In the Matter of )
Updating Part 1 Competitive Bidding Rules )

To: The Commission

REPLY COMMENTS OF THE AUCTION REFORM COALITION

The Auction Reform Coalition ("ARC" or the "Coalition"), by its undersigned attorneys, respectfully submits this reply in response to the comments of other interested parties in the above-captioned proceeding\(^1\) in which the Federal Communications Commission ("Commission" or "FCC") is proposing changes to the competitive bidding rules for spectrum auctions. As is set forth in greater detail below, the comments provide substantial evidence that a variety of rule changes are necessary for the Commission to meet its statutory obligation to provide spectrum-based opportunities for small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities" or "DEs").

I. Reform Is Needed to Promote Opportunities for DEs

The NPRM elicited numerous thoughtful responses on key issues affecting the Commission’s implementation of Section 309(j) the Communications Act of 1934, as amended (the "Act"), which requires the Commission to adopt licensing rules in competitive bidding proceedings that avoid excessive concentration of licenses and disseminate licenses among a wide variety of

applicants, including DEs. Like ARC, many of the commenters either have participated, or have members who have participated, in prior spectrum auctions as DEs. These commenters, including the DE Opportunity Coalition (“DEOC”), the Competitive Carriers Association (“CCA”), King Street Wireless (“King Street”), the Rural Wireless Association (“RWA”) and the Wireless Internet Service Providers Association (“WISPA”), uniformly indicate that significant reforms are necessary in order for the DE program to accomplish the objectives envisioned by Congress. In particular, many of these parties agree that the Commission should: (1) eliminate the attributable material relationship (“AMR”) rule in favor of a two-step process for determining whether an entity qualifies as a small business; (2) increase bidding credits; (3) increase the gross revenue thresholds; (4) retain the five-year unjust enrichment period; and (5) adopt additional incentives for bidders to serve unserved and underserved areas. ARC urges the Commission to heed these calls for reform since these commenters have a substantial basis in experience for informed comment in this proceeding. And, as is discussed below, the Commission also should favorably consider certain other creative proposals made by these commenters to further promote the important objectives of the DE program.

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3 Comments of CCA at 9; Comments of DEOC at 16; Comments of NTCA-The Rural Broadband Association (“NTCA”) at 5; Comments of WISPA at 11.

4 Comments of Blooston Rural Carriers (“Blooston”) at 2-3; Comments of CCA at 5; Comments of DEOC at 33; Comments of King Street at 4; Comments of NTCH, Inc. (“NTCH”) at 5; Comments of WISPA at 5.

5 Comments of Blooston at 8; Comments of CCA at 7; Comments of RWA at 8.

6 Comments of CCA at 10; Comments of DEOC at 26; Comments of RWA at 9; Comments of WISPA at 13.

7 Comments of CCA at 8; Comments of NTCH at 5; Comments of WISPA at 9.
In contrast, certain commenters oppose the Commission’s proposed efforts to better implement the statutory objectives. However, all of these comments suffer from a common fatal flaw: they fail to acknowledge the statutory mandate that the Commission is obligated to implement and neglect to offer any concrete proposals as to how the Commission can meet the requirement that it adopt rules that result in the broad dissemination of licenses and the active participation of DEs in spectrum-based services. Instead, these commenters short-sightedly focus only on the outcome of the recently concluded Auction 97 and prematurely draw conclusions that the results of that auction demonstrate that the DE program is subject to abuse. However, as noted in ARC’s initial comments in this proceeding, the need for rule changes to further promote DE opportunities is clear regardless of how the Dish DEs applications are resolved. ARC urges the Commission not to follow the advice of those whose comments do not serve the primary statutory goals of widely disseminating licenses and avoiding excessive concentration of licenses, and the corollary goal of

8 See, e.g., Comments of AT&T; Comments of T-Mobile USA, Inc. (“T-Mobile”); Comments of Taxpayers Protection Alliance (“TPA”). Notably, certain of these commenters are non-DE participants in spectrum-auctions which means that it is not in their economic interests to promote the success of DEs in auctions.

9 See, e.g., Comments of AT&T. Notably, AT&T does not cite the Act or acknowledge the statutory provisions that are the basis of this proceeding.

10 See Comments of ARC at 8 (noting that grants to the DISH DEs would confirm the benefit to small businesses of arrangements with strategic partners and that denying the applications of the DISH DEs would confirm that further changes are needed to spur DE success at auctions).

11 47 U.S.C. § 309(j)(3)(B). See also Comments of DEOC at 6-7 (“Unless DE auction participation yields successful results, the mandates under Section 309(j) that the FCC auction process promote competition, avoid an excessive concentration of licenses, and disseminate licenses among a wide variety of providers . . . would be substantially undermined, if not rendered altogether meaningless. Historically, the DE program’s effectiveness has been measured by auction results, which reveal whether the congressional mandate to disseminate licenses to ‘a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by women and minorities has been successfully met.’” (citations omitted).
ensuring that DEs are given the opportunity to participate in the provision of spectrum-based services.\textsuperscript{12}

\section*{II. Several Creative Proposals in the Comments Merit Consideration}

The initial comments contain several thoughtful and practical proposals that are deserving of the Commission’s serious consideration because they would advance the goals of the DE program. For example, Blooston asks the Commission to permit a winning bidder to deduct from its auction purchase price the \textit{pro rata} value of any area that is partitioned to a rural telephone company or cooperative, where the area includes all or a portion of the rural telco or coop’s service area.\textsuperscript{13} This rule would benefit DEs by providing incentives for partitioning and promote secondary market transactions, which further the prospect of rural telcos obtaining licenses for rural and other underserved/unserved areas where they have an excellent service record. The incentives would be even greater if the winning bidder received a 125\% credit for partitioning to any DE, not just a rural telco. ARC urges the Commission to consider this change.

In addition, the Commission should consider adopting a bidding credit tailored to rural telephone companies as proposed by numerous parties.\textsuperscript{14} However, if the Commission allows rural telco DE benefits to be cumulative to other DE benefits, it should make clear that the cumulative benefit would be maintained if the rural telco enters into a joint bidding arrangement or bidding

\begin{footnotesize}
\begin{enumerate}
\item[14] See Comments of Blooston at 9 (proposing that rural telephone companies receive at least a 25\% bidding credit for any geographic license that overlaps its wireline or wireless service area, where the entity already provides wireline or wireless service); Comments of Cerberus Communications LP at 3-4 (proposing a 35\% bidding credit for rural telephone companies and their subsidiaries and affiliates, in addition to any other credit for which they may be eligible); Comments of NTCA at 2 (proposing a 25\% bidding credit for rural telephone companies, in addition to any small business credit for which they would otherwise qualify); Comments of RWA at 3 (proposing a 25\% bidding credit to rural telephone companies and their subsidiaries and affiliates, in addition to any small business bidding credit for which they qualify).
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consortia with another DE that is not a rural telco. This would encourage cooperative arrangements among and between rural telco and non-rural telco DEs and increase their prospects of success in obtaining licenses for rural and other underserved/unserved areas.

Finally, in making a point discussed in ARC’s initial comments,\footnote{Comments of ARC at 10.} NTCH properly points out that one important focus of the Commission should be on avoiding a “concentration of licenses.”\footnote{Comments of NTCH at 3-5.} NTCH proposes a 50% bidding credit for persons who hold less than 40 MHz of spectrum in a market and who are not nationwide providers. ARC agrees that such a credit would promote the wide dissemination of licenses required by the Act, while being “likely to indirectly aid in allowing minorities and women to acquire licenses.”\footnote{Id. at 5.} NTCH’s proposal should be considered in conjunction with the localism credit proposed by ARC.\footnote{See Comments of ARC at 23.}

III. The Commission Should Reject Proposals that Are Inconsistent with Statutory Objectives

The initial comments of several parties contain proposals that, if adopted, would exacerbate the excessive concentration of licenses and undermine the dissemination of licenses to DEs. Certain of these proposals are made by nationwide carriers that enjoy the large market share and high margins characteristic of an industry with an “excessive concentration of licenses.”\footnote{See Comments of ARC at 10-11; Comments of DEOC at 17 n.48.} These proposals should be rejected.

AT&T cautions the Commission that the rules “should be carefully crafted to fulfill the purpose of the DE program and ensure that DE benefits flow to their intended recipients: \textit{bona fide}
small businesses.”20 AT&T proceeds, however, to urge the Commission to adopt rules that are not tethered in any meaningful fashion to the objectives of the Act. As DEOC properly notes, “[c]ritics of DE relationships . . . have not explained how, given access to capital challenges, DEs would otherwise be able to raise money and fulfill the statutory mandate to avoid excessive concentration of licenses.”21 Rather, the sole impetus for AT&T’s proposed changes appears to be to entrench its position vis-à-vis other nationwide carriers and DISH.22

For example, AT&T proposes that the Commission “cap the amount of DE benefits that a DE may claim during any given auction … [in order to] prevent DEs with substantial financial backing from racking up billions in federal subsidies.”23 AT&T proposes a $32.5 million cap, based upon the Small Business Administration (“SBA”) guidelines prescribing $32.5 million in annual receipts as the size limit for telecommunications small businesses.24 Of course, such a cap on “DE benefits” also would effectively cap how much a DE could bid at auction, and how many licenses a DE could acquire, because a DE rarely would be likely to become a provisionally winning bidder without the benefit of bidding credits. As the price of spectrum continues to soar, a fixed dollar cap on DE benefits would have the perverse effect over time of automatically reducing the dissemination of licenses to DEs. And, well-financed incumbents such as AT&T could easily

20 Comments of AT&T at 16.

21 Comments of DEOC at 14.

22 See Comments of AT&T at 15-16 (“While AT&T believes the DE program serves the important purpose of allowing small businesses to compete more effectively to purchase spectrum in Commission auctions, DISH’s activity in the AWS-3 auction shows that the DE rules must be strengthened.”).

23 Id. at 16-17. TPA similarly recommends capping a DE’s bidding, for example, at 10 times its annual revenues, noting that “[t]hus, small businesses would have a $400 million cap; very small businesses would have a $150 million cap.” Comments of TPA at 11.

24 AT&T Comments at 17.
calculate the price they would have to bid for a license in order to place it above the threshold for a capped DE benefit. Thus, AT&T’s proposal would benefit only AT&T and other bidders having greater access to capital markets than do DEs. This does not serve the public interest and is plainly at odds with Section 309(j)(3)(B) of the Act. Any artificial limit on a DE’s ability to utilize bidding credits would likewise restrict its ability to acquire spectrum licenses and participate in spectrum-based businesses.

The Commission likewise should reject AT&T’s proposal to attribute to a DE the revenues and spectrum of any “spectrum holder” that holds a direct or indirect, equity or non-equity interest of more than 10%. Any such rule would severely limit DEs’ access to capital. The term “spectrum holder” is vague and could encompass a wide variety of classes of investors with interests in spectrum other than the particular DE seeking bidder credits in a future auction. For example, venture capital funds which specialize in investments in the telecommunications sector are an important source of capital for DEs. These specialty funds have portfolio companies that hold spectrum licenses and thus could themselves be considered “spectrum holders.” Attributing the revenue of these funds to the DE would destroy eligibility and no doubt cause the funding to evaporate.

Moreover, even if AT&T’s intent is merely to preclude large incumbent wireless operators from providing meaningful financial resources to DEs, such a rule would greatly diminish DEs’ access to capital and other resources. The Commission should, as the NPRM proposes, determine on a case-by-case basis whether the relationship between a DE and its investors raises questions of de facto or de jure control that would make the DE ineligible for benefits.

ARC also opposes T-Mobile’s suggestion that the Commission adopt a rebuttable presumption that equity investments of 50% or more constitute de facto control for purposes of the

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25 Comments of AT&T at 17.
attribution rules. Standing alone, the percentage of equity does not dictate control, and a presumption of such control would have a serious chilling effect on the efforts of *bona fide* DEs to raise capital. The better course is the one used by the Commission now. The Commission looks to the totality of the circumstances (e.g., equity investment, monetary investment and loans, management rights, put and call rights, investor protections, material relationships, etc.) to ascertain whether the an enterprise is properly under the control of a qualified DE.

Finally, ARC opposes commenters that support retaining or adding additional limitations to the AMR rule. As DEOC notes, the current rule is inconsistent with both the language and intent of Section 309(j) of the Act, and “inappropriately presumes that all DEs are alike, with identical business and capital needs, thus impeding access to capital, innovation in business plans, and DE capacity to adapt to changing market conditions.” Rather than limit DE flexibility with a broad prohibition on arrangements that increase the likelihood of DEs acquiring licenses and participating in spectrum-based businesses, the Commission should, as proposed in the NPRM, replace the AMR rule with a two-step, case-by-case standard.

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26 Comments of T-Mobile at 15.

27 If the Commission wanted to adopt a rebuttable presumption of control, it should limit it to circumstances where an incumbent nationwide or regional carrier has a 50% or greater equity interest and another material relationship with the applicant (for example, a construction or management agreement; a loan agreement which provides the primary source of funds; or a spectrum leasing or wholesale distribution agreement).

28 *See* Comments of TPA at 9-10 (Commission should “retract” a bidding discount if a DE leases a “significant portion” of its spectrum to a larger company); Comments of MediaFreedom.org (opposing repeal of the AMR rule); Comments of Citizens Against Government Waste (“CAGW”) at 3 (proposing to eliminate bidding discounts for any DE that enters into a spectrum lease); Comments of T-Mobile at 12 (proposing to prohibit DEs from leasing more than 25% of their spectrum in the aggregate). *See also* Comments of Blooston at 7 (Commission should continue to restrict DEs from leasing spectrum acquired with bid credits to nationwide wireless carriers).

29 Comments of DEOC at 16. *See also* Comments of ARC at 18 (noting decline of DE success in auctions since the AMR rule was adopted).
IV. Restrictions on Bidding Agreements Should Be Narrowly Tailored to Address Specific Concerns

Several initial comments express concerns about the manner in which the joint bidding arrangements in Auction 97 among and between DISH Network Corp. (“DISH”) and two DE applicants (the “DISH DEs”) were exercised. According to AT&T, these three bidders coordinated their efforts “in a way that effectively accorded them advantages in terms of buying power, bidding eligibility and reduced exposure risk that no other bidder could achieve.”\(^{30}\) ARC agrees that the coordinated bidding by DISH and the DISH DEs provided them with an advantage over other bidders. Because all three entities were coordinating their bids, they could bid on the same licenses, knowing that only one could be the provisionally winning bidder. This enabled them to artificially preserve eligibility for each bidder to the disadvantage of other bidders, particularly other DEs, in the auction.

ARC is confident that the Commission will closely scrutinize these coordinated bidding efforts in the course of reviewing the winning bidders’ long form applications. If the Commission concludes that the approach taken by the DISH DEs violated no rule, the Commission should, on a going forward basis, ban bidding tactics of this nature. Parties who are privy to others’ bidding information during the auction should not be allowed to place multiple coordinated bids on a common license. The Commission can adopt a narrowly tailored prohibition on this specific practice, and should not adopt an outright ban on all joint bidding arrangements as proposed by some commenters.\(^{31}\) There is no justification for abandoning the general presumption that joint bidding and other arrangements among non-nationwide bidders are pro-competitive, nor any basis

\(^{30}\) Comments of AT&T at 2. See also Comments of Blooston at 4; Comments of CAGW at 3; Comments of MediaFreedom.org at 2; Comments of NTCA at 4; Comments of TPA at 1; Comments of T-Mobile at 23.

\(^{31}\) Comments of AT&T at 10 (urging the Commission to ban joint bidding arrangements entirely); Comments of CAGW at 3 (urging Commission to prohibit joint bidding arrangements between DEs and non-DEs); Comments of TPA at 11 (same).
for declaring that all such arrangements among non-nationwide and nationwide bidders are anti-competitive. Rather, the Commission should continue to review such arrangements on a case-by-case basis and, as Sprint notes, “rely on existing regulatory and antitrust mechanisms to prevent or penalize any specific arrangements that might threaten to create anti-competitive effects.”

V. Conclusion

For all of the foregoing reasons, the Commission should modify the competitive bidding rules consistent with the Comments of the Auction Reform Coalition.

Respectfully submitted,

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32 See Comments of CCA at 13-14; Comments of RWA at 11-13; NPRM at ¶ 120. See also Comments of ARC at 25 (noting the importance of joint bidding arrangements to smaller companies in light of the increase cost of spectrum and expansion of geographic scope of regional systems).

33 Comments of Sprint Corp. (“Sprint”) at 13.