

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

In the Matter of)
)
Auction of Advanced Wireless Services Licenses) AU Docket No. 14-78
Scheduled for November 13, 2014; Comments)
Sought on Competitive Bidding Procedures for)
Auction 97)

COMMENTS OF DISH NETWORK CORPORATION

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I. INTRODUCTION AND SUMMARY

DISH Network Corporation (“DISH”) submits these comments in response to the *Public Notice* issued in the above-captioned proceeding,¹ which seeks input on procedures for the auction of licenses in the 1695-1710, 1755-1780 and 2155-2180 MHz bands (together, “AWS-3”). Auctioning the AWS-3 bands in the upcoming Auction 97 will facilitate the goals of the Middle Class Tax Relief and Job Creation Act of 2012² by, among other things, making available additional spectrum for mobile broadband services and raising revenue for the U.S. Treasury and FirstNet. DISH provides a number of recommendations to the proposed auction procedures in order to promote competition, participation, and efficiency in the administration of Auction 97.

First, DISH proposes that the Commission adopt separate bidding eligibility, activity waivers, and stopping rules for the different spectrum bands available in Auction 97. The 1695-1710 MHz licenses and the 1755-1780/2155-2180 MHz band licenses appear to not be interchangeable in terms of their characteristics and likely uses, and it is thus unlikely that the two bands offer licenses that could be used as close substitutes. As a result, policy and auction precedent demonstrate that there is no legitimate, pro-competitive reason that the Commission should establish combined bidding eligibility, activity waivers, and auction stopping rules for the unpaired spectrum at 1695-1710 MHz and for the paired spectrum at 1755-1780/2155-2180 MHz.

¹ See Auction of Advanced Wireless Services Licenses Scheduled for November 13, 2014; Comment Sought on Competitive Bidding Procedures for Auction 97, *Public Notice*, DA 14-669 (rel. May 19, 2014) (“*Public Notice*”).

² See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat 156 (2012) (“*Spectrum Act*”).

Second, based on its experience in the recently completed H Block Auction (Auction 96), DISH proposes a number of refinements to the auction rules. Among other things, DISH proposes that the Commission conduct at least two mock auctions prior to the start of Auction 97. In addition, DISH proposes refinements to the FCC Auction System that will make information more easily accessible to bidders.

Third, the Commission should use Auction 97 to implement much needed reforms to the so-called “former defaulter” rule. In particular, DISH urges the Commission to temporarily waive the burden of the former defaulter rule for Auction 97 participants, and later open a rulemaking to overhaul the rule for future auctions. This course of action is supported in the record by industry stakeholders.

II. BIDDING ELIGIBILITY, ACTIVITY WAIVERS, AND STOPPING RULES SHOULD BE SEPARATE FOR THE DIFFERENT TYPES OF LICENSES IN THE AWS-3 AUCTION

DISH respectfully proposes that the Commission adopt separate bidding eligibility, activity waivers, and stopping rules for the different spectrum bands available in Auction 97. The *Public Notice* proposes that “[a] bidder’s upfront payment is not attributed to specific licenses of licenses,” and that rather “a bidder may place bids on any combination of the licenses it selected on its short-form application (FCC Form 175), provided that the total number of bidding units associated with those licenses does not exceed its current eligibility.”³ DISH believes that structuring the auction in this way could have unintended consequences that would disproportionately hurt smaller competitors and potential new entrants. Instead, DISH urges the Commission to establish different bidding eligibility, activity waivers, and auction stopping rules

³ *Public Notice* ¶ 33.

for the paired G, H, I, and J Blocks (1755-1780/2155-2180 MHz), and for the unpaired A1 and B1 Blocks (1695-1710 MHz).

Separate bidding eligibility, activity waivers, and stopping rules are necessary to promote competition, participation, and efficiency in the administration of Auction 97. As an initial matter, the 1695-1710 MHz licenses and the 1755-1780/2155-2180 MHz band licenses have distinct characteristics. Therefore, it is unlikely that the two bands offer licenses that could be used as close substitutes. As further explained below, combining auction procedures for bands that are not substitutable could enable bidders to employ bidding strategies designed to hurt smaller competitors and new entrants. Commission policy and auction precedent demonstrate that such strategies deter competition and can ultimately suppress revenue.

In addition, separate eligibility pools for the unpaired spectrum at 1695-1710 MHz and for the paired spectrum at 1755-1780/2155-2180 MHz will enhance the efficiency of Auction 97 and increase potential revenue. This is because differentiating procedures for bidder eligibility and activity for spectrum licenses that are not substitutable requires bidders to declare, in effect, their actual interest in each type of spectrum prior to the beginning of the auction and to participate fully in the course of the auction. In addition, separate procedures are necessary in situations where the anonymous bidding rules may not sufficiently conceal the identity of bidders, as could be the case in Auction 97. Thus, as explained more fully below, separate bidding eligibility, activity waivers, and stopping rules will promote competition, participation, and efficiency in the administration of Auction 97

A. The Spectrum Bands Offered in Auction 97 Are Distinct

Although the 1695-1710 MHz band and 1755-1780/2155-2180 MHz band licenses are all being offered at the same time under a single named auction – Auction 97 – the two sets of licenses are very different from one another in terms of, among other things, likely deployment

scenarios and operational challenges. As a result, it is unlikely that the two bands offer licenses that could be used as close substitutes. A given bidder would likely not see these bands as interchangeable: either the bidder would be interested in licenses in both bands for different planned uses for each, or the bidder would likely only need spectrum in one band, but not the other. As a result, it makes more sense to auction the two sets of licenses separately.

1. Bands Under the “AWS-3” Umbrella Have Different Characteristics

The Commission need not combine bidding eligibility, activity waivers, and stopping rules for the paired spectrum at 1755-1780/2155-2180 MHz and the unpaired spectrum at 1695-1710 MHz in Auction 97 just because these bands fall under the “AWS-3” title. The Commission has recognized that the term “AWS-3” is simply “informal nomenclature”⁴ and therefore not indicative of the differing characteristics of each of the bands subject to auction. In fact, in the *AWS-3 NPRM*, the Commission noted that the term “AWS-3” had previously referred to the 2155-2175 MHz band and revised this title to encompass “1695-1710 MHz, 1755-1780 MHz, 2020-2025 MHz, and 2155-2180 MHz.”⁵ Subsequently, in the *AWS-3 Report and Order*, the Commission determined that, because of the pending election associated with adjacent spectrum at 2000-2020 MHz, it would “address service rules for the 2020-2025 MHz band separately in a subsequent item.”⁶ The changing nature of both the definition of “AWS-3” and the bands now slated for sale in the upcoming AWS-3 auction illustrates that the “informal

⁴ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands, WT Docket No. 13-185, *Notice of Proposed Rulemaking and Order on Reconsideration*, 28 FCC Rcd. 11479, 11481-11482 ¶ 1, n.1 (2013) (“AWS-3 NPRM”).

⁵ *Id.*

⁶ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185, *Report and Order*, FCC 14-31 ¶ 1, n.1 (rel. Mar. 31, 2014) (“AWS-3 Report and Order”).

nomenclature” employed by the Commission does not serve as a basis for combining the bidding eligibility requirements for spectrum bands with distinct characteristics in the AWS-3 auction.

2. The Spectrum Bands Offered in Auction 97 Are Not Substitutable

The 1695-1710 MHz licenses and the 1755-1780/2155-2180 MHz band licenses exhibit distinct characteristics. As a result, they are unlikely to be seen as substitutes for one another from the perspective of any given Auction 97 bidder.

The 1695-1710 MHz band is being offered in “an unpaired configuration for low-power mobile transmit (i.e., uplink) operations,”⁷ and is being made available on a shared basis with incumbent Federal meteorological-satellite (MetSat) data users.⁸ For one, any bidders for this spectrum will need to have service deployment plans that can accommodate the need to coordinate on a long term basis with existing Federal users in certain areas. In addition, a bidder for any of these licenses likely will need to have existing or planned downlink spectrum assets to pair with the uplink-only 1695-1710 MHz licenses. In general, broadband networks experience greater demand for downlink capacity, with the uplink spectrum being relatively underutilized. Mobile operators typically can use extra unpaired downlink spectrum, which can be integrated into an existing network as supplemental downlink, but supplemental uplink may not be as useful based on the heavier downlink needs of today’s broadband networks.

The type of operator that would find unpaired uplink spectrum attractive would be one that has substantial downlink spectrum assets, but little or no uplink spectrum. To the best of DISH’s knowledge, there are relatively few downlink bands that are configured for paired operations (FDD mode), but which are not otherwise paired and which are available today for

⁷ *Public Notice* ¶ 4.

⁸ *Id.* ¶ 7.

broadband use. A couple of examples would be (1) the AWS-4 spectrum;⁹ and (2) the Lower 700 MHz D and E Blocks. And even among these two options, it would make little sense to pair 1695-1710 MHz with the Lower 700 MHz D and E Blocks, because pairing low-band spectrum with higher-frequency spectrum means that the carrier does not make the most efficient use of the superior technical characteristics of the low-band segment.¹⁰ Pairing 1695-1710 MHz with the AWS-4 downlink could make more sense, because both are mid-band frequencies. Beyond these two examples, there do not appear to be available downlink bands suitable for broadband that would benefit from a new uplink pairing. This leaves open the possibility that a large incumbent may engage in anti-competitive strategic bidding to pick on smaller competitors and new entrants so they do not gain licenses in the 1695-1710 MHz band.

By contrast, the 1755-1780 MHz band will be paired with the 2155-2180 MHz band, with the 1755-1780 MHz band authorized for mobile transmit (*i.e.*, uplink) operations and the 2155-2180 MHz band authorized for base station and fixed (*i.e.*, downlink) operations.¹¹ The licenses will be offered as paired spectrum, meaning they could be used to deploy LTE mobile broadband service without needing to have other spectrum assets for pairing, unlike the 1695-1710 MHz licenses. The paired spectrum licenses also differ from the unpaired licenses because the 2155-

⁹ The AWS-4 licenses are currently configured for an uplink/downlink pair, but the FCC has granted regulatory flexibility to convert all of it to downlink. *See* DISH Network Corporation, Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) and Request for Extension of Time, WT Docket No. 13-225, *Memorandum Opinion and Order*, WT Docket No. 13-225, 28 FCC Rcd. 16787 (2013) (“*Downlink Waiver Order*”).

¹⁰ The Commission recognized the limitations of low and high frequency spectrum pairings in the incentive auction context, explaining that to “effectively use 600 MHz downlink-only blocks, a provider must not only have available uplink spectrum to pair it with, but that spectrum ideally should be below 1 GHz in order to take advantage of the superior propagation characteristics of the 600 MHz Band that allow for increased coverage.” *See* Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, GN Docket No. 12-268 ¶ 54 (rel. June 2, 2014).

¹¹ *Public Notice* ¶ 4.

2180 MHz band is unoccupied by Federal users today, and the 1755-1780 MHz band will be mostly vacated of Federal users, with only a subset of users remaining for an indefinite period.¹²

3. The Unpaired Spectrum and Paired Spectrum Licenses Have Separate Reserve Prices

The Commission apparently recognized the differences in the sale procedures of the spectrum bands subject to Auction 97 when it set *separate* aggregate reserve prices for the unpaired spectrum licenses and the paired spectrum licenses. The 1695-1710 MHz and 1755-1780 MHz bands are both categorized as “eligible frequencies” under the Commercial Spectrum Enhancement Act (“CSEA”), and that statute requires that auction proceeds fund the estimated relocation or sharing costs of incumbent federal entities operating on those frequencies.¹³ For this reason, the Commission established reserve prices for each of the bands sufficient to cover the applicable estimated relocation/sharing costs.¹⁴ The *Public Notice* appears to propose that the reserve prices for each band will be independent:

- “[T]he aggregate reserve price [for 1695-1710 MHz] will be met if the total winning bids for the licenses in Blocks A1 and B1, net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit), is at least \$579,775,900.”¹⁵
- “The aggregate reserve price [for 1755-1780 MHz/2155-2180 MHz] will be met if one half of the total winning bids for the licenses in Blocks G, H, I, and J, net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit), is at least \$5,033,163,300. Therefore, the winning 'net' bids for the paired 1755-1780/2155-2180 MHz licenses must be at least twice that amount, or \$10,066,326,600, in order for the Commission to conclude the auction.”¹⁶

¹² *Id.* ¶ 7.

¹³ *Id.* ¶ 46.

¹⁴ *Id.* ¶ 47.

¹⁵ *Id.* ¶ 49.

¹⁶ *Id.* ¶ 50.

Although it is not entirely clear from the *Public Notice*, the structure of the reserve prices suggests that the auction of 1695-1710 MHz spectrum could be cancelled if the aggregate reserve price for that band is not met, while the auction for the paired spectrum bands could be completed provided that the winning net bids for those licenses exceeds \$10,066,326,600. If the Commission's intent is that the auction for one bucket of licenses could end in cancellation, while the auction for the other bucket could end successfully, then it would make little sense to mix bidding eligibility, activity waivers, and stopping rules for all the AWS-3 licenses together.

B. Combined Bidding Procedures Could Harm the Public Interest

Given that the 1695-1710 MHz band licenses and the 1755-1780/2155-2180 MHz band licenses exhibit distinct characteristics and likely uses, there is no legitimate, pro-competitive reason why any bidder would pay for only enough eligibility to win licenses in one of the bands, yet shift its eligibility back and forth during the course of the auction. If bidding eligibility is interchangeable between the two bands, there is, however, an anti-competitive strategic reason to shift eligibility back and forth. A bidder could accomplish this using a recognized strategy called “parking” which generally involves “a bidder bidding on items they have little interest in winning during the first part of the auction to draw attention away from the licenses they are interested in and then moving to their real interests late in the auction.”¹⁷ In the context of Auction 97, strategic parking could be used to pick on smaller competitors and new entrants.

Consider, for example, a bidder that ultimately only wants to win paired spectrum licenses, but wishes to drive up the price of the 1695-1710 MHz unpaired licenses to harm a smaller competitor or new entrant. That bidder could park a large amount of eligibility in the

¹⁷ Timothy C. Salmon, *Spectrum Auctions by the United States Federal Communications Commission*, 18 (2002), available at <http://faculty.smu.edu/tsalmon/FCCchapter.pdf>.

1695-1710 MHz band in the earlier rounds of the auction and bid up those licenses with no intention of winning them,¹⁸ only to then move all of its bidding eligibility over to the paired spectrum licenses late in the auction. The result of this strategic parking could be to cause a smaller competitor or new entrant to drop out early, thus potentially depressing auction revenues. In addition, prices for the paired spectrum may also be depressed compared to the prices that would prevail if the bidder had to maintain its activity by bidding for the spectrum it was truly interested in.

1. Combined Eligibility Rules for Non-Substitutable Spectrum Could Undermine the Commission's Auction Goals

Combining several different types of goods in a single auction can sometimes yield positive results for revenue and efficiency, but this general approach does not hold up where the goods are non-substitutable. In theory, the eligibility and activity rules prevent licensees from waiting to bid on licenses, while at the same time giving them flexibility to switch their bids to other desired spectrum in order to maximize the bidding for each license.¹⁹ As one academic explained, the “purpose of selling different items in a single auction is to allow bidders to trade off between the items for sale as relative prices change.”²⁰ If one block of spectrum in a given market is going for \$1.25 per MHz/POP and another, similar block is going for \$0.75 per MHz/POP, a bidder can switch its bids from the more expensive block to the less expensive one,

¹⁸ If the bidder did win a license or set of licenses it had no interest in retaining as a result of using anti-competitive strategic parking, the bidder could withdraw the bid, but it would be subject to the Commission's proposed withdrawal payment penalty.

¹⁹ See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2371 ¶ 134 (1994) (“1994 Auction Order”).

²⁰ Coleman Bazelon, *Too Many Goals: Problems with the 700 MHz Auction*, 21 *Information Economics and Policy* 115, 123 (2009) (“Bazelon”).

thus maximizing the collective value of both spectrum blocks for the Commission and the future licensees.

This theory appears to work well in the FCC auction context only when all of the licenses are substitutable. By contrast, “jointly auctioning items with largely unrelated demands creates the opportunity for strategic behavior such as parking.”²¹ Professor Cramton agrees, explaining that “[i]ncluding nonrelated licenses (neither substitutes nor complements) in the same auction does not tend to increase efficiency and may create strategic incentives during the auction that ultimately end up reducing the efficiency of allocation of licenses.”²² For example, early in an auction, a bidder may choose to park its eligibility in one type of spectrum that it has no real interest in winning while it awaits prices for its desired type of spectrum to stabilize. This behavior is virtually risk free if the bidder either knows or expects that other bidders, who are actually interested in winning that type of spectrum, will eventually outbid it, or if the bidder is able to withdraw its bid for the unwanted spectrum without significant penalty.

These concerns come to the fore where, as here, the spectrum blocks to be auctioned are not close substitutes for one another. These differences create opportunities for near-risk-free eligibility parking and a powerful temptation for companies to bid for licenses they do not want for strategic reasons designed to hurt smaller competitors and new entrants. It permits bidders to

²¹ *Id.* at 124. See also Peter Cramton, Auctioning the Digital Dividend, *published in* Jan Kramer, Stefan Seifert, eds., *Communications Regulation in the Age of Digital Convergence: Legal and Economic Perspectives*, at 72 (2009) (noting that providing low-cost places to park bidders’ eligibility tends to “exacerbate[e] parking and other problems associated with the activity rule”); National Economic Research Associates, Inc., *Final Report to Swedish Government for the 800 MHz Auction*, at 23 (2010), available at <https://www.pts.se/upload/Ovrigt/Radio/Auktioner/800-auction.pdf> (noting that parking behavior hinders “useful price revelation”). While different valuations of different licenses are of course unavoidable in any spectrum auction, the inclusion of different spectrum categories with fundamentally different characteristics compounds these differences and calls for separate treatment of these heterogeneous categories.

²² See Peter Cramton et. al., *Using Spectrum Auctions to Enhance Competition*, 54 *STANFORD UNIVERSITY JOURNAL OF LAW AND ECONOMICS* 167, 185 (2011).

pursue the very “wait and see” approach that the FCC’s eligibility and activity rules were designed to prevent.²³ These strategies enable large incumbents to pick on smaller competitors or new entrants that wish to purchase licenses at auction. Separate eligibility pools, on the other hand, will enhance the efficiency of the auction by inducing bidders to reveal their true valuation of the spectrum more quickly and fully. That information revelation will help to ensure that the licenses are allocated to the bidders that value them most highly and that licenses are combined in an efficiency-enhancing manner.

2. Commission Policy and Past Auction Experience Confirm the Wisdom of Separate Eligibility Pools

Spectrum auction rules are intended to elicit genuine bids for licenses in which bidders are truly interested. At least once, the Commission has acted in response to concerns about strategic eligibility parking;²⁴ the Commission has also made clear it disfavors risk-free eligibility parking.²⁵

The outcome of Auction No. 73—the Commission’s 700 MHz auction in 2008—illustrates the harms to revenue and competition that can occur when distinct spectrum bands are

²³ See *1994 Auction Order*, 9 FCC Rcd. at 2371 ¶ 133.

²⁴ See *Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for March 6, 2001*, *Public Notice*, 16 FCC Rcd. 217, 220 (2001) (refining the minimum acceptable bid rule for package bidding due to the Wireless Telecommunications Bureau’s concern that the prior rule might “afford to bidders that have not bid on a license/package for some time the ability to ‘park’ (i.e., make bids that receive eligibility activity credit but have little prospect of winning) on that license/package since potentially small allocations of shortfall will be added to a bid amount that is well below the amount needed to become a provisional winner.”).

²⁵ See *Application of US WEST Communications, Inc. for Facilities in the Broadband Personal Communications Systems in the D, E, and F Blocks*, *Notice of Apparent Liability*, 13 FCC Rcd. 8286, ¶ 32 (1998) (faulting US WEST for using asymmetrical information gained from another bidder to reduce its “risk of having to either purchase the license or pay a substantial withdrawal payment if another bidder does not subsequently place a higher bid on the market.”).

subject to a single eligibility pool. There, the Commission auctioned five distinct types of 700 MHz authorizations which were not necessarily substitutes for each other:

<u>Spectrum</u>	<u>Size</u>	<u>Geographic Area</u>	<u>Restrictions</u>
A Block (lower)	12 MHz	EA	Significant market-by-market interference from Channel 51 broadcasters
B Block (lower)	12 MHz	CMA	Small geographic areas
C Block (upper)	22 MHz	REAG	Subject to open-access restrictions
D Block (upper)	10 MHz	Nationwide	Subject to conditions regarding public-private, public-safety partnership
E Block (lower)	6 MHz	EA	Unpaired

These different categories of authorizations were made subject to a single eligibility pool. As a result, at least two bidders were able to use parking strategies to avoid bidding earlier on spectrum they eventually acquired. One bidder was able to park much of its eligibility in the Upper D Block during the opening round, and then abandon that bid in order to acquire its actual targets in the Lower E Block in later rounds.²⁶ That strategy may have contributed to the Upper D Block sale's failure to reach the reserve price.

C. Dividing Eligibility and Activity Rules Between Paired and Unpaired Spectrum in Auction 97 Is a Simple and Straightforward Solution

The issues described above can be largely avoided by differentiating procedures for bidder eligibility, activity waivers, and stopping rules for spectrum that is not substitutable in an auction. Such action requires bidders to declare, in effect, their actual interest in each type of spectrum prior to the beginning of the auction, and then expects maximum participation from them throughout the auction. Separate eligibility pools for the paired G, H, I, and J Blocks (1755-1780/2155-2180 MHz), and the unpaired A1 and B1 Blocks (1695-1710 MHz), will therefore enhance the efficiency of Auction 97 and increase potential revenue.

²⁶See *Bazon* at 124-25.

1. The Spectrum Act Does Not Require a Simultaneous Auction

Nothing in the relevant statute prevents the Commission from structuring the AWS-3 auction to designate separate bidding eligibility, activity waivers, and stopping rules between the 1695-1710 MHz band licenses and the 1755-1780/2155-2180 MHz licenses. Title VI of the Spectrum Act does not require the Commission to conduct the auction of these three bands simultaneously, or to use any combined bidding and eligibility procedures.²⁷ The *AWS-3 Report and Order* recognized that the Spectrum Act established a deadline of February 2015 to identify, reallocate, auction, and license certain spectrum bands – including the bands now identified as “AWS-3” – for commercial use. But, the *AWS-3 Report and Order* did not provide a statutory justification that would require the Commission to conduct these auctions simultaneously, or by using the same bidding and eligibility procedures.²⁸ Indeed, the Commission has already concluded a separate auction for 10 MHz of spectrum (1915-1920 MHz and 1995-2000 MHz) subject to the Spectrum Act’s February 2015 deadline.²⁹ There is thus no statutory reason that

²⁷ See *Spectrum Act* § 6401.

²⁸ See *AWS-3 Report and Order* ¶ 5. (“In February 2012, Congress enacted the Spectrum Act. That Act includes several provisions designed to make more spectrum available for commercial use. It established, among other things, deadlines applicable to both the Secretary of Commerce and the Commission to identify, reallocate, auction, and license, subject to flexible use service rules, spectrum for commercial use. Specifically, the Spectrum Act requires the allocation of spectrum in the following bands for services that support commercial use:

- 25 megahertz at 2155-2180 MHz;
- an additional contiguous 15 megahertz to be identified by the Commission;
- 15 megahertz between 1675-1710 MHz, to be identified by NTIA by February 2013;
- 10 megahertz at 1915-1920 MHz and 1995-2000 MHz, if the Commission finds no harmful interference to the neighboring Personal Communications Service (PCS) band.

The Spectrum Act states that the Commission shall grant new initial licenses for all of these bands by February 2015.”)

²⁹ See *Auction of H Block Licenses in the 1915-1920 MHz and 1995-2000 MHz Band Closes; Winning Bidder Announced for Auction 96, AU Docket No. 13-178, Public Notice, DA 14-279* (rel. Feb. 28, 2014).

would require the Commission to combine eligibility or other auction procedures for the separate bands subject to the Spectrum Act's deadlines.

2. Given the Unique Aspects of Auction 97, the Anonymous Bidding Rules May Not Sufficiently Deter Anti-Competitive Strategic Behavior

Separate bidding eligibility, activity waivers, and stopping rules for the unpaired and paired licenses in Auction 97 are also necessary because the anonymous bidding rules, on their own, may not be sufficient to deter strategies designed to pick on smaller competitors and new entrants. Under the proposed anonymous bidding rules, the amount of every bid placed and whether a bid was withdrawn would be disclosed after the close of every round, but the identities of bidders placing specific bids or withdrawals and the net bid amounts would not be disclosed until after the close of the auction.³⁰ These rules have been adopted in previous auctions “in response to analysis suggesting that under certain circumstances the competitiveness and economic efficiency of a simultaneous multiple-round auction may be enhanced if such information is withheld until after the close of the auction.”³¹ DISH thus supports the use of the proposed anonymous bidding rules.

The Commission has opined previously that anonymous bidding procedures are even more important where there may be a limited number of parties interested in a particular license or set of licenses. The anonymous bidding procedures have, in general, been adopted in previous spectrum auctions based on the overall competitive benefits they offer, such as “reduced opportunities for bid signaling, retaliatory bidding, or other anti-competitive strategic bidding.”³²

³⁰ *Public Notice* ¶ 19.

³¹ *Id.* ¶ 23.

³² *See* Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 78,

They are seen as particularly helpful for spectrum licenses that may have limited likely interested bidders. “[W]e believe that the potential harms from anti-competitive behavior facilitated by the release of extensive information relating to bidder interests, bids, and bidder identities is likely to be greater when the auction is less competitive -- that is, when the number of bidders and the level of upfront payments are relatively low compared to the number of licenses offered.”³³ In instances where the auction is less competitive, it will be “easier for bidders to signal and enforce cooperative divisions of the market.”³⁴

In the case of Auction 97, however, the anonymous bidding rules may not sufficiently conceal the identity of bidders. The unpaired spectrum at 1695-1710 MHz may be well suited to only a limited number of bidders who happen to have available downlink spectrum, as noted above in Section II.A.2. This could allow large incumbents to pick on new entrants or smaller carriers that they believe may be interested in the unpaired licenses, simply for anti-competitive strategic purposes. DISH, for its part, has AWS-4 spectrum that is currently configured as a 20+20 MHz paired set of licenses, but has an option to convert the entire 40 MHz to downlink use, making the offer of an unpaired uplink band useful.³⁵ There may be other potential bidders who have unique circumstances that make them more likely to be interested in bidding for licenses in the 1695-1710 band, but this is unlikely to be a large number.

Public Notice, 23 FCC Rcd 7496, 7536 ¶ 157 (2008) (the Bureau recognized that limited information procedures may have overall competitive benefits from reduced opportunities for bid signaling, retaliatory bidding, or other anti-competitive strategic bidding).

³³ See Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66, *Public Notice*, 21 FCC Rcd 4562, 4601 ¶ 141 (2006) (“*Auction 66 Procedures Public Notice*”).

³⁴ *Id.*

³⁵ See *Downlink Waiver Order* ¶ 1.

As a potential new wireless entrant, DISH could be targeted by incumbents who engage in strategic parking with regard to the 1695-1710 MHz band without any intention of winning those licenses. To the extent that other interested bidders in the 1695-1710 MHz licenses are potential new entrants, they would be vulnerable in the same way. The anonymous bidding rules would not be sufficient to guard against this scenario, because existing market conditions like DISH's current spectrum assets could enable anyone to guess who an active bidder might be. By requiring Auction 97 participants to establish separate bidding eligibility for the 1695-1710 MHz band licenses, the Commission can ensure that parties that bid on those licenses are serious about trying to win the licenses, rather than merely parking eligibility in those licenses on a temporary basis for strategic purposes designed to hurt smaller competitors and new entrants. The Commission has a long-standing policy of promoting competition in the provision of broadband services, and auction policies that prohibit collusive behavior are critical to facilitating this goal. Indeed, the Commission has noted that Congress directed it to “‘include safeguards to protect the public interest’ when specifying the classes and characteristics of licenses and permits to be issued by competitive bidding.”³⁶

* * *

In short, actual spectrum auction experience, as well as economic literature, show that a single eligibility pool covering non-substitutable blocks of spectrum can result in strategic and inefficient bidding strategies designed to hurt smaller competitors and new entrants. The Commission can help avoid such a result in Auction 97 by establishing distinct bidding

³⁶ Policies Regarding Mobile Spectrum Holdings, *Report and Order*, WT Docket No. 12-269; GN Docket No. 12-268, ¶ 17 (rel. June 2, 2014).

eligibility credits, activity waivers, and auction stopping rules for the unpaired spectrum at 1695-1710 and for the paired spectrum at 1755-1780/2155-2180 MHz.

III. OTHER RECOMMENDED REFINEMENTS TO THE AUCTION RULES

Each FCC spectrum auction presents an opportunity to make the auction more efficient and user-friendly, and thus attract the maximum amount of revenue for the U.S. Treasury. DISH recently participated in the H Block auction (Auction 96), and that experience enables it to suggest some process improvements to allow Auction 97 to run more smoothly. DISH would be pleased to work with the Commission to help develop structural improvements to the online auction systems to enhance the experience for all Auction 97 bidders. Below DISH offers suggestions for the mock auction and for the auction itself.

A. Mock Auction Proposals

Although the *Public Notice* did not discuss a mock auction for Auction 97, DISH urges the Commission to conduct at least one. Each auction presents unique challenges based on the licenses offered, and a mock auction for Auction 97 will help potential bidders practice using the FCC Auction System and be better prepared for the actual auction.

- *Overall Mock Auction Format:* The Commission should structure the mock auction to match real auction scenarios as closely as possible. For example, the mock auction should offer the same number of licenses as the real auction.
- *Number of Mock Auctions:* Mock auctions are a helpful tool to ensure potential bidders are familiar with the online auction system prior to the actual auction, and DISH suggests expanding the number and format of mock auction. The Commission should provide at least two mock auctions prior to the actual auction, and allow for at least one week between the mock auction(s) and Auction 97. The Commission should also design a test environment that potential bidders could use as a learning tool that would be available any time, thus creating a sort of self-service mock auction.

B. Proposed Process Improvements for Auction 97

DISH proposes some refinements to the FCC Auction System and the information made available to bidders during the auction. All of these suggestions will make the system easier to use and enable bidders to have the information they need to plan their bidding:

- *Auction Announcements:* The Commission should provide several different methods for communicating new auction announcements, apart from posting notices to the FCC Auction System website. These should include, at least, e-mails and SMS text messages. Increasing the accessibility and visibility of auction announcements will ensure that all bidders have the most up to date information throughout the course of the auction.
- *Publish Auction System Specifications as Early as Possible:* At least 4 weeks prior to the start of Auction 97, the Commission should publish all technical specifications for the online auction system, including specifications for reporting auction round results. It would also be useful if the Commission released sample data files so that potential bidders could test any software they plan to use during the course of the auction.
- *Provide an Auction API:* The Commission can increase the accessibility and usability of auction data by making an Application Programming Interface (“API”) available for several different types of auction statistics and bid actions, which will reduce the amount of manual work needed for bidders to digest information between rounds and execute bid actions. This will, in effect, create a system-to-system method to access the auction and round statistics to make it easier to download data into an individual bidder’s own software tools. To that end, the Commission should provide an API for, at least, the following data points and bid actions:
 - Overall round results;
 - Provisionally winning bids for each license;
 - Overall cumulative auction statistics;
 - Bid submission; and
 - Bid removal.
- *Improve Bidder Eligibility Data:* After each round closes, the Commission should provide total current bidder eligibility by bidding unit, and identify the number of bidders (though not their identity) who have reduced eligibility.
- *Improve Information About Waivers:* The FCC Auction System should make available to all bidders, after each round, information about the total number of waivers used in the previous round, including all proactive and automatic waivers. This will enable each auction participant to have a fuller understanding of the

pace of the auction and how close other bidders may be to reducing their eligibility.

IV. THE COMMISSION SHOULD UPDATE THE FORMER DEFAULTER RULE PRIOR TO AUCTION 97

Finally, the Commission should use Auction 97 as an opportunity to begin the process of making much needed reforms to the so-called “former defaulter” rule. In particular, DISH supports a letter filed recently by industry stakeholders³⁷ proposing a temporary waiver to ease the burden of the former defaulter rule for Auction 97 participants, followed by the opening of a rulemaking to overhaul the rule going forward. As the letter notes, an applicant that has been in default or delinquent must make a substantial additional upfront payment before it can participate in Auction 97 – in the amount of 150 percent of what would otherwise be required.³⁸ This 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.

DISH supports the letter’s proposed solution, which is for the Commission to grant a limited interim waiver for Auction 97 for:

- (1) Debts that were resolved more than three years prior to the application deadline; or
- (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).³⁹

³⁷ See Letter from Rebecca Murphy Thompson, CCA; Julie Kearney, CEA; Scott K. Bergmann, CTIA; and Jill Canfield, NTCA, to Marlene H. Dortch, FCC, RM-11395, GN Docket Nos. 13-185, 12-268, AU Docket No. 14-78 (May 30, 2014).

³⁸ *Id.* at 1-2.

³⁹ *Id.* at 3-4.

This limited, temporary waiver will relieve bidders of the need to make substantial additional upfront payments for Auction 97 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 U.S. Treasury. To the contrary, the 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. Following this relief for Auction 97, the Commission should open a rulemaking to make permanent changes to the former defaulter rule.

V. CONCLUSION

DISH urges the Commission to adopt separate bidding eligibility, activity waivers, and stopping rules for the different spectrum bands available in Auction 97. In addition, the Commission should adopt improvements to the auction rules, including the implementation of mock auctions and refinements to the FCC Auction System. Finally, the Commission should use Auction 97 to implement much needed reforms to the former defaulter rule. Adoption of the proposals recommended by DISH will promote competition, auction participation, and efficiency in the auction process.

Respectfully submitted,

/s/

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