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October 30, 2015

**Via ECFS – Ex Parte Communication**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Re: Updating Part 1 Competitive Bidding Rules, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 14-170, GN Docket No. 12-268, AU Docket No. 14-252, WT Docket No. 12-269, MB Docket No. 15-146; Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, Auction of Advanced Wireless Services (AWS-3) Licenses, GN Docket No. 13-185, AU Docket No. 14-78

Dear Ms. Dortch:

T-Mobile US (“T-Mobile”) has a track record of supporting improvements to the FCC’s auction rules that uphold the integrity and fairness of the competitive bidding process.<sup>1/</sup> DISH Network Corporation (“DISH”) and entities that the Commission found it controlled (the “DISH DEs”) abused the competitive bidding process<sup>2/</sup> and now the Commission must act to keep them from

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<sup>1/</sup> See Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (filed Feb. 20, 2015); Reply Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (filed Mar. 6, 2015); Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (filed May 14, 2015).

<sup>2/</sup> In the AWS-3 auction, the Commission correctly found that DISH, through various intermediate subsidiaries, had *de facto* control and the power to control two entities – Northstar Wireless, LLC (“Northstar”) and SNR Wireless LicenseCo, LLC (“SNR,” and together with Northstar, the “DISH DEs”). *Northstar Wireless, LLC; SNR Wireless LicenseCo, LLC; Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd. 8887 (2015) (“*DISH DE Order*”). As a result, the Commission rejected the DISH DEs’ claims that they were entitled to bidding credits as designated entities (“DEs”). *Id.* at ¶¶ 51-56. The Wireless Telecommunications Bureau subsequently applied funds that the DISH DEs had on deposit to satisfy the interim penalty caused by DISH DEs “selective default” on some of the licenses for which they were the high bidder. Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau to Mark F. Dever, Counsel for Northstar Wireless, LLC, ULS File No. 0006670613 (Oct. 1, 2015); Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau to Ari Q. Fitzgerald, Counsel for SNR

doing so again. The Commission should therefore prohibit DISH and the DISH DEs from bidding in the future on AWS-3 licenses on which the DISH DEs “selectively” defaulted and consider DISH and the DISH DEs “former defaulters,” requiring them to provide a fifty percent greater upfront payment if they wish to participate in the upcoming incentive auction. Commission action is necessary to preserve the integrity of the auction process, to prevent DISH and the DISH DEs from further gaming the system, and to send a clear message that the behavior of DISH and the DISH DEs will not be tolerated in others.<sup>3/</sup>

### **The Commission Should Prohibit DISH and the DISH DEs From Re-Acquiring AWS-3 Licenses in a Subsequent Auction**

The Commission has already highlighted the DISH DEs’ behavior that compromised the AWS-3 auction outcome and resulted in the DISH DEs’ selective default on licenses won at auction.<sup>4/</sup> AT&T notes industry analyst observations that if DISH or the DEs are permitted to participate in the re-auction of the licenses, the financial consequences to DISH of the default may be minimal.<sup>5/</sup> DISH also stands to reap substantial strategic and competitive benefits if it is allowed to fully participate in a re-auction, a result that compromises the integrity of the auction process.

By winning licenses using entities that violated the rules, and then selectively defaulting, DISH deprived other bidders of the ability to fairly win licenses that they intended to immediately put to use. DISH also has seized control of the timing of the release of spectrum assets from the FCC which is now faced with delaying deployment of the defaulted licenses until a re-auction sometime in the future.<sup>6/</sup> And, to the extent that it reacquires some or all of the defaulted licenses, absent Commission action to prevent it, DISH (which has yet to serve a single wireless customer) will effectively give itself an extension of time to meet the build-out requirements for the defaulted licenses – an outcome that should trouble the Commission – again with potentially

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Wireless LicenseCo, LLC, ULS File No. 0006670667 (Oct. 1, 2015) (collectively “*DISH DE Default Letters*”). To the extent required to take the actions T-Mobile requests, the Bureau should consider this letter a petition for reconsideration of the *DISH DE Default Letters*.

<sup>3/</sup> See, *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Technical Formulas for Competitive Bidding*, Public Notice, DA 15-1183 (rel. Oct. 15, 2015) (“*Incentive Auction Procedures PN*”); Letter from AT&T, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 14-170, GN Docket No. 12-268 (filed Oct. 9, 2015) (“AT&T Letter”).

<sup>4/</sup> As AT&T suggests, the Commission should prohibit bidders from reacquiring defaulted licenses in any re-auction of incentive auction spectrum. But this recommendation does not go far enough. DISH should be specifically precluded from reacquiring AWS-3 licenses that were the subject of its selective default.

<sup>5/</sup> See AT&T Letter at 2 (“[S]ome analysts have observed that DISH may ultimately have received billions in financing from the FCC at an effective rate of 5 percent. . . the FCC’s penalty provisions are not acting as a sufficient disincentive to engage in strategic default behavior.”).

<sup>6/</sup> The broadcast incentive auction must continue to be the FCC’s priority, so the AWS-3 re-auction likely will not occur for several years.

little to no financial consequence for their improper behavior.<sup>7/</sup> The dangers and distortions of insincere and strategic bidding designed to prevent a rival from acquiring licenses is well-documented and should not be countenanced by the Commission.<sup>8/</sup>

For these reasons, prohibiting DISH and its surrogate DEs from re-acquiring AWS-3 spectrum in a subsequent auction would appropriately punish that behavior and is consistent with the Commission's often-stated emphasis on maintaining the integrity of the auction process. In contrast, allowing the DISH DEs to re-acquire licenses on which they selectively defaulted creates the perverse incentive for DISH surrogates to participate in a re-auction for the sole purpose of bidding up the licenses to avoid or minimize the penalties they otherwise would incur (perversely amounting to the FCC shouldering the carrying costs of those licenses that DISH and its DEs otherwise would have to bear, just as other auction winners must do).<sup>9/</sup>

Auction winners should be high bidders who value the spectrum the most and are therefore most likely to build it out and provide service to the benefit of consumers. Not so here if DISH and its DEs are allowed to game the auction process yet again and use the ability to "cherry pick" licenses and rebid for their sole competitive and economic benefit. A default on one license should therefore be a default on all licenses; otherwise the tactic employed by DISH will destroy the free-market nature of the Commission's auction process and amount to gamesmanship at its worst. Without taking strict action here, DISH and its DEs suffer no meaningful consequence to their destructive AWS-3 behavior and the FCC will only invite similar antics by others.

### **Additional Safeguards Are Necessary for Future Auctions, Including the AWS-3 Re-Auction and the Incentive Auction**

T-Mobile applauds the Commission's recent action imposing the maximum penalty of twenty percent for default bid amounts for the upcoming incentive auction, but more safeguards are necessary. The Commission should find that DISH and the DISH DEs are former defaulters and

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<sup>7/</sup> DISH and its affiliates have engaged in a pattern of seeking, and obtaining, extensions to put the wireless spectrum it acquired, to use. See, e.g., *Promoting Interoperability in the 700 MHz Commercial Spectrum; Requests for Waiver and Extension of Lower 700 MHz Band Interim Construction Benchmark Deadlines*, Report and Order, 28 FCC Rcd. 15122, ¶¶ 55-59 (2013); *DISH Network Corporation Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time*, Memorandum Opinion and Order, 28 FCC Rcd. 16787, ¶ 1 (2013).

<sup>8/</sup> In addition to, among other actions, adopting strong rules and policies prohibiting collusion and imposing penalties on entities that withdraw bids or fail to make auction payments, it has noted that insincere bidding "whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency." *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd. 2348, ¶ 147 (1994). The Commission also stressed that strategic bidding – e.g., attempting "to deter a rival from acquiring . . . licenses (or from entering altogether) by bidding up the price of key licenses and then withdrawing" – is especially damaging to the auction process. *Id.*

<sup>9/</sup> The Commission's rules provide that defaulting bidders pay a deficiency payment and an additional payment. The deficiency payment is the difference between the defaulted bid and the winning bid in the next auction. By bidding up a price in a subsequent auction, DISH DEs would reduce or eliminate the deficiency payment. See 47 C.F.R. § 1.2104(g)(2).

require them to submit an upfront payment in the upcoming incentive auction and the AWS-3 re-auction equal to 50 percent more than the amount that would otherwise be required.<sup>10/</sup> Including DISH and the DISH DEs – entities that failed to pay for licenses for which they were the high bidder – within the definition of a former defaulter will impose a more meaningful penalty on their destructive tactics. This interpretation is warranted by changed circumstances since the Commission narrowed its interpretation of a former defaulter. Since then, the Commission has become aware of the breadth and scope of DISH’s and the DISH DEs’ willingness to manipulate the AWS-3 auction process.<sup>11/</sup> While those entities would still be allowed to participate in the auction, the Commission would be provided with greater protection against the type of activity in which they previously engaged.

In addition, if despite the strong public policy reasons against it, the FCC continues to permit bidders to selectively default on winning bids, the Commission must establish additional safeguards to deter strategic defaults that undermine the auction process. For example, the Commission must address the perverse incentives created by a selective default with regard to its build-out requirements. DISH has proven masterful in acquiring a vast spectrum portfolio while using a piecemeal build-out extension process to avoid in the near term the obligation to serve even a single wireless customer.<sup>12/</sup> If DISH is permitted to participate in a re-auction, the Commission should not reward this strategic behavior by according DISH the same build-out rights as non-defaulting bidders. To deter strategic defaults by DISH or others, if the licenses are reacquired at re-auction the build-out dates should match those associated with the original auction. This would prevent bidders from insincerely defaulting with every intention of reacquiring the licenses. To do otherwise cedes control of the release of critical spectrum assets into the marketplace to the defaulting bidder, saddles the FCC with the carrying cost of the spectrum and the complexities of a re-auction, and gives substantial, additional time to construct to an insincere defaulter.

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<sup>10/</sup> In the past, the Commission has taken a narrow view of Section 1.2106(a), finding that the penalty covers only those entities that have been notified of a debt and failed to pay it. *Incentive Auction Procedures PN*, ¶ 138, n.270. A broader interpretation is appropriate in order to include entities, like DISH and the DISH DEs, that purposefully evade payment obligations that would not otherwise be characterized as debts. Otherwise, DISH and the DEs will be able to avoid treatment as former defaulters until after the AWS-3 re-auction, which as noted is likely several years away.

<sup>11/</sup> In the aftermath of the AWS-3 auction, the Commission found itself closely examining the standards for certifying *bona fide* DEs. Similarly, the Commission should take a hard look at the gamesmanship associated with the DISH DEs’ strategic defaults and deter such conduct in the future by deeming DISH and the DISH DEs to be former defaulters.

<sup>12/</sup> See *supra* note 7 and accompanying text; see also Thomas Gryta et al., *Dish Network Surprise Winner In Spectrum Auction*, WALL STREET JOURNAL (Jan. 30, 2015), <http://www.wsj.com/articles/fcc-names-winning-bidders-in-record-wireless-spectrum-auction-1422642337> (“Dish and Mr. Ergen have amassed a trove of valuable wireless spectrum the past several years, but the company doesn’t have a cellphone network or an agreement with another carrier that would allow it to start selling wireless plans.”).

The Communications Act directs the Commission, in designing auction methodologies, to “include safeguards to protect the public interest in the use of the spectrum.”<sup>13/</sup> Use of the spectrum is imperiled if the auction process by which it is licensed is corrupted. DISH and its DEs have done that in the AWS-3 auction, and the Commission must act to preserve the integrity of the auction process by preventing them from bidding on any of the AWS-3 licenses on which they defaulted in a subsequent re-auction and by requiring DISH and the DISH DEs to pay a fifty percent greater upfront payment in the incentive auction. Anything less will allow DISH and the DISH DEs to continue to game the system to the detriment of other bidders and, ultimately, the American public.

Respectfully submitted,

*/s/ Kathleen O'Brien Ham*

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cc: (each electronically)  
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<sup>13/</sup> 47 U.S.C. § 309(j)(3).