

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Updating Part 1 Competitive Bidding Rules	)	WT Docket No. 14-170
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268
	)	
Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver	)	RM-11395
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	

**Comments in Support of Petitions for Reconsideration**

The law firm of Fletcher, Heald & Hildreth, PLC<sup>1</sup> respectfully submits the following comments in support of the petitions submitted by the Blooston Rural Carriers ("Blooston") and the Rural-26 DE Coalition ("Rural-26") in the above captioned proceeding.<sup>2</sup> The petitions seek clarification and/or reconsideration of an unexpected new sentence which materialized as a final rule at Section 1.2105(a)(2)(iii) during the larger effort to update Part 1 Competitive Bidding Rules. The new sentence appears to prohibit any individual from serving as an authorized auction bidder for more than one auction applicant. Fletcher, Heald & Hildreth agrees with the petitioners that the new sentence is unnecessary and will have a chilling effect upon auction participation by small and mid-sized auction applicants.

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<sup>1</sup> Fletcher, Heald & Hildreth, is a lawfirm that was founded in 1936, one year after the Federal Communications Commission began operating. Since its founding, Fletcher, Heald & Hildreth continuously has provided comprehensive legal services in every aspect of communications law. Fletcher, Heald & Hildreth has represented numerous clients in the majority of FCC auctions since the FCC began its first auction in 1994.

<sup>2</sup> Petitions for Reconsideration of Action in Rulemaking Proceeding, *Updating Part 1 Competitive Bidding Rules, et al.*, 80 Fed. Reg. 69,630 (Nov.10, 2015).

Fletcher, Heald & Hildreth agrees with the petitioners that both current and new auction rules adequately protect against collusive behavior. The Commission adopted new rules in this docket which prohibit common control of more than one applicant and which restrict collusive behavior.<sup>3</sup> In addition, as the Blooston petition notes, long-standing FCC policies and rules prohibit individuals from serving as an authorized bidder for two applicants in direct competition with one another.<sup>4</sup> The new sentence is unnecessary in light of currently effective rules.

As the Blooston petition suggests, the new sentence is overly broad and it limits the ability of applicants to use the same expert bidder even when there is no potential for abusive bidding.<sup>5</sup> One need look only to the most recent FCC Auction of FM broadcast construction permits for an example of the overly broad effect that the new sentence will have on auctions. In August 2015, the Commission completed Auction 98; among the permits at auction were a class B license in the Virgin Islands and - - nearly 6,000 miles away - - a class C-2 license in Hawaii.<sup>6</sup> Had the new sentence been in effect during Auction 98, the rule would have prohibited a small applicant in Hawaii (who selected only that permit) from sharing the same authorized bidder as a small applicant in the Virgin Islands (who similarly selected only its local permit). In that situation, there is no way for any collusive behavior to occur between the two applicants, but the breadth of the new sentence would have deterred small applicants from participating in the auction due to the restrictions upon who they may use to render bidding assistance.

The petitioners are not alone in recognizing that "small companies [ ] do not have a large enough staff to devote one more employees to full-time auction participation"<sup>7</sup> and "very small companies [have] limited staff already stretched too thin".<sup>8</sup> The Commission itself realizes that portions of the auction process can impose "a significant regulatory burden" on certain

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<sup>3</sup> See Blooston Petition at 11 and DE-26 Petition at 2.

<sup>4</sup> See Blooston Petition at 14.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 98, *Public Notice*, 30 FCC Rcd 8313 (2015).

<sup>7</sup> See Blooston Petition at 7.

<sup>8</sup> See DE-26 Petition at 3.

applicants. In the Final Regulatory Flexibility Analysis which accompanies the new sentence, the Commission highlights that the elimination of certain reporting requirement will minimize significant economic impact on small entities.<sup>9</sup> Yet, in the same Analysis the Commission makes only a scant reference to the new sentence; a sentence which imposes a far greater burden than reporting requirements upon applicants who seek to use common bidding experts. Small and rural applicants will suffer unnecessarily due to the new sentence.<sup>10</sup>

The new sentence also raises statutory concerns. As the DE-26 point out, pursuant to Section 309(j) of the Communications Act, the Commission has a statutory obligation to ensure rural and small company participation in auctions.<sup>11</sup> The new sentence has the opposite effect of encouraging auction participation by restricting the ability of small and rural applicants from hiring a common expert bidder from the limited pool of current auction experts.

In addition, the new sentence limits an applicant's access to counsel and impinges upon an applicant's statutory entitlement "to appear in person or by or with counsel or other duly qualified representative . . ."<sup>12</sup> This is particularly troubling in the instance of applicants for whom English is not their first language such as potential bidders in Puerto Rico and elsewhere in the United States.

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<sup>9</sup> 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, *Updating Part 1 Competitive Bidding Rules, et al., WT Docket No. 14-170 et al.*, 80 Fed Reg 56,763 (Sept. 18, 2015) (emphasis added).

<sup>10</sup> The Final Regulatory Flexibility Analysis reveals that the new sentence may have been drafted to serve another purpose but has resulted in an unintended consequence. The Analysis refers to the new sentence in its analysis of "Joint Bidding" arrangements. However, as the petitioners indicate and as referred to in these comments, small auction applicants who rely upon the expert help of a common authorized bidder cannot select overlapping markets and are neither joint bidders nor a collusive threat to the auction process.

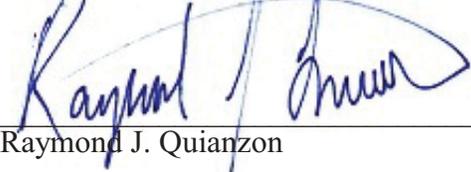
<sup>11</sup> See DE-26 Petition at 2.

<sup>12</sup> 5 U.S.C. §555(b).

In this proceeding, the Commission adopted dozens of well considered amendments to its rules. However, the unexpected sentence that was tacked on to Section 1.2105(a)(2)(iii) does nothing to further the proceeding's goals. Instead, it deprives small and medium sized applicants of the opportunity to have trusted experts work closely with them during auctions as authorized bidders. The petitioners are correct that the new sentence must be reconsidered and eliminated. Eliminating the new sentence will protect the statutory rights of small, rural and midsized applicants, encourage participation by applicants who require experts for assistance and will not threaten the integrity of the auction process.

1300 North Seventeenth Street  
Eleventh Floor  
Arlington, Virginia 22209  
(703) 812-0400  
Telecopier (703) 812-0486

Respectfully Submitted,  
FLETCHER, HEALD & HILDRETH, PLC



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Raymond J. Quianzon

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