May 21, 2015

VIA ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Notice of Ex Parte

WT Docket No. 14-170, Updating Part 1 Competitive Bidding Rules  
GN Docket No. 12-268, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions  
RM-11395, Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission’s Rules and/or Interim Conditional Waiver  
WT Docket No. 05-211, Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures

Dear Ms. Dortch:

On May 19, 2015, James F. Wade, Managing Director of M/C Partners (“M/C”), Brian M. Clark, Managing Director of M/C (by telephone), Carl W. Northrop of Telecommunications Law Professionals PLLC, and the undersigned met with Louis Peraertz, Senior Legal Advisor to Commissioner Mignon Clyburn. During the meeting, we discussed issues raised in the Notice of Proposed Rulemaking (“NPRM”) and the supplemental Public Notice in the above-captioned proceedings.¹

M/C, formed in 1986, is a leading private equity firm which invests primarily in the services sectors of the communications, technology, and media industries, including wireless services, fiber communications services, and technology services. M/C’s equity investments range in size from $5 million to $50 million. Among M/C’s notable investments are Cellular One, ICG Communications, MetroPCS, Coral Wireless d/b/a MobiPCS, Telecorp, Triad, L.P., Triton PCS, PRWireless d/b/a Open Mobile, Western Wireless

Corporation, and Zayo Bandwidth. Several of the companies in which M/C has invested qualified as small business designated entities or DEs in their early stages. As M/C explained at the meeting, it has valuable experience and insight regarding the rules that are the subject of this proceeding. Since the Commission first adopted rules promoting participation in competitive bidding proceedings by small businesses and other “designated entities,” M/C’s portfolio has included numerous such entrepreneurial companies that qualified for bidding discounts at auction.

At the meeting, M/C urged the Commission not to revise its competitive bidding rules in any manner that would discourage private equity and venture capital investments in spectrum-based businesses, including those owned by designated entities. Private equity investors have provided critical capital and expertise to entrepreneurs, including spectrum-based business models that promote competition and diverse license ownership, and will continue to do so unless the rules are overly restrictive. Since investment opportunities in businesses regulated by the FCC must be evaluated by fund managers in relation to investments in non-regulated businesses, the Commission risks driving venture capital from away from designated entities if the rules and policies saddle the DE with undue restrictions on the structure of the investment, the permissible businesses and sale conditions.

In particular, M/C urged the Commission not to adopt certain “poison pill” proposals that would be a deterrent to private equity investments in designated entities. For example, some commenters have asked the Commission to extend to ten years the period during which a so-called “unjust enrichment” payment must be paid if a designated entity seeks to assign or transfer control of a license. Such a change would effectively foreclose private equity investments, which typically are made from large capital pools contributed by institutional investors and have a ten-year investment horizon, with the first few years being devoted to identifying investments and the last few years being devoted to planning an exit. The practical effect of extending the unjust enrichment period beyond five years and removing the payback tiers would be to discourage venture capital investments in DEs. A designated entity licensee must have reasonable flexibility to transfer or assign licenses in order to attract capital given the investment parameters within which equity funds operate. The current five-year rule effectively balances private and public policy interests, and should not be changed.

M/C also opposes other poison pill proposals, including attributing the revenues of any ten percent or greater investor in a designated entity applicant, mandating minimum equity contributions by the controlling interests of a designated entity, arbitrarily restricting the number of licenses or geographic areas that a designated entity may obtain at auction, or placing unreasonable limits (e.g., $10 million) on the total bidding credits that a designated entity may be eligible to obtain. These proposals do nothing to promote entrepreneurial interest in spectrum-based businesses. To the contrary, they dampen investor interest and make it more difficult for entrepreneurs to raise capital. And, any limit or mandatory minimum requirement would inherently be arbitrary. Entrepreneurs and investors must have flexibility to negotiate structures that are appropriate to a particular investment opportunity.
We also discussed the Commission’s proposal in the NPRM to eliminate the attributable material relationship (“AMR”) rule and the related “facilities-based” policy. M/C supports this proposal. In M/C’s view, the AMR rule and policy are a deterrent to investment because they irrationally limit prospective applicants’ and licensees’ ability to pursue innovative spectrum-based business models. As just one example, assume a geographic area has three commercial mobile service providers, all of which anticipate bidding at a future auction to acquire additional licensed spectrum. The AMR rule would compel a designated entity to pursue a business plan that mandates new and costly construction in order to retain the license. However, a more efficient use of capital, and of spectrum, may be a business plan premised on acquiring the license rights and then leasing all or a portion of the spectrum rights to the existing facilities-based licensees in the market. Notably, there would no diminishment of competition for the license at auction; the applicant still would need to be the high bidder at auction. Moreover, the business model ensures that the spectrum would be put to efficient use. The AMR rule, however, forecloses investment in such entrepreneurial business models, while undermining the Commission’s statutory mandates “to promote . . . economic opportunity and competition” and to “disseminat[e] licenses among a wide variety of applicants. . . .” As M/C noted, outside of the context of Commission spectrum auctions, in no other business would it consider an investment that so limits the flexible allocation of resources. By eliminating the AMR rule and facilities-based policy, the Commission will encourage efficient use of capital and of spectrum.

Flexibility likewise is critical for post-auction secondary market transactions. Therefore, M/C strongly supports the Commission’s proposal to determine eligibility to retain designated entity benefits on a license-by-license basis. Any particular transaction between a designated entity and a non-designated entity should not cause a loss of designated entity benefits as to any other licenses held by the designated entity.

M/C also supports (1) the proposal in the NPRM to increase the average annual gross revenue thresholds in order to qualify for bidding discounts which is overdue in light of the increase in capital required to obtain licensed spectrum rights since the current thresholds were adopted; (2) the need to increase the bidding credits associated with the revenue thresholds for small businesses, since entrepreneurs backed by venture capital have not succeeded sufficiently in recent auctions; and (3) setting aside a portion of auctioned spectrum solely for DEs. On this last point, M/C pointed out that, because the installment financing option which created the bankruptcy and default problems in the C Block PCS auction has been eliminated, set asides could succeed in promoting new entrants as they have in Canada.

Finally, regarding joint bidding arrangements, M/C believes no wholesale changes to the Commission’s rules are needed. Instead, the Commission can address concerns arising from the specific circumstances of Auction 97 by banning applicants who have obtained each other’s bidding information from placing bids on common licenses, and continuing generally to review joint bidding arrangements on a case-by-case basis.
This letter is being filed with your office electronically in accordance with Section 1.1206(b) of the Commission’s rules. Please do not hesitate to contact me with any questions.

Respectfully submitted,

/s/ E. Ashton Johnston
E. Ashton Johnston
of TELECOMMUNICATIONS LAW PROFESSIONALS PLLC

cc: Louis Peraertz (by e-mail)