

**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 TRISTAR LICENSE GROUP, LLC

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Dated: May 14, 2015

SUMMARY

Tristar License Group, LLC (“Tristar”) is a qualified DE and participated in Auction 97. The company’s management has been actively involved in the wireless telecommunications markets since the 1980s, and has firsthand experience with the obstacles faced by small businesses in the auction process as well as in raising capital and building and operating wireless markets. Tristar appreciates this opportunity to provide comment and offer its own proposals for reforming the Commission’s DE program.

The wireless marketplace has changed significantly in the 22 years since Congress initially granted the FCC its auction authority. If small businesses and other DEs are going to have a legitimate shot at providing competition in today’s highly competitive market with entrenched incumbents, they will need much more than bidding credits. DEs need the maximum amount of operational flexibility to enter into leasing and wholesale arrangements as they see fit, and the ability to pursue other yet-to-be-developed entrepreneurial opportunities with their licensed spectrum. DEs will be doomed to failure if they are shackled to a one-size-fits-all business plan of being a facilities-based service provider.

Hand-in-hand with adopting policies that maximize operational and business opportunities, the Commission should maximize regulatory flexibility for DEs. The Commission should reevaluate its unjust enrichment policies so that DEs can more freely transfer licenses to fund operations and so they can more freely enter into joint ventures, partnerships or other business arrangements that put their licensed spectrum to use. The Commission should also relax buildout obligations for legitimate DEs and encourage DE capital formation by eliminating the presumption that family members are controlling interests.

The Commission can also help legitimate DEs by curbing abuse of the DE program by entities that aren’t eligible for DE benefits. It should adopt restrictions on DE financing arrangements involving other auction participants and incumbent service providers; it should adopt an aggregate \$35 million cap on small business bidding credits; and it should evaluate DE qualifications prior to the start of bidding.

Finally, the Commission should prohibit coordinated bidding in the upcoming Broadcast Incentive Auction. Entities seeking to coordinate bidding in the BIA should be required to demonstrate to the Commission prior to the beginning of the auction that their activities would be justified under the circumstances and will not be used in an improper manner.

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COMMENTS OF TRISTAR LICENSE GROUP, LLC

Tristar License Group, LLC (“Tristar”) hereby submits these comments in response to the Federal Communications Commission (“Commission”) *Public Notice* seeking further comment in the above referenced proceedings.¹ Tristar qualified as a designated entity (“DE”) and participated in Auction 97. Tristar’s management has been actively involved in the wireless telecommunications markets since the 1980s. We have firsthand experience with the numerous obstacles faced by small businesses, not only in the auction process, but in raising capital and building and operating wireless markets.

¹ See Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules, *Public Notice*, FCC 15-49 (*rel.* April 17, 2015), 80 FR 22690 (April 23, 2015).

I. Introduction

The obstacles for small businesses and new entrants in the wireless markets today are more formidable than in the past since the market has matured and now has significantly consolidated. If small businesses and other DEs are going to have a legitimate shot at providing competition in today's market against entrenched incumbents, large or small, rural or urban, they will need much more than just a bidding credit. DEs need the same operational flexibility that non-DEs enjoy – including without limitation, the ability to enter into leasing and wholesale arrangements, and the ability to pursue other yet-to-be-developed entrepreneurial opportunities that utilize licensed spectrum. Consumers in the vast majority of markets already have access to services from multiple providers. Pigeon-holing DEs into the business model of being a startup facilities-based service provider will simply doom most DEs to failure. DE's should instead be given the regulatory and operational flexibility to engage in all services related to their spectrum holdings – the ability to enter into partnerships and joint ventures; the ability to work freely with other telecommunications carriers and new entrants; to utilize third party service providers; to sell, swap, exchange, partition and disaggregate licenses, without limit – so long as their activities are not part of a pre-conceived arrangement to funnel access to licenses won with DE benefits to an ineligible entity. Any regulatory limitation on DE operational flexibility will harm the ability of DEs to compete in today's wireless marketplace, and thus would be contrary to the clear intent of Section 309(j). DEs also need a fair auction.

We applaud the Commission for seeking further comment in these proceedings after the conclusion of Auction 97. The Commission must take numerous steps in these proceedings to truly promote competition by DEs in the current and future wireless markets. The Commission must revise the auction bidding and application processing policies to protect the integrity of the

auction process. Congress granted the Commission broad regulatory authority to develop and implement spectrum auction policies and procedures to meet a variety of objectives. Section 309(j) is replete with ambiguous terms, the meanings of which were left to the Commission's discretion, so long as the interpretations remain "within the bounds of reasonable interpretation."² The Commission is not bound by previous interpretations of statutory terms, but instead, in fulfilling its obligation to engage in informed rulemaking, must "consider varying interpretations and the wisdom of its policy on a continuing basis."³

The upcoming Broadcast Incentive Auction (BIA) will be "historic" in many respects. It will be historic both in complexity and structure. It may also be historic in its pricing. It may be the LAST auction for the foreseeable future of spectrum which is ideally suited for mobile wireless use. It is likely to be the LAST auction **EVER** of prime low-band spectrum. We urge the Commission to proceed deliberately in these proceedings and carefully consider all comments and alternatives and revise its small business policies in a manner that will, in fact, promote competition and entrepreneurship in today's market – a market that is much different than it was 22 years ago when Section 309(j) was enacted. These proceedings are far too important to be expedited merely to meet an arbitrary goal of initiating the BIA in the first quarter of 2016.

As Tristar sees it, these proceedings basically ask three questions:

1. What should the Commission do in designing procedures for the BIA to ensure that entities that do not qualify as a DE do not indirectly receive DE benefits through bidding "fronts" or "Special Purpose DEs"?

² Arlington v. FCC, 569 US (slip opinion page 5)(2013).

³ See Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 863 (1984) ("An initial agency interpretation is not carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.")

2. What “bidding preferences and *other procedures*”⁴ should the Commission utilize in the BIA to “ensure that [DEs] are given the opportunity to participate in the provision of spectrum-based services . . .”?
3. Should coordinated bidding be allowed in the BIA?

These proceedings have generated countless comments, reply comments and ex parte presentations which, one way or another, addresses one or more of these three basic questions. As expected, commenters each have their own “slant” depending upon what business, service or opportunity they want to promote or protect. We applaud the Commission for its commitment to maintain an appropriate balance between these numerous competing interests.

II. Preventing Abuse of the DE Program

Tristar offers the following proposals to curb the potential for abuse of the DE program:

a. Limit the Amount of Financial Support That DE Bidders Receive from Other Auction Participants and Wireless Licensees

As to the first question, after Auction 97 it is obvious that the Commission’s “controlling interest” and “attribution” rules *alone* are insufficient to prevent abuse of the DE program. Appropriate limitations should be placed on the amount of “financial support” a DE may receive from an entity that, directly or indirectly, is either (i) participating in the BIA or (ii) holds wireless spectrum licenses. “Financial support” should be defined to encompass all financial arrangements contributing to the capitalization and funding of the DE, including without limitation, voting and non-voting equity, debt or financing arrangements (other than bona fide vendor financing) and loan guarantees. To prevent manipulation, this term should include financial support to the DE applicant as well as to its members/investors. We propose the limit be 10% (consistent with the spectrum aggregations limit).

⁴ See, Section 309(j)(4)(D) (*emphasis added*).

The Commission should also establish the rebuttable presumption that any provider of financial support that provides 25% or more of the financial support (directly or indirectly) should be deemed a “controlling interest” of the DE. If a DE wants to rely on the financial support of a single entity for over one quarter of its capitalization, then it should be prepared to rebut the presumption of control. Furthermore, any provider of 50% or more of the financial support should be deemed a “controlling interest.” Period. These limits will not prevent a DE from raising capital or financial support but they do help prevent the development and financing of Special Purpose DEs and abuse of the Commission’s small business policies. Such limitations are reasonable in light of past experience and will assist in avoiding the “unjust enrichment” that would accrue to an ineligible entity which, through clever lawyering, obtains DE benefits directly. It is highly doubtful that Congress, when enacting Section 309(j), intended to allow DEs to be the puppet or front for an otherwise ineligible entity.

b. Adopt an Aggregate \$35 Million Cap on Bid Credits

The Commission should also establish a limit on the aggregate amount of bidding discounts that a DE (or group of related DEs) may receive. The amount should be the same for all DEs and not tied to a complex formula which could be prone to manipulation. We suggest the limit should be based on an implied 35% discount on a \$100 million investment or \$35 million. In light of the results of Auction 97, a limit on aggregate benefits is reasonable and justifiable for the BIA. Inherent in its ability to grant preferences to DEs is the ability of the Commission to limit those preferences, so long as the limitation does not frustrate the goals of Section 309(j). An aggregate limitation of this nature does not frustrate the purposes of Section 309(j), but instead assists in protecting the integrity of the DE program and the auction itself.

c. Evaluate DE Qualifications Prior to Bidding

Finally, to limit harm to DEs and integrity of the auction process if a winning bidder is later disqualified, the Commission should require Form 175 short-form applications for the BIA to be filed at least 6 months prior to the start of the auction. The Commission's staff needs sufficient time *prior to the auction*, to make informed decisions as to whether or not a DE applicant actually qualifies as a DE. This gives DEs with a 25% or more financial support provider sufficient time to present evidence to the Commission to rebut the presumption of control. Furthermore, a post-auction determination of actual control or DE disqualification does nothing to address the damage to the auction and other bidders that occurs when an ineligible DE bids in an auction assuming it has a 25% (or whatever) discount. A stronger pre-auction review of DE eligibility status will also help DEs in their capital raising efforts by giving providers of financial support comfort in knowing that the entity in which it is investing will in fact qualify for the discount it is seeking before it commits to purchase licenses in the auction.

III. Ensuring that DEs have Realistic Opportunity to Compete in Auctions and Thereafter in a Mature Wireless Marketplace

With respect to the second question, Tristar believes that the Commission must grant qualified DEs more than just a bidding credit in the BIA to ensure that they are given a reasonable opportunity to win licenses and provide meaningful competition in today's and tomorrow's wireless market. With that in mind, we offer the following proposals:

a. Permit DEs to Have Same Operational and Regulatory Flexibility as Non-DEs

The Commission should revise its small business policies and to allow DEs to engage in any activities with its licenses that are available to non-DEs, without limit. In light of significant changes in the wireless marketplace, it makes no sense for the Commission to rely on 22-year-

old statements about “spectrum based activities” as always meaning “facilities based activities.” Congress used expansive terminology throughout Section 309(j) in order to give the Commission latitude in designing and implementing the competitive auction program to serve the public interest. If Congress had intended to allow preferences in the DE program only to those small and other disadvantaged companies which built out and operated full wireless networks, it would have been easy for it to include clear language to that effect in Section 309.⁵ The fact that it did not coupled with the fact that another party participating in the conference report used the term “facilities based services” suggests that Congress did not intend to limit “spectrum based services” to only “facilities based services.” Furthermore, the fact the Commission has consistently interpreted the term “spectrum based services” in the past does not preclude it from revising its interpretation in these proceedings.⁶

The Commission should revise its interpretation of the “spectrum-based services” to allow DEs to engage in leasing and any other activities available to license holders, such as leasing and wholesale activities, as it has proposed. There should be no limitation on these activities since a DE in today’s marketplace (and in the future) will need the flexibility to engage in a variety of business activities with multiple different partners and joint venture participants as may be required. DEs will benefit from the ability to sell, swap or exchange its licenses with other entities, or contribute all or part of the license rights to others, by disaggregation or partition, just like non-DE license holders – and without limitation. Tristar respectfully submits that any limitation on a DE’s ability to compete in an evolving wireless marketplace is contrary to the plain language of Section 309(j).

⁵ See, Arlington v. FCC, 569 US -- (slip opinion page 5)(2013) (“Congress knows how to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion).

⁶ See Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., *supra* Note 3.

b. The Commission Should Reevaluate What it Considers to be “Unjust Enrichment”

In making our suggestion that the Commission move away from its focus on the continuing “control” of licenses granted to DEs, we are aware that the Commission has other obligations under Section 309(j), one of which is to prevent “unjust enrichment,” another ambiguous term. It seems that the interpretation of “unjust enrichment” has focused mainly on the DE bidding discount and the assumption that a DE would be “unjustly” enriched merely by the transfer of control of a license acquired with a bidding discount. But all transfers do not necessarily result in an “unjust” enrichment to the DE license holder. There are many reasons why a DE would consider a transfer of control of one or more of its licenses, all of which are legitimate business reasons. In some cases the only valuable asset a DE may have is its licenses and it may need to transfer licenses to fund operations in other markets or to compete through a joint venture, partnership or other business arrangement. A DE may initially plan to grow into other markets, but after gaining actual experience, determine that it does not have the capital or management or appropriate business plan to do so. In such cases it makes sense that the DE would want to sell, transfer or lease one or more of its licenses if it could. It may be that the DE determines that it just cannot effectively compete on its own and the best alternative is to sell, transfer or lease its licenses. These, and more, are valid business reasons why a DE might transfer control of its licenses, just as would a non-DE under similar circumstances, and none of which would ipso facto generate “unjust” enrichment. And it doesn’t automatically make the DE a “speculator” any more than T-Mobile should be viewed as a “speculator” for swapping AWS licenses to Verizon for 700 A Block licenses.

However, we do recognize that a lease, sale or transfer of licenses by a DE could be used to circumvent the DE qualification rules and, as such, justifiably constitute “unjust enrichment”

to one of the parties to the transaction. This would be where a non-DE and the DE have a pre-existing understanding that the DE will transfer control of the licenses it obtains with a bidding discount to the non-DE after the auction is completed. This is the type of “material relationship” that should be disclosed in the Form 175 and disqualify the applicant as a DE.

The Commission’s revision of its interpretation of “spectrum based services” to allow leasing and other transfers of control of the licenses is legally defensible because it is not an unreasonable interpretation of that term. Furthermore, the circumstances of today’s telecommunications market are far different from those in the early 1990s, and these changes alone warrant a new interpretation in order for the Commission to fulfill its obligation to support competition and ensure that DEs have an opportunity to compete in spectrum based services. Many other commenters in these proceedings have stated that the leasing and change of control restrictions have hampered their ability to raise capital and prevented them from participating in previous auctions. Expanding the interpretation and granting widespread operational flexibility to DEs would actually promote economic opportunity and competition and encourage entrepreneurship from DEs.

c. The Commission Should Relax Build-Out Obligations for Legitimate DEs

In addition to expanding the operational activities of DEs as proposed, the Commission should also consider relaxing the build-out requirements for DEs. DEs will need time to “ease into” their operations and should not be forced into making poor capital deployment decisions (or forced to relinquish control of their licenses) based merely on a regulatory defined build-out time frame that is the same for DEs as for the dominant nationwide carriers. DEs will need regulatory leniency if they are to be reasonably expected to provide competition in today’s

mature wireless market where even in rural markets multiple service offerings are already available. At a minimum the build-out obligations of DEs should be longer than for non-DEs, and based on a low but growing percentage of the aggregate population of all of the DE's licenses. This would give DEs the ability to focus on the higher population markets first and expand into less populated areas, just like the dominant carriers of today did in the past (and still do today). Extensions should be favored and expected from DEs demonstrating a legitimate effort to provide competition.

Relaxing build-out obligations would improve a DEs ability to raise capital and would not be contrary to the language of Section 309. It is true that other stated goals of Section 309(j) include the "efficient and intensive use of electromagnetic spectrum"⁷ and the "rapid deployment of new technologies and services."⁸ These goals could still be furthered by making them applicable to non-DEs, as well as rural telephone companies which independently do not qualify as a DE but have ongoing wireless operations.

d. Give Preference for Awarding Interference-Free Channels to DEs and Assist DEs in Identifying Markets Where Cross-Border Interference is a Concern

The Commission should also design the BIA in such a manner that the blocks of licenses in each PEA with the least amount of interference should be allocated first to DE winning bidders for licenses in that PEA. DEs will not be able to compete with non-DEs on a pricing basis in the assignment round. Non-DEs, particularly the existing regional and nationwide carriers, will be much better suited to design and operate systems which can handle the differing

⁷ 47 U.S.C. Section 309(j)(3)D

⁸ 47 U.S.C. Section 309(j)(4)(c)(iii).

levels of interference than a DE. Such a procedure is certainly reasonable and promotes the participation of DEs in the auction and in the wireless market.

As another benefit to DEs (and all BIA participants) the Commission should, at least six months prior to the short-form application deadline, publish engineering reports identifying and quantifying the level of “unavoidable” cross-border interference in each affected PEA. Small businesses and other DEs most likely will not have the engineering resources (or capital to hire engineering resources) to identify such interference and plan accordingly. It is assumed the larger BIA applicants, particularly the large national carriers, will in fact have identified the potential for cross-border interference and factored the impact of such interference into their bidding strategies. This gives them a bidding advantage that the Commission could and should mitigate by publishing the information prior to the auction.

Finally, the Commission should revise its kinship affiliation rules⁹ to remove the presumption that members of the “immediate family” of a controlling interest have the ability to control the applicant. This presumption, in conjunction with the application disclosure requirements of 1.2112(b)(iv), has a significant adverse impact on the ability of many DEs to raise capital. In many instances the most reliable source of capital for small companies is the “friends and family” of its founders and officers. Requiring the disclosure of the gross revenues of all family members who invest in the DE actually discourages those family members’ from making an investment in the DE. A DE should be allowed to submit affidavits or other undertakings or certifications of family members who wish to invest in or provide financial support to the DE that they will not be actively engaged in the operations of the DE, instead of being forced to make public what in many instances is an individual’s private financial

⁹ 47 CFR 1.2110(c)(5)(iii)(B).

information. This small change in presumption alone could significantly increase a DE's ability to raise capital and certainly would reduce the administrative burden on Commission staff.

IV. The Commission Should Prohibit Coordinated Bidding in the BIA

With respect to the third question, we believe that coordinated bidding should not be allowed in the BIA. This opinion is based on our experience in Auction 97 and the fact that a post-auction determination of improper collusive bidding does nothing to compensate all bidders in the impaired auction for any damages the improper collusive bidding may have caused. With respect to the BIA with its two categories of licenses (restricted and unrestricted) and complex bidding structure, coordinated bidding can be used to cause great mischief. It would be far better under the circumstances to prohibit coordinated bidding in the BIA.

The prohibition should be designed to allow joint bidding of entities through a single bidding entity. However, the bidding arrangement should be carefully scrutinized before the auction begins to ensure that coordinated bidding will not be used to achieve improper goals. Entities seeking to coordinate bidding in the BIA should be required to demonstrate to the Commission prior to the beginning of the auction that their activities would be justified under the circumstances and will not be used in an improper manner.

CONCLUSION

The Commission has full statutory power and authority to revise its small business policies and other applicable rules and interpretations in the manner suggested herein. The overall purpose of Section 309(j) was to grant the Commission authority to develop a "competitive bidding methodology" to auction spectrum licenses¹⁰. This grant of authority is

¹⁰ 47 U.S.C. Section 309(j)(3).

broad and does not anticipate the design of one particular “competitive bidding methodology” that must be used in all auctions. Instead, the Commission is directed to “design and test multiple alternative methodologies under appropriate circumstances.”¹¹ Just as the Commission was not limited to a single auction design methodology, it was not bound to any earlier interpretations of ambiguous statutory language.¹²

The wireless telecommunications market today is far different than it was ten years ago, much less 22 years ago. The Commission’s small business policies need to be revised to take these changes into account in order to foster competition and entrepreneurship from DEs in the telecommunications market of the future. Operational flexibility and regulatory leniency for DEs is necessary, appropriate and justifiable under the circumstances.

In closing we would remind the Commission of its obligation under Section 309(j)(3)(E) to “ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed- . . . (ii) *after the issuance of bidding rules*, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services: “ We believe that the adequate time period should be at least 6 months after the final revised rules are published before the Form 175 applications for the BIA will become due. We also believe that the Commission staff will need at least 6 months after the Forms 175 are filed to make pre-auction DE eligibility determinations and that bidding arrangements, if allowed, will not be manipulative. We urge the Commission to refrain from cutting either of those periods short merely to expedite the beginning of the BIA. A

¹¹ *Id.*

¹² See Chevron *supra* Note 3.

delay in the BIA is warranted and necessary to protect the integrity of the BIA auction process and the ability of qualified DEs to participate in that “historic” event.

Respectfully submitted,

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