

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Updating Part 1 Competitive Bidding Rules)	WT Docket No. 14-170
)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission’s Rules and/or for Interim Conditional Waiver)	RM-11395
)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures)	WT Docket No. 05-211
)	
)	

REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

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May 21, 2015

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REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”) hereby submits the following reply comments in connection with the Commission’s *Public Notice* seeking further comment on certain issues raised in the above-captioned proceedings regarding changes to the competitive bidding framework in Part 1 of the Commission’s Rules.¹

I. INTRODUCTION AND SUMMARY

Many of the commenters in this proceeding agree on the importance of designated entity (“DE”) participation in spectrum auctions, and particularly in the upcoming incentive auction,

¹ *Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170; GN Docket No. 12-268; RM-11395; WT Docket No. 05-211, Public Notice, FCC 15-49 (rel. Apr. 17, 2015) (“*Public Notice*”); *see also Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014) (“*NPRM*”).

which presents the last opportunity for the foreseeable future to acquire below-1-GHz spectrum at auction. Like CCA, many commenters recognize that in order to adhere to the Congressional directives of Section 309(j) of the Communications Act of 1934, as amended (the “Act”)—which prompts the Commission to auction licenses in a manner that avoids the excessive concentration of spectrum licenses and to provide economic opportunity to a wide variety of applicants—the Commission must reform the DE program to counterbalance the rampant consolidation in the wireless industry by the two largest carriers and the skyrocketing costs of scarce spectrum resources.² Commenters also confirm CCA’s observation that DE participation in past auctions has been proven to enhance competition.³ Following the initial comment round, CCA filed a study by Professors Peter Cramton and Pacharasut Sujarittanonta deconstructing bidding and prices for Auction No. 97, and demonstrating the impact of DEs in the auction and AT&T and Verizon’s dominance.⁴ In fact, the study found that DE discounts significantly increased auction revenue.⁵

² See, e.g., Council Tree Investors, Inc., Comments in Response to Public Notice Request for Further Comment, WT Docket No. 14-170 at 3-4 (filed May 14, 2015) (“CTI Comments”); Comments of King Street Wireless, L.P., WT Docket No. 14-170 at 3 (filed May 14, 2015) (“King Street Comments”); Comments of United States Cellular Corporation, WT Docket No. 14-170 at 6-7 (filed May 14, 2015) (“USCC Comments”); Multicultural Media, Telecom and Internet Council, Response to the FCC’s Request for Further Notice, WT Docket No. 14-170 at 5 (filed May 15, 2015) (“MMTC Comments”); see also 47 U.S.C. § 309(j)(3)(B).

³ See CTI Comments at 25-26 (providing data demonstrating the incentive that bidding credits provides for increased bidding, generating additional competition); USCC Comments at 4-5; King Street Comments at 2.

⁴ See *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, *et al.* (filed May 20, 2015) (attaching Peter Cramton and Pacharasut Sujarittanonta, *Bidding and Prices in the AWS-3 Auction* (May 2015) (“Cramton Study”)).

⁵ Cramton Study at 15.

The Commission thus should be careful not to modify the competitive bidding rules in ways that will unnecessarily restrict DE eligibility without any corresponding benefit and should resist the urge to drastically curtail the availability of small business benefits as a knee-jerk reaction to the criticisms of particular DEs in Auction No. 97. Restricting DE eligibility as some commenters propose would hamper the ability of DEs to access the level of financing needed to meaningfully compete with the largest carriers for spectrum at auction.⁶ Since the inception of the DE program, the Commission has always understood that, as a practical matter, DEs would need financial backing from investors that can provide access to the significant amounts of capital needed to compete and succeed in the wireless marketplace.⁷ Indeed, the wireless industry is highly capital intensive.⁸ Access to capital is even more critical today, and not just for the smallest carriers, in light of the dominance of the two largest carriers and the need for greater spectrum to accommodate the bandwidth-intensive services demanded by consumers.

Thus, CCA reiterates its request for the Commission to repeal the attributable material relationship (“AMR”) rules and to use *de jure* and *de facto* control standards to evaluate DE eligibility—the approach supported by the record. Doing so will afford greater flexibility to DEs to implement innovative business plans that can facilitate deployment of diverse wireless services. Nevertheless, this greater level of flexibility should be balanced with targeted unjust enrichment rules and other safeguards to ensure the buildout of DE spectrum and to deter the abuse of DE benefits, while avoiding overly stringent requirements that could unreasonably

⁶ See Harold Furchtgott-Roth, *Economic and Regulatory Perspectives on Structuring Designated Entity Programs for Commission Auctions* 26 (May 2015), attached to USCC Comments.

⁷ See, e.g., CTI Comments at 23; Comments of Sprint Corporation, WT Docket No. 14-170 at 3 (filed May 14, 2015) (“Sprint Comments”).

⁸ See CTI Comments at 12.

hinder investment in DEs. In addition, there is broad support in the record for maintaining and expanding small business bidding credits, including retention of the exemption to the affiliation rules for tribal entities. CCA opposes proposals that would significantly reduce the number of entities eligible for DE benefits, most notably the extremely limited joint proposal put forth by AT&T and rural carriers.

Finally, CCA supports commenter proposals to continue to allow joint bidding arrangements between nationwide and non-nationwide carriers, and DEs and non-DEs. CCA endorses Sprint's proposal to align eligibility standards for joint bidding arrangements with those for reserve-spectrum eligibility. Pro-competitive joint bidding arrangements would not threaten auction integrity, and this integrity can be better protected through the adoption of targeted measures to prevent collusive bidding activity.

II. FLEXIBILITY AFFORDED BY THE REPEAL OF THE AMR RULES CAN BE TEMPERED WITH REASONABLE MEASURES TO PREVENT ABUSE OF THE DE RULES

In response to the *Public Notice*, CCA reiterated support for the repeal of the strict prohibitions of the AMR rule, which has been echoed in other comments to the *Public Notice*.⁹ There is broad support in the record for increased flexibility for DEs to implement a wide range of innovative business plans that could otherwise be prohibited by the current restrictions on leasing or wholesaling spectrum acquired with DE benefits.¹⁰ Specifically, CCA called for loosening the restrictions on third-party access to spectrum acquired using bidding credits.¹¹ Council Tree similarly emphasizes the pro-competitive benefits of a potential wholesale model

⁹ See, e.g., USCC Comments at 11; CTI Comments at 33; MMTC Comments at 12.

¹⁰ See USCC Comments at 12-13; CTI Comments at 34; MMTC Comments at 13.

¹¹ Comments of Competitive Carriers Association, WT Docket No. 14-170 at 8 (filed May 14, 2015) ("CCA Comments").

by a DE.¹² For example, separate ownership and control of wireless facilities and infrastructure that can be utilized by competitive carriers, like the LightSquared model, could promote competition.¹³ As U.S. Cellular notes, absolute restrictions on the amount of spectrum a DE may lease stifles competition.¹⁴

Eligibility for DE benefits should instead be determined based on the Commission's well-established *de jure* and *de facto* control standards and affiliation rules, which will afford flexibility while allowing applicants to rely on guidance in the Commission's abundant precedent on the indicia of control.¹⁵ A few commenters propose other changes to the attribution rules that would apply in determining small business eligibility. For instance, T-Mobile proposes a 25 percent minimum equity requirement for the controlling interest holder in a DE, as well as a requirement that any loans utilized to achieve minimum equity thresholds be negotiated at arms-length.¹⁶ A minimum equity requirement and arms-length negotiations could be reasonable and compatible as a supplement to the *de jure* and *de facto* control standards, as they would ensure that the controlling interests in the DE are sufficiently committed and have the financial wherewithal to utilize the spectrum. At the same time, the Commission should be very careful not to set a minimum equity requirement at a level that hampers the ability to attract investors. While CCA has not settled on a percentage here, a 25 percent minimum equity requirement will likely be a disincentive to investors, as cautioned above.

¹² CTI Comments at 34.

¹³ *Id.* at 34.

¹⁴ USCC Comments at 13.

¹⁵ *See, e.g.*, USCC Comments at 12; King Street Comments at 7-8.

¹⁶ Comments of T-Mobile USA, Inc., WT Docket No. 14-170 at 6 (filed May 14, 2015) ("T-Mobile Comments").

Moreover, as CCA has maintained throughout this proceeding, other safeguards are needed to balance the flexibility that would result from the repeal of the AMR rules with protections against arbitrage and other potential abuse of DE benefits by ineligible entities. Specifically, CCA has supported requirements for DEs to ensure that they are utilizing spectrum won at auction to deter speculators from using DE credits to acquire and warehouse spectrum, including T-Mobile's proposal to require evidence of buildout activity within one year of acquiring the license or upon clearing spectrum incumbents.¹⁷ However, CCA cautions, and T-Mobile agrees, that any such requirements should not create undue burdens for DEs that are legitimately using the spectrum.¹⁸

Unjust enrichment provisions are another way to safeguard against abuse. While CCA recognizes the need for strong unjust enrichment protections in the Commission's rules,¹⁹ CCA opposes proposals to extend unjust enrichment penalties to apply throughout the entire license term.²⁰ The Commission has tried this before, and the consensus view previously was that a 10-year unjust enrichment payment period was too restrictive to facilitate a successful DE program.²¹

Further, certain commenters propose other onerous restrictions and burdensome attribution criteria that would unnecessarily limit opportunities for small businesses. For

¹⁷ CCA Comments at 10; T-Mobile Comments at 7.

¹⁸ T-Mobile Comments at 7.

¹⁹ CCA Comments at 11 (suggesting the Commission extend the unjust enrichment period while proportionately maintaining the traditional descending repayment schedule).

²⁰ *See id.* at 8; *see also* CTI Comments at 31 (“lengthening the unjust enrichment penalty period will devastate DEs’ access to capital”).

²¹ *See Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 245, 256 n.10 (3d Cir. 2010) (vacating the 10-year repayment schedule based on inadequate notice but noting that the Commission did “not appear to have thoroughly considered the impact of the extended repayment schedule on DEs’ ability to retain financing”).

instance, AT&T proposes an attribution threshold of 10 percent for investors whose revenues would be counted against a small business for purposes of determining DE eligibility.²² CCA agrees with the many commenters who observe that such a threshold would be far too constraining and would significantly hinder small businesses from attracting the capital and raising the funds needed to have a reasonable chance of success in spectrum auctions.²³ Other proposals, such as those that prohibit a DE's investors from acquiring the licenses in the future if the investor is not itself qualified as a small business at the time of the license assignment, or from leasing or wholesaling such spectrum to those investors, are also too restrictive.²⁴ These kinds of requirements would act as significant disincentives to investment, which would exacerbate the challenges that competitors and new entrants face in raising funds needed to participate meaningfully in the competitive bidding process.

III. THE COMMISSION SHOULD MAINTAIN EXISTING BIDDING CREDITS AND EXPAND THE AVAILABILITY OF SUCH CREDITS

Commenters agree with CCA that bidding credits are an effective way to promote competition and increased auction participation by small carriers, consistent with the Congressional intent of Section 309(j) of the Act.²⁵ As CCA urged in its comments to the *Public Notice*, the FCC should maintain small business bidding credits, and it should foster access to these credits by a greater number of entities through increases in the applicable revenue

²² See *Public Notice* ¶ 10 n.35.

²³ See, e.g., Comments of The Blooston Rural Carriers, WT Docket No. 14-170 at 12 (filed May 14, 2015) (“Blooston Carriers Comments”); T-Mobile Comments at 5.

²⁴ See Blooston Carriers Comments at 11.

²⁵ See, e.g., Public Knowledge, Notice of *Ex Parte* Communications, WT Docket No. 14-170 at 2 (filed May 18, 2015) (“Public Knowledge *Ex Parte*”); USCC Comments at 6-7.

thresholds based on the GDP price index.²⁶ CCA also suggested defining the scope of small businesses that would qualify for bidding credits using the SBA’s employee-based size standard, as another way to expand the scope of eligible entities that can compete at auction with the two largest carriers.²⁷ Council Tree rejects this proposal as too broad and encompassing entities that have gross annual revenues that exceed the revenue-based size standard being considered by the Commission.²⁸ But that, in essence, is the point of CCA’s alternative proposal. In this capital intensive and continually consolidating industry, a “small business” may need to be defined in a more expansive fashion that increases access to bidding credits in a way that expands beyond parties that meet the smaller gross revenue thresholds. In any event, even if the Commission finds that the SBA definitions are not appropriate in this context, it should explore other proposals for enlarging the number of qualifying businesses for whom the playing field needs to be leveled, given the state of competition in wireless markets.

Public Knowledge proposes to expand the availability of bidding credits for new entrants without regard to the entity’s revenues, to position these new entrants to successfully compete against the largest incumbent providers.²⁹ As mentioned, CCA is generally supportive of proposals to expand access to bidding credits to a larger pool of competitors to the largest carriers. However, CCA does not endorse the establishment of a separate credit mechanism for new entrants, which would be complicated to administer and could lead to unintended consequences and possible gaming. For similar reasons, CCA also does not support proposals

²⁶ CCA Comments at 13.

²⁷ *Id.* at 14.

²⁸ CTI Comments at 20-21.

²⁹ Public Knowledge *Ex Parte* at 2-3.

for the establishment of a separate rural telephone company bidding credit.³⁰ Instead, CCA maintains a preference for the simple and straightforward approach of maintaining “small business” as the touchstone of any bidding credit mechanism. Casting a wider net by expanding the small business definition, as discussed above, would capture smaller entities that are new entrants or that serve rural areas without adding the administrative complexity of separate credits.

Correspondingly, CCA opposes efforts to significantly reduce the number of entities that can qualify for DE benefits. CCA supports preserving and strengthening opportunities for competitors, including through tribal participation in the provision of spectrum-based services. In response to the *Public Notice*, representatives of Native American Tribes and Alaska Native Corporations urge the Commission to maintain the tribal exemption to the affiliation rules to determine eligibility for small business bidding credits.³¹ The Commission’s rules exempt tribes from consideration as affiliates of an applicant that are owned and controlled by such tribes for purposes of determining eligibility for small business bidding credits.³² Unlike other race-based preferences that the Commission had previously adopted and that were determined to be inconsistent with the Supreme Court’s holding regarding the standard for racial classifications, the Commission determined that its tribal exemption is valid based on the unique legal status of

³⁰ See, e.g., Blooston Carriers Comments at 3; Comments of the Rural Carrier Coalition, WT Docket No. 14-170 at 5 (filed May 14, 2015); Comments of the Rural Wireless Association, Inc. and NTCA – The Rural Broadband Association, WT Docket No. 14-170 at 6-7 (filed May 14, 2015).

³¹ See, e.g., Comments of Doyon, Limited and Chugach Alaska Corporation, WT Docket No. 14-170 at 3-4 (filed May 14, 2015); Comments of Leech Lake Telecommunications Company, WT Docket No. 14-170 at 2 (filed May 13, 2015); Comments of Native Public Media, WT Docket No. 14-170 at 5 (filed May 14, 2015).

³² See 47 C.F.R. § 1.2110(c)(5)(xi).

the tribes.³³ CCA therefore agrees that the Commission should maintain the tribal exemption in the rules.

CCA also urges the Commission to decline to adopt the joint proposal for an alternative bidding credit mechanism put forth by AT&T and the Rural-26 DE Coalition. AT&T and the Rural-26 DE Coalition's bidding criteria are far too limiting, especially the \$10 million cap. Notably, AT&T previously proposed a cap on DE bidding credits of \$32.5 million.³⁴ Through these proposals, AT&T transparently attempts to gerrymander the eligibility for bidding credits to exclude a significant portion of carriers and entities, thereby limiting the number of competitors that could conceivably compete with AT&T on a level playing field in a spectrum auction. Furthermore, any proposal that limits bidding credit eligibility to a subset of preexisting operators is incongruous with the Act's directive to ensure that spectrum licenses are disseminated among a wide variety of applicants and reaffirmation of Commission authority to adopt "rules of general applicability . . . concerning spectrum aggregation that promote competition."³⁵ CCA agrees with commenters that recognize that proposals to cap the amount of bidding credit discounts or total bid amounts for DEs only serve to tip the scales in favor of larger and deep-pocketed incumbents³⁶ and hamper the growth of competitive wireless services.³⁷

³³ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136 ¶ 34 (1995); see also *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995).

³⁴ See *Public Notice* ¶ 10, n.42.

³⁵ 47 U.S.C. §§ 309(j)(3), (4), (17).

³⁶ See CTI Comments at 30.

³⁷ See MMTC Comments at 16.

IV. JOINT BIDDING RULES SHOULD BE REFORMED TO PROMOTE GREATER COMPETITION WHILE TARGETING COLLUSIVE BIDDING BEHAVIOR

Like CCA, other commenters urge the Commission to continue to allow pro-competitive joint bidding arrangements and to reject proposals that would prohibit all arrangements between DEs and non-DEs or between nationwide and non-nationwide carriers.³⁸ CCA agrees that joint bidding affords applicants flexibility to combine resources and to share risk, which in turn can help achieve the economies of scale needed to acquire critical spectrum resources.³⁹ Along with bidding credits, allowing for flexible business arrangements is another way the Commission can facilitate opportunities for a wide range of applicants to participate in auctions and compete for spectrum with the largest carriers.

Ensuring that such opportunities exist in the upcoming 600 MHz incentive auction is particularly imperative, given the Commission's findings regarding the importance of competitors having access to below-1-GHz spectrum.⁴⁰ Thus, CCA agrees with Sprint's proposal as it understands it to align the eligibility standards for joint bidding arrangements with those for reserve-spectrum eligibility in the incentive auction.⁴¹ Specifically, should the Commission adopt rules limiting joint bidding arrangements, it should exempt from these rules arrangements between or among any non-nationwide entities or nationwide entities that hold less than 45 MHz of below-1-GHz spectrum in a Partial Economic Area, so long as the arrangement is disclosed to the Commission prior to the commencement of the auction. If the nationwide parties to the joint bidding arrangement would in the aggregate have less than 45 MHz of below-

³⁸ See Sprint Comments at 2-3; T-Mobile Comments at 11; Public Knowledge *Ex Parte* at 5.

³⁹ See Sprint Comments at 3; T-Mobile Comments at 11.

⁴⁰ See *Policies Regarding Mobile Spectrum Holdings*, Report and Order, 29 FCC Rcd 6133 ¶ 58 (2014) (“*MSH Order*”).

⁴¹ See Sprint Comments at 4-5 (citing *MSH Order* ¶¶ 174-78; 286-88).

1-GHz spectrum in the areas in which they proposed to bid jointly, the Commission would allow the arrangement. T-Mobile supports this general framework as well.⁴²

CCA acknowledges the need to balance bright-line rules that provide certainty with flexibility to allow a wide range of pro-competitive arrangements that may require case-by-case determinations.⁴³ Bright-line rules should be established prior to the commencement of the auction, as CCA suggested in its opening comments, to avoid delay in the start of the incentive auction.⁴⁴ However, CCA supports a more extensive review of such arrangements in the context of post-auction long-form applications, as has been the typical practice in previous spectrum auctions.

Many commenters reinforce CCA's position that the Commission should act on a targeted basis to mitigate collusion concerns and should refrain from broadly prohibiting joint bidding.⁴⁵ CCA strongly opposes proposals by AT&T and King Street to ban all joint bidding arrangements.⁴⁶ Prohibiting joint bidding arrangements altogether and requiring the formation of a single bidding entity, as AT&T proposes, severely limits parties' flexibility. Such extreme measures would undercut the public interest benefits that the Commission has acknowledged exist with collaborative approaches among carriers to use spectrum efficiently and to ensure that services can be deployed to consumers quickly and with broad coverage.⁴⁷ And doing so could inadvertently create disincentives and uncertainty regarding other pro-competitive arrangements

⁴² See T-Mobile Comments at 12.

⁴³ See, e.g., CTI Comments at 23.

⁴⁴ CCA Comments at 19.

⁴⁵ See, e.g., Sprint Comments at 6; T-Mobile Comments at 10-11; USCC Comments at 10-11.

⁴⁶ See AT&T Comments at 11; King Street Comments at 8.

⁴⁷ See, e.g., Sprint Comments at 4.

between applicants, such as spectrum and network sharing arrangements, roaming agreements or joint initiatives to serve underserved areas.

T-Mobile emphasizes that joint bidding arrangements are not intended to be used to unfairly coordinate during an auction, and there is no need to unreasonably restrict joint bidding.⁴⁸ CCA agrees. The concerns raised after the close of Auction No. 97 related to possible coordinated bidding behavior should be addressed instead through targeted measures directed at regulating bidding activity, rather than limiting flexibility in joint bidding structures or eligibility for DE benefits.

CCA agrees with commenters advocating for the adoption of certification requirements and “firewall” approaches to prevent collusive auction behavior. For instance, adopting the certification requirement proposed by U.S. Cellular that prohibits a person with knowledge of or involvement in the bidding strategy of one applicant, from having such knowledge of or involvement in the bidding strategy of any other applicant in the same auction, would directly address concerns regarding anti-competitive behavior, without precluding pro-competitive business arrangements.⁴⁹ Similarly, T-Mobile proposes that the Commission 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.⁵⁰ T-Mobile also proposes to prohibit individuals from serving as an authorized bidder for more than one auction participant.⁵¹ Sprint offers a refinement to this

⁴⁸ T-Mobile Comments at 11.

⁴⁹ USCC Comments at 11; *see also* AT&T Comments at 16 (regarding a requirement to provide an anti-collusion certification that the applicant is not privy to any other applicant’s bids or bidding strategy).

⁵⁰ T-Mobile Comments at 10-11.

⁵¹ *Id.* at 12.

proposal, which would prohibit entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same geographic area with more than one short-form application, in order to eliminate the risk of commonly-controlled entities coordinating bids and gaining an unfair advantage over other bidders.⁵² CCA urges the Commission to consider all of these measured approaches that are directed at improper behavior, rather than to sweep broadly to prohibit joint bidding entirely.

V. CONCLUSION

There is strong record support for the Commission to modify the competitive bidding rules to enhance and broaden opportunities for a wide range of carriers to acquire spectrum at auction and to access critical spectrum resources. CCA respectfully requests that the Commission consider the proposals in this reply, and in CCA's other pleadings in the above-captioned dockets, to expand the availability of DE benefits while taking a targeted approach to adopting effective safeguards against anti-competitive behavior and abuse of DE benefits.

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⁵² Sprint Comments at 6.