

May 30, 2014

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: ***Petition of DirectTV Group, Inc. and EchoStar, LLC for Expedited Rulemaking to Amend Sections 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver, RM-11395***

***Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-110 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185***

***Auction of Advanced Wireless Services Licenses, Competitive Bidding Procedures for Auction 97, AU Docket No. 14-78***

***Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268***

Dear Ms. Dortch:

As companies develop their plans and funding for participating in the upcoming spectrum auctions, they must determine whether they have ever been in default on a license or delinquent on a debt owed to a federal agency. An FCC rule states that an applicant that has been in default or delinquent must make a substantial additional upfront payment before it can participate in the auction – 150 percent of what would otherwise be required.

This “former defaulter” rule has in past auctions required bidders to make millions of additional dollars in upfront payments. Yet it encompasses any and all debts – regardless of the amount of the debt, and even if the debt was long ago paid. The rule imposes a financial penalty that directly impacts bidders’ financing plans and can deter or discourage bidding. There is no basis to apply it to smaller debts, or those paid years earlier, as long as the bidder has no current defaults or delinquencies. The FCC has before it a petition that seeks changes to this rule and, pending those changes, a limited, interim waiver which would exempt such small or past debts. The FCC can and should grant that waiver now, so that the rule does not impede robust participation in upcoming auctions.

## The Problem:

Section 1.2106(a) of the Commission's rules states:

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.<sup>1</sup>

The obligation to finance these additional payments (on which no interest is paid even though they are typically held for months) could discourage bidders from making upfront payments on as many licenses as they would otherwise compete for. This could mean less robust bidding and lower auction revenues in the upcoming AWS-3 and incentive auctions – auctions in which billions of dollars of revenues must be raised for FirstNet and for Government users' relocation costs.

The FCC imposed this rule in 2000, in the wake of some winning bidders' defaults on installment payments on auctioned PCS licenses. It concluded that an upfront premium penalty would preserve the integrity of the auction process and ensure that bidders are capable of meeting their financial commitments to the Commission.<sup>2</sup> Putting aside the FCC's current practice not to allow installment payments (it collects all payments for licenses before granting them), the rule's stated purpose does not apply when the bidder is current on its financial obligations, but trips the rule based on past debts unrelated to FCC licenses. The lack of connection between the rule's purpose and its scope is particularly acute as to debts that are small or have long since been paid.

First, because the rule applies to any delinquent debt, regardless of size, even a \$10 debt requires an extra 50% upfront payment. That penalty can be wildly disproportional to the debt. In the AWS-1 auction, bidders who reported they were former defaulters paid an additional \$619 million upfront; in the 700 MHz auction, former defaulters paid an extra \$496 million.

Second, the rule applies to any debts, no matter how long ago they had been settled or paid off in full. But companies may owe debts to a federal agency for many reasons that do not relate to their willingness or ability to pay for spectrum licenses. For example, many applicants for FCC licenses also make contributions to the Universal Service Fund. The Universal Service Administrative Company (USAC), which administers the fund, typically sends monthly bills for payments which require payment within 30 days. Other entities, such as the Telecommunications Relay Service and North American Numbering Plan Administrators, also send monthly

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<sup>1</sup> A related rule, Section 1.2105(a)(2)(xi), requires bidders to include in their applications a "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."

<sup>2</sup> Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 15 FCC Rcd 15293, 15317 (2000).

bills requiring payment within 30 days. Some companies with multiple FCC-regulated entities receive dozens of bills annually. On occasion a bill can be misaddressed, lost or paid late, resulting in a delinquency, regardless of the amount.

These situations are entirely distinct from the PCS installment payment history which led the FCC to adopt the rule. They do not demonstrate that an applicant is less likely to pay for the licenses it wins at auction. They should not result in an upfront auction penalty.

### The Solution: Grant a Limited Interim Waiver

In 2007, DirecTV and EchoStar filed a petition for rulemaking to reexamine Section 1.2106(a). They documented why the rule is overbroad in that its reach far exceeds its stated purpose, and should be modified. They also asked the FCC to waive the rule on an interim basis (pending action in the rulemaking) as to delinquent debts that were fully paid more than three years prior to a spectrum auction, involved small amounts, or involved delinquencies other than by the applicant itself or persons who controlled the applicant. The Commission put the petition out for comment.<sup>3</sup> The petition was supported in the record; there was no opposition. The Commission has not acted on it.

The Commission should promptly grant interim relief from Section 1.2106(a). While a rulemaking is warranted to look at changing the rule to reflect changes in FCC auction policies, there is insufficient time to begin and complete that rulemaking before AWS-3 applications will be due. Indeed, the Commission has ample authority and opportunity to grant this waiver request in an Order addressing the Auction 97 Competitive Bidding Procedures (expected in Summer 2014),<sup>4</sup> or alternatively, it can address the waiver in a separate decision.

The Commission should thus waive the rule, pending action on the DirecTV-EchoStar petition, as to two simple, bright line categories of debts:

- (1) Debts that were resolved more than three years prior to the application deadline.
- (2) Debts that were for less than the lesser of \$100,000 or 0.1% of the average annual revenues of the applicant (as computed under the FCC's competitive bidding rules).

This limited, temporary waiver will relieve bidders of the need to make substantial additional upfront payments merely because of small or old debts. Bidders will, however, continue to be required to be current on all payment obligations to federal agencies. The standards for waiver are clearly met. The relief will not undermine the purpose of the rule, and poses no risk to the integrity of the auctions, or to the federal treasury. To the contrary, the

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<sup>3</sup> DirectTV Group, Inc. and EchoStar, LLC, Petition for Expedited Rule Making to Amend Sections 1.2105 and 1.2106 of the Commission's Rules and/or for Interim Conditional Waiver, RM-11395, Public Notice, Aug. 22, 2007.

<sup>4</sup> See Auction of Advanced Wireless Services Licenses, Competitive Bidding Procedures for Auction 97, AU Docket No. 14-78 Public Notice, May 19, 2014.

waiver will serve the public interest, by relieving bidders from incurring unnecessary financial costs that could discourage robust participation in the auction and reduce the substantial revenues that must be raised for FirstNet and other purposes.

Sincerely,

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