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September 21, 2015

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through
Incentive Auctions, GN Docket No. 12-268
Notice of Oral Ex Parte Communication*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, this letter provides notice that on September 17, 2015, the undersigned, along with Brian Benison of AT&T Services, Inc., Stacy Fuller of DIRECTV, Jonathan Cohen of Wilkinson Barker Knauer, LLP and Eric DeSilva of Wiley Rein LLP, met with FCC staff to discuss the rules regarding the prohibition of certain communications in the upcoming broadcast incentive auction. The FCC staff members in attendance were: Gary Epstein and Howard Symons, Co-Chairs of the Incentive Auction Task Force ("IATF"); Mary Margaret Jackson, Legal Advisor for the IATF; Roger Sherman, Chief, and Jean Kiddoo, Deputy Chief, of the Wireless Telecommunications Bureau ("WTB"); Margaret Wiener, Chief of the Auctions & Spectrum Access Division ("ASAD") of the WTB; Erik Salovaara, Assistant Chief and Chief Counsel of the ASAD; Martha Stancill, Assistant Chief, Economics, of the ASAD; William Lake, Chief, Media Bureau; and Dorann Bunkin, Chief Policy Counsel, Video Division, Media Bureau.

At this meeting, we urged the Commission to foster an atmosphere of greater certainty regarding the routine business transactions that may be discussed while the prohibited communications rules are in effect for the incentive auction. Specifically, we encouraged the Commission to provide concrete, bright-line guidance regarding the business discussions in which broadcasters, multichannel video program distributors (MVPDs), and wireless industry players may engage outside the purview of those rules.

With respect to the reverse auction, we noted that the prohibited communications rule adopted for the reverse auction differs markedly from the rule typically applied in spectrum auctions to date in that (1) it will apply to all "covered television licensees," whether they choose to participate in the auction or not; and, (2) the Commission's obligation to keep confidential the identity of stations participating in the auction could cause a communication that discloses the mere fact of whether or not a covered television licensee is participating in the reverse auction to be deemed, in and of itself, a prohibited communication.

Most broadcast licensees and many MVPDs have little or no experience with FCC auctions or the application of the prohibited communications rules. In the absence of clear, specific guidance from the FCC regarding routine business discussions that will be permitted under these rules, broadcasters will understandably be extremely cautious about discussions they might normally undertake while the rule is in effect, and may even forego participating in the auction.

Furthermore, the smooth functioning of the video programming distribution market – and therefore the interests of consumers – would be severely disrupted if discussions regarding retransmission consent and program acquisition, for example, were to be suspended during the auction. The goals on which the prohibited communications rules are based do not require this disruption because negotiations regarding these matters need not reveal whether or not a broadcaster is actually participating in the reverse auction. Standard contractual language can deal with auction contingencies, and in the case of retransmission consent agreements, if a TV station relinquishes its spectrum usage rights and goes off the air, its retransmission agreements should naturally terminate. To advance the Commission goal of fostering maximum participation by broadcasters in the reverse auction, and to protect the interests of consumers in the MVPD marketplace, the FCC should make it clear in written guidance that:

- discussions regarding normal course transactions (i.e., those that are routine in the industry and are not predicated on the fact that the incentive auction is occurring) may be conducted while the rule is in effect as long as neither party communicates to the other, directly or indirectly, (1) whether or not it is participating in the auction, and/or (2) any information regarding specific bids or bidding strategies relating to the auction;
- if no such communications occur during these discussions, other information communicated in the course of the discussions will be deemed “not auction-related” for purposes of the prohibited communications rule; and
- if an MVPD that is neither a forward auction applicant nor a “covered television licensee” receives auction-related information from another party during the period while the prohibited communications rule is in effect, that communication will not be considered a prohibited communication under the rule if the auction-related information is not conveyed to either of those two categories of entities.

As a separate matter, AT&T also requested clarification that the prohibited communications provisions of Section 1.2105(c)(1) were intended to be co-extensive with the scope of the disclosure provisions of Section 1.2105(a)(2)(viii) and the certification provisions of Section 1.2105(a)(2)(ix). Specifically, AT&T noted that the FCC had revised the language of (a)(2)(viii) and (a)(2)(ix) to address only agreements “relating to the licenses being auctioned” and agreements that communicated, directly or indirectly, bids (including specific prices), bidding strategy (including the specific licenses on which to bid or not to bid), or the post-auction market structure.¹ AT&T noted

¹ See 47 C.F.R. § 1.2105(a)(2)(viii) (requiring the applicant to identify “any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined

that the revised language was a significant step towards ensuring that the FCC's "quiet period" rules do not limit carriers from engaging in the types of routine day-to-day negotiations regarding operational issues necessary for the mobile services marketplace to function optimally. AT&T noted that not only had the FCC specifically created an exemption to permit certain "solely operational agreements" and certain sales and assignment agreements, the FCC had also modified the anti-collusion rules to be specific to agreements "relating to the licenses being auctioned."

However, AT&T observed that the language used in Section 1.2105(c)(1) regarding prohibited communications was slightly different than the language used in the certification provisions of Section 1.2105(a). Section 1.2105(c)(1) prohibits auction applicants from "cooperating or collaborating with respect to, communicating with or disclosing, . . . in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline, unless such communications are within the scope of an agreement described in paragraphs (a)(2)(ix)(A) through (C) of this section that is disclosed pursuant to paragraph (a)(2)(viii) of this section."² Thus, communications regarding certain pre-existing agreements that are solely operational or otherwise properly disclosed under Section 1.2105(a)(2)(viii) are clearly permitted, but carriers may be dissuaded from seeking new operational or other agreements, since those agreements could not be fit within the exemption of being "within the scope of an agreement . . . disclosed pursuant to paragraph (a)(2)(viii) of this section," even though the negotiation of such agreements would not be prohibited by the certification requirement in paragraph (a)(2)(ix). AT&T therefore requested clarification that, to the extent that Section (c)(1) refers to "post-auction market structure," (as a parenthetical), the reference is intended only to modify "bids and bidding strategy," and that therefore the overall scope of (c)(1) is co-extensive with the coverage of subsection (a). In other words, AT&T sought clarification that "bids and bidding strategy (including post-auction market structure)" should be interpreted in a manner that exempts discussions that do not relate to the licenses being auctioned.

AT&T also argued that a further clarification would be beneficial in the context of industry standards-setting discussions that occur during the quiet period. As the Commission is aware, industry standards discussions regarding new spectrum bands are highly likely to occur precisely when that spectrum is being auctioned—both actions are pre-requisites to the new spectrum being commercially deployed and tend to occur simultaneously. Given that such standards and regulatory discussions could well be interpreted to involve "post-auction market structure," AT&T sought

in paragraph (a)(4) of this section or is controlled by the applicant, is a party"); 47 C.F.R. § 1.2105(a)(2)(ix) (requiring a certification that the applicant has not entered into "any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than [certain enumerated agreements]").

² 47 C.F.R. § 1.2105(c)(1).

clarification that well-attended industry meetings, which may even concern the bands being auctioned, would not be presumptively interpreted as implicating the licenses being auctioned. With that clarification, AT&T believes the industry would be more engaged in the development of standards that would benefit the public by allowing spectrum to be more rapidly integrated. Please direct any questions concerning this submission to the undersigned.

Respectfully submitted,

/s/ Michael P. Goggin

cc:

Gary Epstein
Howard Symons
Mary Margaret Jackson
Roger Sherman
Jean Kiddoo
Erik Salovaara
Martha Stancill
William Lake
Dorann Bunkin