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

COMMENTS OF NTCH, INC.

NTCH, Inc., by its attorneys, submits these comments in the above-referenced Docket. NTCH applauds the Commission for taking steps to update Designated Entity rules that in many cases are outdated, counterproductive, or discourage rather than foster the participation of DEs in the FCC auction process.

NTCH strongly supports Commission action to reform the auction process in the following respects:

- Non-immediate family members should not be presumed to control an applicant, nor should officers or directors who do not personally have executive authority.
- Bidding credits benefitting Indian tribes per se should be abolished. To the extent that individual tribes need bidding credits to encourage mobile deployment, such decisions should be governed by the same criteria that justify extending aid to any rural or impoverished region.

- Diversity of ownership could and should be most directly encouraged by giving a significant bidding credit to non-nationwide entities who own less than 20 MHz of spectrum in the market at issue.
- The Former Defaulter category should be abolished in toto. The circumstances that cause a former defaulter to default vary widely, but in no case does the default have to do with the amount of money that was paid as an upfront auction payment. The rule therefore serves no useful purpose but actually impedes auction participation by smaller players.
- If the former defaulter rule is not abolished in its entirety, it should be limited in time and scope along the lines proposed by the Commission (i.e., small and old defaults should be ignored), but most importantly a "default" should not be deemed to be such until the alleged default has been finally established. This is the approach used by the Commissions for the "red line" rule, and there is no reason why an alleged former defaulter should be treated more harshly than an alleged current defaulter. The Commission should also clarify who qualifies as a former defaulter (e.g., companies that went through bankruptcy while owing the FCC money).

NTCH further <u>opposes</u> the notion that non-equity debt financing should be taken into account in determining an entity's DE status. The Commission has not heretofore factored debt into the DE equation. To do so now would particularly disadvantage smaller businesses or applicants who must often rely on non-institutional sources of debt financing. So long as debt is truly debt, it should not be treated as equity. In this connection, bright line safe harbors should be established to assure lenders that their personal finances will not be dragged into FCC auction proceedings.

A. No Attribution of Non-Immediate Family Members and Non-Executive Officers and Directors

The Commission's rules currently call for the presumptive allocation of gross revenues from tangential persons who in the real world are highly unlikely to exercise any "control" over the applicant entity.

1. On the family side, Section 1.2110(c)(5)(iii)(B) of the rules encompasses immediate family members of an applicant: spouses, parents, children and siblings – kinship relations that are normally quite close and might merit scrutiny for attribution of the family member's revenues. However, without explanation or justification, the rule goes on to include as "immediate family members" all of an applicant's in-laws, half-siblings, and step-relations as presumptively controlling the applicant. In our experience it is an extremely rare occurrence that a brother-in-law or sister-in-law exercises control over his or her in-laws' financial affairs. Kinship with step-relations is invariably even *more* remote and less likely to constitute control. Quite often a person has no contact with step-siblings or half-siblings whatsoever. Many of the kinfolk deemed to be presumptively in control of an applicant would not even receive an invitation to an applicant's holiday dinner, much less exercise control over him. Yet the Commission's rules require applicants to affirmatively demonstrate that these remote relations are not "closely involved with each other in business matters." This presumption can be difficult to overcome if an applicant has, for example, loaned a brother-in-law a small sum of money. This "close involvement" would require full disclosure of all of the gross revenues of the brother-in-law from other businesses he may be involved in. It is understandably difficult, if not impossible, to extract financial information from these distant family members who have no connection with the application whatsoever and no desire to have their financial affairs made public.

The enforcement of the rule has, in any case, been spotty. Very few applicants actually identify the dozens of persons who count as "immediate family members" of each of the controlling owners, officers and directors of the applicant entity. This could easily add up to more than a hundred peripheral people who have nothing whatsoever to do with the application at issue but are presumed to control it. To our knowledge, very few applicants obey the rule in this regard and the Commission does not typically enforce it, presumably because the rule is silly. The Commission should revise the rule to limit its embrace to true immediate family members (spouses, parents, and children) and require a showing of non-involvement only when such an immediate family member in fact has more than incidental business relations with the applicant, for example, by common ownership of other business enterprises. Such a rule would narrow the focus of the rule to the relationships that actually require closer scrutiny.

2. Similar considerations apply to certain officers and directors of corporations. Section 2110(c)(2)(ii)(F) of the rules deems all officers and directors of a company to control it for auction purposes. Many corporations have officers such as secretaries and assistant secretaries and even vice-presidents and treasurers who have no executive authority whatsoever. Frequently these officer positions are strictly ministerial or contingent positions with no actual authority to direct the company's affairs. While the board of directors, of course, controls a corporation as a whole, any individual director has no control whatsoever. To suggest that a single director (other than a director who also has actual executive authority and is therefore independently attributable) "controls" the company is legally and factually inaccurate. Of course, if a group of directors are appointed or elected by a single controlling entity, the controlling entity would be deemed to control the applicant rather than the directors themselves.

Application of the rule to an outside or otherwise non-controlling director has the obvious effect of discouraging directors from sitting on the board of companies which might become FCC auction bidders. Yet often such directors are sought out precisely to provide an independent perspective on the company's affairs. No one would want to take a seat on a board if it meant the disclosure of all of his or her private revenue information for the last three years. The net has been cast too wide. In no other context does the Commission deem an officer or director to be in control of an FCC applicant unless the person additionally holds the voting power or corporate authority to actually exercise such control over the entity. There is no reason why a different standard should apply in this limited context from the Commission's treatment of ownership and control for all other purposes, including Section 310(d) of the Act.

B. No Automatic Bidding Credits for Indians

NTCH is sympathetic to the plight of many members of Indian tribes who have been historically disadvantaged, but such sympathy must be tempered by assessing the real world status of tribes and tribal members. Many tribes and their constituent members are doing very well by virtue not only of gaming activities but oil and gas investments and other business enterprises. Tribes are also eligible for many forms of grants or loans from other Federal government agencies in order to directly address their needs for better infrastructure – roads, schools and telecom facilities. These programs very likely overlap with the bidding credit program to the point of far overextending the helping hand that most Americans want to offer, turning a helping hand into a boondoggle.

Indians do not need, and probably do not want, to be patronized as people who are generically incapable of being financially successful on their own. Rather than lumping all tribes together as charity cases that deserve special credits in auctions, the Commission should grant bidding credits based on criteria developed in conjunction with the Bureau of Indian Affairs to determine objectively which tribes and reservations actually need extra help to facilitate tribal ownership of local telecom facilities. Credits in that circumstance are fully warranted and could be granted in lieu of small business credits.

C. Diversity of Ownership Should be Encouraged

The "Request for Further Comment" expressly asked for "alternative frameworks that the Commission should consider to promote a diverse telecommunications ecosystem." RFC at Para. 24. Section 309(j)(3) of the Act requires the Commission to avoid excessive concentration of licenses and to foster diverse ownership, including ownership by small businesses, rural telephone companies, and businesses owned by minorities and women. NTCH agrees that diversity of ownership of licenses is a good thing which should be furthered by the Commission's DE rules. The best way to directly attack "concentration of licenses" is by directly stimulating ownership of licenses by new entities. The Commission's auction licensing policies have largely ignored this requirement of the Act, with the result that much of the CMRS spectrum in the US has become concentrated in a handful of companies. Going forward, this concentration can be reduced by offering significant discounts to persons who hold less than 20 MHz of spectrum in the given market at issue *and* who are also not counted as "nationwide providers," as defined by the Commission in the *Part 1 NPRM*.

Diversity of media ownership has long been a cornerstone of FCC policy in the mass media area, and no one questions the wisdom of having multiple media voices in the marketplace. It turns out, as Congress recognized, that diversity of ownership is also important where program content is not implicated. Diverse ownership has been shown to enhance competition, to spur innovation in services, to permit locally-based service to customers, and to spread out the benefits of stewardship of a national resource (spectrum) to a broader segment of the American people. The Commission should, and by edict of 309(j)(3) <u>must</u>, adopt auction procedures that foster this goal.

To that end, the Commission should grant a 50% bidding credit for bidders who can deliver this important diversity benefit by acquiring licenses. We recognize that this is a large number, but given the history of auctions to date where 15%, 25% and even 35% discounts have had little impact on the ability of DEs to win auctions, a large number is justified. The diversity credit, if we may call it that, is also very likely to aid in allowing minorities and women to acquire licenses because it is their very historical exclusion from licenseeship that qualifies them for this credit, without any unconstitutional taint of racial or gender discrimination. It would also encourage large businesses who have so far stood on the sidelines of the telecom marketplace to enter the fray.

D. Abolition or Limitation of the Former Defaulter Rule

The former defaulter rule is apparently intended to ensure by slightly raising the ante that former defaulters do not again default on FCC-related debts. The rule requires them to put up 150% of the money that they would otherwise have to put up to bid on a certain quantum of licenses. NTCH has been unable to discover any discernible effect of this measure on defaults. A review of reported orders involving bidders who defaulted after making winning bids offers no evidence that such defaulters were either more or less likely to have been former defaulters. We could find no evidence of a former defaulter defaulting again in a subsequent auction, but that could simply be because the defaulter had learned his lesson and was more careful the second time around or understood better how the auction process works. Where bidders defaulted, there was no indication that the upfront payment obligation served as any deterrent at all to defaulting.

The cases involving auction defaulters indicate very strongly that defaults almost always occur not because the upfront payment was too small but because the defaulting party lost a source of funds that it had expected to be able to tap into to pay its debt. In the overall scheme of things, the 50% premium on upfront payments is usually a very small percentage of the obligation that a bidder takes on when he bids on and wins numerous licenses. What this means is that the former defaulter premium is worse than useless: it does nothing to accomplish its intended purpose while at the same time preventing former defaulters from being able to bid on the full array of licenses that they might otherwise have wanted. Since the rule is at best ineffective and at worst counterproductive, it is time for the rule to simply be abolished.

If the rule is not abolished *in toto*, NTCH certainly agrees that its scope should be narrowed as proposed by the Commission to eliminate small and very dated defaults that have no predictive significance whatsoever for future defaults. But two other important reforms should be adopted. First, the former defaulter label should not be applied to an entity whose default status is still unresolved. The same thing should apply to alleged current defaulters. There is no principled reason why a person or entity should be tarred as either a current or a former defaulter if its status in that regard is unresolved because of pending reviews at the Commission or the courts. The Commission does not bar an applicant from receiving a non-auctioned license while such reviews are pending, and the issuance of a license is undoubtedly the most important benefit the FCC can grant. Why should auction participation be subject to a higher standard than granting an ordinary license? The problem is especially acute for alleged defaulters whose status is unresolved. These hapless entities cannot even correct their status to become a former defaulter because it is unclear whether they are defaulters at all. They are stuck – often for many years – in a Kafkaesque state of administrative limbo. If the Commission's mission is to expand the pool of potential bidders and licensees to embrace the largest numbers, it should not leave this category of bidders in a state of prolonged uncertainty which affects their ability to participate full – or at all – in auctions for which they may well be eligible.

The other unclear element is the effect of bankruptcy on FCC obligations. There have unfortunately been many cases in past years where companies took on debt obligations to the FCC and then sought bankruptcy protection to avoid loss of their licenses. While the Nextwave case established very clearly that a license of a bankrupt entity cannot be yanked for failure to pay its FCC debt, that does not necessarily mean that the delay in payment of the debt when due should not be treated as a default or former default, as the case may be. This point is significant because companies that were once in bankruptcy or the owners of those companies seem to have re-emerged in the auction market. It would seem that they should be branded as "former defaulters" because no matter how the bankruptcy was resolved, the FCC debt was not paid when due. The Commission should therefore clarify which persons or entities associated with defaulters or former defaulters are embraced by the rule, and whether controlling persons or entities of defaulters whose default was ultimately cured by bankruptcy qualify as former defaulters.

E. Attribution of Debt Financing Would be Mistake

The Request for Further Comment raised the question of whether some non-equity interests in a DE should be attributed for revenue calculation purposes. In particular, the RFC seems to be contemplating attributing the gross revenues of mere lenders to the applicant in assessing the applicant's DE status. NTCH believes this would not only be bad policy but would deter applicants, especially small businesses, from participation in auctions. It would also be inexplicably inconsistent with the Commission's otherwise consistent principle for assessing DE status, namely, identifying who controls the entity.

The Commission's current DE attribution rules provide a long list of affiliations or connections with an applicant entity which trigger attribution of the affiliated entity's gross revenues to the applicant. Notably *not* include in this list of attributable associations is lenders. The soundness of this policy is clear on several grounds.

- Lenders are primarily concerned with the repayment of their loans, with interest. They have no desire to run or operate the enterprise to which they have loaned money, and, in fact, they typically avoid taking on that responsibility as much as possible. Thus, for example, the bank holding our mortgage certainly wants us to make money so that we can repay our loan, and it certainly wants its collateral to be kept safe, but it exercises and attempts to exercise no control whatsoever over our professional or business activities. There is therefore no reason why a mere lender should be deemed to be a controlling party of a Designated Entity.
- Debt financing is a very common way of financing commercial acquisitions, including FCC licenses. However, most lending entities would be very leery of having their revenues be attributed to an applicant and made part of the public record of an FCC proceeding. And if the lender were deemed by FCC fiat to be a controlling party of an application, then the revenues of the key officers and

controlling people of the lender would also have to provide their revenue information for attribution. Under those circumstances, debt financing would very quickly dry up, making it virtually impossible for new DEs to break into the industry. This would effectively leave only non-DEs as bidders, thus perfectly contravening the mandate of Congress to encourage participation by small businesses.

- The adverse consequence of attributing lenders is even more dramatic for very small businesses. Startup businesses typically rely on "friends and family" financing. That is, people who know the entrepreneur are willing to lend some money to help the individual get started in business. If the Commission starts treating lenders as though they are equity holders in an applicant (which would require display of their personal and private revenue information on the public record), very few such individuals would be willing to lend money since their only interest in the application is as a lender and they have no control over it. Again, small enterprise would be throttled.
- To be sure, loan deals can sometimes be tied to option arrangements or convertible debt or other mechanisms that make the lender more of an investor in the company than a lender. The Commission is certainly within its rights to require the terms of any such arrangements to be disclosed so that disguised equity can be identified. But as long as a loan arrangement is strictly a loan accompanied by typical loan security provisions, there is no reason to treat a lender here as any more nefarious than the mortgage holder on one's home.
- The Commission can and should eliminate any ambiguity about what sorts of security provisions fall comfortably on the safe side of this line. For if potential lenders believe the FCC has unlimited discretion to demand access to their personal financial situations, they would – and should – hesitate to make a loan. Small businesses would likely be unable to participate in auctions. There are ample precedents in other contexts where the Commission has examined ownership structures where minority parties have certain limited rights with respect to the controlling parties, and such protective measures have been deemed perfectly acceptable and customary. There should be similar safe harbors for lenders so that

they can make loans with the confidence that they will not somehow be deemed a party to an FCC application contrary to their intent or desire.

- It goes without saying that any rule attributing debt financing as a kind of equity position must be prospective only. In addition to constituting an unlawful retroactive rulemaking, this would be grossly unfair to the legitimate privacy rights of lenders in current proceedings who had no idea that the FCC would or could seek to pry into their private lives or those of their companies.

To go down the path of treating creditors of a DE applicant as equity participants in the application whose gross revenues must be reported in the application would chill or strangle small business participation in auctions, reduce the amount of money the U.S. Treasury will receive from auction participants, complicate processing of auction applications, and serve no useful purpose. The Commission should therefore continue to treat lenders as lenders, not equity holders.

Respectfully submitted,

NTCH, Inc.

By_______/s/ _________
Donald J. Evans
Its Attorney

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Fletcher, Heald & Hildreth
1300 N. 17th St.
Suite 1100
Arlington, VA 22209
703-812-0430