



Competitive Carriers Association
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September 29, 2015

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: EX PARTE NOTICE

GN Docket No. 12-268: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions;*

AU Docket No. 14-252: *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002*

Ms. Dortch:

On September 25, 2015, Steven K. Berry, C. Sean Spivey and I, on behalf of Competitive Carriers Association (“CCA”), Steve Sharkey and Josh Roland of T-Mobile USA, Inc., Grant Spellmeyer of U.S. Cellular Corp., and Michael Lazarus of Telecommunications Law Professionals PLLC, on behalf of CCA and various CCA members, met with Gary Epstein and Howard Symons of the Federal Communications Commission’s (“FCC’s” or “Commission’s”) Incentive Auction Task Force, and Jean Kiddoo, Sue McNeil and Erik Salovaara of the FCC’s Wireless Telecommunications Bureau, to discuss the Commission’s anti-collusion rules.¹

During the meeting, CCA expressed its concern that the breadth and duration of the anti-collusion rules for the upcoming Incentive Auction will significantly deter ongoing business activities in the wireless industry, and worse, quell participation in the Incentive Auction by both reverse and forward auction applicants. In addition to scope, CCA expressed concern about the length of the quiet period, as it is expected to last anywhere from six months to a year. If the Commission cannot reduce the length of the quiet period, it is imperative for the FCC to clarify the scope of the rules and to ensure that their application is as narrowly tailored as possible. At the very least, the Commission should clarify that the scope of disclosures that need to be made pursuant to the anti-collusion rules is intended to be narrowly tailored to agreements relating to the licenses being auctioned, allow forward auction participants to continue operational agreement negotiations after the quiet period has commenced, and provide additional guidance regarding what agreements would be considered “solely operational.”

CCA members take their obligations under the Commission’s anti-collusion rules very seriously. As a result, in the past discussions by and between carriers related to a whole host of issues have slowed—if not stopped entirely—during auction quiet periods. Specifically, discussions

¹ See 47 C.F.R. § 1.2105.

related to spectrum acquisition, leasing, partitioning and disaggregation, roaming relationships, device acquisition, interconnection agreements, capital calls and other day-to-day business operations have all been impacted during Commission spectrum auctions.

The unique circumstances of the Incentive Auction will cause the anti-collusion rules to have an even more profound impact absent additional guidance. As AT&T has noted:

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.²

This has the practical effect of limiting additional conversations by wireless providers, including discussions with Channel 51 licensees related to voluntary relocation, potential tower siting and colocation discussions, and potential retransmission consent and other multichannel video programming distributor (“MVPD”) negotiations.

CCA thanked the Commission for its willingness to provide guidance regarding its anti-collusion rules. Unfortunately, the Commission’s changes in its Part 1 Report and Order have injected additional uncertainty into potential applicants’ consideration of whether or not to participate in the Incentive Auction at all. While the rules do not prohibit applicants from entering into agreements, arrangements or other understandings that are defined as “solely operational,”³ the prohibited communications rule arguably prohibits applicable communications “unless such communications are within the scope of an agreement described in section 1.2105(a)(2)(ix)(a)-(c) [*sic*] that is disclosed pursuant to section 1.2105(a)(2)(viii).”⁴ As AT&T has noted, this has the practical effect of permitting ongoing operational discussions that can be framed within an *existing* agreement that is disclosed on an applicant’s short form application, but would prohibit communications on a going-forward basis that are not rooted in a disclosed agreement.⁵ To overcome the concerns expressed above, the Commission should issue a written clarification providing additional guidance or establishing safe harbors to create more certainty and increase auction participation. Such guidance should allow applicants to continue negotiations regarding “solely operational” agreements even after the quiet period has begun, without the need to disclose them.

More specifically, CCA encouraged the Commission to provide potential auction participants (both forward and reverse) with additional guidance on communications that may be prohibited by the rule versus those that are not. Doing so will increase participation in the auction, as carriers often weigh the opportunities presented by participating in an auction against the often significant loss of business productivity resulting from conservative application of the anti-collusion

² *Ex Parte* Letter from Michael Goggin, General Attorney, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 at 1 (filed Sept. 21, 2015) (“AT&T Ex Parte”).

³ 47 C.F.R. § 1.2105(a)(2)(ix)(A).

⁴ 47 C.F.R. § 1.2105(c)(1).

⁵ AT&T Ex Parte at 3.

rules. This scenario is even more likely to occur in the case of broadcasters, who are generally less familiar with the Commission's anti-collusion rules than forward auction participants.⁶

In particular, the Commission should provide more specificity regarding the scope of agreements that would qualify as being "operational in nature" for purposes of the rules. While no one can expect the Commission to list every conceivable example of agreements that may qualify, parties would benefit from additional guidance. As one example, CCA noted that the First Responder Network Authority ("FirstNet") recently sought comment on a draft Request for Proposal for construction of the Nationwide Public Safety Broadband Network ("NPSBN").⁷ Pursuant to the Commission's *Mobile Spectrum Holdings Report and Order*, providers who are given access to Upper 700 MHz spectrum via commercial relationships with FirstNet will not have that spectrum counted against them for purposes of the Commission's spectrum screen.⁸ Engaging in FirstNet's RFP process could therefore implicate "post-auction market structure," but these discussions are likely to take place during the Incentive Auction quiet period. Without additional guidance, carriers may be left in the unenviable position of having to choose between bidding on FirstNet opportunities or spectrum made available in the Incentive Auction. As another example, CCA agrees with AT&T that the Commission should clarify that "well-attended industry meetings, which may even concern the bands being auctioned, [sh]ould not be presumptively interpreted as implicating the licenses being auctioned" and thus in violation of the Commission's rules.⁹

Moreover, the Commission should clarify that its anti-collusion rules will not prohibit entities with both broadcast/MVPD and wireless interests from conducting business in each realm, so long as the entity "has established internal control procedures to preclude any person from acting on behalf of the applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person acting on behalf of and possessing such information regarding another applicant."¹⁰ Such entities need to be able to conduct their respective businesses during the Incentive Auction, particularly in light of an extended quiet period. Discussions with broadcasters to facilitate voluntary relocation out of Channel 51 should also be considered operational and not prohibited, so long as they do not convey a licensee's potential bids or bidding strategy for the auction.

The Commission should also provide clarity to expedite the Incentive Auction process, such that applicants will not over disclose agreements that the FCC did not intend. Under the Commission's revised anti-collusion rules, applicants only need to certify that they have not entered into certain agreements relating to post-auction market structure with certain specifically permitted exceptions that do not relate to the licenses being auctioned, such as "solely operational" agreements, or certain agreements with respect to the transfer of licenses, and to further certify that

⁶ *Id.* at 2.

⁷ FirstNet, First Responder Network Authority (FirstNet) Nationwide Public Safety Broadband Network (NPSBN) Special Notice – D15PS00295 (Apr. 27, 2015), *available at* <https://www.fbo.gov/?s=opportunity&mode=form&id=fa93b913eb397ddb5aaafc2506be60a50&tab=core&cvview=1> (last viewed Sept. 29, 2015).

⁸ *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 6188 ¶ 130 (2014).

⁹ AT&T Ex Parte at 4.

¹⁰ *Updating Part 1 Competitive Bidding Rules, et al.*, WT Docket No. 14-170, *et al.*, Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order, 30 FCC Rcd 7493, 7577 ¶ 199 (2015) ("DE Report and Order").

they have provided a brief description of various agreements that do relate to the licenses being auctioned.¹¹ The Commission should clarify that this certification language satisfies its rules, and that solely operational agreements, which by definition do not “relate to the licenses at auction” and do not address or communicate bidding at auction or bidding strategies or post-auction market structure, are not required to be disclosed. Some CCA carrier members are overly diligent in their short-form applications, and disclose relationships that they are not necessarily required to under the rules, out of an abundance of caution. While auction participants may still remain overly cautious, providing better guidance on the scope of the rules would likely streamline applicants’ disclosures and save Commission staff valuable time going into the auction.

As noted above, CCA’s members take their obligations under the Commission’s anti-collusion rules very seriously, and do not wish to skirt their responsibilities under the rules. Additional guidance from the FCC on the scope of auction participants’ obligations is sorely needed, and providing this guidance well in advance of the Incentive Auction will ensure that potential participants are familiar with the rules, and are poised to bid aggressively while at the same time conducting business as usual to the greatest extent possible.

This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission’s Rules.

Regards,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
General Counsel

cc (via email): Gary Epstein
Howard Symons
Jean Kiddoo
Sue McNeil
Erik Salovaara

¹¹ 47 C.F.R. §§ 1.2105(a)(2)(viii), (ix).