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 AT&T

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I. INTRODUCTION AND SUMMARY

AT&T Services Inc. ("AT&T"), on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, "AT&T"), hereby submits these comments in response to the Federal Communications Commission's ("Commission") Public Notice seeking additional comment on a number of proposed changes to the Commission's Part 1 competitive bidding rules.[1] AT&T is pleased that the Commission has undertaken this comprehensive and much-needed review of its designated entity rules in advance of the upcoming broadcast television incentive auction. Since the Commission introduced its auction program in 1994, spectrum auctions have transformed the wireless industry while raising billions in revenue for the U.S. Treasury and funding important

[1] *Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules*, Public Notice, FCC 15-49 (April 17, 2015) ("*Public Notice*").

Federal initiatives such as FirstNet. The Commission's most recent auction, the recently-completed AWS-3 auction ("Auction 97"), raised more than any spectrum auction in history. The results of Auction 97 made clear that the demand for additional mobile broadband spectrum remains strong, and that well-crafted auction rules and procedures are essential to the continued success of this program.

While the AWS-3 auction was undeniably a success, it also revealed serious deficiencies in the Commission's existing competitive bidding rules, in particular with respect to designated entities ("DEs"). It is clear that these rules are no longer serving their intended purpose – to benefit true small businesses to ensure diversity in spectrum ownership. In particular, the success of Auction 97 has been overshadowed by the revelation that two particular DEs – bidders funded almost entirely by DISH and in which DISH holds an 85 percent interest – were able to spend over $10 billion in the auction, acquire more spectrum licenses than any other bidder, and seek to claim more than $3 billion in subsidies from American taxpayers. In so doing, these entities also drove *bona fide* small businesses out of the auction. This is clearly not the outcome that Congress or the Commission envisioned when they adopted the legislation and rules enabling the DE program. Without major reform of the DE rules, such gamesmanship could be repeated in future auctions. AT&T believes that the Commission should adopt changes aimed at ensuring that designated entity benefits inure only to true small businesses and new entrants. These rules should be clear, readily understood, easy to administer, and free from loopholes that jeopardize auction integrity. At the same time, the Commission should take other steps to minimize gamesmanship in auction bidding and remove regulatory burdens for qualified auction bidders.

To this end, a coalition composed of AT&T and twenty-five small businesses and rural communications providers have developed a proposed framework (the "Joint Proposal") that would, if adopted, redirect the Commission's DE program to its original mission: facilitating access to spectrum by small and rural communications providers and new entrants.[2] The Joint Proposal includes two types of bidding credits:

- *First*, a Small Business/Rural Telco Bidding Credit of 25 percent would be available to applicants that are in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless/wireline consumers.

- *Second*, a Small Business/New Entrant Bidding Credit of 25 percent would be available in cases where the applicant has average annual gross revenues (based on the three previous completed fiscal years) of $55 million or less.

Both bidding credits would be capped at $10 million per bidding entity, which will provide a critical disincentive for bidders to attempt gamesmanship or other abuses of the DE program. In addition, the Joint Proposal's framework includes several other safeguards against abuse. *First*, no individual or entity would be entitled to benefit, either directly or indirectly, from more than one bidding credit, i.e., *either* one Small Business/Rural Telco Bidding Credit *or* one Small Business/New Entrant Bidding Credit (but not both). *Second*, no applicant claiming a bidding credit would be permitted to join a joint bidding arrangement or consortium (to the extent such arrangements continue to be permitted at all) with an applicant that is not separately eligible for a bidding credit. *Third*, any recipient of a bidding credit would be required to meet any and all interim performance requirements, without exception, before sale of the relevant spectrum license or would fully forfeit any bidding credit associated with that license.

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[2] Letter from Joan Marsh, AT&T *et al.* to Roger Sherman, FCC, GN Docket No. 12-268 (May 11, 2015).

Finally, there are other steps the Commission can take to reform its Part 1 competitive bidding rules to promote efficiency and fairness in auctions. *First,* the Commission should prohibit coordinated and/or joint bidding between multiple applicants in an auction.[3] The actions of DISH in the AWS-3 auction demonstrated that joint bidding can distort auction results and deter bidding by other competitors, and the Commission must take steps to prevent this from happening again. *Second,* the Commission should simplify and strengthen its anti-collusion rules by requiring bidders to submit an anti-collusion certification. This will reduce administrative burdens for applicants and Commission staff, and will help uphold the principles of competitive bidding. *Third,* and finally, the Commission should eliminate – or significantly reform – the former defaulter rule. The existing rule is overly broad and has the effect of penalizing financially sound auction applicants. To the extent the Commission is concerned about the credit-worthiness of auction applicants, it may rely on the existing red light system and/or a credit rating exemption to fulfill the spirit of the former defaulter rule while eliminating the current rule's associated administrative burdens.

II. THE AWS-3 AUCTION RESULTS MAKE CLEAR THAT THE COMMISSION'S DESIGNATED ENTITY RULES ARE NO LONGER SERVING THEIR ORIGINAL PURPOSE.

In most respects the AWS-3 auction was a great success, unleashing 65 megahertz of much-needed mobile broadband spectrum and raising more revenue than any other spectrum auction in history.[4] Undermining this success, however, was the fact that the auction revealed serious deficiencies in the Commission's Part 1 competitive bidding rules with respect to DEs.

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[3] If the Commission fails to completely prohibit joint bidding, it should be limited to allow joint bidding only between or among eligible DEs.

[4] *Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97,* Public Notice, DA 15-131 (Jan. 29, 2015).

Two DEs almost exclusively funded by and under the majority ownership of DISH (Northstar Wireless and SNR Wireless, hereinafter "Northstar" and "SNR") won more licenses than any other winning bidder, and did so while seeking to take more than $3 billion in taxpayer-subsidized bidding credits. In so doing, they also forced *bona fide* small businesses and rural communications service providers out of the auction. This outcome is a far cry from that envisioned by Congress and the Commission when they created the DE program. Many commenters in this proceeding have voiced great disappointment with the manner in which DISH and its DEs were able to distort the outcome of Auction 97, and it is clear that to prevent similar gamesmanship in future auctions, the Commission must adopt sweeping reforms.

The Commission's original Part 1 competitive bidding rules were crafted to implement Congress' directive that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences."[5] When the Commission first adopted its DE rules, it expressed its hope that this framework would "ensure that small businesses, rural telephone companies and businesses owned by minorities and women have the opportunity to participate in spectrum-based services."[6] The DE rules were intended to "allow [DEs] to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital."[7] Finally, the Commission noted that "this program will lead to the development and rapid deployment of new services by entrepreneurs who have

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5 47 U.S.C. § 309(j)(4)(D).

6 *Competitive Bidding for Licenses,* Second Report and Order, 9 FCC Rcd 2348, ¶ 230 (1994) ("*Competitive Bidding Second Report and Order*").

7 *Id.*

traditionally lacked access to the telecommunications marketplace. This enhanced access will benefit the public, including businesses and residents in rural areas, and will promote economic growth."[8]

The two most prominent DE winning bidders in the AWS-3 auction – Northstar and SNR – had the financial backing of DISH, a company with annual revenues of almost $14 billion, a market capitalization of over $32 billion, and more than 14 million customers.[9] Prior to the AWS-3 auction, DISH already had significant nationwide spectrum holdings, including the recently-auctioned H Block, in which DISH won every license.[10] DISH currently has no terrestrial wireless subscribers. As others have observed, DISH is the antithesis of the type of company the Commission envisioned would benefit from the DE program. DISH is neither a rural communications provider nor a small business, it does not lack access to capital or spectrum, and it has yet to deploy its wireless assets for the benefit of U.S. consumers. Indeed, Commissioner Pai characterized DISH's participation as "mak[ing] a mockery of the DE program."[11]

DISH's success in the AWS-3 auction can be attributed to its gamesmanship during the auction. Because DISH, Northstar, and SNR frequently bid on the same licenses in the same rounds while other bidders were active, they created a distorted sense of competition for these

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8 *Id.*

9 News Release, FCC, "Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program" (Feb. 2, 2015) ("Commissioner Pai Feb. 2 Statement"), *available at* https://www.fcc.gov/document/commissioner-pai-statement-abuse-designated-entity-program.

10 *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Closes, Winning Bidder Announced for Auction 96,* Public Notice, DA 14-279 (Feb. 28, 2014).

11 *See* Commissioner Pai Feb. 2 Statement.

licenses while preserving bidding eligibility and limiting their own exposure.[12] Eventually, DISH was able to withdraw from the auction without risk or penalty – yet was still able to obtain significant spectrum interests through its relationships with SNR and Northstar.[13] And, by dropping out of the auction and relying on Northstar and SNR to win spectrum, DISH was able to acquire a considerable equity interest in prime spectrum covering a nationwide footprint while not having to pay full price for a single license.

Previous rounds of comments in this proceeding revealed disappointment and outrage over the conduct of DISH and its DEs in Auction 97. When forced to compete at auction against DEs with financial backing amounting to billions of dollars, "*[b]ona fide* small businesses and rural telephone companies that are the intended beneficiaries of small business bidding credits are losers."[14] With respect to the DISH DEs, this is because DISH exploited the bidding rules to park eligibility, distort demand, and discourage *bona fide* small businesses from participating. The record in this proceeding contains an illustration of how DISH-affiliated DEs outbid rural carriers in Indiana, resulting in only one license being won by a small business and/or rural communications provider.[15] Meanwhile, Vermont Telephone Company and VTel Wireless (collectively, "VTel") paint a distressing picture of VTel's attempt to purchase the AWS-3 A1 block license in Burlington, Vermont:

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12 Letter from Kathleen Grillo, Verizon to Marlene H. Dortch, FCC, WT Docket No. 14-170, at 2 (Apr. 24, 2015).

13 *Id.*

14 Comments of NTCA – The Rural Broadband Association, WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 5 (Feb. 20, 2015) ("NTCA Comments").

15 Comments of Cerberus Communications Limited Partnership, WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, at 2-3 (Feb. 20, 2015) ("Cerberus Comments").

> [D]espite being the winner at the end of round 16, VTel was topped by DISH and Northstar in subsequent rounds. But, VTel bid back and was the higher bidder in round 20. However, in round 21, DISH, Northstar, and SNR all placed bids, which created the impression that VTel faced increased competition from three different bidders from the spectrum, even though that was not actually the case. Nonetheless, in light of the perceived interest in the spectrum by multiple bidders that would drive up the price to levels that it could not afford, VTel did something it has rarely done in past auctions – it dropped out.[16]

VTel's failed attempt to acquire spectrum in the AWS-3 auction is just one example of how "most rural entities were completely shut out in their attempt to obtain spectrum in their service areas" while "almost all of the benefits of the FCC's DE program went to specialized investment vehicles that are designed to qualify for 'small business' bid credits, but truth be told, are anything but small."[17]

Any program that injures its intended beneficiaries is unquestionably broken. The events of the AWS-3 auction make clear that the Commission's DE rules are no longer serving their original purpose, which was to promote small, independent business participation in competitive bidding. In particular, commenters overwhelmingly agree that the DISH-backed DEs are not the type of entities that the Commission's DE program was intended to benefit. To prevent similar results in future auctions, the Commission must adopt sweeping reforms to its Part 1 competitive bidding rules.

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[16] Letter from Bennett L. Ross, Wiley Rein LLP to Marlene H. Dortch, FCC, WT Docket No. 14-170, at 2 (Mar. 26, 2015) ("VTel *Ex Parte* Letter").

[17] Comments of the Blooston Rural Carriers, 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 2 (Feb. 20, 2015) ("Blooston Comments").

III. THE COMMISSION SHOULD ENSURE THAT BIDDING CREDITS FLOW ONLY TO *BONA FIDE* SMALL BUSINESSES AND NEW ENTRANTS.

In response to the "mockery of the DE program"[18] displayed in the AWS-3 auction, AT&T and a coalition of small businesses and rural communications service providers have devised an alternative regime (the "Joint Proposal") that would fulfill the DE program's original vision and safeguard against the gamesmanship allowed under the current rules. This proposed framework replaces the existing bidding credit system with two bidding credits: (1) a Small Business/Rural Telco Bidding Credit and (2) a Small Business/New Entrant Bidding Credit. As explained further below, this framework also includes safeguards against abuse of this program by unqualified entities and ensures that spectrum won by DEs is rapidly put into use for the benefit of the taxpayers supporting these bidding credits.

Small Business/Rural Telco Bidding Credit. Congress mandated the creation of the DE program to ensure that small businesses and rural telephone companies have meaningful opportunities to acquire spectrum through the auction process and serve as viable competitors in the provision of wireless communications services.[19] A properly-crafted DE program must ensure that *true* small businesses and rural communications service providers receive enhanced opportunities through the awarding of bidding credits. The 25 percent Small Business/Rural Telco Bidding Credit envisioned by the Joint Proposal would be limited to those companies that are in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless and wireline customers. By basing eligibility on the number of customers, the reformed DE program will properly exclude large, well-funded established providers as well as speculators who have no intention of serving customers.

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18 *See* Commissioner Pai Feb. 2 Statement.

19 *See, e.g., Competitive Bidding Second Report and Order* at ¶ 230.

Small Business/New Entrant Bidding Credit. In addition to promoting small businesses and rural communications service providers, Congress also sought to enhance competition by new entrants that might otherwise be prevented from entering the wireless telecommunications market, including businesses owned by women and minorities. The 25 percent Small Business/New Entrant Bidding Credit will provide meaningful opportunities for new entrants to obtain spectrum at a discounted price, allowing them to reallocate financial resources toward other aspects of wireless service provision. The Small Business/New Entrant Bidding Credit envisioned by the Joint Proposal would be limited to applicants whose average annual gross revenues (based on the previous three completed fiscal years) are $55 million or less.

Safeguards Against Abuse. Both bidding credits described above would come with certain limitations to prevent abuse of the designated entity program. *First*, both the Small Business/Rural Telco Bidding Credit and Small Business/New Entrant Bidding Credit would be subject to a cap on benefits limiting any entity to aggregate bidding credits of no more than $10 million. This cap will make it impossible for a large firm to dominate an auction to the exclusion of other DEs, while providing a meaningful discount for qualifying entities. The cap is essential to AT&T's support of the framework as it provides policymakers and auction participants alike with strong assurances that the program will not be abused for unfair auction advantage. *Second*, an individual or entity would be permitted to obtain a Small Business/Rural Telco or Small Business/New Entrant bidding credit, but not both. Further, no individual or entity would be entitled to benefit, either directly or indirectly, from more than one bidding credit, barring certain exceptions.[20] The point of these restrictions is to ensure that the program cannot be gamed

[20] AT&T supports the Joint Proposal's inclusion of two limited exceptions to this rule. First, there is an exception with regard to commercial banking entities. This exception is necessary to ensure that bidders would be able to receive arms-length commercial financing from

through a single entity participating in or standing behind multiple individual designated entities to circumvent the proposed cap.

Third, no applicant claiming a bidding credit would be permitted to join a consortium or, to the extent the Commission continues to permit such arrangements, a Joint Bidding Arrangement, with an applicant that is not separately eligible for a bidding credit. As discussed elsewhere, Joint Bidding Arrangements are ripe for abuse, so to the extent the Commission continues to permit them, DEs should not be allowed to join one with non-DEs. *Finally*, any applicant who obtains a bidding credit would be required to meet any and all Commission-mandated interim performance requirements with respect to the licenses they win, without exception, before sale of the relevant spectrum license. Failure to meet this requirement for any individual license would result in the full forfeiture of the entirety of any bidding credit associated with that license. This restriction is essential to discourage deep-pocketed investors that participate at auction for the sole purpose of financial gain.

Some may argue for more expansive limits on applicant eligibility or a higher bidding credit cap. But any expansion of the framework will inevitably invite more gamesmanship and increase the potential for abuse by those that are not the intended beneficiaries. As such, in considering any such expansion, policymakers must consider whether such modifications would move the program away from the beneficiaries targeted in the statutory mandate – small businesses and rural telcos (or communications providers that primarily serve rural communities).

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the institution of their choice, and that such institutions would be permitted to provide arms-length financial support to more than one designated entity. Second, in furtherance of rural deployment, there is an exception for members of long-standing rural partnerships and their individual partners, each bidding in their own service areas, as long as they do not bid against each other in the same market.

Policymakers should also look critically at any argument that a larger bidding credit is needed to support new entrants bidding for licenses in major markets. If a "new entrant" seeks to obtain and deploy spectrum licenses in major urban areas, the cost of the spectrum will be just a small fraction of the significant capital that will be necessary to deploy the licenses. If the entity has access to that type of capital needed to compete in urban markets for licenses and then meet the FCC's performance requirements, it seems unlikely that the entity is the type of business that any rational small business program is meant to assist.

The framework described in the Joint Proposal and herein will provide for and support robust participation in future auctions by rural communications service providers and true small business entrants, while safeguarding against the types of gamesmanship that marred the AWS-3 auction. The Joint Proposal would provide a full 25 percent bidding credit to any entity with a capital budget for a spectrum auction of up to $40 million – a significant amount for a small business. Indeed, 22 of the 31 winning bidders in the AWS-3 auction spent less than $40 million on their licenses. By definitively limiting the amount that any DE could claim in bidding credits, the Commission would prevent a repeat of the spectre of having a multi-billion dollar enterprise like DISH claiming billions of dollars in "small business" credits, and it would ensure that benefits flow to bidders in a manner consistent with Congress' vision.

IV. THE COMMISSION SHOULD TAKE ADDITIONAL STEPS TO REDUCE GAMESMANSHIP IN THE AUCTION PROCESS.

A. The Commission Should Prohibit Joint Bidding Arrangements.

The AWS-3 auction demonstrated that the Commission's existing Part 1 rules do not sufficiently protect against the harmful effects of coordinated bidding. In particular, DISH and its two bidder subsidiaries were able to "park" eligibility, increase their odds when random selection was employed to select from identical bids, limit their bid exposure to a degree no other

applicant could match, and create "shadow demand" that distorted market signals and caused at least one wireless provider to drop out of the auction altogether.[21] The Commission, citing many concerns with joint bidding, has proposed to prohibit joint bidding arrangements among nationwide carriers.[22] AT&T submits, however, that this proposal does not go far enough – the Commission should prohibit coordinated bidding by different applicants altogether.

The actions of DISH in the AWS-3 auction make clear that if left unchecked, coordinated bidding will have severe negative consequences on the auction process. DISH, Northstar, and SNR had 400 million more bidding units than any other applicant in the auction was permitted to hold.[23] The entities were able to "park" this eligibility freely by placing double or triple bids on the same licenses. These entities were also able to increase their odds of winning a contested license when random selection was employed to select from among identical bids. And, by engaging in this double or triple bidding, the DISH entities were able to present a distorted picture of competition to rival bidders while limiting their own exposure. This gave the DISH entities an unmatched, unassailable competitive advantage in the AWS-3 auction. The results reflect this advantage: SNR and Northstar combined won more licenses than any other bidder.

To prevent similar gamesmanship in the future, the Commission must prohibit coordinated bidding. As DISH's behavior during the AWS-3 auction made clear, coordinated bidding among multiple entities has the potential to eviscerate the Commission's eligibility and activity rules and distort auction results. This result is clearly not what the Commission intended

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21 VTel *Ex Parte* Letter at 2.

22 Public Notice at ¶ 28.

23 *See* Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (Feb. 20, 2015) ("AT&T February Ex Parte").

when it created its joint bidding rules, but it should be self-apparent that *any* rule allowing "competing" bidders in an auction to exchange information and tactically align during the course of the auction threatens the integrity of the auction. Indeed, the joint bidding rules are premised on the policy that "if anticollusion rules are too strict or are not sufficiently clear, they 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."[24] But, as AT&T observed in its prior comments, the Commission can achieve its policy objectives while foreclosing strategic coordination by permitting entities to form joint ventures, or consortia, for purposes of bidding. A bidding consortium, which results in a single bidding entity, offers the benefits associated with joint bidding arrangements without jeopardizing the integrity or transparency of an auction.

The coordinated bidding used by DISH in Auction 97 would not have been possible if the DISH entities were required to form a bidding consortium. This is because while multiple entities are permitted to pool capital and expertise, only one entity may bid. The bidder would not be permitted to hold more bidding units than other applicants, nor could it bid against itself on licenses to distort competition. Further, requiring the use of a single bidding entity is consistent with the Commission's proposal to "prohibit parties that are privy to others' bidding information during the auction from placing multiple coordinated bids on a common license."[25] As DISH's behavior in Auction 97 makes clear, the dangers of coordinated bidding are not confined to nationwide carriers. To prevent such gamesmanship from impacting future auctions, the Commission must prohibit coordinated bidding altogether.

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[24] *Competitive Bidding Second Report and Order* at ¶ 221.

[25] *Public Notice* at ¶ 36.

B. The Commission Should Simplify and Re-Focus Its Anti-Collusion Rule.

In the Public Notice, the Commission has sought further comment on how it can regulate the behavior of commonly-controlled bidders in spectrum auctions, recognizing that bidding by commonly-controlled entities carries significant risk.[26] Previously, the Commission proposed that entities under "the common, exclusive control" of a single individual or set of individuals be prohibited from qualifying to bid on licenses in the same or overlapping geographic areas.[27] AT&T agrees that the Commission should not permit commonly-controlled entities to participate in Commission auctions. However, additional steps should be taken to prevent collusion among bidders, which will have the added beneficial effect of simplifying the application process and easing burdens on both bidders and the Commission.

As an initial matter, AT&T proposed prohibition on joint bidding would eliminate the possibility of commonly-controlled entities participating in Commission auctions.[28] As the Commission correctly observed, there appear to be no legitimate benefits to allowing commonly-controlled entities to participate separately in spectrum auctions, and no hardships would result from a prohibition on such arrangements. At the same time, however, such a prohibition does not go far enough because it would not have facially altered the eligibility of the DISH entities to participate, since both Northstar and SNR have represented that they were not under the control

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[26] *Public Notice* at ¶ 27.

[27] *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, FCC 14-146, ¶ 103 (Oct. 1, 2014) ("*NPRM*"). The Commission further proposes using the concepts of "control" and "controlling interest" from Section 1.2110 of the Commission's rules. *Id.* A "controlling interest" includes individuals or entities with either *de jure* or *de facto* control of the applicant. 47 C.F.R. § 1.2110(c)(2). *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation. *Id. De facto* control, on the other hand, is evaluated on a case-by-case basis. *Id.*

[28] Informal auction policies already have barred the same applicant from filing more than one short-form application to participate in an auction. *Id.* at ¶¶ 98-99.

of DISH. It is clear, then, that additional steps are necessary to prevent collusion and/or coordinated bidding behavior.

The Commission can safeguard against collusion and coordinated bidding by requiring a certification from each auction applicant that it has not entered into any agreements with any other applicant regarding bids or bidding strategy, and that they are not privy to any other applicant's bids or bidding strategy. This anti-collusion certification will give much-needed weight to the Commission's anti-collusion rule program. These rules do little to *prevent* collusion, as applicants must make only limited disclosures prior to an auction, making it virtually impossible for the Commission to recognize that a particular agreement poses a competitive threat to an auction prior to the commencement of bidding.[29] Moreover, by requiring an anti-collusion certification, the Commission will enable itself to take action against violators pursuant to, among other rules, its existing rules requiring truthful statements to the Commission.[30]

Not only will the use of an anti-collusion certification go farther to prevent actual collusion, it will greatly simplify the process of preparing and reviewing short form applications. Under the Commission's current procedures, applicants must make extensive disclosures regarding any and all active agreements with other bidders. This process is incredibly laborious,

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[29] *See* 47 C.F.R. § 1.2105(a)(viii) (requiring applicants to identify "all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure"). Applicants are instructed to simply "disclose the existence of agreements" and the names of the parties thereto. *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, Public Notice, AU Docket No. 14-78, at ¶¶ 23-24 (rel. Jul. 23, 2014) ("AWS-3 Procedures PN").

[30] 47 C.F.R. § 1.17.

and applicants may need to communicate with dozens of parties to determine the need for and nature of particular disclosures. As AT&T has noted, there exists considerable confusion regarding what sorts of agreements must be disclosed, which can lead to disagreements among applicants and prolong the process of preparing short form applications.[31] Further complicating the process is the fact that the Commission requires that such disclosures be parallel – if Applicant A properly discloses an agreement with Applicant B on its short form application but Applicant B does not, *both* applicants' short form applications may be deemed incomplete.[32] Not only is this burdensome for applicants, but it also requires Commission staff to comb through long lists of agreements and confirm that all agreements have been disclosed in parallel. The anti-collusion certification, together with the prospect of criminal enforcement by the Department of Justice, would serve as a highly effective deterrent of anti-competitive conduct, and is much simpler for bidders and Commission staff than the current regime.

C. The Record Shows That the Commission Should Eliminate the Former Defaulter Rule.

The FCC's Public Notice requests comment on codification of the broad waiver granted in Auction 97 related to the former defaulter rule. AT&T suggests that the Commission may wish to simply eliminate the former defaulter rule in its entirety, as the Commission has alternative, less punitive means of ensuring that winning bidders do not default on their licenses. The DCIA red light rules, for example, require that all outstanding financial obligations be paid off as a condition precedent of auction participation.[33] Thus, regardless of the former defaulter

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31 Comments of AT&T, WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 12-13 (Feb. 20, 2015) ("AT&T Comments).

32 *Id.* at 12.

33 47 C.F.R. § 1.1910(b).

rule, it is impossible for a *current* defaulter to participate in a Commission auction. And AT&T is unable to find examples of former defaults – that have since been paid – that warrant the draconian penalty associated with the existing former defaulter rule, save for the possible exception of prior auction-specific defaults. However, in the case of a prior auction default, the Commission could consider whether it may be more appropriate to afford itself the latitude to require – as part of the auction default rules – the option of requiring a defaulting party to pay a larger upfront payment as a specific remedy. This would empower the Commission to extract greater financial assurances from true default risks while facilitating auction participation by financially qualified entities.

In the event that the FCC inadvisably determines the rule should be maintained, AT&T supports modification of the policies. In the Public Notice, the Commission has noted the strong record support for codifying the former defaulter rule policies it adopted in connection with Auction 97.[34] As numerous parties have observed, the existing former defaulter rule is overly broad, and has the effect of penalizing – or even excluding – financially sound applicants by imposing excessive upfront payment obligations.[35] Codifying this waiver would ensure that qualified bidders are able to participate without penalty, while still allowing the Commission to impose higher upfront payments in cases of significant defaults that may legitimately warrant such action. AT&T also urges the Commission to closely consider its proposal to adopt an

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[34] *Public Notice* at ¶ 26.

[35] *See, e.g.*, Comments of the Competitive Carriers Association, WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 11-12 (Feb. 20, 2015); Comments of NTCH, Inc., WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 7-10 (Feb. 20, 2015); Comments of CTIA – The Wireless Association®, WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, RM-11395, at 5-7 (Feb. 20, 2015).

exemption from the former defaulter rule based on an applicant's credit rating.[36] As AT&T has explained previously, a credit rating exemption would fulfill the spirit of the former defaulter rule by providing the Commission with assurance that applicants can pay for auctioned licenses while ensuring that credit-worthy applicants are not unnecessarily penalized.[37]

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36 *Public Notice* at ¶ 26.

37 AT&T Comments at 21.

V. CONCLUSION.

With the unprecedented success of the AWS-3 auction came unprecedented gamesmanship, and the results of the auction make clear that reform of the Part 1 competitive bidding rules is long overdue. AT&T is committed to promoting fairness, integrity, and efficiency in the auction process. The Commission must take action to refocus its designated entity rules so that they produce the results envisioned by Congress in the Communications Act. The Joint Proposal developed by AT&T and twenty-five small businesses and rural communications providers provides a framework that will promote access to spectrum by the intended beneficiaries of the DE program while eliminating incentives for gamesmanship. For example, by adopting a $10 million cap on bidding credits, the Commission will provide a meaningful discount to *bona fide* rural communications providers and small business new entrants while reducing incentives for gamesmanship and abuse by entities seeking to exploit the designated entity program to achieve an unfair auction advantage. In addition, the Commission can simplify and improve the auction process for all bidders by prohibiting coordinated bidding, reforming the anti-collusion rules, and revising or eliminating the former defaulter rule.

Respectfully submitted,

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