

**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 T-MOBILE USA, INC.

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COMMENTS OF T-MOBILE USA, INC.

I. INTRODUCTION AND SUMMARY

T-Mobile USA, Inc. (“T-Mobile”)¹ respectfully submits these comments in response to the Federal Communications Commission (“Commission”) Public Notice in the above-referenced proceeding (“*Public Notice*”).² T-Mobile commends the Commission for its initiative in seeking additional comment on the proposals offered in response to the *Part 1 NPRM*.³

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

² *Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules*, Public Notice, FCC 15-49 (rel. Apr. 17, 2015) (“*Public Notice*”).

³ *See Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29

Updating the Part 1 competitive bidding rules is a long and complex process, but an essential one given the importance of the upcoming 600 MHz incentive auction to a wide range of industry participants. By soliciting further input on alternative proposals and exploring other issues raised to date, the *Public Notice* ensures a more complete record for the Commission to evaluate and act upon the concerns raised by commenters in advance of that auction.

For its part, T-Mobile identified several important themes in its initial and reply comments for the Commission to consider as it reevaluates the Part 1 competitive bidding rules, including:⁴

- The designated entity rules require strengthening to ensure facilities-based competition that will benefit consumers. The Commission should preserve and strengthen the attributable material relationship (“AMR”) rule, adopt new eligibility requirements, and impose stricter unjust enrichment rules, reinforced with more specific build-out requirements, to prevent speculation or warehousing of valuable spectrum resources.
- The Commission should address the risks inherent in allowing bidders that share common, non-controlling interests to participate in an auction, as it proposes to do for commonly controlled entities. The Commission should require individuals or entities listed as disclosable interest holders on more than one short-form application to certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant. The Commission also should prohibit individuals from serving as an authorized bidder for more than one auction participant.
- The Commission should preserve its longstanding policy of permitting joint bidding arrangements on a case-by-case basis, including those among nationwide carriers. This policy is appropriately balanced and targeted to protect competition and consumers, and it ensures flexibility for all auction participants to explore the full range of business arrangements available to them to compete effectively both at auction and in the market.

FCC Rcd 12426 (2014) (“*Part 1 NPRM*”).

⁴ See Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (filed Feb. 20, 15) (“T-Mobile Comments”); Reply Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (filed Mar. 6, 2015) (“T-Mobile Reply Comments”).

With these organizing principles in mind, T-Mobile offers additional input below on the wide range of topics and questions raised in the *Public Notice*.

II. THE COMMISSION SHOULD ADOPT PROPOSALS IN THE RECORD TO IMPROVE THE DESIGNATED ENTITY RULES

The *Part 1 NPRM* took on the Herculean task of reevaluating the Commission's designated entity program. Perhaps not surprisingly, the record quickly was filled with a laundry list of proposals covering almost every aspect of the rules, from the size and type of bidding credits available to bidders to the scope of attribution requirements and unjust enrichment obligations, to name a few. Some commenters expressed a preference for stronger safeguards, while a small but vocal minority attacked the rules as not permitting sufficient flexibility for small businesses. T-Mobile agrees with the majority of commenters arguing for tightening the rules overall for future auctions.

To begin with, the Commission should preserve and strengthen the AMR rule, not eliminate it. Participation in the AWS-3 auction reflected the growing number of complex agreements between designated entities and those with whom they choose to enter into financial and operational relationships. The complicated relationships underpinning such agreements underscore the need for stricter regulatory parameters going forward to ensure that the designated entity program promotes facilities-based competition.⁵ The AMR rule helps serve this important function by ensuring that designated entities preserve the majority of their spectrum capacity for the provision of facilities-based service by competitive small businesses, while still allowing them flexibility to engage in agreements that are intended to provide access to valuable capital. Indeed, eliminating the AMR rule effectively would gut the purpose of the

⁵ See T-Mobile Comments at 13; T-Mobile Reply Comments at 8.

designated entity program if a designated entity could acquire spectrum at a discount and then turn around and lease all of the spectrum to a large carrier.

The only justification advanced in the record for repealing the AMR rule is an unsupported claim that it excessively interferes with designated entities' ability to acquire capital.⁶ The AWS-3 auction confirmed that this concern is illusory at best. A number of designated entities participated and won licenses in the AWS-3 auction; two spent a total of more than \$10 billion combined. Clearly, then, to the extent there is a barrier to access, it is not the AMR rule.

Moreover, several commenters agree with T-Mobile that the AMR rule should be strengthened.⁷ In retaining the AMR rule, the Commission should prohibit designated entities from leasing more than 25 percent of their spectrum in the aggregate to one or more lessees.⁸ Permitting leasing above the 25 percent mark offers too tempting an incentive for ineligible entities to try to bypass the unjust enrichment rules through the secondary markets framework. To deter such behavior, the Commission should attribute to any designated entity that exceeds the 25 percent leasing threshold all of the revenues of its lessees. Moreover, the proposed

⁶ See, e.g., Comments of Auction Reform Coalition, WT Docket No. 14-170, at 17-18 (filed Feb. 20, 2015) ("ARC Comments"); Reply Comments of Auction Reform Coalition, WT Docket No. 14-170, at 2, 8 (filed Mar. 6, 2015) ("ARC Reply Comments"); Comments of the DE Opportunity Coalition, WT Docket No. 14-170, at 16 (filed Feb. 20, 2015) ("DE Opportunity Coalition Comments"); Reply Comments of the DE Opportunity Coalition, WT Docket No. 14-170, at 3 (filed Mar. 6, 2015) ("DE Opportunity Coalition Reply Comments").

⁷ See, e.g., Comments of Blooston Rural Carriers, WT Docket No. 14-170, at 7 (filed Feb. 20, 2015) ("Blooston Rural Carriers Comments"); Reply Comments of Blooston Rural Carriers, WT Docket No. 14-170, at 11 (filed Mar. 6, 2015) ("Blooston Rural Carriers Reply Comments"); Comments of Taxpayers Protection Alliance, WT Docket No. 14-170, at 9-10 (filed Feb. 20, 2015) ("TPA Comments"); Comments of MediaFreedom.org, WT Docket No. 14-170, at 1-2 (filed Feb. 20, 2015) ("MediaFreedom.org Comments").

⁸ T-Mobile Comments at 4-5, 17; T-Mobile Reply Comments at 8.

threshold should affect eligibility for designated entity benefits for all of the entity's licenses, rather than on a license-by-license basis. Alternatively, the Commission could adopt a brightline rule against a designated entity leasing more than 25 percent of its spectrum in the aggregate in order to ensure that ineligible entities are not unjustly enriched through leasing arrangements. Both requirements would apply so long as the designated entity remains subject to the Commission's unjust enrichment obligations under Subpart Q of the rules for any of its licenses.

In addition to preserving and strengthening the AMR rule, the Commission should address gaps in its existing policies for determining eligibility for designated entity benefits. It is clear that the current standard for disclosable interest holders and affiliates is not sufficiently rigorous for evaluating such eligibility. Because the Commission's eligibility standard focuses strictly on whether the small business maintains control of the corporate entity, ineligible entities are able to hold substantial equity interests in a designated entity without having their revenues attributed for purposes of determining eligibility for benefits.

The Commission can address these gaps in its eligibility standard by considering in its analysis non-controlling interests in a designated entity that may potentially cause unjust enrichment of ineligible entities or enable ineligible entities to exercise undue influence. Specifically, T-Mobile urges the Commission to consider a modified version of AT&T's proposal to "[a]ttribute to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than 10 percent."⁹ Instead of adopting a bright line rule that requires such attribution at 10 percent, which may prove too restrictive for small businesses seeking access to capital, the Commission should adopt a

⁹ Comments of AT&T, Inc., WT Docket No. 14-170, at 17 (filed Feb. 20, 2015) ("AT&T Comments"); *see also* Reply Comments of C Spire, WT Docket No. 14-170, at 2-3 (filed Mar. 6, 2015) ("C Spire Reply Comments"); T-Mobile Reply Comments at 10-11.

rebuttable presumption that equity interests above 50 percent represent *de facto* control.¹⁰ A rebuttable presumption at the 50 percent mark will address the concerns raised by AT&T without unduly prohibiting business arrangements that do not result in unjust enrichment or undue influence. The proposed benchmark also would be consistent with the Commission's existing standards for evaluating *de jure* control.¹¹ Under the modified proposal, designated entities would be required to show in any application for designated entity benefits that their equity owners above 50 percent appropriately are insulated and cannot unduly influence the corporate entity. Otherwise, the designated entity would be required to disclose and attribute the revenues of the equity holder.

Concurrently, the Commission should require that a designated entity's controlling interest holder is properly invested in the business and is not relying solely on the financing of ineligible entities to gain access to discounted spectrum. In its initial and reply comments, T-Mobile proposed a 25 percent minimum equity requirement for the controlling interest holder in the designated entity, as well as a requirement that any loans utilized to achieve minimum equity thresholds be negotiated at arms-length.¹² These proposed rules carry no down side for small businesses seeking access to capital. If anything, they will help persuade potential investors and banks that the business is responsibly capitalized and an ideal target for investment. By ensuring that controlling interests are properly invested in their companies, the proposed rules also will help safeguard against abuse of the designated entity program.

¹⁰ T-Mobile Reply Comments at 10-11.

¹¹ See 47 C.F.R. § 1.2110(c).

¹² T-Mobile Comments at 15; T-Mobile Reply Comments at 6-7. See also C Spire Reply Comments at 3 (expressing support for T-Mobile's proposal for a 25 percent minimum equity threshold).

Finally, the Commission should adopt additional safeguards proposed by T-Mobile to better deter and prevent unjust enrichment. As the *Part I NPRM* recognizes, “[unjust enrichment] provisions will be as important as ever and...strong enforcement of [the designated entity rules] is critical.”¹³ T-Mobile’s proposals for stricter unjust enrichment rules coupled with more meaningful license obligations will tighten eligibility without undermining the Commission’s statutory directive to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services.

First, the Commission should adopt more meaningful standards for evaluating designated entity status. As T-Mobile proposed in its initial comments, the Commission should require designated entities to show some evidence of build-out activity, such as engaging in due diligence activities, hiring employees or contractors, conducting site acquisition surveys, entering into lease, co-location, or network share agreements, or negotiating with vendors, within one year of acquiring a license (or, for 600 MHz spectrum, within one year of clearing broadcast users).¹⁴ The proposed build-out demonstration would not be burdensome on licensees that actually intend to build-out their licenses. Indeed, the rule requires licensees simply to show some tangible steps toward construction—it does not require them to complete build-out, or even to start actual construction, within the first year of being licensed or of clearing incumbent users. Moreover, one year is the appropriate benchmark for the proposed obligation. A build-out showing at the one-year mark would provide the Commission with sufficient confidence that the licensee is taking meaningful steps toward constructing the license and providing facilities-based

¹³ *Part I NPRM* at ¶ 42.

¹⁴ T-Mobile Comments at 14; T-Mobile Reply Comments at 9; *see also* Reply Comments of the Competitive Carriers Association, WT Docket No. 14-170, at 9 (filed Mar. 6, 2015) (“CCA Reply Comments”).

service to consumers, rather than simply waiting for the five-year unjust enrichment clock to run out. It also would ensure sufficient opportunity for the Commission to intervene on behalf of the public interest where valuable spectrum is being warehoused.

Second, the Commission should strengthen unjust enrichment rules to better deter speculation and abuse of the designated entity program. The unjust enrichment period should cover the entire license term, and not just the first five years. As T-Mobile explained in its opening comments, a five-year unjust enrichment period has no rational justification in many cases where spectrum is not even available for use in the near term due to incumbent uses, such as with AWS-3 and 600 MHz spectrum.¹⁵ In fact, the Commission previously recognized that a ten-year unjust enrichment period is in the public interest.¹⁶

In addition to extending the unjust enrichment period, the Commission should: (i) modify the repayment schedule to require full repayment of the bidding credit, plus interest, if a licensee transfers a designated entity license to an ineligible entity at any time during the standard ten-year license term; and (ii) require repayment of the difference between the sales price of the license and the auction bid price, plus interest.¹⁷ Businesses that acquire spectrum with taxpayer-funded bidding credits for the purpose of providing facilities-based service should not then be able to obtain windfall profits from the sale of those licenses. Only the adoption of

¹⁵ T-Mobile Comments at 16-17.

¹⁶ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, at ¶¶ 36-37 (2006). The U.S. Court of Appeals for the Third Circuit vacated the Commission's previous modifications to the competitive bidding rules extending the unjust enrichment period from five years to ten years on the grounds that the modification had been accepted without proper notice and opportunity for comment as required by the Administrative Procedures Act. See *Council Tree Communications Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010).

¹⁷ T-Mobile Comments at 17; T-Mobile Reply Comments at 10.

strict penalties for the licenses acquired with bidding credits will ensure that the objectives of the designated entity program are fulfilled and that taxpayers are made whole in the event that a designated entity turns out to be a sham company.

III. THE PART 1 COMPETITIVE BIDDING RULES MUST ADDRESS AUCTION PARTICIPATION BY COMMONLY OWNED ENTITIES

The *Part 1 NPRM* proposed to codify the Commission’s competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application as well as to establish a new rule to prohibit entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction based on more than one short-form application.¹⁸ The *Public Notice* now seeks input on commenters’ proposals for the Commission to take a step further and apply similar proposals to entities with common, non-controlling interests.¹⁹ T-Mobile advanced such proposals in its initial and reply comments, and continues to urge the Commission to adopt them.²⁰

T-Mobile and other commenters recognize a glaring contradiction in the Commission’s treatment of commonly owned entities.²¹ While the *Part 1 NPRM* addresses at length the potential for harmful, coordinated bidding activity by commonly controlled entities during an auction, it is silent as to the exact same conduct by entities that are not commonly controlled but that share certain attributable ownership interests. Granted, the *Part 1 NPRM* was released prior to the completion of the AWS-3 auction. With the close of that auction, however, the need for

¹⁸ *Part 1 NPRM* at ¶ 98.

¹⁹ *Public Notice* at ¶ 27.

²⁰ T-Mobile Comments at 9-10; T-Mobile Reply Comments at 5.

²¹ *See, e.g.*, Comments of the Competitive Carriers Association, WT Docket No. 14-170, at 13 (filed Feb. 20, 2015) (“CCA Comments”); AT&T Comments at 5-6.

rules addressing auction participation by commonly owned entities is clear, and the Commission must act to foreclose further behavior exploiting the use of such entities to coordinate bidding activity.

Accordingly, T-Mobile reiterates its proposal for a certification requirement that would require individuals or entities listed as disclosable interest holders on more than one short-form application to certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant.²² The Commission also should require that authorized bidders on a short-form application be unique to that applicant—meaning that an individual would be prohibited from serving as an authorized bidder for more than one auction participant.²³ Not only is there strong support in the record for these proposals, they intuitively make sense for a blind auction format, where fairness and transparency are paramount.²⁴

While some commenters suggest limiting direct or indirect ownership or financial interests in multiple applicants, the above proposals will protect against unfair bidding behavior without restricting business flexibility or getting into tricky questions of appropriate ownership thresholds.²⁵ Moreover, as T-Mobile previously explained, the Commission's existing ownership disclosure rules offer a reasonable benchmark and practical guidance for establishing when the proposed certification would be required.²⁶ Consistent with Section 1.2112(a), any

²² T-Mobile Comments at 9-10; T-Mobile Reply Comments at 5.

²³ T-Mobile Comments at 9-10; T-Mobile Reply Comments at 5.

²⁴ *See, e.g.*, AT&T Comments at 3-4; CCA Reply Comments at 12; C Spire Reply Comments at 3; Blooston Rural Carriers Reply Comments at 9-10.

²⁵ *See* C Spire Reply Comments at 3.

²⁶ T-Mobile Comments at 9-10.

individuals or entities that have a 10 percent or greater interest in more than one applicant should be required to submit the certification with each of these applicants' short-form applications.²⁷

T-Mobile recognizes that the *Public Notice* notes a potential conflict between the proposed certification and existing competitive bidding rules.²⁸ T-Mobile does not perceive such a conflict. However, to the extent necessary, the Commission should modify the existing rules to be consistent with this proposed certification requirement.

IV. THE COMMISSION SHOULD NOT PROHIBIT JOINT VENTURES TO FORM A SINGLE BIDDING ENTITY, BUT SHOULD PROHIBIT COORDINATED BIDDING BY MULTIPLE BIDDERS IN THE SAME GEOGRAPHIC MARKETS

The *Public Notice* seeks comment on a wide range of alternative proposals concerning joint bidding arrangements. Commenters are divided on the *Part 1 NPRM's* joint bidding proposals, partly because there is widespread confusion in the record concerning what types of arrangements they cover. Specifically, commenters are confused whether the term “joint bidding arrangements” refers only to coordinated bidding by multiple bidders or whether it also covers the formation of a single bidder comprised of multiple entities in a joint venture or similar arrangement.

The purpose of the joint bidding rules is to permit applicants to combine resources and to share risk, not to unfairly coordinate during an auction. Accordingly, the Commission should continue to permit joint bidding arrangements that allow entities—including nationwide carriers—to join together in a joint venture or similar entity to bid in an auction as a single bidder. The record reflects a widely shared view that these kinds of arrangements can have pro-

²⁷ 47 C.F.R. § 1.2112(a).

²⁸ *Public Notice* at ¶ 27 (noting a potential conflict with 47 C.F.R. §§ 1.2105(c)(1) and 1.2105(c)(4)).

competitive benefits both for auctions and for the wireless marketplace.²⁹ Moreover, not a single commenter supports a blanket prohibition on joint ventures among the nationwide providers. To the extent that the Commission determines to limit bidding joint ventures among nationwide carriers, however, T-Mobile agrees with Sprint that the Commission should carve out an exception for the 600 MHz auction to permit such arrangements in Partial Economic Areas where the participating parties collectively hold less than 45 MHz of low-band spectrum on a population-weighted basis.³⁰ As Sprint notes, this exception is consistent with the Commission's approach to evaluating spectrum concentration in the wireless marketplace, particularly for valuable low-band spectrum.³¹

That said, the Commission should clarify its joint bidding rules to prohibit the use of joint bidding arrangements by two or more bidders who are bidding in the same geographic market as well as between two or more bidders with one or more common attributable owners.

Commenters widely protest that the existing joint bidding rules permit coordinated bidding activity that could harm other bidders and the public interest. AT&T, for example, appropriately argues that some entities use the joint bidding rules to “put themselves in a position of

²⁹ See, e.g., Comments of Sprint Corporation, WT Docket No. 14-170, at 2-3 (filed Feb. 20, 2015) (“Sprint Comments”); Comments of the Rural Wireless Association, WT Docket No. 14-170, at 11 (filed Feb. 20, 2015) (“RWA Comments”); CCA Comments at 13-14; ARC Comments at 26.

³⁰ See Sprint Comments at 11-12; Reply Comments of Sprint Corporation, WT Docket No. 14-170, at 4 (filed Mar. 6, 2015) (“Sprint Reply Comments”); T-Mobile Reply Comments at 14.

³¹ Sprint Comments at 12. In the event that the Commission feels it necessary to evaluate bidding joint ventures on a case-by-case basis, T-Mobile supports CCA's proposal that the Commission implement a prior approval process for joint ventures before the short-form deadline. Such an approach has the advantage of providing bidders with clear guidance, well ahead of short-form submission, regarding which arrangements would be deemed harmful to competition and thus prohibited. As such, the proposed prior approval process would enhance regulatory efficiency and guarantee predictability for bidders that commit significant resources to spectrum auctions.

unassailable advantage through their coordinated bidding activity.”³² This is clearly not what the Commission intended in adopting the joint bidding rules, and it should act quickly to foreclose such behavior. As AT&T suggests in the record, to the extent two or more entities want to coordinate their bidding activities in the same geographic market, they may form a bidding consortium that allows them to channel their bidding activity through a single entity, and then divide licenses after the auction.³³ There is no need to prohibit joint bidding arrangements that do not cover the same geographic markets, however, since there is not the same risk of harm to the auction process or distortion of demand.

³² AT&T Comments at 6.

³³ *Id.* at 7.

V. CONCLUSION

The Commission should proceed swiftly to revise the Part 1 competitive bidding rules consistent with the policies and proposals described above. Indeed, as has been made abundantly clear in the record, the Commission's reevaluation of the Part 1 rules must not derail or delay the upcoming 600 MHz incentive auction. Competitive bidding rules consistent with the framework proposed herein will ensure a fair, transparent, and timely auction for all bidders.

Respectfully submitted,

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