

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: In the Matter of 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

Since 2010, I have been calling on the Commission to consider creative and legally sustainable approaches to promote greater participation by small businesses in the communications industry.¹ Therefore, I applaud Chairman Wheeler for putting forth comprehensive reforms to the Commission's competitive bidding rules that will enable small businesses to compete more effectively in auctions and in the commercial wireless market. These proposals address important developments in the wireless industry and are fully consistent with Congress's directives that authorize the agency to conduct spectrum auctions. It is imperative that we update our rules in advance of the voluntary broadcast TV incentive auction, which will offer applicants a historic opportunity to acquire substantial amounts of valuable wireless spectrum below 1 GHz. While I support all the proposals in this NPRM, I find three proposals particularly noteworthy: (1) the repeal of the AMR rule; (2) bidding credits for winning bidders who plan to deploy networks to underserved areas; and (3) changes to the former defaulter rule.

Congress's Directive to Promote Small Business and Deter Unjust Enrichment

In 1993, Congress authorized the Commission to conduct spectrum auctions by enacting Section 309(j) of the Communications Act. It realized that small businesses faced significant barriers to entering the communications market particularly when competing against large, well-capitalized, and entrenched communications companies. It was concerned that unless the Commission "is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications businesses."² Therefore, Section 309(j) directs the Commission to adopt auction rules that would "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."³

In implementing its auctions authority, the Commission has tried to promote small business participation in the wireless industry primarily by awarding auction bidding credits through its Designated Entity (DE) program. The challenge for the Commission has been to find the proper balance between allowing small businesses to acquire spectrum through DE credits, on the one hand, while preventing parties from circumventing the purpose of those rules and being unjustly enriched, on the other.

¹ Statement of FCC Commissioner Mignon L. Clyburn, Statement on Public Notice Seeking Comment on Proposal to create an "Overcoming Disadvantage" category for its current Designated Entity rules (December 3, 2010); Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and other Small Businesses, *Report*, 26 FCC Rcd 2909, 2969-70 (2011) (Separate Statement of FCC Commissioner Mignon L. Clyburn); Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357, 12368 (2012) (Separate Statement of FCC Commissioner Mignon L. Clyburn).

² H.R. Rep. No. 103-111 at 254 (1993).

³ 47 U.S.C. § 309(j)(3)(B).

In 2004, the Commission Decides DEs Must Use the Spectrum they Obtained with Bidding Credits to Directly Provide Facilities Based Service

Between 2004 and 2006, the Commission made policy changes which shifted that balance towards further preventing non-DEs from improperly benefitting from spectrum won using small business credits. In 2004, as part of its proceeding to promote efficient use of spectrum by removing barriers to secondary market transactions, the Commission rejected a request that it allow DE licensees to lease spectrum to any entity, without regard to how the spectrum lease might affect the licensees' status as DEs. The Commission believed it was required to interpret Section 309(j) of the Communications Act so that licensees, which acquired spectrum at auction with small business credits, must use that spectrum to directly provide facilities based services to the public.⁴ The Commission based that interpretation on the following two sentences in the House Report that accompanied draft amendments to the Communications Act.

This paragraph expressly authorizes the Commission to impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses. The Committee anticipates that the Commission will use this authority to deter speculation and participation in the licensing process by those who have no intention of offering service to the public.⁵

To determine “whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee,” the 2004 Order explained that the Commission would conduct a case-by-case approach and “look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease.”⁶

The Attributable Material Relationship (AMR) Rule Moves the Commission from Case-by-Case Review of Spectrum Leases to a Bright Line Test

The 2006 Designated Entities Order reaffirmed the Commission's earlier interpretation that Congress intended the Commission to require small businesses, who acquire spectrum with small business credits, to use that spectrum to directly provide facilities based services. But it went even further to prevent unjust enrichment. It also adopted the Attributable Material Relationship (AMR) rule that would require every small business to attribute the gross revenues of another entity if that small business planned to apply for DE benefits and entered into an arrangement with that entity to lease, wholesale, or resell more than 25 percent of the capacity of any one of its licenses to that entity.

By adopting the AMR rule in 2006, the Commission moved away from the case-by-case examination of the relationships between DEs and lessees, which it had reaffirmed in the 2004 Secondary Markets Order, to a bright line rule that would require attribution, under the terms of the AMR rule, without an inquiry into what influence the lessee entity might have on the small business. The AMR rule would also

⁴ Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17541 ¶ 71 (2004) (*Secondary Markets Second Report and Order*) (“While we believe that spectrum leasing by small businesses serves many policy goals, we cannot disregard Congress' stated intent that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license.”)

⁵ H.R. Rep. No. 103-111, at 257-58 (1993).

⁶ *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17542 ¶ 77.

require a DE to make this attribution even if the spectrum it leased was not acquired with DE bidding credits. For example, the AMR Rule would penalize a DE for raising funds for its own spectrum-based communications business by temporarily leasing to another company more than 25 percent of any of its licenses even if those licenses were not acquired with DE bidding credits and the lessee had no influence over the DE.

The 2004 and 2006 Policies Were Based on an Unnecessarily Narrow Interpretation of Section 309(j)

The Supreme Court has made clear this Commission has the discretion to depart from an earlier policy choice when “there are sound reasons for the new policy.”⁷ Today’s NPRM provides several sound bases to reevaluate those earlier DE policies. As an initial matter, there is no reason the Commission should believe it is bound by the statutory interpretations reached in those 2004 and 2006 Orders. The starting point of statutory interpretation is the language in the statute itself.⁸ The term “facilities based service” does not appear anywhere in Section 309(j). Nor is there any other language in Section 309(j) which would compel the Commission to decide that entities who acquire licenses with small business bidding credits must use that spectrum to directly provide facilities based service.

Although legislative history can be helpful, there is no specific language in those two sentences from the 1993 House Report that requires the phrase “offering service to the public” to be defined as “designated entities providing facilities based service.” The plain meaning of those two sentences in the House Report is that any entity, which uses a small business bidding credit to acquire spectrum in an auction, should primarily intend that the spectrum be used to serve the public and not simply try to resell the spectrum to another entity for a profit. That is why the Commission defined trafficking as “obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee’s own private use.”⁹ Thus, if a designated entity used bidding credits to acquire spectrum at an auction, with the intent of offering service to the public, and then leased the spectrum to another entity (DE or non-DE) and that lessee used the spectrum to provide facilities based services, then such an arrangement would not appear to violate the plain language of the anti-trafficking and unjust enrichment provisions of Section 309(j) or the legislative history of those provisions.

The better reading of this statute is that Congress gave the Commission wide discretion to adopt DE policies that strike an appropriate balance between (1) promoting small business participation in the wireless industry, and (2) deterring unjust enrichment, and to amend those policies when developments in the commercial wireless market warrant such changes.

Developments in the Commercial Wireless Industry Require Changes to the AMR Rule

Substantial changes in the structure of the commercial wireless market call for a change to the AMR rule. We have seen increased consolidation in the commercial wireless industry. In 2003, six nationwide wireless carriers accounted for 79 percent of the mobile wireless subscribers. In 2013, four nationwide carriers had a combined market share of approximately 97 percent of subscribers. The Commission uses the widely accepted Herfindahl-Hirschman Index (HHI) to measure concentration in competition analysis. A highly concentrated industry is one with an HHI over 2500. In 2006, when the Commission adopted

⁷ *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

⁸ *Dean v. United States*, 556 U.S. 568, 572 (2009) (“We start, as always, with the language of the statute.”)

⁹ 47 C.F.R. § 1.948(i)(1).

the AMR rule, the HHI for the wireless industry was 2674. By 2013, it had increased to 2873.¹⁰ Voice and data roaming and other network sharing agreements could stimulate the deployment of more networks to offer competitive alternatives. Despite the Commission's 2010 adoption of the data roaming order, it appears that continued resistance to entering into these agreements is preventing smaller carriers from providing competitive service offerings.

In addition, with the introduction of more innovative smartphones and tablets since 2008, we have seen explosive consumer demand for mobile broadband services. This demand is driving intense use of mobile networks and an increasing need for more spectrum. At the same time, the costs of spectrum and network deployment, especially for small and new entrants, have increased in the last 20 years.¹¹ These developments in the commercial wireless market mean it is more important now, than it was in 1993, for small businesses to develop business models that can attract capital for both acquiring communications licenses and for deploying networks that can provide service to the public.

According to a number of commenters, the AMR rule is having an adverse effect on small businesses at a time when these entities are facing increasing challenges to compete effectively in the commercial wireless industry. It appears to have prevented some small businesses, which previously qualified as DEs and had entered into spectrum leases before the rule was adopted, from participating as DEs in the auctions for valuable AWS-1 and 700 MHz spectrum. One party asserts there was “a precipitous drop in DE participation from 70% of winning bids to only 4.0 percent and 2.6 % respectively in those auctions.”¹² That significant a drop in DE participation is not only alarming, it indicates the Commission is not doing enough to meet the clear directive of Section 309(j), that auctions “promote economic opportunity and competition... by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses.”¹³

The AMR rule is also likely deterring current DEs from leasing spectrum they previously acquired at auction for fear they will lose their DE status in upcoming auctions. This type of reaction to our DE rules also improperly impedes our secondary market policies that are important to the dynamic and productive use of spectrum for commercial services. DEs, and other small businesses who want to compete in the wireless market, need flexibility to take advantage of opportunities to participate in the provision of spectrum-based services, including through spectrum leasing, and mobile virtual network operator arrangements.

These Proposed Changes to the DE Rule are Consistent with Congressional Intent

To be sure, I fully support rules and policies that properly enforce Congress's intent that small businesses who acquire spectrum bidding credits are not unjustly enriched by simply reselling spectrum in the aftermarket. But, we can do a better job in developing DE rules, which promote that policy, as well as giving small businesses the flexibility they need to enter into leases and other relationships that will help them secure financing and develop business models to effectively compete in an increasingly consolidated wireless market. By applying well established principles to examine control and affiliation of entities, and thoroughly reviewing leasing agreements, we can safeguard small business benefits by

¹⁰ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, Sixteenth Report, 28 FCC Rcd 3700, 3719 (2013) (*Sixteenth Mobile Services Report*).

¹¹ *Id.* at 3766–69 ¶¶ 79–84.

¹² S. Jenell Trigg & Jeneba Jalloh Ghatt for MMTC, Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry, GN Docket No. 12-268, at 32 (filed Feb. 27, 2014) (Digital Déjà Vu).

¹³ 47 U.S.C. 309(j)(3)(B).

attributing the revenues of any entity that has the ability to control, or potentially control, an applicant's business venture. In addition, by allowing small businesses greater flexibility to engage in a wider range of business arrangements, this should increase the potential sources of revenue for the small businesses and decrease the likelihood they would be subject to undue influence by any particular user of a single license.

The Commission Should Promote Deployment to Under Served Areas and Persistent Poverty Counties

I am also pleased this NPRM seeks comment on whether the Commission should extend bidding credits to winning bidders that deploy facilities and provide service to underserved areas, particularly those areas that would constitute persistent poverty counties. As defined by the Department of Agriculture's Economic Research Service ("ERS"), a county is persistently poor if 20 percent or more of its population was living in poverty over the last 30 years. According to the ERS, "there are currently 353 persistently poor counties in the United States (comprising 11.2 percent of all U.S. counties)."¹⁴ Despite the fact that 98 percent of Americans have access to commercial mobile wireless networks, our last report on the mobile wireless market found that 7.7 million people live in rural areas with two or fewer service options, and there are still 400,000 Americans who lack access to any mobile service option.¹⁵ Deployment of new wireless networks can drive jobs and economic growth in communities. Given that the upcoming broadcast TV incentive auction holds such promise to stimulating investment and innovation in mobile networks, the Commission should consider proposals to promote investment in low income communities that do not have the same level of mobile service competition most areas of the Nation enjoy. Revising our DE rules, auctioning smaller license blocks and geographic license areas, and mandating interoperability are all important regulatory measures that can lower barriers to entry and attract carriers, who may have less capital than nationwide providers, yet possess a strong desire to deploy networks to underserved areas such as persistent poverty counties.

The Commission Properly Adopted Limited Waivers of the AMR and Former Defaulter Rules

I also want to take this opportunity to explain why it was appropriate for the Commission to grant limited waivers of the AMR and the former defaulter rules before the adoption of this NPRM.¹⁶ Those Orders are important to holding an AWS-3 auction that better complies with the directives of the Communications Act to design auctions that promote competition and "disseminat[e] licenses among a wide variety of applicants including small businesses."¹⁷ That auction, which the Commission plans to

¹⁴ See ERS, Geography of Poverty, <http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/geography-of-poverty.aspx> (last visited July 18, 2014).

¹⁵ *Sixteenth Mobile Services Report*, 28 FCC Rcd at 3725-27.

¹⁶ The Commission has, on prior occasions, granted waivers pending the completion of rulemakings. See Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, RM-11688, WT Docket No. 13-32, *Order*, 28 FCC Rcd 7758 (2013) (Granting waivers four months before the adoption of a Notice of Proposed Rulemaking to consider proposed changes to the rules involved in the waivers); Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, WT Docket No. 09-114, *Notice of Proposed Rulemaking and Order*, 24 FCC Rcd 9620, 9630 ¶ 24 (2009) (granting waiver pending outcome of rulemaking when no party, who could be potentially harmed by the waiver order, opposed the grant of the waiver); Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, *Order*, 22 FCC Rcd 20354 (2007) (waiving the impermissible material relationship rule for purposes of determining DE eligibility solely with respect to arrangements for lease or resale (including wholesale) of the Upper 700 MHz Band D Block license).

¹⁷ 47 U.S.C. §309(j)(3)(B).

hold this fall, will make 65 megahertz of spectrum available for flexible commercial wireless use. It is the first auction to offer multiple blocks of paired spectrum licenses on a nationwide basis since the 700 MHz auction some eight years ago. The March 2014 AWS-3 Order helped to promote robust competitive bidding and opportunities for both small and larger carriers by adopting a band plan with a mix of five and 10 megahertz license blocks and small and large geographic license areas (CMAs and EAs). Such a band plan promotes an efficient allocation of spectrum to its highest and best use because it offers interested parties diverse options, thereby encouraging participation by large and small carriers.

But there was more the Commission could do to encourage participation in the AWS-3 auction, as a number of parties have shown through petitions for waivers of parts of our Part 1 Competitive Bidding Rules. Specifically, Grain Management, LLC, petitioned to waive the AMR rule. It contended that a bright line application of the AMR rule would require every small business to attribute the gross revenues of another entity if that small business planned to apply for DE benefits and entered into an arrangement with that entity to lease more than 25 percent of the capacity of any one of its licenses to that entity. This attribution would be required even if, as in the case of Grain, the small business acquired the spectrum license without using DE bidding credits. The attribution would also be required without any inquiry into what influence the other entity might have on the small business. Separately, CTIA, CCA, and NTCA filed a joint petition to waive the former defaulter rule for this auction. Under that rule, an applicant is considered to be a former defaulter if the entity, including any of its affiliates, its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission license or has been delinquent on any non-tax debt owed to any Federal agency. Former defaulters are eligible to bid in a Commission auction, provided they are otherwise qualified, but they must pay an upfront payment that is 50 percent more than the normal upfront payment amount.

Although two of my colleagues dissented from the granting of the Grain limited waiver in July, I continue to support both waivers because the waiver petitions are procedurally similar and advance the Communications Act's goals of designing auctions that promote competition. The petitions were filed by entities who intend to participate in the AWS-3 auctions. The Commission released Public Notices seeking comment on both waiver petitions. No party filed oppositions to the petitions. Both petitions sought waivers of bright line rules that the Commission adopted years ago to strike a balance between competing policy objectives. In the case of the AMR rule, those objectives were promoting participation by smaller businesses in auctions through DE credits, while deterring unjust enrichment by those who acquired auction using those DE credits. With regard to the former defaulter rule, the Commission was balancing the goal of encouraging bidders to submit serious bids with the recognition that past business misfortunes do not necessarily preclude an entity from meeting present and future responsibilities as a Commission licensee. Both petitions persuasively argued that the Commission needed to reevaluate the balances it struck with those rules because, due to developments in the industry, those rules were now acting as unnecessary barriers to greater competition in auctions. The Grain petition and its supporters demonstrated that the AMR rule was having an undue adverse effect on the ability of small businesses to secure financing and compete. The former defaulter rule petition showed that it has been 14 years since the Commission adopted the former defaulter rules and the application of those rules 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. This Competitive Bidding NPRM finds that the public interest would be served by initiating a proceeding to change both of those rules.

Contrary to what some have said, the waiver of the AMR Rule is consistent with the Commission's policies with regard to Joint Sales Agreements (JSA). In both contexts, the Commission's public interest goals are the same because the Commission is looking to see whether a broadcast station or a DE has lost actual control of its operations. But the broadcast media business is different from the commercial wireless industry and, with regard to our proposal to repeal the AMR rule, we simply recognize that spectrum leasing arrangements do not automatically result in a surrender of control over a small wireless

carrier's decision-making. Moreover, we would keep the Commission's other existing control rules, which include a thorough review of all pertinent spectrum leasing agreements.

As I mentioned earlier in this statement, I have been asking the Commission for years to consider approaches to promote greater small business participation in auctions and the communications industry. The parties filing these petitions needed the Commission to waive the application of those rules, before the September 12, 2014, deadline for filing short form applications for the AWS-3 auction. Both waivers could give small businesses greater access to capital and enhance their ability to more effectively compete in the important AWS-3 auction. Once again, I commend Chairman Wheeler for circulating orders granting both limited waivers so the entire industry has clear guidance in advance of the AWS-3 auction.