

**STATEMENT OF
COMMISSIONER AJIT PAI
CONCURRING IN PART, DISSENTING IN PART**

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

When Congress authorized the Commission to provide small businesses with taxpayer-funded discounts on auctioned spectrum, it required us to put safeguards in place to prevent abuse and unjust enrichment at the expense of the American people.¹ And for over 20 years, the FCC has worked in a bipartisan manner to ensure that discounted spectrum could not just be passed along to large, well-funded corporations.² Indeed, the whole point was to promote independent, facilities-based competition by small providers—competition that will spur the deployment of new service to the public, including in rural and underserved areas—not to create taxpayer-funded middlemen.

But today, the Commission proposes to jettison this framework. The NPRM proposes to permit small businesses (known as “designated entities” or “DEs”) to obtain taxpayer-funded discounts and then turn around and lease 100% of their spectrum to the world’s largest corporations. It does absolutely nothing good for competition in the wireless marketplace to award bidding credits to entities that flip their spectrum to large incumbent providers. To the contrary, it only makes it harder for small and regional facilities-based providers to win spectrum and compete on a level playing field.

The Commission did not need to take this approach. We could have adopted an NPRM that focused exclusively on ways we could lawfully advance and strengthen our DE program, improve our competitive bidding regulations, and make it easier for DEs and other providers to deploy facilities. To be sure, the NPRM asks some questions along those lines. And I thank my colleagues for agreeing to include some suggestions designed to promote DE participation while guarding against unjust enrichment, such as seeking comment on whether the FCC should retain a modified version of the facilities-based requirement or adopt a 10-year unjust enrichment schedule. But I cannot support the vast majority of today’s proposals. As a result, I am concurring in part and dissenting in part.

I.

At the outset, let’s be clear about what the Commission’s proposal would allow. A small business would be permitted to purchase spectrum at a 35% discount and then lease all of its spectrum capacity to our nation’s largest wireless carriers. I can see how this could be good for the large wireless carrier that would gain access to discounted spectrum (rather than purchasing it for itself at full price). And I can see how this would be profitable for the small business with no business plan beyond regulatory arbitrage. But how is any of this in the public interest? It isn’t. By failing to recover the full value of spectrum, we are adding to the national debt. And by failing to require DEs to offer service to the public, we are denying the American people the benefits of additional competition that taxpayer-funded discounts were intended to provide. In fact, by giving bidding credits to entities that simply lease all of their spectrum

¹ See 47 U.S.C. § 309(j)(4)(D)–(E); see also Conference Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep. 103-213, 103rd Cong., 1st Sess. 484 (1993), available at <http://go.usa.gov/55wx>.

² 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, 2394-95, paras. 258-65 (1994) (*Competitive Bidding Second Report and Order*).

capacity to the nation’s largest wireless carriers, we are *increasing* concentration in the wireless market by preventing smaller carriers that actually provide facilities-based service from obtaining spectrum.

In short, this proposal would make a very small number of Americans very wealthy and leave 99.99% of us worse off.

Indeed, the NPRM’s approach creates all the wrong incentives, as both Democratic and Republican FCC Commissioners have consistently recognized. For example, Commissioner Michael Copps called on the Commission to strengthen—not eliminate—the facilities-based requirement the last time the FCC examined these rules precisely because it encourages competition from smaller providers and gives them a “fighting chance to compete with industry giants.”³ Commissioner Copps recognized that giving large corporations access to “discounts they were never meant to enjoy”—which today’s NPRM proposes to do—“threatens the integrity of our auctions and, worse, it cheats consumers. It costs taxpayers millions of dollars in foregone revenue. It also means that spectrum goes to those most willing and able to manipulate the rules of the game, rather than to the entities Congress actually intended to benefit.”⁴

What is more, the NPRM actually proposes to eliminate an FCC rule that enables the Commission to conduct oversight of DE leases.⁵ So at the very moment the FCC is proposing DE rules that invite abuse, it is seeking to eliminate reporting requirements that enable the FCC to police just such misconduct. This is troubling.

In my view, and consistent with Commissioner Copps’ views years ago, proposing to eliminate the long-standing facilities-based requirement is contrary to our statutory authority, undermines the integrity of the DE program, impedes competition, and abdicates the responsibilities we owe to the American taxpayer.

II.

It should come as no surprise that the NPRM’s proposal to eliminate the requirement that taxpayer-funded businesses provide facilities-based service runs contrary to the statutory scheme Congress enacted, as numerous bipartisan FCC decisions make clear. How does the NPRM justify this drastic change of course? It engages in some revisionist history. It casually asserts that up until today, the Commission’s decisions simply “placed undue weight on language” contained in certain legislative history.⁶ This assertion does not withstand scrutiny.

Start with Section 309(j) itself. In that provision, Congress authorized the Commission to use bidding credits to provide DEs with “the opportunity to participate in the provision of spectrum-based services.”⁷ Congress then codified its determination that the Commission shall “require such transfer disclosures and antitrafficking restrictions . . . as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.”⁸

The Commission has consistently and unanimously recognized this language as requiring DEs to operate as facilities-based providers—not profiteering middlemen. Less than seven months after Congress passed Section 309(j), the Commission recognized that “[i]t would be unjust and inconsistent

³ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4808 (2006) (Statement of Commissioner Michael J. Copps) (*CSEA/Part I Second Report and Order*).

⁴ *Id.*

⁵ *NPRM* at paras. 77–79.

⁶ See *NPRM* at para. 23.

⁷ 47 U.S.C. § 309(j)(4)(D).

⁸ 47 U.S.C. § 309(j)(4)(E).

with the will of Congress for [DEs] . . . to obtain a license with the government’s help, transfer that license after a short period of time to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market value of the license and the discounted price which they paid the government for that license.”⁹

Ten years later, when the FCC sought to liberalize its secondary market rules, it recognized that Section 309(j) required it to treat leases of DE spectrum differently than all others. Congress’s “statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service.”¹⁰ The Commission also stated, “the licensee cannot make spectrum leasing its primary business and must . . . continue to provide facilities-based network services under its licenses” regardless of the degree of control the DE maintains over the leased spectrum.¹¹ In fact, the Commission rejected the contention made by many large wireless providers at the time that DEs “need not be limited to constructing and operating a facilities-based network in order to satisfy Congress’ objective that they participate in the spectrum market.” It stated that “[w]e cannot accept that reading of Section 309(j)” because “Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.”¹²

The statutory basis for this decision was clear. The Commission stated that “Section 309(j) . . . directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment.”¹³ Treating DE leases differently was necessary, the Commission determined, because otherwise “we would run the risk that [DE] . . . incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent.”¹⁴

When the Commission took up the question of Section 309(j)’s application to DE leases in 2006, the Commission found no wiggle room in the statutory language. It recognized that the provision directs the FCC to ensure that “every recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.”¹⁵ It adopted the current rules “to ensure, as Congress intended, that . . . benefits are awarded to provide opportunities for designated entities to become robust independent facilities-based service providers with the ability to provide new and innovative services to the public.”¹⁶ It held that “where an agreement concerns the actual use of the designated entity’s spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity’s ability to become a facilities-based provider, as intended by Congress.”¹⁷

⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, para. 260.

¹⁰ *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, 17538, para. 70 (2004) (*Secondary Markets Second Report and Order*); see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, para. 260.

¹¹ *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17541, para. 76.

¹² *Id.* at 17544, para. 82.

¹³ *Id.* at 175378, para. 71.

¹⁴ *Id.*

¹⁵ *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4760, para. 15.

¹⁶ *Id.* at 4762, para. 21.

¹⁷ *Id.* at 4762, para. 23.

In a subsequent order, the FCC again stated that “Section 309(j)(4)(D) directs the Commission to issue regulations to ‘ensure’ that designated entities ‘are given the opportunity to participate in the provision of spectrum-based services.’”¹⁸ “We believe that the word ‘participate’ in this directive contemplates significant involvement in the provision of services to the public, *not merely passive ownership of a license to spectrum used by others to provide service.*”¹⁹

Given this strikingly consistent approach over many years, the NPRM’s abrupt assertion that the FCC’s facilities-based requirement was grounded in a misreading of legislative history belies credibility. The legislative history shows that Congress passed the relevant portions of Section 309(j) “to deter speculation and participation in the licensing process by those who have no intention of offering service to the public.”²⁰ There is simply no way to square the NPRM’s proposal to eliminate the facilities-based requirement with Section 309(j) or the policies underlying that provision.²¹

What is more, there has been broad-based support for the FCC’s long-held view that imposing limits on DE leasing is critical to the success and integrity of the Commission’s program. For example, Commissioner Copps in 2006 urged the Commission to “move quickly to curb abuses of the DE program” by adopting the facilities-based requirement that the NPRM proposes to eliminate today.²² He explained that without the rule in place “entities with deep pockets helped themselves to discounts they were never meant to enjoy.”²³ “[B]y strengthening our unjust enrichment rules,” Commissioner Copps stated, “we take away the incentive for speculators to try to masquerade as legitimate DEs And most importantly, we reserve the DE program for companies that actually intend to use their spectrum to serve customers.”²⁴

Commissioner Adelstein shared a similar position. He believed that the Commission should be acting to close “loophole[s]” in the DE program, not opening them up.²⁵ He expressed serious concerns about the impact a contrary approach would have on American taxpayers: “Do we really want the nation’s largest wireless carriers partnering with DEs to get a 25% discount so that auction revenues to the U.S. Treasury could potentially be reduced by billions of dollars? How is the public interest served in that outcome?”²⁶

The U.S. Court of Appeals for the Third Circuit made the same point when it reviewed the FCC’s 2006 DE rules.²⁷ The court drew a distinction between the provision of facilities-based service, on the

¹⁸ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration, 21 FCC Rcd 6703, 6705, n.8 (2006) (emphasis added) (*CSEA/Part I Order on Reconsideration*).

¹⁹ *Id.* (emphasis added).

²⁰ H.R. Rep. No. 103-111, at 257–58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993)).

²¹ While some have cited consolidation in the wireless industry as counseling in favor of eliminating the facilities-based requirement, any such consolidation is irrelevant to determining the limits Congress imposed on the FCC’s authority. And in any case, as mentioned above, eliminating that requirement would only increase market concentration since spectrum would be flipped from non-facilities-based entities to the largest wireless carriers.

²² See *CSEA/Part I Second Report and Order*, 21 FCC Rcd at 4808 (Statement of Commissioner Michael J. Copps).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 4810 (Statement of Commissioner Jonathan Adelstein Approving in Part, Dissenting in Part).

²⁶ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, 21 FCC Rcd 1753, 1772 (2006) (Statement of Commissioner Jonathan Adelstein).

²⁷ See *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 255 n.8 (3d Cir. 2010).

one hand, and arrangements under which “a DE merely monetizes its credits or partners with a large carrier, thus rendering the DE’s separate existence a mere formality” on the other.²⁸ The court indicated that the rationale underlying the relevant DE rule would not permit small businesses to “sell or lease overly large quantities of their capacity to any single lessee.”²⁹

And the U.S. Department of Justice has stated that “the FCC should disqualify a DE that has any . . . agreement with a large wireless carrier that suggests that the licenses will be used principally for the benefit of the large wireless carrier.”³⁰

Congress, numerous FCC Commissioners over the years, the Third Circuit, the Department of Justice—all were in unison regarding how to ensure that DEs are truly independent providers. Yet today’s NPRM blesses just the opposite approach.

III.

The NPRM’s proposals suffer from several additional flaws as well. *First*, the NPRM’s approach to DE leasing cannot be reconciled with its proposal on joint bidding.³¹ In the joint bidding section of the NPRM, the Commission proposes to adopt a broad prohibition against any agreement between nationwide wireless providers that even relates to the competitive bidding process, even though the NPRM identifies no evidence that there’s any need for such a rule.³² The FCC’s reasoning? Any such arrangement “would reduce the participants’ ability or incentive to compete independently, which would lessen competition . . . and could harm American consumers by increasing the price or reducing the quality of mobile wireless service.”³³ This begs the question: How can the NPRM conclude that *any* type of agreement between two nationwide providers would necessarily harm consumers and reduce the incentives to compete, yet maintain that an agreement under which a small provider leases 100% of its spectrum to a large corporation raises no such concerns? The NPRM offers no answer.

Second, and similarly, the proposal to eliminate the facilities-based requirement cannot be reconciled with the FCC’s recent approach to Joint Sales Agreements (JSAs) in the broadcast television industry.³⁴ In the JSA context, the FCC prohibited one broadcast television licensee from selling more than 15% of another station’s advertising time. The FCC’s theory? It claimed that the mere existence of such an agreement gave licensees selling the advertising “the opportunity, ability, and incentive to exert significant influence over the” other station.³⁵ It was said then that “[w]hen one licensee controls the cash

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Ex Parte Submission of the U.S. Department of Justice, WT Docket No. 05-211, at 5 (Mar. 17, 2006), available at <http://go.usa.gov/58fY>.

³¹ See NPRM at paras. 107–40.

³² See *id.* paras. 131–34.

³³ *Id.* para. 132.

³⁴ See, e.g., *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 29 FCC Rcd 2647 (Med. Bur. 2014) (*JSA Processing PN*).

³⁵ 2014 Quadrennial Regulatory Review — *Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527 para. 340 (2014) (*2014 Quadrennial Regulatory Review*) (“[T]he ability of a broker to control a brokered television station’s advertising revenue, its principal source of income, affords the broker the opportunity, ability, and incentive to exert significant influence over the brokered station.”); see also *id.* at 4533, para. 350 (“[T]elevision JSAs involving a significant portion of the brokered station’s advertising time convey the incentive and potential for the broker to influence program selection and station operations.”); *id.* at 4539, para. 360 (“[A] 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, including programming choices, and give them an incentive

flow of another, it controls the other. The old admonition ‘follow the money’ has never been more appropriate.”³⁶ The Commission thus determined that the mere presence of these agreements required attribution for purposes of the agency’s media ownership rules because the risk of undue influence was simply too great.³⁷

Yet under today’s proposal, one licensee could control 100% of the spectrum of another. How can the FCC reconcile these different approaches? How is it that one television station in a small market selling 16% of another station’s advertising is conclusive evidence of “undue influence” and an intolerable end-run around our rules, but, as proposed in this NPRM, a DE can lease 100% of its spectrum to some of the largest companies in the world without triggering any concerns about undue influence? As I stated earlier when the Commission waived our facilities-based requirement for the benefit of a single private equity firm,³⁸ whatever happened to the old admonition “follow the money”? Why follow 16% of the money, but not 100% of the money? Some say that we must take into account differences between the broadcast television business and the wireless business. But if anything, those differences cut the other way. Indeed, a middleman that simply leases all of its spectrum to our nation’s largest wireless carriers is not even a “wireless carrier” in any meaningful sense of the term.

Third, the NPRM makes no attempt to harmonize its proposed approach to DE leasing with other Commission precedents. For example, the NPRM proposes to replace our existing, bright-line approach to DE leasing with a post-auction, fact-based inquiry into the degree of control that particular leases would give large companies over the DE. But the level of uncertainty that this case-by-case approach will create is directly contrary to the FCC’s recent approach to spectrum auctions. In the FCC’s *Mobile Spectrum Holdings Order*, for example, the Commission concluded that “it is in the public interest to replace our post-auction case-by-case analysis” with bright-line, *ex ante* rules.³⁹ Likewise, the NPRM itself states in the joint bidding section that “certainty and clarity in advance of the start of an auction . . . best serve the public interest.”⁴⁰ There isn’t any way to square those approaches with the decision here, and the NPRM doesn’t try. It would seem the Commission chooses either the certainty of bright-line rules or the flexibility of case-by-case adjudication as necessary to further its ideological agenda.

Fourth, I do not support the Commission’s decision to seek comment on instituting closed, DE-only spectrum auctions.⁴¹ In my view, the FCC should not limit competitors’ ability to compete. We should not pick winners and losers. Instead, we should pursue policies that maximize participation in our

to do so.”); *id.* at 4539, para. 361 (“As the amount of advertising revenue controlled by the brokering station increases, so too does its incentive and ability to influence brokered station’s programming.”); *id.* at 4582 (Statement of Chairman Tom Wheeler) (JSAs provide broker stations “the incentive and ability to unduly influence the operations” of brokered stations), *available at* <http://go.usa.gov/58Ck>.

³⁶ *Id.* at 4582 (Statement of Chairman Tom Wheeler).

³⁷ See *JSA Processing PN*, 29 FCC Rcd at 2648; *but see* Statement of FCC Commissioner Ajit Pai on the Media Bureau’s New Guidance on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), <http://go.usa.gov/58ax>; *2014 Quadrennial Regulatory Review*, 29 FCC Rcd at 4587 (Dissenting Statement of Commissioner Ajit Pai), *available at* <http://go.usa.gov/58a5>; Joint Statement of Commissioners Ajit Pai and Michael O’Rielly on Three More TV Stations Going Dark Under The FCC’s New JSA Policy (June 24, 2014), <http://go.usa.gov/58xQ>; Statement of Commissioners Ajit Pai and Michael O’Rielly on the Negative Impact of the Decision to Restrict Television Stations’ Use of Joint Sales Agreements (May 29, 2014), <http://go.usa.gov/9N7V>.

³⁸ See *Grain Management, LLC’s Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules*, WT Docket No. 05-211, Order, FCC 14-103 (2014) (Dissenting Statement of Commissioner Ajit Pai), go.usa.gov/5PSY.

³⁹ *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 619, paras. 139–42 (2014).

⁴⁰ *NPRM* at paras. 133–34.

⁴¹ See *id.* paras. 80–81.

spectrum auctions. That's especially the case when bidding limitations by definition will reduce the revenue the U.S. Government (and hence taxpayers) could gain from such auctions while providing no offsetting public benefits under the new spectrum-flipping regime.

Finally, at a time when the FCC is proposing changes that invite arbitrage and abuse of the DE program, I cannot support the NPRM's proposal to lessen FCC oversight.⁴² This is not the time to discard tools that can help the FCC identify misuse of taxpayer funds. Nonetheless, the NPRM proposes to eliminate the requirement that DE licensees file annual reports with the FCC that identify all agreements, in existence or proposed, that relate to the licensee's eligibility for DE benefits. In my view, transparency is essential here.

IV.

While I do not support the NPRM's proposal to eliminate the facilities-based requirement, I appreciate my colleagues agreeing to incorporate some of my suggestions. I am glad that the NPRM now seeks comment on retaining a modified version of the facilities-based requirement and whether eliminating the requirement would increase the chances that DEs would be subject to undue influence. Also, the NPRM now seeks comment on how its proposed approach could impact auction revenues and whether it would result in ineligible entities obtaining access to discounted spectrum. Moreover, the NPRM now seeks specific comment on whether the Commission should strengthen its unjust enrichment rules by adopting a 10-year repayment schedule⁴³ and by requiring full reimbursement of any taxpayer-funded discounts, plus interest, if a DE loses eligibility before completing its licensing obligations.⁴⁴ Finally, the NPRM asks whether a DE with multiple agreements or arrangements with a large provider merits more rigorous scrutiny.⁴⁵ I hope commenters submit useful information on these important topics.

The NPRM includes other proposals that are worth exploring. For example, it seeks comment on prohibiting a single entity from filing multiple short-form applications and on prohibiting commonly-controlled entities from submitting multiple applications. In addition, the NPRM seeks comment on whether the FCC should modify our former defaulter rule. I concur in these portions of the NPRM.

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In the end, this NPRM is the latest lost opportunity to focus on ways we could, on a bipartisan basis, lawfully promote entry by small companies into the wireless business, facilitate the deployment of new facilities, and encourage the provision of service to underserved areas. Instead, the Commission proposes an arbitrage scheme that allows DEs to obtain discounted access to spectrum and then profit as middlemen. This impedes—rather than furthers—the type of competition that Congress sought to promote when it authorized taxpayer-funded discounts on spectrum. I therefore hope that the Commission veers from its current course in this proceeding.

⁴² See *id.* paras. 77–79 (proposing to repeal the reporting requirement at 47 C.F.R. § 1.2110(n)).

⁴³ *Id.* para. 45.

⁴⁴ *Id.* para. 46.

⁴⁵ *Id.* para. 35.