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

In re:

Petition for Expedited Rule Making to	)	
Amend Sections 1.2105(a)(2)(xi) and	)	RM-11395
1.2106(a) of the Commission's Rules	)	
and/or for Interim Conditional Waiver	)	

To: The Commission

COMMENTS IN SUPPORT OF PETITION FOR EXPEDITED RULE MAKING AND/OR FOR INTERIM CONDITIONAL WAIVER

AT&T Inc., on behalf of its affiliate, AT&T Mobility LLC (f/k/a Cingular Wireless LLC) ("AT&T"), hereby files comments in support of the Petition for Expedited Rule Making and/or for Interim Conditional Waiver, filed June 8, 2007 by DIRECTV Group, Inc. and EchoStar LLC (the "Petition"). For the reasons discussed in the Petition and below, the Commission should expeditiously institute rule making proceedings to amend Sections 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's rules (the "former defaulter rules") so that, as applied, they can achieve their intended purpose. In the event that the Commission does not adopt the requested amendments before the deadline for submitting FCC Form 175 short-form applications to participate in the upcoming auction of commercial licenses in the 700 MHz Band ("FCC Auction No. 73"), the Wireless Telecommunications Bureau should grant an interim conditional blanket waiver of the former defaulter rules for FCC Auction No. 73 along the lines suggested in the Petition.

I. The Former Defaulter Rules Are Overbroad and Do Not Serve Their Intended Purpose.

As the Petition correctly points out, it was in the wake of the financial difficulties of C Block PCS licensees that the Commission initially adopted the requirement that applicants who have previously defaulted or been delinquent on non-tax Federal debt make an additional 50 percent upfront payment in advance of an auction.[1] Having been forced to adjust to several C Block defaults and bankruptcies, the Commission understandably wished to take action to avoid a repeat of that debacle. As the Commission put it two years later when it incorporated the PCS rule into its general auction rules, "[t]he purpose of the rule is to preserve the integrity of the auction process and to ensure that bidders are capable of meeting their financial commitments to the Commission."[2] The Commission sought to achieve this goal by "requiring a more stringent financial showing from applicants with a poor Federal financial track record."[3] In so doing, however, the Commission has cast too wide a net. The former defaulter rules as currently written and applied require additional upfront payments in numerous situations that go well beyond the Commission's purpose of ensuring the integrity of the auctions process.

The Commission's former defaulter rules are overbroad in three ways: (1) they make relevant too broad a universe of prior defaults and delinquencies; (2) they fail to

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[1] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order*, 13 FCC Rcd 15743, 15753 (1998) ("*C Block Fourth Report and Order*") (adopting Section 24. 706 of the FCC's Rules).

[2] *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15316 ¶ 40 (2000) ("*Part 1 Recon Order*").

[3] *Id*. at 15317 ¶ 42, quoting the *C Block Fourth Report and Order*, *supra*, at 15761.

exempt *de minimis* delinquent debts; and (3) they look back retrospectively without any time limitation whatsoever. The Petition offers reasonable suggestions that would remedy these shortcomings in the current rule, making it more rationally tailored to its intended purpose without sacrificing the Commission's ability to ensure that bidders are capable of meeting their financial commitments in FCC auctions.

The former defaulter rules apply to an auction applicant if it, any of its affiliates, or any of its controlling interest holders or their affiliates has ever been in default on any Commission license or delinquent on a non-tax debt owed to any Federal agency.[4] The Commission employs the definition of "controlling interests" found in Section 1.2110 of its rules for purposes of defining the universe of relevant entities and individuals.[5] The broad reach of the former defaulter rule as structured by the Commission causes it to be triggered unjustifiably in numerous cases.

For example, the additional upfront payment requirement is triggered if an officer of an applicant's corporate parent owed a personal non-tax debt to a Federal agency (*e.g.*, a student loan) that was at any point delinquent, even if that officer has no role in or influence over the applicant's auction participation. That corporate officer's personal Federal debt delinquency has no bearing on the applicant's "Federal financial track record," yet it is considered relevant for purposes of determining whether a prospective auction applicant must identify itself as a "former delinquent debtor."

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[4] *See* 24 C.F.R. § 1.2106(a) and *Wireless Telecommunications Bureau Reminds Prospective Broadband PCS Spectrum Auction Applicants of Default and Delinquency Disclosure Requirements*, Public Notice, DA 04-3491 (WTB, rel. October 29, 2004), at n. 1.

[5] *See Part 1 Recon Order*, *supra*, at 15317 ¶42. Under Section 1.2110(c)(2)(ii)(F) of the Commission's Rules, "officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant."

Similarly, the rule requires that the upfront payment premium be paid by any auction applicant that has ever had even a single minor delinquent Federal debt, even if it has an excellent overall Federal debt payment history earned over decades and through thousands – or even hundreds of thousands – of payments. There is no rational connection between insignificant former delinquencies occurring in the distant past and the financial reliability of a prospective auction bidder.

The purpose of the former defaulter rule – requiring additional pre-auction security from applicants whose financial bona fides are questionable – is not advanced by applying the rule indiscriminately to every applicant who cannot boast a perfect Federal debt payment record for itself, its affiliates, and its controlling interests and their affiliates. The Commission should amend the rule to more effectively target it to its purpose.

II. The Current Rule Is Unfair and Disserves the Public Interest.

As currently written and applied, the former defaulter rules impose unnecessary, and potentially significant, costs on bidders whom the rule was not intended to reach (*i.e.*, bidders whose Federal financial track records are not "poor"). When auction license values are expected to be high, these unjustifiable costs also rise.[6] It is undeniable that AT&T has an exceptional Federal financial track record, and AT&T and its affiliates, who have acquired hundreds of FCC licenses at auction, have never failed to make an

[6] In its FCC Form 175 short-form application for FCC Auction No. 66, for example, AT&T subsidiary Cingular AWS, LLC identified itself as a "former delinquent debtor" upon discovering a few very minor Federal debt delinquencies that had occurred up the corporate chain in the past. As a result, Cingular AWS was required to finance an excess upfront payment for that auction of over $166 million. Using the formula assumed in the Petition (a 6% cost of capital and a 79-day holding period until those funds were applied to Cingular AWS's required auction down payment), the excess upfront payment cost the company over $2 million.

auction-related payment. Indeed, every single auction-related payment made by AT&T for auction has been timely made. As noted above, the former defaulter rules are intended "to preserve the integrity of the auction process and to ensure that bidders are capable of meeting their financial commitments to the Commission."[7] No one could credibly doubt that AT&T will make good on any financial commitment it makes through its participation in spectrum auctions. Yet under the former defaulter rules as they currently operate, the existence of a few trivial former non-auction related delinquent debts would obligate AT&T to offer additional upfront payment security in every FCC auction *ad infinitum*. This simply makes no sense, and the Petition offers a reasonable approach for rectifying this disconnect between the rules' intent and their operation.

For the upcoming FCC Auction No. 73, the Commission has proposed total upfront payments in the hundreds of millions of dollars.[8] The overbroad application of the former defaulter rules for this auction could unfairly impose many millions of dollars of costs on auction applicants as the consequence of prior debt delinquencies that are insignificant, occurred in the distant past and/or are irrelevant to the applicant's ability to fulfill its auction obligations. The public interest would be ill-served by continuing to impose such unfairness in FCC auctions.

The rule's unfairness (not to mention its unwieldiness) is especially acute in multi-layered corporate structures like AT&T's, where the personal debt histories of officers and directors (even independent outside directors) working several levels up the corporate chain become relevant to an auction applicant's former defaulter status. In

[7] *Part 1 Recon Order*, *supra*, at 15316 ¶ 40 (2000).

[8] See Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, Public Notice, DA 07-3415 (rel. August 17, 2007), at Attachment A.

many cases, such individuals have neither a role in nor any influence over the auction activities of a subsidiary auction applicant. Consequently, a delinquent debt payment that has absolutely nothing to do with an auction applicant's ability or inclination to make good on its auction obligations can cause the applicant to incur substantial financing costs associated with the 50 percent upfront payment premium.[9]

Furthermore, as the Petition argues, the current application of the former defaulter rules runs counter to the foundation on which the FCC's competitive bidding system was built – the notion that licenses should be awarded to those bidders who value them most highly.[10] The costs resulting from the upfront payment premium are factored by bidders into their business models, and thus necessarily affect the values they place on the licenses at auction. To the extent that the former defaulter rules impose these additional upfront payment costs unnecessarily, they reduce the demand for spectrum and interfere with both efficient auction outcomes and the underlying objectives of Section 309(j) of the Communications Act.

III. The Solutions Proposed in the Petition Are Reasonable and Can Easily Be Implemented.

The Petition asks the Commission to amend the former defaulter rules to more narrowly tailor them to fit their intended purpose, proposing three changes that would make the rules more rational:

- Exclude former defaults/delinquencies of a *de minimis* nature from the scope of the former defaulter rules;

[9] As seen in connection with Auction 66, the additional financial obligation imposed by the former defaulter rule can amount to hundreds of millions of dollars, even if the relevant former delinquent debt was a mere pittance.

[10] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2349 (1994).

- Exclude prior delinquencies and defaults that are more than a certain age from the scope of the former defaulter rules; and
- Apply the rules only to auction applicants and to individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities.[11]

By making these suggested changes, the Commission will continue to have the ability to require a more stringent financial showing from those applicants whose Federal financial track records warrant such a requirement. At the same time, these changes will minimize the extent to which additional costs are imposed upon auction applicants whose payment records do not call into question their ability to meet their auction financial commitments.

The Commission should quickly institute a rule making proceeding aimed at amending the former defaulter rules in advance of the short-form deadline for FCC Auction No. 73. If time is too short to complete the rule making, the Bureau can and should adopt the interim conditional blanket waiver proposed in the Petition so that this important auction can proceed without imposing unnecessary costs on prospective bidders. As the Petition argued, such a waiver is warranted in these circumstances and the relevant legal standard for a waiver is met. The waiver parameters outlined in the Petition – setting a three-year look-back period, excluding personal debts of the officers and directors of parent entities, and setting a formula for determining *de minimis* prior delinquencies – are reasonable, can easily be implemented for FCC Auction No. 73, and would ameliorate the problem for this auction while the Commission considered amendment of the rules.

[11] *See* Petition at pp. 7-8.

IV. Conclusion.

Requiring additional financial security from prospective bidders with "poor" Federal debt payment histories makes sense. The former defaulter rules, however, currently operate to require a "perfect" Federal financial track record – throughout the applicant's corporate family and regardless of the relevance of that record to the applicant's creditworthiness – in order to avoid the financial burdens of an additional upfront auction payment. As they are now written and applied by the Commission, the former defaulter rules thus are overbroad and do not serve their intended purpose. They cast too wide a net, ensnaring bidders whose payment histories, though imperfect, are nonetheless excellent and who should not be brought within the purview of the former defaulter rules.

For the foregoing reasons, AT&T respectfully urges the Commission to expeditiously institute a rule making proceeding to amend the former defaulter rules so that they will achieve their intended purpose – ferreting out applicants who represent a real credit risk. If that proceeding cannot be brought to a conclusion before the deadline for submitting FCC Form 175 short-form applications for FCC Auction No. 73, the Bureau should issue a conditional blanket waiver along the lines suggested in the

Petition. In completing its short-form application for FCC Auction No. 73, each applicant may then determine whether it qualifies for this waiver.

Respectfully submitted,

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