STEVE CHABOT, OHIO
CHAIRMAN

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NYDIA M. VELAZQUEZ, NEW YORK
RANKING MEMBER

Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

Spectrum incentive Auctions

June 8, 2015

The Honorable Thomas Wheeler
Chairman
United States Federal Communications Commission
445 12th Street
Washington, D.C. 20551

Dear Chairman Wheeler:

In the Federal Communications Commission's (FCC or Commission) recent AWS-3 Auction DISH Network funded two companies, Northstar Wireless LLC (Northstar) and SNR wireless LLC (SNR), which won more than 700 licenses in the auction and have now applied for the 25 percent bidding credits that are available to "very small businesses" under the FCC's rules governing designated entities (DEs). If the FCC awards those bidding credits, they will have won $13 billion of spectrum while having to pay only $10 billion, at a cost to American taxpayers of $3.3 billion.

Following the auction, a number of smaller companies that bid in the auction have raised concerns that they were squeezed out of the bidding on spectrum licenses in the auction by the actions of DISH and its two DEs. Significant evidence also has emerged that strongly suggests that DISH and its DEs closely coordinated their bidding in ways that appear designed to obtain an artificial advantage in the auction over other bidders, to drive other bidders out of the auction, and to claim a significant discount at taxpayer expense in the process.

For example, one company, VTel Wireless (VTel), has explained that it actively participated in nearly every previous spectrum auction and succeeded in obtaining spectrum in those auctions.[1] In the AWS-3 auction, however, VTel contends that it was effectively squeezed out by the coordinated bidding activity of DISH, Northstar, and SNR, which made it appear that three other bidders were competing for the license to VTel when in fact it was only the DISH entities. Similarly, a group of rural telephone companies have explained that the coordinated bidding by DISH and its DEs "systematically and quickly drove most of the Telecos out of the auction."[2]

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[1] Letter from Bennett L. Ross, on behalf of VTel, to Marlene H. Dortch, FCC (March 26, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001041479.

[2] Letter from Donald L. Herman, Jr. on behalf of 10 rural telephone companies, to Marlene H. Dortch FCC (March 25, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001041455.

These reports are troubling and merit your thorough investigation. When Congress established the Commission's auction authority, it also required the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[3]

Accordingly, I encourage you to carefully investigate all aspects of the conduct of DISH and its DEs in the AWS-3 auction before determining whether to award licenses or grant discounts to these entities.

Additionally, as cited in footnote 580 in the FCC's AWS-3 Auction Order, the FCC requested the United States Small Business Administration's (SBA) approval of its final rule adopting small business size standards differing from the SBA's size standards. However, no mention is made of a response from the SBA. The Committee requests a copy of both the FCC letter to the SBA requesting the alternate size standards as well as the SBA's response permitting use of such alternate standards.

Thank you for your prompt attention to this matter. If you have any questions regarding this request, please contact Joe Hartz, Professional Staff with the Committee at (202) 225-5821 or joe.hartz@mail.house.gov.

Sincerely,

Steve Chabot
Chairman

[3] 47 U.S.C. §309(j)(4)(D).

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 17, 2015

The Honorable Steve Chabot
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chabot:

Thank you very much for your June 8, 2015, letter about the Federal Communications Commission's (FCC) Auction of Advanced Wireless Services (AWS-3) Licenses (Auction 97). Attached to this letter is a copy of the correspondence between the FCC and the Small Business Administration you requested in your letter.

The two AWS-3 bidders you discuss in your letter – Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC – have submitted "long-form" license applications to the FCC. The FCC's Wireless Telecommunications Bureau is currently reviewing these two bidders' applications to make sure they are in compliance with FCC rules, including rules pertaining to ownership interests and eligibility for small business bidding credits. Under FCC rules, the review of a license application is a "restricted proceeding," during which *ex parte* presentations are prohibited.[1] The Commission's decision to grant or deny these applications will be based on the totality of circumstances in the record about each application. A number of parties have filed petitions to deny these applications, and these filings are part of the record the Bureau is considering.

In addition to adjudicating individual license applications, the Commission is engaged in a more general effort to address the role of small businesses in spectrum auctions. On October 10, 2014, the Commission issued a notice of proposed rulemaking (NPRM) to revise many of the so-called "Part I" competitive bidding rules about which you and others have recently raised concerns, including small-business eligibility for bidding credits and joint bidding agreements.[2] On April 17, 2015, the Commission released a request for further comment on this proposed rulemaking, specifically asking interested parties to incorporate "lessons learned" from the Auction 97 into their comments.[3]

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[1] 47 C.F.R. §1.120.

[2] Updating Part I Competitive Bidding Rules, WT Docket No. 14-170, *Notice of Proposed Rulemaking*, 29 FCC Rcd 12426 (2014).

[3] Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part I Competitive Bidding Rules, *Public Notice,* WT Docket No. 14-170 (Apr. 17, 2015).

It is my expectation that any new rules that are adopted will both reflect the dynamics of the current spectrum marketplace, and fulfill our statutory obligation to ensure that small businesses, rural telephone companies and minority and women-owned businesses have the opportunity to compete in spectrum auctions.[4]

Please do not hesitate to contact me if you have further questions.

Sincerely,

Tom Wheeler

Enclosure

Cc (with enclosure): The Honorable Nydia M. Velázquez
Ranking Member

[4] 47 U.S.C. §309(j)(4)(D).

Federal Communications Commission
Washington, D.C. 20554

March 20, 2014

Dr. Khem Sharma
Division Chief
Office of Size Standards
U.S. Small Business Administration
409 Third Street, S.W.
Washington, D.C. 20416

RE: Small Business Size Standards – Competitive Bidding Rules for Advanced Wireless Services in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands

Dear Dr. Sharma:

I am writing to obtain approval from the Small Business Administration (SBA) for a Federal Communications Commission (Commission) final rule that would adopt small business size standards for Advanced Wireless Services in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands, identified as the "AWS-3 bands."[1] The rule is contained in a draft Report and Order, the pertinent portion of which is enclosed for your reference. The draft Report and Order would implement a statutory directive in the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) to grant new initial licenses for the use of spectrum in certain specified frequency bands through a system of competitive bidding.[2] Under this final rule, the Commission would make small businesses eligible for bidding credits in an auction of geographic area licenses in the AWS-3 bands.

On August 27, 2004, we requested consultation with the SBA regarding two small business size standards included in an NPRM seeking comment on competitive bidding and service rules for what were then designated as the AWS-2 bands, which consisted of the 1915-1920 MHz and 1995-2000 MHz spectrum bands, identified as the H Block, and the 2020-2025 MHz and 2175-2180 MHz bands, identified as the J Block.[3] The *2004 AWS-2 NPRM*, which was published in the Federal Register on November 2, 2004, proposed that small businesses would be eligible for bidding credits in any auction of

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[1] My July 23, 2013 letter to you on this matter sought consultation regarding proposed small business size standards contained in a draft Notice of Proposed Rulemaking (NPRM) that also would have applied to a fourth frequency band, 2020-2025 MHz, that was also designated as one of the "AWS-3 bands." *See* Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Khem R. Sharma, Division Chief, Office of Size Standards, U.S. Small Business Administration, dated July 23, 2013 (*July 23 Letter)*. However, the draft Report and Order states that the Commission is deferring action on the 2020-2025 MHz band and will address service rules for that band separately in a subsequent Commission item. Accordingly, we are not seeking SBA approval for adoption of small business size standards for the 2020-2025 MHz band at this time. Thus, for purposes of this request, any reference to the "AWS-3 bands" means the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands.

[2] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6401, 126 Stat. 156, 222-223 (2012), codified at 47 U.S.C. §§ 1451; *see also* 47 U.S.C. § 309(j).

[3] Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Gary M. Jackson, Assistant Administrator, Office of Size Standards, U.S. Small Business Administration, dated August 27, 2004.

non-nationwide licenses in the H and J blocks.[4] On September 22, 2004, the SBA replied to our letter, stating that the contemplated size standards appeared reasonable and that the SBA had no specific comments.[5]

On September 24, 2007, we requested consultation with the SBA regarding the small business size standards included in an NPRM seeking comment on competitive bidding rules for what was then designated as the AWS-3 band, which consisted of the spectrum at 2155-2175 MHz.[6] The *2007 AWS-3 NPRM*, which was published in the Federal Register on November 14, 2007, proposed that small businesses would be eligible for bidding credits in any auction of non-nationwide licenses in the 2155-2175 MHz band.[7] On October 16, 2007, the SBA replied to our letter, stating that the contemplated size standards appeared reasonable and that the SBA had no specific comments.[8]

In the *July 23 Letter*, we advised you that the Commission was initiating a new proceeding to adopt service rules for licensing the spectrum in the 1695-1710 MHz, 1755-1780 MHz, 2155-2180 MHz, and 2020-2025 MHz bands through a system of competitive bidding.[9] The *July 23 Letter* supplemented our August 27, 2004 and September 24, 2007 requests for SBA consultation concerning the 2155-2180 MHz and 2020-2025 MHz bands and sought initial consultation concerning the 1695-1710 MHz and 1755-1780 MHz bands, related to a proposal in a draft NRPM involving small business size standards.[10] That NPRM proposed to make small businesses eligible for bidding credits in an auction of licenses in the AWS-3 bands.[11] The size standards proposed in the *2013 AWS-3 NPRM* were identical to those outlined in our August 27, 2004 and September 24, 2007 letters with respect to the 2020-2025 MHz and 2175-

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[4] Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket Nos. 04-356 and 03-353, *Notice of Proposed Rulemaking*, 19 FCC Rcd 19263 (2004) (*2004 AWS-2 NPRM*). *See also* 69 Fed. Reg. 63489 (Nov. 2, 2004).

[5] See Letter from Gary M. Jackson, Assistant Administrator, Office of Size Standards, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Spectrum Access Analysis [sic] Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 22, 2004.

[6] Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Gary M. Jackson, Assistant Administrator, Office of Size Standards, U.S. Small Business Administration, dated September 24, 2007. *See also* In the Matter of Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, WT Docket No. 07-195, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17035 (2007) (*2007 AWS-3 NPRM*).

[7] *2007 AWS-3 NPRM*, 22 FCC Rcd at 17097-98 ¶¶ 152-54. *See also* 72 Fed. Reg. 64013 (Nov. 14, 2007).

[8] Letter from Gary M. Jackson, Assistant Administrator, Office of Size Standards, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated October 16, 2007.

[9] *See July 23 Letter*.

[10] *See* Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands; Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 202-2025 MHz, and 2175-2180 MHz Bands; Applications for Authority to Operate in the 2155-2175 MHz Band; Petitions for Forebearance Under 47 U.S.C. § 160, *Notice of Proposed Rulemaking and Order on Reconsideration*, 28 FCC Rcd 11479 (2013) (*2013 AWS-3 NPRM*). A summary of the *2013 AWS-3 NPRM* was published in the Federal Register on August 20, 2013. *See* 78 FR 51560 (August 20, 2013).

[11] *See 2013 AWS-3 NPRM*.

2180 MHz bands, and the Commission proposed to use these same size standards for each of the AWS-3 bands in light of its current service rule proposals for these frequencies. On August 29, 2013, the SBA replied to our letter, indicating that the contemplated size standards appeared reasonable and that the SBA had no specific comments.[12]

The final rule contained in the draft Report and Order mirrors the proposal submitted to the SBA during the consultation process and remains unchanged. The Commission received comments from two parties in response to its bidding credit proposal in the *2013 AWS-3 NPRM*.[13] One commenter stated that the Commission's thresholds for defining small and very small business are outdated.[14] This commenter asked the Commission to reevaluate its standards for determining eligibility for bidding credits in an AWS-3 auction, rather than using the same small business size standards used in prior AWS auctions, but offered no suggestions regarding what alternative size standards could potentially be used. The other commenter asked the Commission to consider offering additional support to incumbent rural carriers in the AWS-3 auction through an additional (cumulative) non-size based bidding credit of 15 percent for entities that qualify as a "rural telephone company" or that are a subsidiary or affiliate of a qualified rural telephone company under the Commission's rules.[15] As discussed in the draft Report and Order, the size standards are consistent with bidding procedures that have been employed in prior Commission auctions for licenses in the Advanced Wireless Services. Accordingly, the draft Report and Order adopts the following two small business definitions for the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands:

- Small business – An entity with average gross revenues for the preceding three years not exceeding $40 million; and

- Very small business – An entity with average gross revenues for the preceding three years not exceeding $15 million.

Under these definitions, the Commission would provide qualifying "small businesses" with a bidding credit of 15 percent, and qualifying "very small businesses" with a bidding credit of 25 percent, which are the bidding credits set forth in the standardized schedule at 47 C.F.R. § 1.2110(f)(2).[16]

The small business size standards established in the draft Report and Order comply with the requirements of section 3(a) of the Small Business Act and would enable the Commission to properly administer the assignment of the licenses at issue. Consistent with section 121.903(a)(1)(ii) and (a)(3) of

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[12] Letter from Khem Sharma, Division Chief, Office of Size Standards, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 29, 2013.

[13] *See* Comments of The Competitive Carriers Association, filed September 18, 2013; Reply Comments of Blooston Rural Carriers, filed October 28, 2013. Copies of these comments are enclosed for your reference.

[14] *See* Comments of The Competitive Carriers Association, filed September 18, 2013.

[15] *See* Reply Comments of Blooston Rural Carriers, filed October 28, 2013.

[16] In the *Part I Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on our auction experience. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 403-4 ¶ 47 (1997); *see also* 47 C.F. R. § 1.2110(f)(2).

the SBA's small business size regulations,[17] the size standard is based on an entity's eligibility according to its average annual gross revenues for the preceding three years, and the size standard has been subject to public notice and comment pursuant to the Administrative Procedure Act.

As required by section 121.903(a)(5) of the SBA's small business size regulations,[18] we are providing the SBA with copies of all relevant public comments, a copy of the pertinent portions of the draft Report and Order containing a justification for the intended size standards, and a copy of the draft final rule.[19] In addition, we will be glad to provide any additional information that the SBA requests. I emphasize that the rules contained in this document are Commission staff draft rules that are subject to Commission deliberation. Because this letter and the draft Report and Order contain internal confidential information that is being provided to the SBA in connection with its statutory responsibilities regarding small business size standards, they should not be disclosed or distributed.[20] In light of its sensitive nature, we request that you limit access to this information to SBA staff working on small business size standard issues.

As always, we are pleased to work with you. If you or your staff have any questions or need further information, please contact me at (202) 418-7583.

Sincerely,

Gary D. Michaels
Deputy Chief
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

Enclosures

cc: Dr. Winslow Sargeant, Chief Counsel for Advocacy, SBA
Thomas Reed, Director, Office for Communications Business Opportunities, FCC

[17] 13 C.F.R. §§ 121.903(a)(1)(ii) and 121.903(a)(3).

[18] 13 C.F.R. § 121.903(a)(5).

[19] The final rule will be contained in subpart L of Part 27 of the Commission's Rules.

[20] *See* 47 C.F.R. § 0.457(e).

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

April 16, 2014

Gary D. Michaels
Deputy Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Michaels:

Thank you for your recent letter regarding the Federal Communication Commission's (Commission) request for U.S. Small Business Administration's (SBA) approval to adopt small business size standards in a final rule for the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands, identified as "AWS-3 bands". The rule is contained in a draft Report and Order (Report and Order), the pertinent portion of which you enclosed for reference. Under the rule, the Commission would make small businesses eligible for bidding credits in an auction of geographic area licenses in the specified frequency bands.

Pursuant to SBA regulations, the Commission consulted with the Chief of SBA's Office of Size Standards, at least 14 calendar days before publishing the proposed size standards, and provided SBA with the required supporting documentation (see 13 CFR § 121.903(a)(2)).

The Commission consulted with SBA on three occasions regarding all or some of these bands, specifically:

August 27, 2004 – AWS-2 bands
H Block – 1915-1920 MHz and 1995-2000 MHz spectrum bands
J Block – 2020-2025 MHz and 2175-2180 MHz bands
September 24, 2007 – AWS-3 band
2155-2175 MHz band
July 23, 2013 – AWS-3 bands
1695-1710 MHz, 1755-1780 MHz, 2155-2180 MHz, and 2020-2180 MHz bands

The Commission's July 23, 2013 consultation indicated it was initiating a new proceeding for the anticipated auction of the AWS-3 bands, included in a draft Notice of Proposed Rulemaking (NPRM) seeking comment on the bidding and service rules. The July 23, 2013 consultation supplemented the Commission's August 27, 2004 and September 24, 2007 consultations identified above. SBA replied on August 29, 2013 that the contemplated size standards appeared reasonable and that it had no specific comments.

However, the Commission "is [now] deferring action on the 2020-2025 MHz band and will address service rules…in a subsequent Commission item." The Commission published the NPRM in the *Federal Register* on August 20, 2013, and received two comments to the proposed size standards, namely

- The Competitive Carriers Association (CCA) commented that the Commission should update its definition of "small business" and "very small business" for determining bidding credits because those size standards are outdated and "exclude many entities that should be eligible for credits." The CCA cited SBA's definition of a small telecommunications carrier as one with no more than 1,500 employees, without suggesting that the Commission should use the SBA's definition. The Commission looked to its history and experience with using bidding credits in spectrum auctions and has determined that continuing to extend such benefits to the AWS-3 bands would be consistent with its statutory mandate, and that it should retain the same size standards it used for prior AWS auctions (draft Report and Order, par. 185-186).

- The Blooston Rural Carriers supported the proposed size standards, but asked the Commission to consider additional support to incumbent rural carriers with an additional (cumulative) bidding credit. However, the "Commission has previously considered and rejected proposals to create an additional rural telephone company bidding credit," and declined to adopt additional credits (draft Report and Order, par. 184). Because the requested additional credit would not be based on a small business size standard, SBA has no comment on it.

The draft Report and Order reflects the proposed size standards submitted to SBA during the consultation process and adopts them as proposed, except for the exclusion of the 2020-2025 MHz band. Specifically, the draft Report and Order adopts the following small business definitions for the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands, identified as AWS-3 bands:

- Small Business – A business concern not exceeding $40 million in average annual gross revenues for the preceding three years; and,

- Very Small Business – A business concern not exceeding $15 million in average annual gross revenues for the preceding three years.

With your request for approval of the above size standards, you included a copy of the pertinent portions of the draft Report and Order containing a justification for the intended size standards and a copy of the draft final rule.

SBA has reviewed the size standards and approves the Commission's special size standards for the auction of the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands, identified as AWS-3 bands, because the Commission consulted with SBA on these size standards and the SBA determined they were acceptable.

We are pleased to work with you to increase small business participation in this auction. If we can be of additional assistance, please do not hesitate to contact Khem Sharma, Ph.D., at (202) 205-7189 or Carl Jordan, at (202) 205-6093.

With warmest regards,

Maria Contreras-Sweet,