. 97 proved there continues to be great demand for spectrum and that AT&T and Verizon can and will foreclose

²³ See Taxpayers Protection Alliance Comments at 10.

²⁴ See T-Mobile Comments at 14.

²⁵ See, e.g., Blooston Rural Carriers Comments at 7; CCA Comments at 10; NTCA Comments at 5; T-Mobile Comments at 13-15; WISPA Comments at 9.

²⁶ See AT&T Comments at 17 (proposing to limit the total amount of the subsidies any single DE or group of affiliated DEs can receive in a single auction to the amount equal to the Small Business Administration's limit on annual receipts for small telecommunications businesses).

bidding opportunities for smaller participants.²⁷ As an alternative to a cap on discount amounts, the FCC should consider another metric like population, to tie discounts more closely to a typical business plan of a small business. DE bidding on licenses covering a relatively small number of pops, such as in rural areas, would not be subject to a cap, but nationwide licenses or licenses covering high-value, metropolitan areas would. Targeting bidding caps in this manner would reduce incentives for speculative acquisitions that would undercut the objectives of DE programs, without disadvantaging smaller carriers that are competing for licenses in their own service territories with larger carriers.

IV. CCA URGES THE COMMISSION TO TAKE A BALANCED APPROACH TO RULES GOVERNING AUCTION BEHAVIOR

In the opening comments, many parties expressed serious concerns regarding alleged strategic bidding behavior in Auction No. 97, and put forth proposals to prevent this behavior in future auctions. A few urge the Commission to prohibit all arrangements between DEs and non-DEs.²⁸ However, imposing broad *per se* prohibitions on DEs entering into joint bidding arrangements would be an extreme, reactionary response that is unnecessary. Instead, CCA encourages the Commission to refine its rules to ensure that pro-competitive joint bidding and other arrangements that will serve the public interest are permitted, while balancing such flexibility with measures that directly address the types of concerns raised in this proceeding regarding the potential for gaming of spectrum auctions through participatory interests in multiple bidders.

²⁷ Smaller carriers early on in Auction No. 97 were boxed out of the J Block (the larger, 10x10 MHz block of spectrum licensed in Economic Areas) by AT&T and Verizon. Notably, these two dominant carriers won *165 of the 176 licenses* offered for that block of spectrum. And when one of the two dominant carriers did not win the J Block, the other generally acquired the H and I blocks.

²⁸ See Taxpayers Protection Alliance Comments at 11; Citizens Against Government Waste Comments at 3.

A wide range of joint bidding arrangements are effective in facilitating robust competition and enabling participation by competitive carriers, including DEs. Several commenters agree with CCA's endorsement of the Commission's tentative conclusion that joint bidding arrangements between non-nationwide providers are presumptively pro-competitive and should be permitted.²⁹ Joint bidding arrangements between non-nationwide providers can serve as a useful and necessary tool to allow for the pooling of capital resources that can allow smaller providers to benefit from financial economies of scale.³⁰ Non-DEs that are not nationwide providers thus should be able to enter into arrangements with DEs in appropriate circumstances.

Moreover, arrangements between and among other entities can also be structured to be pro-competitive. For instance, a scenario where a nationwide provider seeks to acquire a license to build out a metropolitan area, while a smaller non-nationwide partner can make effective use of a second-tier market covered by the same license, could be facilitated by a joint bidding arrangement and has the potential for significant pro-competitive public interest benefits.³¹ Joint bidding arrangements thus should not automatically be presumed to be anticompetitive, but rather should be reviewed on a case-by-case basis.

Therefore, CCA urges the Commission not to limit any currently permissible joint bidding arrangements, and to decline to categorically limit joint bidding arrangements, as some commenters propose. Rather, to combat the concerns in the record regarding the potential for parties in joint bidding arrangements to engage in strategic bidding behavior, CCA urges the Commission to employ safeguards that directly target this activity to protect against abuse of the DE program. As CCA recommended in its comments, adopting a prohibition on an individual or

²⁹ See, e.g., RWA Comments at 12; Auction Reform Coalition Comments at 25.

³⁰ RWA Comments at 12; Auction Reform Coalition Comments at 25.

³¹ Auction Reform Coalition Comments at 26.

entity, or a group of commonly-controlled entities, from submitting multiple short-form applications would be effective in curbing anticompetitive behavior in auctions. Sprint agrees with this approach.³²

CCA also encourages the Commission to address concerns that, even in the absence of common control, investors that may be privy to the bidding strategy of multiple applicants may engage in strategic bidding behavior.³³ T-Mobile and AT&T propose to require individuals or entities listed as disclosable interest holders on more than one short-form application to certify that they are not involved in, and will not be privy to, the bidding strategy of more than one auction participant, and require that authorized bidders on a short-form application be unique to that applicant.³⁴ The Commission's rules currently employ these types of "firewalls" to ensure that non-controlling investors that become attributable interest holders of a bidder after the filing of short-form applications are not privy to, and will not become privy to, the bids or bidding strategies of more than one applicant.³⁵ Tightening the competitive bidding rules in this manner would be more effective than sweeping prohibitions on joint bidding arrangements in prohibiting problematic auction behavior.

V. THE RECORD REFLECTS WIDE RANGING SUPPORT TO ADOPT LIMITED EXCEPTIONS TO THE FORMER DEFAULTER RULE

There is unanimous support in the record to adopt the Commission's proposal to modify Sections 1.2105(a)(2)(xi) and 1.2106(a) to provide limited relief from the "former defaulter"

³² Sprint Comments at 17.

³³ See T-Mobile Comments at 8; AT&T Comments at 10.

³⁴ See T-Mobile Comments at 8-9; AT&T Comments at 10.

³⁵ See 47 C.F.R. § 1.2105(c)(4)(i).

policies, consistent with the approach in the *Auction 97 Former Defaulter Waiver Order*.³⁶ Requiring an additional 50 percent upfront payment to participate in a spectrum auction for any previous default on any Commission license or delinquency on any non-tax debt owed to any federal agency is far too broad and is overly punitive where the debt or default at issue was *de minimis* or has long since been cured, and does not reflect an applicant's ability to satisfy its financial obligations in an auction.³⁷ And, given that the Commission has already determined that excluding these categories of debts and defaults is in the public interest, adopting this proposal would be uncontroversial and requires no further deliberation.

VI. CONCLUSION

For the foregoing reasons, and for the reasons set forth in CCA's Comments, CCA respectfully requests that the Commission adopt reforms to its competitive bidding rules that would expand meaningful opportunities for a diverse array of carriers to acquire spectrum at auction. Particularly in the upcoming Incentive Auction, promoting opportunities for competitive carriers to access scarce spectrum resources below 1 GHz will be critical. In addition, CCA urges the Commission to maintain flexibility for pro-competitive business

³⁶ See CTIA Comments at 3; AT&T Comments at 19; Sprint Comments at 16; NTCH Comments at 7-8; see also *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*, Order, 29 FCC Rcd 10828 (2014) ("*Auction 97 Former Defaulter Waiver Order*") (exempting debts or defaults from triggering the former defaulter rule if any of the following criteria are met: (i) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (ii) the default or delinquency amounted to less than \$100,000; (iii) the default or delinquency was paid within six months after receiving the notice of the final payment deadline or delinquency; or (iv) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding).

³⁷ See, e.g., AT&T Comments at 18-19; CTIA Comments at 5.

arrangements while guarding against misuse of DE benefits and strategic bidding behavior in a targeted manner.

Respectfully submitted,

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