

**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
)	
Petitions 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 UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation (“U.S. Cellular”) submits these reply comments in response to the Public Notice released April 17, 2015 in the above-captioned proceedings and the comments filed in response to the Public Notice.¹ In its initial comments, U.S. Cellular strongly supported the existing Designated Entity (“DE”) program, noting that participation in that program has been vital to its success as one of the few remaining mid-sized wireless carriers. Further, we demonstrated that the DE program is grounded in the Communications Act, and that its value has been proven over time by DE contributions to wireless service, including U.S. Cellular’s provision of 4G services in cooperation with its DE partner, King Street Wireless, L.P. We also underscored that the rules that were in place from 2006 to 2010, which were antithetical

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. Apr. 17, 2015) (“Public Notice”). Unless otherwise noted, all comments cited herein are those filed in response to the Public Notice on May 14, 2015.

to DE formation, resulted in a drastic reduction in DE auction participation. In short, we demonstrated a need for leaving the basic structure of the DE program in place.

In addition, we supported the Commission’s proposal in last year’s Notice of Proposed Rulemaking (“NPRM”) to repeal the “attributable material relationship” rule to better enable DEs to participate effectively in the provision of communications services.² We also proposed that the Commission correct “collusion” abuses alleged to have occurred in Auction 97 by clarifying that its rules prohibit coordinated bidding among multiple auction applicants. Further, we strongly opposed proposals, such as draconian “caps” on bidding credits, which would essentially end the DE program in the guise of “reforming” it. We reiterate all of those points. Having reviewed the other comments filed in response to the Public Notice, we believe the Commission should focus on the following central issues in considering changes to its DE rules.

I. THE COMMISSION SHOULD CHANGE THE AUCTION PROCESS, NOT THE DE PROGRAM

Everyone understands that the recently-concluded AWS-3 auction has become a center of controversy owing to alleged “collusion” abuses among three of the bidders in that auction. In its comments, U.S. Cellular offered a solution to this problem for future auctions – namely, amending Section 1.2105(a)(2)(viii) of the Commission’s rules to require that those persons with knowledge of, or involvement in, the bidding strategy of one applicant may not have knowledge of, or involvement in, the bidding strategy of any other applicant in the same auction.

Other commenters made similar proposals.³ The Commission should adopt a version of this proposal in order to forbid coordinated bidding among multiple applicants, and thereby address the issues related to Auction 97. The DE program is not a problem, and would not have been controversial but for Auction 97. Accordingly, we urge the Commission to place that

² See *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, 12434 (2014) (“NPRM”).

³ See, e.g., Comments of T-Mobile USA, Inc. (“T-Mobile”) at 9-13; Comments of AT&T at 12-15.

auction in perspective, remedy any actual or perceived bidding abuses for future auctions, and return to the reform agenda set out in the NPRM.

II. THE COMMISSION SHOULD RECOGNIZE THE VALUABLE ROLE OF DE INVESTORS

In its comments, U.S. Cellular described the importance of its involvement in the DE program to its continued success as a mid-sized carrier, as well as the value of U.S. Cellular's participation in the DE program to its DE partners and the public. We noted that there is no "magic formula" whereby the DE rules can be changed to prevent investors in DEs from receiving any benefit from the arrangement while at the same time enabling the participation of minorities and small businesses in the provision of wireless service on a relatively large scale.

These arguments received powerful reinforcement by other commenters. For instance, the Multicultural Media, Telecom and Internet Council ("MMTC") demonstrated that the present DE structure, with modest improvements, can "increase competition and foster meaningful diversity in the ownership and control of the public's spectrum."⁴ In its comments, Council Tree Investors, Inc. ("Council Tree") described in detail the DE statutory mandate under Section 309(j) of the Communications Act. It also discussed how the "history of the DE program illustrates that DE alliances between small businesses and large investors have long played an important role in spectrum auctions,"⁵ and noted how such alliances are even more crucial given the current state of the industry. Specifically, Council Tree explained how, as "the large incumbents have further consolidated their collective grip on the wireless industry, DE alliances with large investors have evolved to become the only pragmatic way to bring new entrant competition to those same massive companies."⁶

⁴ Response to the FCC's Request for Further Notice of the Multicultural Media, Telecom and Internet Council, WT Docket No. 14-170, *et al.*, p. 5 (May 15, 2015) ("Comments of MMTC").

⁵ Comments of Council Tree at iv.

⁶ *Id.* at 25.

The MMTC and Council Tree comments, like those of U.S. Cellular, demonstrate conclusively that “scale and scope” matter to whether a DE program will be meaningful. Similarly, the Competitive Carriers Association stressed “that competition in the wireless industry is based in significant part on achieving sufficient scope and scale within a market to effectively compete against the two largest incumbents.”⁷ The present rules, as appropriately amended, are the proper way to ensure the DE program can continue to serve the public interest.⁸

III. THE COMMISSION MUST REJECT PROPOSALS THAT WOULD UNDERMINE THE DE PROGRAM AND THE STATED GOALS OF THIS PROCEEDING

In the NPRM, the Commission made a series of proposals designed to “assure that [its] Part 1 rules continue to promote [its] fundamental statutory objectives.”⁹ In particular, the Commission proposed to update its rules in ways that “reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today’s communications marketplace.”¹⁰ Then, a few months after the release of the NPRM, Auction 97 concluded, and certain carriers began to allege that the results of that auction demonstrate the need to overhaul the entire DE program in ways directly contrary to the Commission’s stated objectives, and to the detriment of those entities Congress intended the program to benefit.

As noted, however, the current DE program did not cause, or even permit, the Auction 97 outcomes complained of by these carriers. For instance, AT&T alleges that “DISH exploited the

⁷ Comments of Competitive Carriers Association (“CCA”) at 16; *see* Comments of King Street Wireless, L.P. (“King Street”) at 14 (“Without scale, newcomers to the industry simply cannot compete.”).

⁸ U.S. Cellular notes the proposed 25% bidding credit for rural telephone companies, which would be either in addition to the credits these entities are already entitled to as small businesses or granted to entities that are too large to be treated as small businesses under the rules. U.S. Cellular has no objection to such proposals, but urges the Commission not to allow more than one bidding credit per applicant in any auction and to not consider such proposals as a replacement for the existing DE program, which fulfills broader social objectives that would not be served by bidding credits for rural telephone companies that do not qualify as small businesses.

⁹ NPRM, 29 FCC Rcd at 12427.

¹⁰ *Id.* at 12430.

bidding rules to park eligibility, distort demand, and discourage *bona fide* small businesses from participating.”¹¹ But AT&T and other commenters wholly fail to explain how these alleged abuses arose as a result of the current DE program, rather than due to potential manipulation of the Commission’s other competitive bidding rules.¹² Nevertheless, they claim that, “[w]ithout major reform of the DE rules, such gamesmanship could be repeated in future auctions.”¹³ In other words, while the issues with Auction 97 could easily be addressed by prohibiting coordinated bidding among multiple applicants, these carriers use the results of that auction as a pretext for their efforts to further disadvantage potential new competitors.¹⁴

For instance, despite the Commission’s repeated findings that bidding credits are the most effective way to satisfy the mandates of Section 309(j),¹⁵ several commenters seek to undermine this crucial competitive safeguard by proposing to “cap” the amount of bidding credits a DE may claim for a given auction. Like U.S. Cellular, MMTC noted how the proposed caps would violate the statutory mandate that the Commission ensure that its competitive bidding rules adequately promote “economic opportunity and competition”¹⁶ because such caps “would serve to impede the ability of DEs to compete in a highly competitive marketplace...”¹⁷ As

¹¹ Comments of AT&T at 7.

¹² See Comments of King Street at 10 (“Two nationwide carriers were particularly critical of the Commission’s DE program, even while they recognized tacitly that the overarching problem with the Auction was collusion.”).

¹³ Comments of AT&T at 2; see Comments of the Rural-26 DE Coalition at i (“Results of the recently concluded AWS-3 auction are an all too obvious indicator of the need for reform of the competitive bidding rules and the FCC’s Designated Entity program.”).

¹⁴ See, e.g., Comments of King Street at 3 (“[M]any of the purported ways to improve the program that have been put forward by nationwide carriers are, in effect, efforts to undermine the program rather than to correct anything.”); Comments of Council Tree at v (“[T]hese proposals to restrict the size and impact of DEs in spectrum auctions would only serve the private financial interests of the largest, most entrenched incumbents in this country...”).

¹⁵ See, e.g., NPRM, 29 FCC Rcd at 12445 (“By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital.”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5589 (2004) (“*Competitive Bidding Fifth R&O*”) (“[B]idding credits are necessary to ensure that women and minority-owned businesses and small businesses participate in broadband PCS.”).

¹⁶ 47 U.S.C. §309(j)(3)(B).

¹⁷ Comments of MMTC at 16.

Council Tree explained, this harm to competition would arise because, with a cap on the amount of credits a bidder may claim, “large investors would have no incentive to ally with them, and would instead choose not to invest their capital in auctions.”¹⁸ U.S. Cellular also agrees with MMTC that the proposed caps are a “grossly overbroad overreaction to allegations of misbehavior,” and would have the effect of “punish[ing] those who have done nothing wrong.”¹⁹

In addition, contrary to their claims, the unreasonably low bidding credit caps proposed by some commenters would not, in fact, permit DEs to acquire a “significant amount” of spectrum in an auction.²⁰ As noted by King Street, even in mid-sized markets, individual licenses have recently sold for upwards of \$40 million.²¹ Consequently, if the Commission were to adopt the \$10 million cap proposed by AT&T and the Rural-26 DE Coalition, “no DE would be able to acquire more than one market in this range” with the assistance of bidding credits.²² The proposed caps, therefore, would effectively prevent DEs from competing for spectrum in the heavily-populated markets of greatest interest to the largest carriers.²³

The proponents of bidding credit caps, however, allege that this consequence of their proposal is immaterial, and even claim that the Commission should “look critically at any argument that a larger bidding credit is needed to support new entrants bidding for licenses in major markets.”²⁴ According to these commenters, because the “cost of the spectrum will be just

¹⁸ Comments of Council Tree at 30.

¹⁹ Comments of MMTC at 17.

²⁰ See Comments of AT&T at 12 (“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.”); Comments of the Rural-26 DE Coalition at 10 (“Spending \$40 million on spectrum is a significant expenditure for any legitimate small business...”).

²¹ See Comments of King Street at 12.

²² *Id.*

²³ See Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, *et al.*, p. 3 (May 18, 2015) (“As a single license in a major market may cost billions of dollars, a cap such as AT&T has proposed would make the new entrant credit essentially useless.”).

²⁴ Comments at AT&T at 12.

a small fraction of the significant capital that will be necessary to deploy [] licenses” in major urban areas, if an entity has the capital necessary to purchase and build out licenses in these markets, “it seems unlikely that the entity is the type of business that any rational small business program is meant to assist.”²⁵ In other words, they allege that the greater the cost to enter a particular market, and thus the greater the advantage the largest carriers already possess with respect to that market, the less need there is to adopt policies to promote competition and advance the public interest. In doing so, however, they ignore Commission precedent finding that bidding credits are even more necessary where both license acquisition *and* build-out costs are expected to be significant.²⁶

U.S. Cellular also again notes that the proposed bidding caps bear no relation to the situation they allegedly are needed to address. For instance, although commenters allege that a cap is needed to prevent an entity from claiming “billions of dollars in ‘small business’ credits,”²⁷ the cap they now propose is only about 0.33% of the amount of bidding credits they allege were improperly claimed by bidders for Auction 97.

Further, U.S. Cellular opposes the adoption of a minimum equity requirement for the controlling interest(s) of a DE. Notably, the Commission has previously declined to adopt a minimum equity requirement, finding that it would subject DEs to unnecessary competitive harms and conflict with the Commission’s goal of providing DEs with “maximum flexibility” in attracting financing.²⁸ As the Commission explained, because a minimum equity requirement

²⁵ *Id.*

²⁶ See *Competitive Bidding Fifth R&O*, 9 FCC Rcd at 5590, n. 110 (“[G]iven the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses and construct the systems, bidding credits are a proper means to ensure that these firms have the opportunity to participate in this service.”).

²⁷ Comments of AT&T at 12 (emphasis added); see Comments of the Rural-26 DE Coalition at 4-5 (alleging that the proposed cap is needed to “deter large entities backed with Wall Street capital from gaming the rules and denying U.S. taxpayers billions in revenue”).

²⁸ See *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15325-26 (2000) (“*Competitive Bidding Recon Order*”).

would force each controlling interest “to retain some level of equity in the applicant,” such a requirement would “reduc[e] the amount of equity the applicant could offer to non-controlling interests in exchange for financing.”²⁹ As a result, it would “limit a small business’ ability to raise capital and undermine [the Commission’s] intention of promoting small business participation in the highly competitive telecommunications marketplace.”³⁰ U.S. Cellular also agrees with the Commission that a minimum equity requirement is unnecessary to “ensure appropriate identification of an applicant’s controlling interests if the principles of *de jure* and *de facto* control are applied.”³¹ Application of those principles, rather than the imposition of a minimum equity requirement, also properly recognizes that it is the corporate governance provisions of a DE’s controlling documents that actually determine control, and that control can even vest in an entity or individual with a minimal amount of equity in a DE.

For similar reasons, U.S. Cellular urges the Commission to reject proposals for either a bright-line rule or rebuttable presumption that equity interests in a DE above a certain percentage threshold represent *de facto* control. Like a minimum equity requirement, this type of policy would limit DEs’ flexibility in attracting financing,³² and thereby “undercut the DE program by impeding the very funding that the Commission understands to be vital to the success of the program.”³³

U.S. Cellular also opposes extending the current five-year unjust enrichment period, which the Commission recognized in the NPRM “could restrict small businesses’ access to capital, which could limit their ability to participate in the provision of spectrum-based

²⁹ *Id.* at 15326.

³⁰ *Id.*; see Comments of King Street at 11 (“The result would be less DE funding, and far fewer and much smaller DEs.”).

³¹ *Competitive Bidding Recon Order*, 15 FCC Rcd at 15326.

³² See Comments of the Blooston Rural Carriers at 12.

³³ Comments of King Street at 11.

services...”³⁴ In particular, the longer a potential investor’s capital must be locked up in a DE, the riskier investing in a DE becomes and the more difficulty DEs will have raising capital on reasonable terms.³⁵ Further, because a longer unjust enrichment period would reduce the business flexibility of DEs *compared to the rest of the industry*, this proposal would place DEs at a competitive disadvantage against entities without such restrictions.³⁶

Finally, U.S. Cellular opposes T-Mobile’s proposal that DEs be required to show “some evidence of build-out activity” within one year of acquiring a license or, alternatively, one year of their spectrum being cleared of incumbents.³⁷ As Council Tree explained, if DEs are “required to comply with onerous special buildout or other rules uniquely applicable to them, their licenses will be less valuable and investor capital will be even more difficult to obtain.”³⁸ In addition to imposing burdensome obligations on only those licensees least equipped to deal with them,³⁹ the differential treatment of DEs under this proposal could lead to other harms as well. For instance, assuming the incentive auction takes place in the first quarter of 2016, as the Commission intends, the 600 MHz band will be cleared in 2019, which is a year or two before the expected rollout of 5G. As a result, non-DE licensees, who will be subject only to the generally-applicable requirement to cover 40% of a PEA’s population within six years, could reasonably decide to delay the start of construction until 5G becomes available. DE licensees, on the other hand, would be forced to begin build-out activity prior to rollout of 5G even though,

³⁴ NPRM, 29 FCC Rcd at 12443.

³⁵ See Comments of MMTC at 15; Comments of Council Tree at 32; Comments of King Street at 11.

³⁶ See Comments of MMTC at 15 (“[S]uch rules would further hamper or eliminate the ability of DEs to raise and retain capital and operate their businesses with flexibility comparable to businesses in the rest of the industry.”).

³⁷ See Comments of T-Mobile at 7.

³⁸ Comments of Council Tree at 30; see Comments of CCA at 10 (“We caution the Commission not to impose overly burdensome obligations that would hamstring smaller carriers’ ability to compete or raise capital...”).

³⁹ See Comments of King Street at 11 (“[I]t would be absolutely counter-productive to require enhanced build-out showings from those who are least equipped to do so.”); Comments of the Rural Wireless Association, Inc. and NTCA – The Rural Broadband Association at 18 (opposing “the imposition of additional unnecessary regulatory hoops upon DEs”); Comments of CCA at 10 (urging the Commission “to avoid impairing smaller competitors through accelerated buildout schedules”).

