

March 11, 2014

Pursuant to Section 309(j), the Commission has authority to design a system of competitive bidding that provides safeguards to protect the public interest and to promote specific objectives including the recovery of a part of the value of the spectrum made available for commercial use.¹

However, the Commission is expressly “prohibited” from considering the expectation of revenues when making a public interest, convenience, and necessity determination in creating certain auction licensing regulations pursuant to its statutory mandate to ensure that there is competition and diversity (including MBEs, WBEs, small businesses and rural telecoms as bidders).² The Commission has long recognized this statutory prohibition.³ Significantly, the

¹ See 47 U.S.C. §309(j)(3)(C). “...In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and the following objectives....[including] recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource” *id.* (*internal citations omitted*).

² See 47 U.S.C. §309(j)(7)(A). “Consideration [of revenues in public interest determinations is] prohibited. In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.” *Id.* (*internal citations omitted*). Paragraph (4)(C), which provides direction for the content of the Commission’s auction regulations, reads: “consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants **including small businesses, rural telephone companies, and businesses owned by members of minority groups and women**, and (iii) invest in and rapid deployment of new technologies and services.” 47 U.S.C. §309(j)(4)(C) (*emphasis added*).

³ See *e.g.* *Northcoast Communications, L.L.C., Order*, 16 FCC Rcd 15637, 15640 ¶5 (2001) (“By statute, the Commission may not base a finding of public interest, convenience, and necessity with respect to licensing matters on the expectation of federal revenues raised from spectrum auctions.”); *Southern Communications Systems, Inc., Second Memorandum Opinion and Order*, 16 FCC Rcd 18357, 18362 ¶11 (2001) (“Section 309(j)(7)(A) prohibits the Commission from assigning a band of frequencies to a particular use, and from prescribing related regulations, based on the expectation of auction revenues; while, Section 309(j)(7)(B) restricts the Commission from prescribing regulations pertaining to alternative payment schedules and methods of calculation “solely or predominantly” on the expectation of auction revenues.”); *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”), Report and Order*, 12 FCC Rcd 10785, 10816 ¶60 (1997) (Responding to “several commenters argu[ing] that their suggested WCS licensed service area sizes will increase auction revenues. We wish to make clear that, consistent with Section 309(j)(7)(A) of the Communications Act, we have considered the communications needs of

March 11, 2014

FCC is prohibited from considering the expectation of revenues when creating regulations that involve DE bidding credits, the size of geographic areas, closed auctions, or other DE incentives. Further, the Commission is expressly “limited” in its ability to consider the expectation of revenues when creating regulations on payment methods or schedules.⁴

potential service providers and the American public in developing these service areas. We have not considered anticipated auction revenues.” (*internal citations omitted*); *Implementation of Section 309(j) of the Communications Act-Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2361 ¶73 (1994) (“While Congress has charged us to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it our sole objective. To the contrary, our goals are to encourage the rapid deployment of service, efficient use of the spectrum and the other goals enumerated in Section I. Pursuing these objectives is in full accordance with the statutory purpose of auctions as set forth in §309(j)(3). And, we have concluded, based on our analysis of the record, that we can best achieve these objectives by generally awarding licenses to the parties that value them most highly. Moreover, this approach is permitted by §309(j)(7)(C), which provides that §§309(j)(7)(A) and (B) do not prevent the Commission from considering “consumer demand,” such as by assigning licenses to those who would provide services most highly valued by the public.”).

⁴ See 47 U.S.C. §309(j)(7)(B). “Consideration [of revenues in public interest determinations is] limited. In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. *Id.* Paragraph (4)(A) reads: “consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods” 47 U.S.C. §309(j)(4)(A).