

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *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 for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

While I have concerns about a number of provisions in the item before us, this proceeding effectively comes down to one fundamental question: Should designated entities (DE) receiving taxpayer money to subsidize the purchase of a valuable public resource have to provide any actual service to the American people? It is my firm belief that the statute, not to mention common sense, requires that small businesses benefitting from spectrum subsidies construct facilities in order to offer wireless services to consumers. To align today's item with the language of the statute, Commissioner Pai and I both requested edits that would require designated entities to build facilities in return for taxpayer funding. However, these edits were rejected as the majority does not share this philosophy; therefore, I must dissent.

Opponents' reasoning for dismissing a facilities-based requirement is incoherent at best. Some argue that the statute does not contain a directive that DEs provide facilities-based services. Admittedly the word "facilities-based" does not appear in the statute, but the goals of "competition," "innovative technologies," and "spectrum-based services" cannot be achieved if DEs act as mere "pass-throughs," leasing or flipping their spectrum to existing wireless providers.¹ This makes a mockery of Congress's directive to disseminate licenses to a wide variety of licensees.² It is also unfathomable that, in seeking "economic opportunity" for small businesses,³ Congress intended to allow valuable spectrum to be bought on the cheap so that the financial backers of DEs could get rich while large wireless providers – ineligible for the credit – access spectrum at a reduced cost.

The item text suggests that our rules need to be more permissive so that DEs can obtain investment and gain "operational experience" from existing providers.⁴ But allowing 100 percent leasing of DE licenses does not prevent a DE from acquiring the spectrum, leasing it for profit and then selling it for even more windfall profits. And simply cashing a check does not equate to obtaining operational experience. It just means that the U.S. taxpayers are being ripped off for the benefit of a select few, soon-to-be millionaires.

Being told that a facilities-based requirement was a non-starter, I sought other edits to prevent abuses of the DE program. For instance, I proposed that we limit the amount of spectrum that could be leased to any one nationwide provider and entertained other possible restrictions on spectrum use arrangements. This wouldn't completely eliminate the issue but would have forced those seeking to lease DE subsidized spectrum to find multiple partners when attempting to do so. And it would be accompanied by more stringent unjust enrichment rules.

¹ 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D).

² *Id.* § 309(j)(3)(B) (stating that there is also an objective to avoid the "excessive concentration of licenses.").

³ *Id.* §§ 309(j)(3)(B), 309(j)(4)(C)(ii).

⁴ *E.g., supra* ¶¶ 4, 42.

The current rules set the unjust enrichment period at five years. However, in today's age of clearing and sharing spectrum, most initial construction requirements fall outside of this five-year timeframe. This loophole allows DEs to acquire spectrum and warehouse it until the unjust enrichment period expires. How can we justify rules that encourage the warehousing of spectrum and so blatantly violate the objective that the Commission promote the "efficient and intensive use of . . . spectrum"?⁵

To rectify this loophole, I requested that, at a minimum, the unjust enrichment period extend to one year past the construction requirement, or, in the case of the upcoming incentive auction, seven years. In addition, if the initial construction benchmark was extended, the unjust enrichment period would be similarly extended to one year after the initial construction requirement. Additionally, a 100 percent reimbursement of the bidding credit would be due if DEs transferred control of their licenses before constructing their own facilities to a FCC licensee that has either invested in the DE or has a spectrum use arrangement with the DE.

Although these reasonable suggestions serve as safeguards to ensure that only *bona fide* small businesses obtain DE benefits,⁶ they were rejected because some believe that prolonged unjust enrichment periods scare off venture capitalists. No one is saying that investors cannot divest their ownership interests, but it is highly possible that such transactions would result in unjust enrichment. I understand that investors want an exit strategy and a return on their investment in a set timeframe. But why shouldn't the American people expect a similar return on their investment or, at the very least, a reimbursement of their generous loan?

The Act also states that there should be "performance requirements . . . to ensure prompt delivery of services to rural areas, to prevent stockpiling or warehousing of spectrum . . . , and to promote investment in and rapid deployment of new technologies and services."⁷ I hope the Chairman will initiate a review of the Commission's wireless buildout requirements to ensure that our rules and policies continue to promote the expeditious deployment of wireless networks by small and large businesses alike.

Additionally, although I am in favor of a cap, \$150 million for a small business is too high, and there must be stronger provisions to ensure that wireless providers cannot invest in multiple DEs, allowing them to aggregate and evade the bidding credit cap. I also cannot support maintaining the revenue exemption for Alaska Native Corporations, a rule change that is also championed by Senator Claire McCaskill.

Although I recognize that today's item takes steps to correct some flaws in the DE program, I cannot support an item that does not require facilities-based DEs and does not prevent the abuses we have seen in the past.

⁵ 47 U.S.C. § 309(j)(3)(D).

⁶ *Id.* §§ 309(j)(3)(C), 309(j)(4)(E) (stating that the Commission's auction design should include safeguards to avoid unjust enrichment and that the Commission's rules should include "antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.").

⁷ *Id.* § 309(j)(4)(B).