



# **Former Defaulter Rules**

August 12, 2010

# Overview: Revising the Former Defaulter Rules

- Context in which the former defaulter rules were adopted
- The former defaulter rules have been applied too broadly
- Overbroad application of rules imposes substantial financial burden
- Proposed changes to the rules still advance the public interest and serve the underlying purpose of the rules
- Need timely action in advance of 2011 auctions

# Purpose of Former Defaulter Rules

- The goal of the FCC’s “former defaulter” rules is important
  - Adoption followed numerous C Block bankruptcies and defaults
- FCC rules:
  - Protect integrity of future auctions and the licensing process
  - Provide additional security that auction winners could satisfy the financial obligations arising out of their auction participation
  - Allow entities with “poor Federal financial track record” to participate in auctions, but require “more stringent financial showing”

# The Former Defaulter Rules are Applied Too Broadly

- But, the rules are applied not only to the applicant and its controlling companies, but also to *officers and directors* of the applicant and of its controlling interests
  - Regardless of whether the officer/director has any role in or control over the applicant's day to day affairs
  - Regardless of whether debt relates to applicant's operations (*i.e.*, includes personal debts)

# The Former Defaulter Rules are Applied Too Broadly (cont'd)

- No limits on application:
  - No minimum amount of debt as threshold
  - No minimum number of defaults/delinquencies (rule is triggered regardless of applicant's overall record of timely satisfaction of non-tax Federal obligations)
  - No time limit

# The Former Defaulter Rules are Applied Too Broadly (cont'd)

- Overbroad application does not serve purposes of the rules
  - Sweeps in applicants with extensive track records of timely satisfying non-tax Federal obligations, and whose ability to satisfy the financial obligations from auctions is well demonstrated
  - Discourages maximum auction participation by financially sound bidders
  - Particularly onerous impact on small businesses and new entrants

# Costs of Overbroad Application of the Rules

- Application of the rule has cost tens of millions of dollars in lost interest alone
  - Applicants lose benefit of funds from date of upfront payment (before auction) through date of down payment (following close of auction)
  - Auction 66 – over \$8 million in lost interest\*
  - Auction 73 – over \$7.3 million in lost interest\*

\* Assuming 6% interest rate

# Auction 66



Bidder	Small Business Status	Amount of Additional Upfront Payment	Cost of Additional Upfront Payment (assuming 6% interest rate)
Wireless DBS		\$324,182,000	\$4,209,925
Cingular AWS		\$166,666,666	\$2,164,384
Cellco Partnership		\$127,781,000	\$1,659,403
Leaco Rural Tel. Coop.	Very Small Business	\$237,500	\$3,084
Innovative Comm. Corp.		\$32,500	\$422
Roberts County Tel. Coop.	Very Small Business	\$20,500	\$266
<b>TOTAL</b>		<b>\$618,920,166</b>	<b>\$8,037,484</b>

Upfront Payment Date (7/17/06) to Down Payment Date (10/4/06) = 79 days

# Auction 73



Bidder	Small Business Status	Amount of Additional Upfront Payment	Cost of Additional Upfront Payment (assuming 6% interest rate)
Cellco Partnership		\$292,050,000	\$4,320,725
AT&T Mobility		\$165,000,000	\$2,441,088
Frontier Wireless LLC		\$38,033,523	\$562,686
Puerto Rico Telephone		\$581,328	\$8,600
VentureTel 700, Inc.	Very Small Business	\$232,815	\$3,444
Chevron USA Inc.		\$25,740	\$381
NatTel, LLC	Very Small Business	\$13,200	\$195
Robinson, Jack E.	Very Small Business	\$891	\$13
<b>TOTAL</b>		<b>\$495,937,497</b>	<b>\$7,337,132</b>

Upfront Payment Date (1/4/08) to Down Payment Date (4/3/08) = 90 days

# The Rules Should Be Tailored

- Former defaults/delinquencies of a *de minimis* nature should be excluded
  - Those totaling less than the lesser of (1) 0.1% of the average attributable annual gross revenues of the applicant (per Sec. 1.2110 attribution rule) or (2) \$100,000
- Prior defaults/delinquencies more than a certain number of years old should be excluded
  - Those occurring more than 3 years prior to Form 175 deadline
- Former defaulter rules should apply to applicants and to individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities
  - Defaults/delinquencies relating to personal obligation of officer/director of entity other than the auction applicant should be excluded

# The Vehicle Exists to Tailor the Rules – Timing is Critical

- EchoStar LLC and DIRECTV Group, Inc. -  
Petition for Expedited Rule Making and/or  
for Interim Conditional Waiver
  - Filed June 8, 2007
  - Placed on PN 8/22/07 (RM # 11395)
  - AT&T Comments filed in support
- National Broadband Plan calls for 2011  
auctions of AWS and D Block spectrum\*

\* National Broadband Plan recommendations 5.8.2 and 5.8.3

# Current Text of Rules

- 1.2105(a)(2)(xi):
  - An attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency.
- 1.2106(a):
  - The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that has previously been in default on any Commission license or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

# FCC Auction Application Instructions

- From Auction 73 Procedures PN (at para 92): “Each applicant must state under penalty of perjury on its short-form application whether or not the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by Section 1.2110,[1] have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency.[2]”

[1] 47 C.F.R. § 1.2110.

[2] 47 C.F.R. § 1.2105(a)(2)(xi); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15317 ¶ 42 and n.142.

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