

Before the
 Federal Communications Commission
 Washington, D.C. 20554

In the Matter of)	
)	
Petition of DIRECTV Group, Inc. and)	RM-11395
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)	
)	
Auction of Advanced Wireless Services (AWS-3))	AU Docket No. 14-78
Licenses Scheduled for November 13, 2014)	
(Auction 97))	

ORDER

Adopted: August 29, 2014

Released: August 29, 2014

By the Commission:

I. INTRODUCTION

1. In this Order, we grant a limited blanket waiver of certain Part 1 competitive bidding rules to applicants for the upcoming auction of AWS-3 licenses (Auction 97) to narrow the circumstances under which an applicant would be considered a former defaulter and required to submit a larger upfront payment to qualify to bid in Auction 97.¹ Under the Commission’s competitive bidding rules, applicants that have cured any default on a Commission license or delinquency on any non-tax debt owed to any Federal agency are considered “former defaulters” and, as such, must provide larger upfront payments to participate in a Commission spectrum auction.² Solely with respect to Auction 97, we waive the former defaulter rules for applicants to exclude any cured default or delinquency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline of September 12, 2014; (2) the amount of the default or delinquency falls below \$100,000; (3) the default or delinquency was paid within two quarters (i.e., 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding. Accordingly, only applicants that have a cured default or delinquency that falls outside of these exclusions must certify to being a “former defaulter” and submit a larger upfront payment in Auction 97.

¹ Auction 97 will offer Advanced Wireless Services licenses in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands (collectively, “AWS-3”). Auction of Advanced Wireless Services Licenses Scheduled for November 13, 2014; Comment Sought on Competitive Bidding Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, 29 FCC Rcd 5217 (2014) (*Auction 97 Comment Public Notice*); Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled For November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 97, AU Docket No. 14-78, *Public Notice*, DA 14-1018 (rel. Jul. 23, 2014) (*Auction 97 Procedures Public Notice*).

² See 47 C.F.R. §§ 1.2105(a)(2)(xi), 1.2106(a).

II. BACKGROUND

2. Each potential participant in a Commission auction must certify on its pre-auction “short-form” application whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency.³ An applicant is considered to be a former defaulter if the applicant, including any of its affiliates, its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission license or been delinquent on any non-tax debt owed to any Federal agency, but has since remedied all such defaults and cured all of its outstanding non-tax delinquencies.⁴ Former defaulters are eligible to bid in a Commission auction provided they are otherwise qualified; such applicants, however, are required to pay an upfront payment that is 50 percent more than the normal upfront payment amount.⁵

3. In 2007, DIRECTV Group, Inc. and EchoStar LLC (collectively, DIRECTV/EchoStar) filed a petition for rulemaking requesting that the Commission modify its former defaulter rules.⁶ DIRECTV/EchoStar argue that the rules apply too broadly to effectively advance the Commission’s goal of ensuring that auction bidders are financially reliable and urge the Commission to amend the rules.⁷ DIRECTV/EchoStar also sought an interim conditional waiver of the former defaulter rules in advance of the 700 MHz auction while the Commission considered their petition.⁸ DIRECTV/EchoStar asked for a limited waiver that would exclude from consideration any former defaults or delinquencies that (1) occurred more than three years before the short-form application deadline; (2) related to personal obligations of an officer/director of an entity that is not the auction applicant; and (3) totaled less than \$100,000 or 0.1 percent of the average annual gross revenues attributable to the auction applicant, whichever is less.⁹ The Commission placed the *DIRECTV/EchoStar Petition* on public notice,¹⁰ and one

³ 47 C.F.R. § 1.2105(a)(2)(xi) (former defaulter certification). Each applicant must also certify that, as of the short-form application deadline, it is currently not in default on any Commission license or delinquent on any non-tax debt owed to any Federal agency; if it is currently in default or delinquent, it cannot participate in the auction. Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15317 n.142 (2000) (*Part 1 Fifth Report and Order*) (“If any one of an applicant’s controlling interests or their affiliates . . . is in default on any Commission licenses or is delinquent on any non-tax debt owed to any Federal agency at the time the applicant files it[s] Form 175, the applicant will not be able to make the certification required by Section 1.2105(a)(2)(x) . . . and will not be eligible to participate in Commission auctions.”). The limited blanket waiver that we are granting in this Order does not apply to such current defaults and delinquencies.

⁴ Controlling interests and affiliates are defined at 47 C.F.R. § 1.2110. See also Wireless Telecommunications Bureau Reminds Prospective Broadband PCS Spectrum Auction Applicants of Default and Delinquency Disclosure Requirements, *Public Notice*, 19 FCC Rcd 21920 (2004) (providing auction applicants information regarding the interplay between defaults, delinquencies, and the Commission’s “red light” rule).

⁵ 47 C.F.R. § 1.2106(a).

⁶ 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, filed June 8, 2007, RM-11395 (*DIRECTV/EchoStar Petition*).

⁷ *DIRECTV/EchoStar Petition* at 2, 5-6. DIRECTV/EchoStar recommend amending the rules in three ways: (i) excluding former defaults or delinquencies of a *de minimis* nature; (ii) excluding prior defaults or delinquencies that are more than a certain number of years old; and (iii) applying the rule only to the applicant and individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities. *Id.* at 8.

⁸ *Id.* at 8–14.

⁹ *Id.* at 9–10.

¹⁰ Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed, *Public Notice*, Report No. 2829, dated Aug. 22, 2007.

party filed comments in support of it.¹¹ In 2010, DIRECTV/EchoStar, along with DISH Network, LLC, further urged the Commission to take action on their pending filing in advance of then-upcoming auctions.¹²

4. In 2014, four industry associations (Four Associations) raised the issue again, asking the Commission to re-examine the former defaulter rules, and in the interim, grant a limited waiver for upcoming Commission auctions, including the upcoming Auction 97 for AWS-3 licenses.¹³ Initially, the Four Associations urged the Commission to waive the rule as to two categories of debt: (1) debts that were resolved more than three years prior to the application deadline; and (2) debts that were for less than the lesser of \$100,000 or 0.1 percent of the average annual revenues of the applicant (as computed under our competitive bidding rules).¹⁴ Later, three of the Four Associations (Three Associations) modified their request to seek waiver of the former defaulter rule with respect to any of the following circumstances: (1) debts occurring more than five years prior, and resolved more than three years prior, to the short-form application deadline; (2) debts that were for less than the lesser of \$100,000 or 0.1 percent of the average annual revenues of the applicant or where the applicant can demonstrate that prior defaults were not material or indicative of any auction payment risk; (3) any applicant (or its parent company) that has an “investment grade” rating from Moody’s, Standard and Poor’s, or another recognized rating agency; or (4) any applicant that can provide a letter of credit from an FDIC member institution or an agricultural credit bank that serves rural utilities and is a member of the U.S. Farm Credit System in an amount adequate to indicate that the applicant will be able to make final payment, or can otherwise demonstrate an ability to make final payment, in the event that it wins the licenses for which it has applied to bid.¹⁵

5. Shortly thereafter, the Three Associations modified their request, seeking a blanket, interim waiver of the former defaulter rule for any Auction 97 applicant with respect to cured debts of less than \$100,000 or for which the applicant received notice more than seven years prior to the short-form application filing deadline.¹⁶ These parties also suggested that, for purposes of the waiver of the former

¹¹ AT&T *DIRECTV/EchoStar Petition* Comments.

¹² See Letter from Barry J. Ohlson to Marlene H. Dortch, Secretary, FCC, RM-11395 (filed Aug. 13, 2010) (*DIRECTV/EchoStar et al. Aug. 13, 2010 Ex Parte Letter*); Letter from Christine M. Crowe to Marlene H. Dortch, Secretary, FCC, RM-11395 (filed Oct. 6, 2010).

¹³ Letter from Competitive Carriers Association, Consumer Electronics Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, RM-11395, GN Docket No. 13-185, AU Docket No. 14-78, GN Docket No. 12-268 (filed May 30, 2014) (*Four Associations May 30th Letter*).

¹⁴ *Four Associations May 30th Letter* at 3. In addition, AT&T also suggested, as alternatives to the current former defaulter policies, relying on ratings from independent credit rating agencies, such as Standard & Poor’s or Moody’s, or accepting a letter of credit from an applicant in lieu of the larger upfront payment. Letter from Joan Marsh, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185 (filed Jul. 24, 2014); *but see* Letter from Richard B. Engelman, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78, RM-11395 (filed Jul. 31, 2014) (asserting that AT&T’s criteria is an expansion over the current rules and suggesting that the criteria expressed by the Four Associations is “more relevant and appropriate for many potential auction bidders and in relation to the Commission’s underlying policy”).

¹⁵ Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185 (filed August 1, 2014). Consumer Electronics Association did not join in this filing.

¹⁶ Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed August 14, 2014) (*Three Associations August 14th Letter*); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed August 20, 2014) (*Three Associations August 20th Letter*); Letter from Competitive Carriers Association, CTIA-The Wireless Association, and NTCA-The Rural Broadband

(continued....)

defaulter rules, an applicant should not be considered to be a former defaulter required to make a larger upfront payment if the debt in question was paid within two quarters of receiving the notice or is the subject of a good faith dispute or a pending legal or arbitration proceeding.¹⁷

6. In addition to the *DIRECTV/EchoStar Petition* and the various requests of the associations, several parties commenting on the procedures for upcoming Auction 97 have also supported revision of the former defaulter rules and a limited waiver for the auction.¹⁸

III. DISCUSSION

7. Under section 1.925 of the Commission's rules, a waiver of a rule is appropriate if (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of waiver would be in the public interest, or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative to seeking a waiver of the rule.¹⁹

8. As explained below, we conclude that a limited blanket waiver of the former defaulter rules to exclude certain cured defaults or delinquencies for Auction 97 is warranted because the underlying purpose of the upfront payment and former defaulter rules would not be served by their broad application in this auction, and a limited waiver serves the public interest. As noted above, this waiver extends only to Auction 97, for which short-form applications are due to be filed by September 12, 2014. Our action in this regard is without prejudice to the Commission's further examination and disposition, based on a complete record, of the issues surrounding the former defaulter rules identified in a rulemaking proceeding.

9. Since the initial implementation of our auctions program, the Commission has required auction participants to provide an upfront payment in order to qualify to bid in an auction.²⁰ In adopting this requirement in 1994, the Commission explained that upfront payments would help prevent frivolous or insincere bidding and provide it with a source of funds from which to collect payments owed at the close of an auction.²¹ The Commission also recognized that, in establishing an upfront payment requirement it was "balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders."²² The Commission further explained that such "balancing may yield different results depending

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Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU Docket No. 14-78 (filed August 28, 2014).

¹⁷ *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 4-5.

¹⁸ See, e.g., Verizon Wireless *Auction 97 Comment Public Notice* Comments at 3-4 (stating that a waiver of the former defaulter rule "entails no risk to the Commission of license payment defaults, because all applicants must pay for their licenses in full before they will be granted"); Competitive Carriers Association *Auction 97 Comment Public Notice* Comments at 5-6; Dish Network Corporation *Auction 97 Comment Public Notice* Comments at 19-20; AT&T, Inc. *Auction 97 Comment Public Notice Reply* at 17-18 (requesting waiver of the former defaulter rule entirely, or in the alternative, limiting the time and amount of the defaults or delinquencies considered). No party has opposed the grant of a limited blanket waiver for Auction 97.

¹⁹ 47 C.F.R. § 1.925(b)(3). See also 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

²⁰ 47 C.F.R. § 1.2106.

²¹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2377-78 ¶¶ 169-71(1994) (*Competitive Bidding Second Report and Order*).

²² *Id.* at 2378 ¶ 171.

on the particular licenses being auctioned” and concluded that the best approach was to retain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis.²³ The Commission reasoned that in so doing it would “be able to tailor the upfront payment requirement to the auction design [selected] and to the characteristics of the licenses being auctioned.”²⁴ Thus, in adopting the upfront payment rule, the Commission was careful to retain the flexibility to tailor the upfront payment requirement when circumstances warrant.²⁵

10. In 1998, after a large number of winning bidders from the Commission’s first auction of Personal Communications Services C Block licenses (Auction 5) defaulted on their payment obligations, the Commission decided that it would allow bidders that had previously defaulted in Commission auctions to participate in C Block re-auctions as former defaulters, but reasoned that “the integrity of the auctions program and the licensing process dictate[d] requiring a more stringent financial showing from applicants with a poor Federal financial track record.”²⁶ The Commission therefore amended its rules for those auctions to require that a former defaulter pay an upfront payment of 50 percent more than the normal amount set by the Wireless Telecommunications Bureau for any given license in a C Block re-auction.²⁷

11. Subsequently, when the Commission on its own motion incorporated the former defaulter provisions into the Part 1 general competitive bidding rules in 2000, the Commission found that, while it was “necessary to limit participation in Commission auctions to entities that can certify that they are not in default on certain debts, . . . past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee.”²⁸ As a result, the Commission reiterated its earlier reasoning in the C Block context and concluded that it would allow entities that have defaulted or been delinquent in the past but have remedied their issues to participate in Commission auctions, but would require such applicants to provide a larger upfront payment, for the reasons it had identified earlier in connection with the C Block reauction.²⁹ Since then, the former defaulter rules have applied without any limitation as to age or scope of an applicant’s prior default or delinquency.

12. Several parties have submitted requests to modify the former defaulter rules or, in the alternative, to waive the provisions on a limited basis. DIRECTV/EchoStar argue that, as currently written, the former defaulter rules “apply too broadly to effectively advance the Commission’s goal of ensuring that auction bidders are financially reliable.”³⁰ The Four Associations mirror that sentiment and suggest that the scope of the rule is unnecessary to achieve its purpose, particularly when the former defaults or delinquencies are in a relatively small amount or were cured years prior.³¹ These parties have

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2378 ¶ 171 & n.132.

²⁶ Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15761-62 ¶ 34 (1998) (*C Block Fourth Report and Order*).

²⁷ *Id.*

²⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316 ¶ 41, citing *C Block Fourth Report and Order*, 13 FCC Rcd at 15753-54 ¶ 18.

²⁹ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316-17 ¶¶ 41-42, citing *C Block Fourth Report and Order*, 13 FCC Rcd at 15761-62 ¶ 34.

³⁰ *DIRECTV/EchoStar Petition* at 2.

³¹ *Four Associations May 30th Letter* at 2.

offered a variety of ways to limit the scope of the former defaulter inquiry, but all consistently contend that the rules are unnecessarily broad to serve the underlying purpose of the rule.³²

13. DIRECTV/EchoStar further argue that a limited waiver of the former defaulter rules would serve the public interest “by relieving auction applicants whose auction *bona fides* could not be seriously questioned from incurring the financial costs associated with the upfront payment premium.”³³ The Four Associations note that, while the Commission should re-examine the former defaulter rules in the context of a rulemaking, there is “insufficient time to begin and complete such a proceeding before AWS-3 applications will be due”³⁴ and they therefore argue that a limited 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.”³⁵

14. We conclude that grant of a limited waiver of the former defaulter rules for applicants in Auction 97 is warranted because the underlying purposes of the upfront payment and former defaulter rules would not be served by their broad application to the instant case and grant of a waiver would be in the public interest. At the time of the adoption of these rules in 1998, the Commission had been assigning licenses by auction for just four years, and had very recently experienced a large number of payment defaults on C Block licenses for which eligibility was limited to small business “entrepreneurs.”³⁶ Two years later, in continuing to standardize and streamline its general competitive bidding rules, the Commission incorporated these rules to apply to all future auctions.³⁷ Thus, the former defaulter rules were adopted during the nascent stage of both the Commission’s auctions program and the mobile wireless industry generally. Moreover, many auction applicants were at that time relatively new entrants into an emerging industry and their financial track records were still unproven.

15. However, in the 14 years since the Commission last considered the underlying purpose of the former defaulter rules, our auctions program has matured and the mobile wireless industry has grown into a major segment of the nation’s economy. As we approach the short-form application deadline for Auction 97, which is the first auction offering multiple blocks of spectrum licenses nationwide since Auction 73 nearly eight years ago, we are mindful that more time has passed since Auction 73 than had passed between our first spectrum license auction in 1994 and the incorporation in 2000 of the former defaulter rule into our Part 1 competitive bidding rules. Accordingly, even a new entrant applicant that may have participated in Auction 73 would now have a longer track record in the industry than many of the applicants to which the rule applied when it was adopted in 1998 and 2000. Moreover, other potential applicants for this auction include entities with wireless industry and auction experience that date back to the earliest days of our auctions program. Thus, the pool of potential Auction 97 applicants – including those that fall within the scope of the former defaulter rules – appears less likely to produce bidders who lack the experience that can lead to unrealistic bids and bidding defaults that could threaten the integrity

³² See, e.g., *DIRECTV/EchoStar Petition* at 5-7; *Four Associations May 30th Letter* at 3.

³³ *DIRECTV/EchoStar Petition* at 11. See also *DIRECTV/EchoStar et al. Aug. 13, 2010 Ex Parte Letter* at 7-9 (asserting that Auction 66 applicants deemed former defaulters paid over \$8 million in lost interest, and Auction 73 applicants deemed former defaulters paid \$7.3 million in lost interest).

³⁴ *Four Associations May 30th Letter* at 3.

³⁵ *Id.* at 3-4.

³⁶ In order to qualify as an “entrepreneur,” an applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, must have had gross revenues of less than \$125 million in each of the last two years and must have less than \$500 million in total assets. See 47 C.F.R. § 24.709. See also Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 58, *Public Notice*, 19 FCC Rcd 18190, 18194-5 (2004) (background information on entrepreneur and C Block eligibility).

³⁷ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316-17 ¶¶ 41-42.

of the auction. In addition, the application of the former defaulter rules as originally adopted could require applicants that are now well-established in a mature industry to make larger upfront payments based on very old or relatively small defaults or delinquencies by today's standards. Such larger upfront payments could dampen participation by bidders based on debts that are not indicative of their current ability to meet their financial obligations.

16. A limited blanket waiver to narrow the scope of the former defaults or delinquencies that require submission of a larger upfront payment balances our goal of encouraging bidders to submit serious, qualified bids with our need to simplify the bidding process and minimize implementation costs for bidders, while also providing reasonable assurance that bidders are financially reliable, consistent with the underlying purposes of our upfront payment and former defaulter rules. Appropriately balancing our goals under the upfront payment and former defaulter rules is particularly important here to serve the public interest because it will help promote broad, robust participation in Auction 97, one of the auctions authorized by the Spectrum Act, which will provide the sole source of federal funding for the Public Safety Trust Fund (PSTF) for FirstNet and other priorities.³⁸

17. Therefore, we waive the former defaulter rules for Auction 97 applicants to exclude certain former defaults or delinquencies from consideration for purposes of requiring larger upfront payments in Auction 97 from former defaulters. First, we exclude any cured default or delinquency for which the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline (i.e., September 12, 2014).³⁹ Various interested parties previously suggested that the former defaulter upfront payment requirement should apply only to prior defaults or delinquencies that occurred within a three-year window prior to an auction application.⁴⁰ One such party notes that a three-year period corresponds to certain federal tax statute of limitations.⁴¹ Most recently, the Three Associations suggest that we should define former defaulters to include only those applicants who have received notice of defaults or delinquencies within seven years before the Auction 97 short-form application deadline.⁴² Based on the limited record we have received relating to a waiver for

³⁸ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012) ("Spectrum Act"), codified at 47 U.S.C. § 1401 *et seq.*

³⁹ Depending on the origin of any federal non-tax debt giving rise to a default or delinquency, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied. Consistent with guidance previously provided with respect to applicability of the former defaulter rules, *see, e.g.*, Letter to Cheryl A. Tritt, Esq., from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004) (*Cheryl Tritt Letter*), for purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. Thus, to the extent that the rules providing for payment of a specific federal debt permit payment after an original payment deadline accompanied by late fee(s), such debts would not be in default or delinquent for purposes of applying the former defaulter rules until after the late payment deadline. In addition, we provide the following clarification with regard to defaults on Commission licenses. Any winning bidder that fails timely to pay its post-auction down payment or the balance of its bid payment or is disqualified for any reason after the close of an auction will be in default and subject to a default payment. *See* 47 C.F.R. § 1.2109(c). *See also, e.g.*, *Auction 97 Procedures Public Notice* at para. 239. Commission staff provide individual notice of the amount of such a default payment as well as procedures and information required by the Debt Collection Improvement Act of 1996, including the payment due date and any charges, interest, and/or penalties that accrue in the event of delinquency. *See, e.g.*, 31 U.S.C. §§ 3716, 3717; *see also* 47 C.F.R. §§ 1.1911, 1.1912, 1.1940. *See also* Auction of Lower and Upper Paging Bands Licenses Closes; Winning Bidders Announced For Auction 95, *Public Notice*, 28 FCC Rcd 11848 (2013). For purposes of the certifications required on a short-form auction application, such notice provided by Commission staff assessing a default payment arising out of a default on a winning bid, constitutes notice of the final payment deadline with respect to a default on a Commission license.

⁴⁰ *See, e.g.*, *DIRECTV/EchoStar Petition* at 9.

⁴¹ *See, e.g.*, *DIRECTV/EchoStar Petition* at 10-11.

⁴² *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 4.

Auction 97, we conclude that a three-year period may be insufficient to account for debts that could be relevant to the ability of an auction applicant to meet its financial obligations. We note that while federal tax laws have a three-year statute of limitations to determine if certain forms of additional tax are owed, the period of limitations to determine whether income was under-reported is six years and the Internal Revenue Service has a seven-year period to review a claim for a loss from worthless securities or a bad debt deduction.⁴³ Likewise, the Fair Credit Reporting Act limits many types of reporting by consumer credit agencies for a period of seven years.⁴⁴ Moreover, the most recent proposals favor a seven-year period.⁴⁵ We conclude that applying the former defaulter rule to any former default or delinquency for which the notice of the final payment deadline or delinquency was received more than seven years before the Auction 97 short-form application deadline would not serve the underlying purposes of the rules under the circumstances of Auction 97, and waiver would serve the public interest.

18. Second, we exclude any former default or delinquency for which the amount of the resolved debt or delinquency falls below \$100,000. Parties initially suggested excluding defaults or delinquencies of what they define as a “*de minimis* nature” and suggest that we should ignore any former default or delinquency totaling less than the lesser of \$100,000 or 0.1 percent of the average annual revenues of the applicant, as computed by our competitive bidding rules.⁴⁶ Most recently, the Three Associations suggest that we exclude from the definition of former defaulter any cured defaults on a Commission license or delinquencies on a non-tax debt owed to a Federal agency in an amount of less than \$100,000.⁴⁷ In the interest of achieving transparency, fairness, and efficiency in our auction processes, we will apply a bright-line exclusion for debts less than \$100,000 as suggested most recently by the Three Associations. We note that \$100,000 is the amount that the Commission and other agencies have used for various purposes to distinguish between less significant or material issues and more significant ones.⁴⁸ Requiring a larger upfront payment based on any cured default or delinquency that is less than \$100,000 could discourage participation in Auction 97 without appreciably ameliorating the risk of bidder defaults, and thereby undermine the underlying purposes of our upfront payment and former defaulter rules. Accordingly, we conclude that a waiver of the former defaulter rules under these circumstances would serve the public interest.

19. Third, we waive the former defaulter rules for Auction 97 applicants to exclude any cured default or delinquency where the debt was paid within two quarters (i.e., 6 months) after receiving the notice of final payment deadline or delinquency. The Three Associations most recently urge this limit on the application of the former defaulter provisions in order to address situations where, due to incorrect addresses, delivery problems or internal issues, applicants may not timely pay USAC or other agency obligations, but cure such debts when discovered.⁴⁹ We note that such an approach is consistent with the grace period provided in the installment payment context.⁵⁰ We conclude that the timely cure of such a default or delinquency sufficiently demonstrates an applicant’s financial wherewithal and therefore it is unnecessary to require a larger upfront payment from the applicant in Auction 97. Moreover, a waiver

⁴³ See, e.g., 26 U.S.C. § 6511(d)(1).

⁴⁴ 15 U.S.C. § 1681c.

⁴⁵ *Three Associations August 14th Letter* at 2.

⁴⁶ *DIRECTV/EchoStar Petition* at 8–9. See also *Four Associations May 30th Letter* at 3.

⁴⁷ *Three Associations August 14th Letter* at 2; *Three Associations August 20th Letter* at 3–4.

⁴⁸ *Three Associations August 20th Letter* at 3–4 (noting that \$100,000 is the threshold for forfeiture orders that can be issued on delegated authority, establishing “material noncompliance” with the Commission’s rules according to the Universal Service Administrative Company, and determining materiality in certain arbitration contexts).

⁴⁹ *Three Associations August 20th Letter* at 4–5.

⁵⁰ See 47 C.F.R. § 1.2110(g)(4) (allowing two additional quarter grace periods). See also *Cheryl Tritt Letter*.

under these circumstances serves the public interest by encouraging prompt payment of debts owed to the government.

20. Finally, we waive the former defaulter rules for Auction 97 to exclude any default or delinquency that was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding.⁵¹ The Three Associations most recently suggested that for purposes of the waiver an applicant should not be considered to be “in default if any debt . . . is the subject of a good faith dispute or a pending legal or arbitration proceeding.”⁵² We include this suggestion in part. Specifically, we conclude in these circumstances, as we do for the six month period discussed above, that the applicant has demonstrated sufficient financial credibility so that we do not need to require a larger upfront payment from the applicant in Auction 97. Similarly, a waiver under such circumstances serves the public interest by encouraging prompt resolution of debts associated with legal or arbitration proceedings. We decline, however, to waive the larger upfront payment requirement for debts that are subject to a “good faith dispute.” A “good faith dispute” provision, even for cured debts, would be too ambiguous to be efficiently applied during the auction short-form application process. While an applicant could verify that a debt was paid after litigation or arbitration, it would be difficult to verify—in short order during the short-form application process—that a debt was paid after a “good faith dispute.”

21. We conclude that grant of this limited blanket waiver will best balance the underlying purposes of the upfront payment rules and former defaulter rules by encouraging broad, robust participation in Auction 97, while continuing to ensure that auction bidders are financially reliable. If an Auction 97 applicant has been in default on a Commission license or has been delinquent on any non-tax debt owed to any Federal agency, and the relevant default or delinquency falls outside the exclusions set forth in this Order, it must certify to being a former defaulter and submit a larger upfront payment. If an applicant has been in default on a Commission license or has been delinquent on any non-tax debt owed to any Federal agency, it nevertheless may certify that it has *not* been in default or been delinquent so long as the only relevant defaults or delinquencies fall within the exclusions described in this Order.⁵³

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 303(r), and sections 1.3 and 1.925 of the Commission’s rules, 47 C.F.R. §§ 1.3 and 1.925, we waive application of 47 C.F.R. §§ 1.2105(a)(2)(xi), and 1.2106(a) to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵¹ Regarding debts that were the subject of legal proceedings or arbitration, we specifically exclude proceedings based on requests for waiver of a rule requiring payment of a debt or delinquency. *See Cheryl Tritt Letter* at n.2.

⁵² *Three Associations August 20th Letter* at 2.

⁵³ When submitting a short-form application to participate in a Commission auction, applicants must certify that the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests have never been in default on any Commission license and have never been delinquent on any non-tax debt owed to any Federal agency, or otherwise must agree to submit a larger upfront payment.