

June 25, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Written Ex Parte Submission*
Updating Part 1 Competitive Bidding Rules: WT Docket No. 14-170, GN Docket No. 12-268,
RM-11395, WT Docket No. 05-211

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules,¹ Atelum LLC ("Atelum") submits this *ex parte* letter to urge the Commission to support small and minority-owned businesses by adopting rules that encourage designated entity ("DE") participation in spectrum auctions and spectrum-based services in order to fulfill Congress' mandate that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services...."² Given the maturity of the wireless industry, it is important that the Commission achieve this goal by providing incentives for established businesses and financiers in the communications industry to meaningfully engage with DEs. The great interest shown by small businesses in this proceeding³ is evidence that the Commission must do more to ensure that it satisfies Congress' mandates in section 309(j) of the Communications Act to encourage the participation of DEs in spectrum auctions and in the wireless broadband market in general.⁴ Moreover, given the upcoming 600 MHz broadcast incentive auction (the "Incentive Auction"), it is critical that the Commission act now so these businesses have an opportunity to participate in this "once-in-a-generation" opportunity.⁵

Atelum is a minority-owned, small business whose principal has been actively involved in the communications industry for years, and is well situated to comment on the many challenges facing like businesses in the relatively mature wireless market. The current wireless market is not a level playing field, because incumbent operators have inherent competitive advantages relative to new entrants and small businesses. With respect to auctions and the deployment of spectrum-based services specifically, the substantial capital required to acquire the necessary spectrum for a near-nationwide network, as well as the capital required to deploy such a network, are simply out of reach

¹ 47 C.F.R. § 1.1206.

² 47 U.S.C. § 309(j)(4)(D).

³ See, e.g., Comments in Response to Public Notice Request for Further Comment on Issues Related to Competitive Bidding Procedures, Council Tree Investors, Inc., WT Docket No. 14-170 (May 14, 2015) ("*Council Tree May 14 Comments*").

⁴ 47 U.S.C. § 309(j).

⁵ *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, 6136 ¶ 2 (Jun. 2, 2014).

for small businesses, putting them at a considerable disadvantage unless they are able to work with strategic and other passive investors.

The Commission should address this disparity. Doing so would fulfill Congress' Section 309(j) mandate and enhance the public interest by enabling more significant DE participation in FCC spectrum auctions and engendering more competition, as demonstrated by the success of Auction 97.

Specifically, Atelum urges the Commission to eliminate the Attributable Material Relationship ("AMR") rule and adopt spectrum reserves specifically for DEs in future auctions. The AMR rule hinders investment in DEs and frustrates satisfaction of the Section 309(j) mandate. Spectrum reserves would protect DEs from foreclosure tactics used by dominant wireless carriers and ensure that spectrum licenses are more widely disseminated.

The Commission should also consider adopting innovative, new approaches involving the use of bidding credits that could facilitate the market entry or expansion of small and minority-owned businesses and, in turn, facilitate their potential participation in future auctions. Specifically, Atelum proposes that the Commission:

1. Provide a bidding credit for any auction applicant, regardless of size, that has sold or leased an undeveloped spectrum license within the prior three years to an entity that would have qualified as a DE under the auction rules pertaining to such license and that has since satisfied the applicable license construction requirements; and
2. Create a 25-percent bidding credit for any auction applicant, regardless of size, that on average spent (i) in the aggregate \$1 billion or more or (ii) at least 10 percent of its annual revenues, in either case, for the preceding three years on business transactions with small disadvantaged businesses ("SDBs"), as defined by the U.S. Small Business Administration ("SBA"), or other similarly defined entities, that individually have average annual gross revenues that do not exceed \$15 million for the preceding three years.

The Commission should also unequivocally reject the proposals by a handful of incumbent carriers to cap auction bidding credits at \$10 million or lengthen the DE unjust enrichment license holding period. Such proposals would dramatically curtail the ability of DEs to participate in auctions by severely limiting their access to capital, thereby reducing competition in the auctions. Neither the Commission's statutory mandate nor the public interest, would be served by adoption of such proposals.

I. BACKGROUND

Atelum has developed these comments based on its insight and experience as a small, minority-owned business that has successfully participated in a spectrum auction and been actively involved in the wireless market for years, in many instances competing against well-capitalized and entrenched incumbents. Atelum is owned and controlled by John Muleta ("Muleta"), an experienced African-American entrepreneur with a broad and established background in wireless and broadband technologies and businesses. Muleta has extensive technology and wireless industry experience in the private sector, holding the following positions over the course of a 29-year career in the industry: network engineer at GTE Corporation; Senior Vice President at PSInet (one of the world's first commercial ISPs); Executive Vice President at Navisite (a company focused on enterprise-class, cloud-enabled hosting, managed applications and services); and Chairman and CEO of Tellus, Inc. (at that time a developer of wireless OEM products, including EVDO cards and modems used in

portable devices). He also served for approximately six years at the FCC, including as Deputy Bureau Chief of the FCC's Common Carrier Bureau and Chief of the FCC's Wireless Telecommunications Bureau ("WTB").

Between 2005 and 2010, Muleta served as the co-founder and CEO of M2Z Networks, Inc. ("M2Z"), a wireless startup company backed by the venture capital firms Kleiner Perkins, Charles River Ventures, and Redpoint Ventures, as well as DirecTV. M2Z sought to deploy a free wireless broadband network, using the 2155-2175 MHz portion of the AWS-3 band through the use of innovative adaptive antenna systems (also known as "smart antennas") that rely on Time Division Duplexing ("TDD") technologies, with the goals of disrupting the traditional wireless business model and spurring innovation in wireless technology and service delivery.⁶ All of the major incumbent wireless carriers opposed the M2Z proposal, alleging that M2Z's technology was inadequate and/or that the company lacked the financial wherewithal to deploy a network, among other reasons.⁷ These operators sought to have the FCC auction the spectrum for Frequency Division Duplexing ("FDD") technologies, thereby foreclosing the possibility of a new and innovative broadband wireless network.⁸ After a four-year proceeding, M2Z's proposal for TDD use of the 2155-2180 MHz band was rejected⁹ and the spectrum M2Z had applied for was combined with other spectrum and auctioned in Auction 97.

Working with a group of passive financial investors comprised of a wholly-owned subsidiary of DISH Network Corporation ("DISH"), BlackRock Inc., and ADK Spectrum GP, LLC,¹⁰ Atelum participated in Auction 97 as the manager of SNR Wireless LicenseCo LLC ("SNR"). SNR ultimately won \$5.48 billion worth of AWS-3 spectrum licenses.¹¹ Simply stated, without the ability to work with its passive investors, Atelum could not have meaningfully and effectively participated in Auction 97 against entrenched incumbents with significant financial and other resources.

Incumbent carriers enjoy a number of competitive advantages in spectrum auctions. The vast amounts of capital required to acquire the spectrum needed for a near-nationwide network and to deploy such a network are out of reach for any small business that participates in a spectrum auction without significant amounts of passive funding. Not only do the established wireless carriers

⁶ See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed May 5, 2006).

⁷ See, e.g., Reply Comments of AT&T, WT Docket No. 07-16, at 11 (Apr. 3, 2007) ("M2Z has failed to demonstrate that it has the financial wherewithal to build and operate a nationwide network on the scale proposed in its application."); Petition to Deny of T-Mobile USA, Inc., WT Docket No. 07-16, at 3-5 (Mar. 2, 2007) (arguing for the Commission to license the spectrum through competitive bidding); Petition to Deny of Verizon Wireless, WT Docket No. 07-16, at 2, 17-19 (Mar. 1, 2007) (arguing that federal law and FCC precedent require the spectrum be licensed through competitive bidding and that interference concerns with existing FDD operations in adjacent bands would make deployment of TDD technology problematic); Petition to Deny of CTIA – The Wireless Association, WT Docket No. 07-16, at 2 (Mar. 2, 2007) ("M2Z should have no right to sidestep the competitive bidding process in order to compete in the broadband marketplace").

⁸ See *supra* note 7.

⁹ *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band*, Order, 22 FCC Rcd 16563 ¶ 1 (2007).

¹⁰ ADK Spectrum GP LLC is owned and controlled by Nathaniel Klipper.

¹¹ See *Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97*, Public Notice, DA 15-131 (Jan. 30, 2015), Attachment B.

already have access to external sources of capital, but they also have steady revenue streams, existing networks, and mature business relationships with industry vendors.¹² As a new entrant into the market, SNR would be at a considerable disadvantage unless it were able to work with strategic and other passive investors, and the Commission's precedent makes clear that such relationships are permissible and serve the public interest.¹³ If the Commission is truly interested in increasing competition and spurring innovation in the wireless marketplace, it should continue to allow these types of relationships, which encourage DE participation, rather than change its rules to protect incumbents that already enjoy a nearly insurmountable competitive advantage.

II. A ROBUST DE PROGRAM IS ESSENTIAL TO EFFECTIVE COMPETITION IN THE WIRELESS MARKET.

The upcoming Incentive Auction has been described as a "once in a generation" opportunity,¹⁴ and has the potential to be the most successful spectrum auction in Commission history.¹⁵ But without vibrant participation from well-funded DEs, that auction will likely be another instance where the incumbent wireless carriers are able to overwhelm their competitors by leveraging their superior financial positions and acquiring the vast majority of the spectrum auctioned. By encouraging DE participation in the Incentive Auction, the Commission can comply with its congressional mandate to diversify spectrum license ownership, as well as promote wireless competition, increase forward auction revenues, and maximize broadcaster participation.

When Congress first granted the FCC spectrum auction authority, it explained that "[o]ne of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with 'deep pockets,' and therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new competitors or startups."¹⁶ Based on these concerns, Congress instructed the Commission to design spectrum auction rules that promote opportunity and competition by "avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."¹⁷

¹² See Don J. Wood, *An Evaluation of Proposed Changes to the Commission's Part 1 Competitive Bidding Rules* at 8-9 (May 20, 2015), attached to Reply Comments of King Street Wireless, L.P., WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (May 21, 2015) (explaining that issues of scale make it difficult for small businesses to compete on cost with incumbent carriers).

¹³ *Council Tree May 14 Comments*, Exhibit 2 (May 14, 2015) (providing an illustrative list of FCC-approved DE strategic alliances).

¹⁴ *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, 6136 ¶ 2 (Jun. 2, 2014) (describing the Incentive Auction as a "once-in-a-generation opportunity to auction significant amounts of greenfield low-band spectrum").

¹⁵ One economist has predicted that the Incentive Auction could raise as much as \$80 billion, nearly twice the revenues generated from Auction 97. See Peter Cramton *et al*, *Design of the Reverse Auction in the FCC Incentive Auction*, 20 (Feb. 19, 2015), attached to Comments of Expanding Opportunities for Broadcasters Coalition, AU Docket No. 14-252, GN Docket No. 12-268 (Feb. 19, 2015).

¹⁶ H.R. Rep. No. 103-111 (May 25, 1993) at 255.

¹⁷ 47 U.S.C. § 309(j)(3)(B).

Thus, while the Commission has been afforded flexibility in crafting its auction rules to comply with this requirement, it must be diligent to ensure that its rules and policies actually achieve the desired goal. A DE program that does not encourage robust DE participation or result in “disseminating licenses among a wide variety of applicants” would fail to meet the mandate in Section 309(j). Therefore, the Commission must carefully avoid rules that would curtail DE participation or limit the ability of DEs to win spectrum licenses. The Commission certainly should not restrict the ability of DEs to participate in future spectrum auctions, particularly in the face of mounting evidence that a vibrant DE program contributes directly to the success of those auctions.

Auction 97 was the most successful FCC spectrum auction to date, raising more than \$40 billion, fully funding First Net, and contributing more than \$20 billion to reducing the federal budget deficit.¹⁸ It is no coincidence that Auction 97 also enjoyed the most robust DE participation of any auction in recent memory. Council Tree has submitted several economic studies showing that without the participation of well-funded DEs, the auction would only have raised a fraction of its overall total revenues.¹⁹ Specifically, Council Tree’s “Unwind Analysis” estimates that the absence of DEs in the auction would have lowered total gross auction revenues by roughly \$17 billion.²⁰ Similarly, by updating the analysis from an April 2014 study conducted by the Phoenix Center with Auction 97 results, Council Tree showed that competition from designated entities added almost \$19 billion to Auction 97 revenues.²¹ These studies show that the participation of DEs was directly responsible for the success of Auction 97. In light of the enormous benefits created when there is robust DE participation in spectrum auctions, it would be unwise to take steps that would limit their participation in the upcoming Incentive Auction.

Greater demand for a product or service generally leads to higher prices. This principle applies with respect to spectrum licenses purchased through auctions, as demonstrated by an analysis of past auctions. For example, Auctions 66 and 73 lacked meaningful DE participation and failed to meet their potential, raising much less revenue than Auction 97 in both absolute terms and on a per MHz-POP basis. In Auction 66, where DE participation was limited by overly restrictive FCC rules, paired spectrum licenses were sold for an average price of just \$0.54 per MHz-POP.²² Similarly, in Auction 73, where DE participation was also limited, paired spectrum sold for \$1.29 per MHz-POP.²³ In contrast, Auction 97 had 15 DEs competing aggressively, and the average price for paired spectrum jumped to \$2.71 per MHz-POP.²⁴ This is more than five times the amount that comparable AWS spectrum sold for in Auction 66. This increase is directly attributable to greater DE participation.²⁵ The Commission should embrace these results and do what it can to encourage additional DE participation in the Incentive Auction, rather than limit it, as some parties have proposed.

¹⁸ Roger C. Sherman, *Putting Auction 97 in the History Books*, Official FCC Blog (Jan. 29, 2015, 12:18 PM), <https://www.fcc.gov/blog/putting-auction-97-history-books>.

¹⁹ *Council Tree May 14 Comments*, Exhibit 4.

²⁰ *Id.* at 22.

²¹ *Id.* at 24.

²² *Id.*, Exhibit 1 at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., Comments of the DE Opportunity Coalition, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 11-12 (Feb. 20, 2015) (describing the shortcomings of Auctions 66 & 73, and explaining that low DE participation was responsible for low auction revenues).

Increased competition from DEs would also have the effect of encouraging broadcasters to relinquish their spectrum rights in the reverse auction portion of the Incentive Auction. As the National Association of Black Owned Broadcasters (“NABOB”) has explained, “[m]ore competition in the forward auction would increase the value of television broadcast licenses, providing television broadcasters, including NABOB members, with a greater incentive to include their spectrum in the reverse auction.”²⁶ This would, in turn, help the Commission achieve higher clearing targets, fuel future innovation, and increase auction revenues even further.

Finally, the DE program has a proven track record of helping small companies become successful entities that have infused competition into the wireless marketplace. Leap Wireless, MetroPCS, and Voicestream all started as and/or invested in DEs as a springboard for future success. They serve as examples for future small businesses. Leap Wireless was one of the first wireless service providers to focus on serving underserved populations by providing low-cost service to customers without requiring a credit check or long-term commitment.²⁷ MetroPCS focused on providing affordable, flat-rate service plans without an annual contract²⁸ and grew to be the fifth-largest carrier before being acquired by T-Mobile. Voicestream became the company that is now T-Mobile, which is using its “Un-Carrier” initiatives to disrupt the wireless marketplace for the benefit of American consumers.²⁹ By supporting the DE program, the Commission can encourage competitive entry of innovative and disruptive companies, like these, that would not have been able to enter the wireless market otherwise.

III. THE COMMISSION SHOULD ADOPT RULES THAT ENCOURAGE DE PARTICIPATION IN FUTURE AUCTIONS.

As explained above, DEs are essential to the success of spectrum auctions. Accordingly, Atelum welcomes the Commission’s review of the DE program and urges the adoption of rules to promote further DE participation.

The Commission should repeal the AMR rule. Replacing the existing AMR rule with the Commission’s proposed two-pronged approach would grant small businesses the flexibility they need to acquire and manage spectrum licenses.³⁰ The Commission correctly acknowledged in its NPRM that the AMR rule prevents investment in DEs and “may have had the unintended consequence of hindering the Commission’s ability to satisfy its statutory goal of promoting opportunities for wireless entry by small businesses.”³¹ By removing the AMR rule’s arbitrary 25% threshold and replacing it with a well-understood *de jure* and *de facto* control standard, the

²⁶ Reply of the National Association of Black Owned Broadcasters, Inc. to Petitions to Deny, ULS File No. 0006670667, Report No. AUC-97, at 2 (May 26, 2015)

²⁷ See Reply Comments of Cricket Communications, Inc., WT Docket No. 10-133, at 1 (Aug. 16, 2010).

²⁸ See Comments of MetroPCS Communications, Inc., WT Docket No. 10-133, at 6 (Jul. 30, 2010).

²⁹ See, e.g., Marguerite Reardon, *T-Mobile Continues to Steal Customers From Rivals*, CNET (Jan. 7, 2015), <http://www.cnet.com/news/t-mobile-continues-to-steal-customers-from-rivals/>.

³⁰ *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, 12434-355 ¶¶ 20, 21 (2014) (proposing to replace the AMR rule with “existing controlling interest and affiliation standards to determine what revenues are attributable to an applicant based upon a rigorous review of all relevant relationships and agreements”).

³¹ *Id.* ¶ 23.

Commission can promote a wide variety of business plans and financial arrangements that ultimately encourage greater DE participation and increase competition.³²

Another means of encouraging small businesses to participate is to set aside a spectrum reserve in an auction only for DEs, which the Commission has done in the past.³³ This would protect small businesses from the foreclosure tactics of the dominant carriers³⁴ and ensure that spectrum licenses are distributed to a wide variety of entities.

Although, as shown in Auction 97, the current DE program can be helpful in promoting small business participation in FCC spectrum auctions, the high legal and other costs associated with properly structuring their relationships with passive strategic and other investors, and the experience and expertise required to evaluate, bid on and win auctioned FCC licenses, makes it extremely difficult for most small businesses to participate meaningfully in FCC auctions. Therefore, the Commission should also consider adopting innovative, new approaches involving the use of bidding credits that would facilitate the entry or development of small and minority-owned businesses in the provision of spectrum-based services, which could, in turn, facilitate their participation in future spectrum auctions.³⁵

Bidding Credits for Secondary Market Transactions with DEs

One approach that would help attract small businesses to the wireless industry and also facilitate wireless network deployment by rural telephone companies would be for the Commission to provide bidding credits to an auction applicant, regardless of size, that certifies that it entered into a secondary market transaction for the sale or lease of an undeveloped license, at a transaction price that was no more than 110% of the auction purchase price of the license, to an entity that would have qualified as a DE under the auction rules pertaining to such license and that has since satisfied the applicable license construction requirements. The total amount of the bidding credit would be equal to the percentage bidding credit that the purchaser or spectrum lessee would have qualified for in the relevant auction (*i.e.*, as a small or very small business) multiplied by the transaction price of the spectrum. The bidding credit would have to be used within three years after the closing of the transaction.

³² See, *e.g.*, Letter from Jamie Belcomre Saloom, Assistant Chief Counsel, SBA Office of Advocacy to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170 (Jun. 8, 2015) (urging the Commission to eliminate the AMR rule and allow DEs more flexibility in their ability to lease spectrum); Letter from John Muleta, CEO of Atelum LLC, to Acting Chairwoman Clyburn, FCC (Aug. 27, 2013) (“The ability of DEs, especially new entrants, to wholesale capacity and lease excess spectrum to the level of demand in the marketplace is critical to their successful participation in these auctions because these type of business arrangements are the primary short term tools that can provide the financial community greater revenue certainty in exchange for providing capital.”).

³³ See, *e.g.*, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994) (establishing the Entrepreneur C Block rules).

³⁴ See *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269, at 11 (Apr. 11, 2013) (“[A] large incumbent may benefit from acquiring spectrum even if its uses of the spectrum are not the most efficient [T]he Commission should consider the potential that the acquisition of specific blocks of spectrum may have to foreclose or raise the costs of competitors”).

³⁵ The specific proposed rules for the three proposals listed below are provided in the Appendix to this letter.

For example, assume an auction participant, Entity A, which was not a DE or otherwise eligible for bidding credits, won and paid \$500 million for a license in Auction 97. If (i) Entity A, prior to building out the license, sells that license for \$440 million to Entity B,³⁶ which would have qualified as a “very small business” in Auction 97, and (ii) Entity B builds out network facilities that utilize the licensed spectrum and meet the FCC’s license construction requirements, then Entity A will be eligible for a bidding credit up to a maximum of \$110 million in any auction occurring within three years after the closing of the spectrum transaction between Entity A and Entity B.

Bidding Credits for SDB Partnerships

Another approach that would support small businesses, lead to the creation of jobs in the wireless sector, and attract capital to small businesses would be to provide a 25-percent bidding credit for any auction applicant, regardless of size, that certifies that it on average spent (i) in the aggregate \$1 billion or more or (ii) at least 10 percent of its annual revenues, in either case, for the preceding three years on business transactions with SDBs, or other similarly defined entities,³⁷ that individually have average annual gross revenues that do not exceed \$15 million for the preceding three years.³⁸

Thus, a large wireless carrier that has spent on average \$200 million on infrastructure maintenance, network construction or other services provided by SDBs that individually have average annual revenues less than \$15 million would receive a 25 percent or \$50 million bidding credit for licenses won at auction. Such a program would encourage all entities seeking to participate in FCC auctions, regardless of size, to do business with small, socially and economically disadvantaged entrepreneurs in the provision of spectrum-based services.

This would be a “win-win-win” for all parties involved: in the example above, the wireless carrier would receive the services for which it paid and a bidding credit that could be used in future spectrum auctions; the SDB would secure engagements and revenues that it might not have otherwise received; and the Commission would promote the public interest by incentivizing the use of SDBs by providers of wireless services and fostering the ability of the SDBs to grow and gain experience in the wireless business. The net effect of this type of incentive would be to potentially introduce more SDBs into the wireless ecosystem, therefore creating more jobs and more experienced entrepreneurs who can meaningfully participate in the wireless business overall and potentially in future spectrum auctions.

³⁶ If Entity A sells the licenses to Entity B for \$555 million, which is greater than 110% of the \$500 auction purchase price, then Entity A would not be eligible for any bidding credits.

³⁷ See 13 C.F.R. § 124.1002 (defining an SDB as an entity with annual receipts or an employee count that falls below a certain set standard, according to entity type and industry categories and is at least 51 percent owned by one or more socially and economically disadvantaged individuals). The proposal would also apply to business transactions with a Disadvantaged Business Enterprise (“DBE”), as that term is defined by the U.S. Department of Transportation, or any entity that otherwise qualifies as disadvantaged under a similar government program. See 49 C.F.R. § 26.5.

³⁸ The data confirms that the proposed minimum spending thresholds are realistic. See, e.g., About AT&T, AT&T.COM (last visited Jun. 17, 2015), <http://www.att.com/gen/corporate-citizenship?pid=17724> (stating that AT&T engages in \$12.8 billion of transactions with minority, women and disabled veterans business enterprises, representing 23.96 percent of its total procurement); Magda Yrizarry, Verizon’s Multibillion-Dollar Commitment to Inclusion and Diversity in 2014, VERIZON.COM (Jan. 29, 2015), <http://www.verizon.com/about/news/multibillion-dollar-commitment-diversity-2014/> (stating that Verizon purchased \$24.5 billion over the past five years from business enterprises certified as being owned by minorities, women and service-disabled veterans).

The Commission should also consider other proposals, not necessarily tied to small businesses, that would encourage broader participation by financial investors in future auctions, which would have corresponding competitive benefits and potentially benefit the country more broadly by driving further investment in the wireless sector.³⁹

IV. THE COMMISSION SHOULD REJECT THE PROPOSALS BY INCUMBENT CARRIERS THAT WOULD UNDERMINE THE DE PROGRAM AND REDUCE COMPETITION.

The proposal to cap DE bidding credits at \$10 million⁴⁰ would severely limit the utility of the DE program. Bidding credits are essential to competing against better funded incumbents and attracting strategic investors. A \$10 million cap would provide limited benefits to DEs that bid more than \$40 million, and reduce greatly the incentive for DEs to compete for the most valuable licenses. Such an outcome would benefit the largest incumbent carriers, but severely threaten competition. In Auction 97, for example, excluding those licenses won by DEs, AT&T and Verizon won 88 percent of the licenses that sold for more than \$40 million.⁴¹ Adopting any absolute dollar cap would simply raise that figure to 100 percent. By eliminating meaningful DE participation, the largest carriers could once again assert their dominance in future spectrum auctions without the threat of competition. The Commission should therefore reject AT&T's proposal to impose a bidding credit cap as against the public interest.

Similarly, the Commission should not extend the DE unjust enrichment period or increase the percentage amounts associated with the DE unjust enrichment repayment schedule.⁴² Such proposals would impair the ability of DEs to raise the capital necessary to participate meaningfully in FCC spectrum auctions. As M/C Investors explained, "[t]he practical effect of extending the unjust enrichment period beyond five years and removing the payback tiers would be to discourage venture capital investments in DEs."⁴³ While the Commission has an interest in protecting the DE program from abuse, there are instances where DEs will need to sell or lease their spectrum licenses in accordance with an established business plan or because of unforeseen events. Adopting such punitive rules would discourage investment and stifle competition. In fact, adopting any of the "poison pill" proposals, such as attributing the revenues of any ten percent or greater investor in a DE, or mandating some minimum equity contribution from a DE's controlling interest, would only serve to limit investment in small businesses and effectively destroy the DE program.

³⁹ As an example, the FCC could create a bidding credit incentive for the repatriation of income earned by U.S. companies overseas, which would not only benefit U.S. consumers and the U.S. economy generally, but would also provide a significant new source of capital for all FCC auction participants. See also, e.g., Reed Hundt and Thomas Mann, Opinion, *Rebuild American infrastructure? Companies' offshore profits can help*, Wash. Post, Jun. 16, 2011, available at http://www.washingtonpost.com/opinions/rebuild-american-infrastructure-companies-offshore-profits-can-help/2011/06/15/AGIYAqXH_story.html (proposing the creation of an "infrastructure bank" for repatriated income).

⁴⁰ See Letter from Joan Marsh, AT&T *et al.* to Roger Sherman, FCC, WT Docket No. 14-170, GN Docket No. 12-268 (May 11, 2015).

⁴¹ Of the 178 licenses that sold for more than \$40 million, AT&T and Verizon won 67 and 38 licenses, respectively. Even with the 25 percent bidding credit, all DEs combined to win only 59 of such licenses.

⁴² See, e.g., Comments of T-Mobile USA, Inc. at 16-17, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (Feb. 20, 2015).

⁴³ Letter of E. Ashton Johnston to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211 (May 21, 2015).

For the foregoing reasons, Atelum urges the Commission to reject proposals that would threaten the viability and usefulness of the DE program. By instead adopting rules that encourage DE participation in future auctions, the Commission can promote competition, increase future auction revenues, and more effectively fulfill its statutory mandate to ensure that licenses are disseminated to a wide variety of entities, including minority-owned, small businesses.

Respectfully submitted,

/s/John Muleta

John Muleta
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APPENDIX

Proposed Rules

PART 1: PRACTICE AND PROCEDURE

1. Section 1.2110 is amended to read as follows:

§ 1.2110 Designated entities.

(c) *****

(6) *****

(7) *Small disadvantaged business.* For purposes of this section, small disadvantaged business means an entity that:

- (i) Qualifies as a small disadvantaged business pursuant to 13 C.F.R. § 124.1002;
- (ii) Qualifies as a disadvantaged business enterprise pursuant to 49 C.F.R. § 26.5; or
- (iii) Otherwise qualifies as disadvantaged under a similar federal or state government program.

(f) *****

(3) *****

(4) *Bidding credit for business transactions with small disadvantaged businesses.* The Commission may award a 25-percent bidding credit to any qualifying auction applicant that certifies that it has on average spent (i) in the aggregate \$1 billion or more or (ii) at least 10 percent of its annual revenues, in either case, for the preceding three years on business transactions with small disadvantaged businesses that individually have attributed average annual gross revenues that do not exceed \$15 million for the preceding three years.

(5) *Bidding credit for secondary market transactions with designated entities.* Any entity that certifies that it:

- (i) won an FCC spectrum license at auction;
- (ii) has not satisfied the applicable construction requirements for the license; and

(iii) sells or leases that license, at a transaction price that is no more than 110% of the auction purchase price of the license, to an entity that, based on its revenue at the time of the closing of the transaction, would have qualified as a designated entity under the auction rules pertaining to such license and that has since satisfied the construction requirements for the license;

shall be eligible for a bidding credit, for use in any subsequent FCC spectrum auction within three years after the closing of the transaction, equal to the percentage bidding credit that the designated entity would have qualified for in the auction from which the license was obtained multiplied by the total transaction price of the spectrum, subject to a maximum spectrum price equal to the applicable auction purchase price of the spectrum.