March 23, 2015

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

Council Tree Investors, Inc.¹ applauds the proposal you announced last week in testimony before the U.S. Senate Committee on Commerce, Science and Transportation indicating that the Federal Communications Commission plans to seek further comment regarding spectrum auction bidding eligibility and activity in light of the record results of Auction 97.

Congressional hearings like those of last week underscore that the Commission’s spectrum auction authority is statutory, a critical component of which is the mandate embedded within Section 309(j)(3)(B) of the Communications Act, which directs the Commission to:

promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. (emphasis added)

¹ Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of new entrants and small businesses, including those owned by members of minority groups and women. The company’s eighteen-year record of advocating for and creating authentic diversity of ownership and competition in the broadcast and telecom industries is substantial. The principals in Council Tree collectively own an indirect 5.3% minority equity interest in Northstar Manager, LLC, the manager and controlling shareholder of Northstar Spectrum, LLC, in turn the manager and controlling shareholder of Northstar Wireless, LLC, which participated in Auction 97.
To ensure that these statutory directives are properly considered and balanced in any revision of auction rules, we urge the Commission to seek broad comment concerning all of the impacts which any auction rule changes, in particular any revisions to “Designated Entity” (DE) rules, would have upon the key goals of “avoiding excessive concentration” and “ensuring wide dissemination” of licenses in the U.S. wireless market.

There can be no doubt that the U.S. wireless market today is highly concentrated among four large incumbent operators (“Incumbents”). Such a market, by its nature, tends to reduce competition and erect barriers to entry by new competitors. One of the key behavioral risks which experts recognize may surface in FCC auctions as a result of this market structure is the phenomenon of “tacit collusion.” When there are only a few viable bidders, mechanisms come into play such as “price discovery,” code words for an invitation to a relatively cordial carve-up of licenses at lower prices. Indeed, one result of such behavior tends to be lower revenue for the public in return for its spectrum resource.

Blind bidding, while helpful, cannot prevent tacit collusion, especially in larger markets, when only the Incumbents (or a subset thereof) comprise the bidding pool. The

---

2 In 2014, four nationwide wireless carriers accounted for 96% of the nation’s mobile wireless service revenues, See Federal Communications Commission, Seventeenth Mobile Competition Report at 30 & Table II.C.2.

3 See Peter Cramton paper entitled “Simultaneous Ascending Auctions.” University of Maryland – Working Paper, 2004. In that paper, Cramton highlights the potential for tacit collusion in FCC Auctions stating “An examination of the bidding in the AB auction is suggestive that the largest bidders did drop out of certain markets at prices well below plausible values, as a result of either demand reduction or tacit collusion.” (Emphasis added.) In that same paper Cramton also states “The DEF auction was especially vulnerable to collusive bidding, since it featured both small markets and light competition. Small markets enhanced the scope for splitting up the licenses. Light competition increased the possibility that collusive bidding strategies would be successful. Indeed, prices in the DEF auction were much lower than prices in the two earlier broadband PCS auctions, as well as subsequent auctions.” (Emphasis added.) See also “Auction Design and Tacit Collusion in FCC Spectrum Auctions” by Patrick Bajari and Jungwon Yeo, October 2008. In that paper the authors highlight certain bidding behaviors observed in FCC auctions, including the more recent Auctions 66 and 73, that are examples of bidding behavior that are consistent with tacit collusion.
well-established “Bidder Effect”\(^4\) instructs that additional bidders are needed. Under the current rules, new bidders mean adequately-funded “New Entrants” who can disrupt tacit collusion and ensure the integrity of an auction. The evidence is overwhelming that, in Auction 97, New Entrant competition ultimately increased Auction 97’s net revenues to the U.S. Treasury by a substantial net amount, on the order of $20-plus billion. The Bidder Effect – new competition facilitated by bidding discounts – substantially enhanced an auction otherwise poised to be dominated by the entrenched Incumbents.

In fact, the greatest single threat to the integrity and success of future spectrum auctions is the potential for collusive dominance by entrenched Incumbents.

Accordingly, in order to fulfill its statutory mandates under Section 309(j) and the Administrative Procedure Act, as well as its role as the steward of spectrum as a public resource, the Commission, in any new public notice on these issues, should explicitly invite comment upon and carefully consider the impact of changes to the DE Program – including effects on the competitiveness and net revenues of auctions. We specifically recommend that the scope of any new comment phase include the following:

1. Review of historical data concerning the DE Program, including whether the plain language of Section 309(j), together with longstanding Commission precedent, direct that competition be fostered at all levels of auction bidding, including markets both large and small. In light of such statutory direction and precedent, can the DE Program be restricted in effect to small entities, small geographic markets, small spectrum blocks or small bids?

---

\(^4\) See “Will Bidder Exclusion Lead to Higher Auction Revenue? – A Preview of the Evidence” by the Phoenix Center, dated April 2014. This paper highlights that “Auction theory suggests that the more bidders there are the higher auction prices are likely to be.” In that study, through a regression analysis of Auction 66’s results, the paper demonstrated that “auction proceeds rise as the number of bidders for a given license increases. . . .”
2. Identification of specific, fact-based effects of bidding behavior that require specific rule changes.

3. Examination of any proposed change in the DE Program to determine if it will promote or undermine agency fulfillment of the directives of Section 309(j), and lead to more or less competition and auction revenue.  

4. Whether the DE Program, or alternative measures such as reserved licenses, can bring both effective competition to the U.S. wireless market and robust auction revenues, particularly if large, New Entrant DE alliances are restricted or prohibited.

5. Examination of auction design mechanisms that can promote competition by preventing "price discovery" and other enablers of tacit collusion.

We look forward to participating in a balanced inquiry conducted by the Commission in a business-like spirit that reduces the potential for hyperbole.

Pursuant to Section 1.1206 of the Commission’s Rules, this letter is being filed electronically via the Electronic Comment Filing System in the following proceedings: WT Docket Nos. 14-170 and 05-211; GN Docket No. 12-268; AU Docket No. 14-252; and RM-11395.

Sincerely,

/s/ Steve Hillard

Steve Hillard
President & CEO

cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly

---

5 One of the problems the Commission faces in making changes to the DE Rules – rules that are now proven to create robust competition and record-setting revenues – is the risk of unintended consequences. As a case in point, the DE rule changes adopted in 2006, in the midst of a similar outcry by Incumbents to reduce competition, resulted in (i) virtual elimination of DEs, (ii) low auction competition, (iii) low auction revenues, (iv) dramatic concentration of licenses, (v) litigation, and (vi) judicial overturn of those rule changes.