



PUBLIC NOTICE

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REQUEST FOR FURTHER COMMENT ON ISSUES RELATED TO COMPETITIVE BIDDING PROCEEDING UPDATING PART 1 COMPETITIVE BIDDING RULES

WT Docket No. 14-170; GN Docket No. 12-268; RM-11395; WT Docket No. 05-211

Comments Due: (21 days after the date of publication in the Federal Register)
Reply Comments Date: (28 days after the date of publication in the Federal Register)

I. INTRODUCTION

1. This *Public Notice* seeks additional comment on a number of proposed changes to the Commission's Part 1 competitive bidding rules offered by commenters in response to the questions and proposals set forth in the *Part 1 NPRM*.¹ Specifically, the Commission seeks further, more detailed input on alternative proposals as well as questions posed and issues raised by commenters on how the Commission can meet our statutory obligation to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities" or "DEs") have an opportunity to participate in the provision of spectrum-based services, while at the same time ensuring that there are adequate safeguards to protect against unjust enrichment to ineligible entities. We also seek further comment on commenters' other suggestions for amending the competitive bidding rules governing auction participation by former defaulters, commonly controlled entities, and entities with joint bidding arrangements in response to proposals advanced in the *Part 1 NPRM*. Soliciting further input on alternative proposals and exploring other issues raised in the record to date will provide a more complete record for us to evaluate and act upon, as appropriate, the concerns raised in the *NPRM*.

II. BACKGROUND

2. In the *Part 1 NPRM*, the Commission emphasized that "we remain mindful of our responsibility to ensure that benefits are provided only to qualifying entities," and asked whether our proposals "provide adequate safeguards against unjust enrichment to ensure that bidding credits are awarded only to qualifying small businesses."² In discussing our proposed two-prong approach to evaluate attribution and establish eligibility for small business benefits, the Commission asked whether we should "take additional steps to assure that ineligible entities cannot exercise undue influence over a

¹ See Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170, *Notice of Proposed Rulemaking*, 29 FCC Rcd 12426 (2014) ("*Part 1 NPRM*" or "*NPRM*"). A summary of this *NPRM* was published at 79 Fed. Reg. 68172 (Nov. 14, 2014).

² *Id.* at 12429 ¶ 7, 12430-31 ¶ 11, 12437 ¶ 27.

small business,” and also asked commenters to “offer any other suggestions the Commission should consider to revise its rules and reform its small business policies.”³

3. After the *NPRM* was released in October 2014, the Commission conducted an auction for 1,614 Advanced Wireless Service licenses in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands (“Auction 97”), which closed on January 29, 2015.⁴ In order to allow interested parties an opportunity to take into account any “lessons learned” from Auction 97, the Wireless Telecommunications Bureau (“WTB”) extended the comment deadline for the *NPRM* three times.⁵ Twenty-one parties submitted comments and fourteen parties submitted reply comments. Based on the issues raised in the *Part 1 NPRM*, several commenters offered alternative proposals, and suggested other policy considerations the Commission should weigh before amending its Part 1 rules. This *Public Notice* seeks additional comment on those proposals and suggestions.

III. ELIGIBILITY FOR BIDDING CREDITS

A. Attribution Rules and Small Business Policies

4. In the *NPRM*, we sought comment on “find[ing] a reasonable balance between the competing goals of affording [designated] entities reasonable flexibility to obtain the capital necessary to participate in the provision of spectrum-based services and effectively preventing the unjust enrichment of ineligible entities.”⁶ The *NPRM* proposed to modify the eligibility standard for small business benefits to provide small businesses greater opportunities to participate in a wide range of spectrum based services. Among other issues, the *NPRM* sought comment on repealing the attributable material relationship (“AMR”) rule which, for the purposes of determining an entity’s eligibility for small business benefits, attributes to the DE applicant the revenues of any entity with which it has one or more agreements for the lease or resale of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license it holds.⁷ Likewise, the *NPRM* revisited the policy underlying the AMR rule. In lieu of a bright-line test, the Commission proposed a more focused two-pronged approach to evaluate an entity’s eligibility for benefits using its longstanding controlling interest and affiliation rules to determine whether an applicant: (1) meets the applicable small business size standard, and (2) retains control over the spectrum associated with the licenses for which it seeks small business benefits.⁸ The Commission also proposed to modify the secondary market rules to make clear that DEs may fully benefit from the same *de facto* control standard for spectrum manager leasing as is applied to non-DE lessors.⁹

5. Several commenters support the Commission’s proposal to modify the DE eligibility standard by eliminating the AMR rule, stating that it will allow small businesses the flexibility needed to

³ *Id.* at 12439 ¶ 33, 12440 ¶ 36.

⁴ Auction of Advanced Wireless Services (AWS-3) Licenses Closes; Winning Bidders Announced for Auction 97, *Public Notice*, DA 15-131 (rel. Jan. 30, 2015).

⁵ On December 8, 2014, the deadlines for comments and replies were extended to January 23, 2015, and February 12, 2015, respectively. *See* Updating Part 1 Competitive Bidding Rules, *Order*, DA 14-1784 (rel. Dec. 8, 2014). On January 13, 2015, the deadlines for comments and replies were further extended to February 6, 2015, and February 26, 2015, respectively. *See* Updating Part 1 Competitive Bidding Rules, *Order*, DA 15-52 (rel. Jan. 13, 2015). After the auction closed, WTB extended the comment deadlines to February 20, 2015 for comments and March 6, 2015 for replies. *See* Updating Part 1 Competitive Bidding Rules, *Order*, DA 15-142 (rel. Jan. 30, 2015).

⁶ *Part 1 NPRM*, 29 FCC Rcd at 12428 ¶ 5.

⁷ *See id.* at 12431- 37 ¶¶ 12-27.

⁸ *Id.* at 12437-40 ¶¶ 28-36.

⁹ *Id.* at 12440-42 ¶¶ 37-41.

obtain the capital necessary to participate in the provision of spectrum-based services.¹⁰ Those commenters note, among other things, that the proposal relies on well-established Commission standards to evaluate *de jure* and *de facto* control with which licensees are familiar,¹¹ and is coupled with effective unjust enrichment provisions to safeguard against abuse of small business benefits.¹² We invite additional comment on this proposal and related concerns. Specifically, parties supporting the elimination of the AMR rule should explain how eliminating or loosening the restriction will promote competition and ensure small business participation in spectrum-based services, while guarding against ineligible entities' acquiring small business benefits.¹³ Several other parties oppose the Commission's proposal to eliminate the AMR rule to replace it with a two-pronged control analysis, arguing that doing so would increase the likelihood that DE benefits might unfairly flow to ineligible entities or spectrum "speculators"¹⁴ in contravention of Congressional intent.¹⁵ Commenters advocating for alternative rule amendments for the DE eligibility rules and the award of benefits should specifically address how the Commission should consider relationships with and investment in a DE applicant, particularly in connection with any use of spectrum acquired with benefits.¹⁶

6. Other parties argue that the AMR rule should not only be retained, but strengthened. For instance, some advocate that a DE should be prohibited from leasing more than 25 percent of its spectrum in the aggregate across one or more licenses.¹⁷ Another commenter argues that, if the AMR rule is retained, a DE should not be allowed to lease more than 25 percent of its total spectrum to any one wireless operator.¹⁸ In light of these and similar comments, we seek further comment on how much of a DE's spectrum it should be able to lease or resell without having to attribute the revenues of its lessees or resellers. Is there a different percentage threshold, either higher or lower, that would better serve the Commission's statutory goals? Should the Commission instead reinstate an absolute limit on the percentage of a DE's spectrum that it may lease or resell?¹⁹ If so, what should that limit be and why? Should any such limit affect DE eligibility as to any license, or only on a license-by-license basis? Should we have different rules for licenses acquired by DEs without bidding credits?²⁰ Should the Commission's rules regarding spectrum use agreements with DE's differ for those that have an equity interest in the DE?²¹ Commenters should also address how any proposed rule amendments for DE

¹⁰ See ARC Comments at 17-18; ARC Reply at 2, 8; CCA Comments at 9-10; CCA Reply at 8-9 (noting also, support for a rule change that prohibits a DE from leasing all or substantially all of its spectrum acquired with bidding credits); Council Tree Reply at 8, Attach. at 6; DE Coalition Comments at 16; DE Coalition Reply at 3; NTCA Comments at 5-7; WISPA Comments at 10-11. *But see* Blooston Rural Reply at 1-2; C Spire Reply at 3.

¹¹ CCA Comment at 9-10; *see also* ARC Comment at 18; DE Coalition Comments at 16; NTCA Comments at 7; WISPA Comment at 11.

¹² CCA Comments at 10; *see also* DE Coalition Comments at 18.

¹³ Taxpayer Advocates Comments at 4.

¹⁴ T-Mobile Comments at 13; *see also* Blooston Rural Comments at 7; Blooston Rural Reply at 11; C Spire Reply at 2; Taxpayer Advocates Comments at 9-10.

¹⁵ T-Mobile Comments at 13.

¹⁶ *See* MediaFreedom Comment at 2.

¹⁷ T-Mobile Comments at 4-5, 17; *see also* C Spire Reply at 3.

¹⁸ C Spire Reply at 3.

¹⁹ *See Part 1 NPRM*, 29 FCC Rcd at 12437 ¶ 27. For example, the impermissible material relationship (IMR) rule, vacated for inadequate notice, barred DE status where the applicant or licensee leased or resold to one or more entities, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of its licenses. *See Council Tree Communications, Inc., v. FCC*, 619 F.3d 235 (3d Cir. 2010).

²⁰ *See, e.g.*, Blooston Rural Comment at 7.

²¹ *See* Taxpayer Advocates Comment at 5.

eligibility would impact the Commission's goal of providing small businesses with greater access to capital.²²

7. Further, some parties suggest that the Commission should consider whether to distinguish between pure spectrum leasing arrangements and network facilities-based wholesale arrangements when evaluating whether to retain the AMR rule.²³ We seek further comment on this distinction and ask whether and how we should treat wholesale and resale agreements differently from lease arrangements for purposes of attributing revenues to a DE applicant. Commenters are also requested to discuss how the Commission should define "resale" and "wholesale agreements" for purposes of any such distinction, as well as for any other rule modifications we might consider, including if we ultimately choose to retain the AMR rule, and the policy of requiring facilities-based service underlying the rule. Are there any potential advantages of distinguishing between agreements on the basis of the provision of facilities-based service? Are there any potential negative effects of such a distinction such that, on balance, it is preferable to retain the current AMR rule?

8. Some parties suggest that the AMR rule be retained, but modified to allow DEs to lease spectrum to rural carriers or other DEs without attribution and allow DEs that have acquired licenses without bidding credits to lease those licenses without attribution.²⁴ In particular, Blooston Rural proposes that the AMR be retained with respect to spectrum licenses that are both acquired with bidding credits and leased to nationwide wireless providers.²⁵ We seek comment on these proposals. Commenters are specifically invited to address how the proposed modifications will achieve our goals of facilitating small business participation in spectrum-based services and enhancing competition, while preventing ineligible entities from acquiring small business benefits and unjust enrichment. Is there a limit on the overall amount of spectrum that a DE should be permitted to lease to another DE or rural carrier? Should any such limit affect DE eligibility as to any license, or only on a license-by-license basis? Commenters are also invited to address whether the proposals regarding modifications to the DE eligibility rules and award of DE bidding credits negatively or positively affect auction revenues,²⁶ and the extent to which section 309(j) permits consideration of any such effects.²⁷

9. With regard to the policy underlying the AMR rule, a number of parties suggest, however, that the Commission should continue to encourage DEs to provide facilities-based service.²⁸ For instance, one party supports the elimination of the AMR rule, but states that DEs should be required to be facilities-based providers.²⁹ Some commenters contend that any rule changes related to eligibility for small business benefits must continue to require an applicant seeking to utilize those benefits to be

²² *See id.*

²³ ARC Comments at 16 (contending that "the practical effect of the requirement that every DE directly provide retail facility-based service was to bar every DE from acting as a wholesale service provider or as a 'carrier's carrier.'"); *see also* WISPA Comments at 12 (stating that the AMR is "an impediment to new entrants, especially those facilities-based DEs that wish to provide wholesale service").

²⁴ Blooston Rural Comments at 7; Blooston Rural Reply at 11; *see also* NTCH Reply at 3 (arguing for the repeal of the AMR rule but asserting that DEs should have the ability to lease spectrum to other rural telephone companies or other DEs without losing DE eligibility).

²⁵ Blooston Rural Comments at 5-6.

²⁶ *Part I NPRM*, 29 FCC Rcd at 12440 ¶ 36.

²⁷ *See* 47 U.S.C. § 309(j)(7); *Ranger Cellular v. FCC*, 333 F.3d 255, 261-62 (D.C. Cir. 2003); *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 692 (D.C. Cir. 2001) (interpreting statutory restriction to apply only to specific subsections of auction statute).

²⁸ CCA Comments at 9; CCA Reply at 8-9; *see also* CAGW Comments at 3; MediaFreedom Comments at 1.

²⁹ CCA Comments at 9; CCA Reply at 8-9.

primarily a facilities-based provider.³⁰ Other commenters support the Commission’s proposal to reconsider requiring DEs to primarily provide facilities-based service directly to the public, and favor the elimination of the policy.³¹ We invite further comment on the proposed change to this policy, including whether such a change would comply with the statute’s directive that the Commission prescribe rules “ensur[ing] that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”³² Commenters are requested to discuss how a policy favoring facilities-based service affects our ability to prevent warehousing and unjust enrichment, and ensure that small business benefits flow to eligible entities.³³ For instance, should we automatically treat an entity that manages a DE’s spectrum license utilization for provisioning services as a controlling interest of the DE? Additionally, we seek comment as to ways in which the Commission can implement the policy that DEs provide facilities-based services if the AMR rule is eliminated.³⁴

10. The record also includes numerous additional proposals that expand or offer alternative proposals for evaluating DE eligibility. We seek comment on the specific suggestions raised in the record and set forth below, and ask interested parties to provide specific details on how any proposed rule amendment would further the Commission’s policy objectives of providing small businesses opportunities and preventing unjust enrichment of ineligible entities.

- a. Modify the applicable attribution, controlling interest or affiliation rule to alter the types of equity arrangements available to a DE applicant, by:
 - “Attribut[ing] to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than 10 percent,” consistent with the spectrum attribution rules used to consider spectrum aggregation;³⁵
 - Restricting larger nationwide and regional carriers,³⁶ entities with a certain number of end-user customers,³⁷ and/or other large companies³⁸ from providing a material portion of the total capitalization of DE applicants or otherwise exercising control over such applicants as part of the definition of ‘material relationship’;³⁹
 - “[A]dopting a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of the [DE] company;”⁴⁰ and
- b. Adopt a 25 percent minimum equity requirement for DEs to “ensure that controlling interests are properly invested in their companies,” and provide that “any loans to achieve

³⁰ *Id.*; see also CAGW Comments at 3; MediaFreedom Comments at 1.

³¹ See, e.g., ARC Comment at 3.

³² 47 U.S.C. § 309(j)(4)(D).

³³ 47 U.S.C. §§ 309(j)(4)(E), (j)(3)(C).

³⁴ *Part 1 NPRM*, 29 FCC Rcd at 12437 ¶ 26.

³⁵ AT&T Comments at 17; see also C Spire Reply at 2-3; T-Mobile Reply at 10-11 (stating that while this argument is “a step in the right direction, [it] may be too restrictive”).

³⁶ NTCA Comments at 7.

³⁷ See AT&T Comments at 15; Blooston Rural Comments at 4.

³⁸ T-Mobile Reply at 10-11 (arguing that, for [NTCA’s] proposition to be fair, it “would need to cover all large companies – not just the carriers.”)

³⁹ NTCA Comments at 7.

⁴⁰ T-Mobile Comments at 15; T-Mobile Reply at 6-7.

- minimum equity thresholds should be negotiated at arms-length.”⁴¹
- c. Limit the total dollar amount of DE benefits that any DE (or group of affiliated DEs) may claim during any given auction, based on some multiple of its annual revenues, or a set cap of \$32.5 million to “ensure that DEs cannot acquire spectrum in a manner that is wildly disproportionate to the concept of a small business.”⁴²
 - d. Limit the overall amount that a small business can bid in order to ensure that a DE is not able to “bid at levels that undercut the purpose of the DE program” and base such cap on some multiple of a small business gross revenue threshold in the Part 1 schedule,⁴³ such as ten times the annual gross revenues.⁴⁴
 - e. Rather than capping DE benefits, adopt another limiting metric such as population, to tie bidding credits more closely to a typical business plan of a small business. Under this proposal, a DE applicant bidding on licenses covering a relatively small number of pops, such as in rural areas, would not be subject to a cap, but nationwide licenses or licenses covering high-value, metropolitan areas would be limited.⁴⁵
 - f. Narrow the scope of the affiliation rules to exclude individuals and entities whose revenues are currently attributable to a DE, such as directors and certain family members, including in-laws, siblings, step-siblings, and half-siblings,⁴⁶ if they are unlikely to exercise control over the applicant entity unless the applicant has more than incidental business relationships with a particular relation.⁴⁷
 - g. “[C]larify the affiliation rules to prevent rural telephone companies from losing [DE] status because they hold a fractional interest in a cellular partnership,” where the rural telephone company has no ability to control the partnership’s day-to-day operations and/or strategy in any significant way.⁴⁸

11. In addressing proposals proffered in the record, commenters are requested to provide specific comment about how the proposals could be implemented and whether there are any alternative thresholds that would better meet the Commission’s goals. For example, commenters should address whether and how any relevant terms should be defined and how the proposals should apply to existing DEs and those that will apply for benefits in the future. Are the existing standards for disclosable interest holders and affiliates appropriate for evaluating DE eligibility consistent with our policy objectives, or should the Commission modify its rules to include other non-controlling interests in a DE that may potentially cause unjust enrichment of ineligible entities or enable ineligible entities to exercise undue influence over a DE? Should there be a cap on the overall amount of money that non-controlling interests can contribute to a DE? Should there be a cap on, or a prohibition of, a non-controlling interest holder’s use of spectrum for a license that has been acquired with DE benefits?⁴⁹ For attribution purposes, is the revenue information we use to determine DE eligibility appropriate, or should we consider other revenues such as sources of personal income?⁵⁰ To what extent should an interest holder’s revenues be attributed

⁴¹ T-Mobile Comments at 15; T-Mobile Reply at 6-7, 11; *see also* C Spire Reply at 3.

⁴² AT&T Comments at 4, 17 (deriving the threshold for the limit from the Small Business Administration’s small business size limit for “all other telecommunications,” in annual receipts); CCA Reply at 9; C Spire Reply at 2.

⁴³ 47 C.F.R. § 1.2110(f).

⁴⁴ Taxpayer Comments at 11.

⁴⁵ CCA Reply at 10.

⁴⁶ *See* NTCH Comments at 1-2; *see also* 47 C.F.R. § 1.2110(c)(2)(ii)(F); 47 C.F.R. § 1.2110(c)(5)(iii)(B).

⁴⁷ NTCH Comments at 1-2.

⁴⁸ Blooston Rural Comments at 10; Blooston Rural Reply at 5-6.

⁴⁹ *See* Blooston Rural Reply at 13.

⁵⁰ We note that in a 2006 *Second FNPRM*, the Commission sought comment on the possible use of a personal net

(continued....)

to a DE, for instance, should the attribution of revenues be based on the correlating percentage of the interest holder's equity contribution to the DE rather than all gross revenues? In advocating for particular changes, commenters should discuss how such changes or any resulting disclosure requirements could be implemented in the auction process, including the short-form application stage. To the extent that the proposals recommend incorporating specific percentages, thresholds, or procedures into the Commission's DE eligibility rules, commenters should explain how these approaches, or any other alternatives, would improve the Commission's DE program and better serve its statutory goals. Additionally, how should we factor in the rising cost of acquiring spectrum licenses into any rule amendments that we consider?

12. In addition to the comments discussed above, on February 26, 2015, United States Senator Claire McCaskill sent a letter to Chairman Wheeler requesting that the Commission eliminate the "preferential" treatment for Alaska Native Corporations ("ANCs") that do not meet the standard definition of a small business under the Commission's attribution rules.⁵¹ Under the Commission's current rules, small businesses affiliated with Indian tribes or ANCs are not required to include revenues of those Indian tribes or ANCs, other than gaming revenues, into their gross revenues for purposes of determining eligibility as a small business.⁵² In adopting this exemption, the Commission sought to ensure that its rules remained consistent with other Federal laws, policies, and regulations, and most notably the affiliation rules of the Small Business Administration.⁵³ We seek comment on whether ANC revenues should be treated the same way as attributable revenues for purposes of DE eligibility. Additionally, we seek comment on whether our rules concerning Indian tribes or ANCs remain consistent with other Federal policies and practices, and whether and how to amend them. We also seek comment on whether our rules pertaining to ANCs increase the risk of unjust enrichment to some entities.

B. Unjust Enrichment

13. In the *Part I NPRM*, we also sought comment on what safeguards we should consider to ensure that bidding credits are extended only to qualifying small businesses, noting that "[unjust enrichment] provisions will be as important as ever and that strong enforcement of our rules is critical."⁵⁴ We sought comment on whether any changes were needed to strengthen the unjust enrichment rules and how best the Commission can continue to scrutinize applications and proposed transactions to ensure that only eligible entities receive benefits, while not undermining the statutory directive to ensure that DEs are given the opportunity to participate in the provision of spectrum-based services.⁵⁵

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worth test in determinations of DE eligibility, citing a proposal to restrict individuals with a net worth of \$3 million or more from having a controlling interest in a designated entity. *See Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753, 4782 ¶ 87. (This proposal was made in a Letter from Messrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005) (Council Tree *ex parte*). *See id.* nn.189-90. In that record, no commenter, including Council Tree, the original proponent of such a test, supported the adoption of a personal net worth restriction. *See, e.g.*, Wirefree Partners Comments at 17-18, Blooston Comments at 9-10. Furthermore, several commenters in 2006 argued strongly that a personal net worth test would be unnecessary and ineffective. *See, e.g.*, October 20 Reply Comments of Aloha Partners, L.P. at 3-4; Wirefree Partners Comments at 17-18; Royal Street Reply Comments at 7-8; Verizon Wireless Reply Comments at 4-5.

⁵¹ Letter from Claire McCaskill (D-MO), U.S. Senator, to Tom Wheeler, Chairman, FCC, at 2 (Feb. 26, 2015). This letter has been placed in the docket of these proceedings.

⁵² *See* 47 C.F.R. §1.2110(c)(5)(xi); *see also* 47 C.F.R. §§ 1.2110(b) and (c)(5).

⁵³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Order on Reconsideration*, 9 FCC Rcd 4493 ¶ 5 (1994).

⁵⁴ *Part I NPRM*, 29 FCC Rcd at 12442 ¶ 42.

⁵⁵ *See id.* at 12442-44 ¶¶ 42-49.

14. Commenters are divided on whether the existing rules provide a sufficient safeguard to protect against unjust enrichment, while ensuring that DEs have an opportunity to participate in the provision of spectrum-based services. Several parties urge us to retain the existing rules, noting that a longer unjust enrichment period would “hamper or eliminate the ability of DEs to raise and retain capital or operate their businesses with flexibility comparable to businesses in the rest of the industry.”⁵⁶

15. Other commenters urge us to adopt stronger rules to provide a more meaningful deterrent to speculation and abuse.⁵⁷ T-Mobile, for example, advocates that the unjust enrichment rules should be adjusted to: “(i) encompass the entire license term; and (ii) require licensees that profit from the sale of a license obtained at a discount to repay that windfall profit [the sales price of the licenses above and beyond the auction bid price], plus interest.”⁵⁸ T-Mobile further notes that, “in cases where spectrum is not available for use in the near term due to Federal Government or commercial incumbents, the Commission’s existing holding periods . . . do not correspond with any rational benchmark for licensees to engage in a legitimate business.”⁵⁹ To ensure that spectrum resources are made available to the public in a timely manner, T-Mobile advocates that the Commission should require DEs to show some evidence of build-out activity within one year of acquiring the license or upon clearing spectrum incumbents.⁶⁰ In addition, Taxpayer Advocates urges the Commission to require a DE to pay back all or part of its bidding credit if it chooses to “lease or sell a significant portion of spectrum within the first five years of ownership.”⁶¹ Other commenters contend that more stringent requirements like these proposals will further impede small businesses’ ability to acquire access to capital.⁶²

16. We seek comment on these alternative viewpoints. Specifically, we seek additional comment on whether to extend the unjust enrichment period for a specified number of years (e.g., 10 years),⁶³ the entire license term or to link it to an interim construction milestone.⁶⁴ Are there other alternatives we should consider? For example, should the Commission revisit the percentage amounts associated with its unjust enrichment repayment schedule? Alternatively, should the Commission enhance its unjust enrichment restrictions as T-Mobile suggests to address concerns that the current unjust enrichment repayment rules are viewed as a “mere cost of doing business” by requiring repayment of any profit or some multiple of the bidding credit received? Commenters are also invited to address whether the DE benefits associated with any and all of a DE’s licenses should be forfeited if it loses DE eligibility as to any one license.⁶⁵ Finally, we seek comment on whether the Commission should consider the proposal in the record to impose additional build-out and reporting obligations on DEs by requiring them to demonstrate “tangible steps toward deployment” within one year of acquiring license(s) or clearing incumbent spectrum users.⁶⁶ Is one year an appropriate timeframe or should the Commission require demonstrations at additional benchmarks? Are there any other options the Commission should consider

⁵⁶ DE Coalition Comments at 26; *see also* ARC Reply at 2; Blooston Rural Reply at 9; CCA Comments at 10; DE Coalition Reply at 3; RWA Comments at 9-11; RWA Reply at ii, 9-10; WISPA Comments at 13.

⁵⁷ T-Mobile Comments at 16-17; T-Mobile Reply at 6-7.

⁵⁸ T-Mobile Comments at 17; T-Mobile Reply at 10.

⁵⁹ T-Mobile Comments at 16-17.

⁶⁰ *See* T-Mobile Comments at 14; T-Mobile Reply at 9; *see also* CCA Reply at 9. *But see* Blooston Rural Reply at 11-12; KSW Reply at 12.

⁶¹ Taxpayer Advocates Comments at 10.

⁶² *See, e.g.*, KSW Reply at 12; RWA Reply at ii, 9-10.

⁶³ T-Mobile Comments at 17; T-Mobile Reply at 10.

⁶⁴ *See* T-Mobile Comments at 14; T-Mobile Reply at 9; *see also* CCA Reply at 9.

⁶⁵ *See Part 1 NPRM*, 29 FCC Rcd at 12440 ¶ 35.

⁶⁶ T-Mobile Comments at 14.

to prevent spectrum warehousing and promote expeditious build-out, e.g., require repayment of some percentage of a bidding credit if a DE fails to meet a benchmark? We ask commenters to address any trade-offs related to these proposals, including the extent to which any implemented rule amendments would restrict a DE's ability to access capital, deter participation of ineligible entities in the DE program, and prevent unjust enrichment.

C. Bidding Credits

17. In the *Part 1 NPRM*, we proposed to increase the gross revenues thresholds for defining the three tiers of small businesses, in order to reflect the changing nature of the wireless industry, including the overall increase in the size of wireless networks and the increasing capital costs to deploy them.⁶⁷ Based upon the percentage increase in the Gross Domestic Product (“GDP”) price index from when the small business definitions were first adopted, the Commission proposed to adjust the three-year gross revenues thresholds from \$3 million to \$4 million for businesses potentially eligible for a 35 percent bidding credit; from \$15 million to \$20 million for business potentially eligible for a 25 percent bidding credit; and from \$40 million to \$55 million for businesses potentially eligible for a 15 percent bidding credit.⁶⁸ The Commission also sought comment regarding the following: increasing the percentage amounts of bidding credits available to small businesses in section 1.2110(f); adding additional small business definitions and associated tiers of bidding credit amounts; and offering bidding preferences based on criteria other than business size.

1. Small Business Bidding Credits

18. Many commenters support increasing the gross revenues thresholds by the proposed increments,⁶⁹ citing the lack of DE participation in recent auctions,⁷⁰ changes in capital markets,⁷¹ and the long period of time since the current thresholds were set.⁷² Some commenters further advocate that the Commission increase the revenue thresholds even more than proposed in the *NPRM*.⁷³ Several commenters support the continued use of gross revenues as the basis for analyzing business size, referring to the administrative workability of this metric.⁷⁴ ARC proposes indexing the gross revenue tiers to the costs of auctioned spectrum on a MHz per pop basis.⁷⁵ With respect to the credit percentages themselves, many commenters support increasing the credit percentages generally or across the board,⁷⁶ and several support specific increases for the lowest threshold tier (the largest credit).⁷⁷ On the other hand, CAGW opposes increasing the bidding credit percentages, arguing that such an increase “could lead to even more

⁶⁷ *Part 1 NPRM*, 29 FCC Rcd at 12445- 49 ¶¶ 51-64.

⁶⁸ *Part 1 NPRM*, 29 FCC Rcd at 12446-47 ¶ 56.

⁶⁹ ARC Reply at 2; Blooston Rural Comments at ii, 8; Blooston Rural Reply at 5; CCA Comments at 2, 7; CCA Reply at 5; DE Coalition Comments at 33; DE Coalition Reply at 4; KSW Reply at 14; WISPA Comments at 6-7.

⁷⁰ ARC Comments at 3; Blooston Rural Comments at 8.

⁷¹ WISPA Comments at 6-7.

⁷² WISPA Comments at 6.

⁷³ ARC Comments at 22; *see also* NTCH Reply at 3; RWA Comments p. ii, 8-9 (urging the increase of the proposed gross revenue threshold for the third tier (15%) from a \$55 million limit to a \$100 million limit); RWA Reply at 3.

⁷⁴ CAA Comments at 6-7; DE Coalition Comments at 35.

⁷⁵ ARC Comments at 22.

⁷⁶ ARC Comments at 23 (recommending 25%, 35%, and 50% credits for the three existing tiers); DE Coalition Comments at 4, 33; KSW Comments at 1-2, 4; NTCH Comments at 4-5; WISPA Comments at 3, 7; *see also* Cerberus Comments at 3.

⁷⁷ DE Coalition Comments at 33 (40% top-end credit); KSW Comments at 1 (40% top-end credit); NTCH Comments at 5 (50% top-end credit).

questionable affiliations between large and small companies.”⁷⁸ Others suggest that bidding credit increases and expanding the eligibility for the DE program should not be implemented until the rules are revised and there is surety that ineligible entities will not benefit from bidding credits.⁷⁹ How does this suggestion align with the Commission’s proposals to address all issues at the same time in this proceeding?

19. We invite comment on these views. Commenters should address implementation issues associated with any alternate approaches, and provide concrete data and analysis to demonstrate whether and how such approaches will better meet our statutory goals.

2. Other Bidding Preferences/Types of Credits

20. A number of commenters urge the Commission to consider bidding credits based on criteria other than business size.⁸⁰ Several parties, for example, encourage us to implement a bidding credit for rural telephone companies, ranging from 25 to 35 percent, to be awarded in addition to any small business bidding credit for which an applicant may qualify.⁸¹ Another commenter urged us to re-examine our rules concerning the tribal land bidding credit.⁸² Other parties request that the Commission adopt bidding credits⁸³ or other preference⁸⁴ for parties that commit to serve rural, unserved and underserved areas.⁸⁵ In addition to the concerns discussed above, at least one party advocates that the Commission’s rules should remain focused on small businesses.⁸⁶

21. We seek specific, data-driven comment regarding these alternative suggestions, including associated implementation issues. Commenters are also requested to discuss how such proposals would advance the Commission’s statutory objectives and why they would be preferable to other proposals.

22. We specifically invite comment on the threshold percentages proposed with regard to the

⁷⁸ CAGW Comments at 3.

⁷⁹ Blooston Rural Reply at 5; AT&T Reply at 12 (arguing that “[i]ncreasing the scale of the DE program before it is reformed will only exacerbate existing problems.”).

⁸⁰ *See, e.g.*, Blooston Rural Comments at 9.

⁸¹ *See* ARC Reply at 4; Blooston Rural Comments at 9; Blooston Rural Reply at ii, 1-4 (preferring a bidding credit of at least 25%); Cerberus Comments at 4-5 (supporting a 35% rural bidding credit); CCA Comments at 2, 8-9; NTCA Comments at 2-3; NTCA Reply at 4 (supporting the 25% rural bidding credit); RWA Comments at 3-6; RWA Reply at i, 4-6 (supporting 25% bidding credit and asserting that the bidding credit should also be available to subsidiaries or affiliates of qualified rural telcos as well as independent rural wireless companies not affiliated with rural telcos; however, if the Commission decides against a rural bidding credit, it should adopt an additional public interest bidding credit).

⁸² *See* NTCH Comment at 4 (suggesting that the Commission adopt a case-by-case approach regarding the bidding credit for serving qualifying tribal land); *see also* 47 C.F.R. § 1.2110(f)(3).

⁸³ ARC Comments at 23; CCA Comments at 2, 8-9; DE Coalition Comments at 33; NTCH Comments at 5-6; *see also* DE Coalition Reply at 4 (recommending increasing and extending bidding credits to race-neutral categories of firms).

⁸⁴ *See* Blooston Rural Comment at 9 (rural telco); CCA Comments at 2, 8-9 (unserved areas); CCA Reply at 3, 5-6 (unserved and rural areas); NTCA Comments at 5; RWA Comments at 3-4 (rural telco); WISPA at 9 (unserved areas). *But see* Blooston Reply at 3-4 (expressing also, concerns regarding the difficulty of administering CCA’s proposal for the Broadcast Television Spectrum Incentive Auction (“BIA”) and that it may potentially frustrate the policy goals of the Mobility Fund).

⁸⁵ *See also* ARC Comments at 23 (advocating for the adoption of a “localism” bidding credit to be awarded to any DE applicant that has a 10 percent or greater interest holder who has been a resident of an unserved or underserved area or of a persistent poverty area for more than one year).

⁸⁶ *See* KSW Reply at 15.

adoption of a bidding credit reserved for rural telephone companies,⁸⁷ as well as the suggestion that such a bidding credit be cumulative with any small business bidding credit for which a rural telephone company may also qualify, possibly exceeding 50 percent.⁸⁸ To what extent would a rural telephone company bidding credit better enable these entities to compete successfully for licenses at auction?⁸⁹ Are the higher costs of service and lower population densities already likely to be reflected in the winning bid price for rural markets?⁹⁰ In addition to the data submitted by Blooston Rural,⁹¹ commenters are invited to provide additional analyses to demonstrate the need for a rural bidding credit. Does the possibility of cumulating small business and rural telephone company bidding credits increase the risk of unjust enrichment or cause concern regarding other statutory provisions?⁹² Commenters are requested to address the extent to which a rural bidding credit may be duplicative of other Commission and Federal government programs designed to facilitate network expansion into rural, unserved, and underserved communities.⁹³ Is there any way to properly monitor any targeted program or other programs run by the Commission or other agencies to prevent potential abuse? Should the Commission consider any additional obligations or responsibilities for entities that benefit from both a small business and rural bidding credit?⁹⁴

D. Alternatives to Promote Small Business Participation in the Wireless Sector

23. In the *Part 1 NPRM*, we sought comment on suggestions that would enable the DE program to remain a viable mechanism for small businesses to gain flexibility to access capital, compete in auctions, and participate in new and innovative ways to provision services in a mature wireless industry.⁹⁵ Several commenters provided suggestions in response to the Commission's inquiry stating that a review of alternatives is necessary to ascertain whether the current DE program is helpful or harmful to its intended beneficiaries.⁹⁶ Many parties advocate for alternatives they contend would facilitate small business access to benefits in both the auction and secondary market contexts.⁹⁷ For instance, AT&T suggests that providing "incentives for secondary market transactions or virtual networks,"⁹⁸ may offer a more direct path for more valuable small businesses in the telecommunications industry and may be more effective than facilitating participation in auctions due to the cost of licenses

⁸⁷ ARC Reply Comments at 4 n.14; Blooston Rural Comments at 8-9 (proposing at least a 25% reduction in the gross winning bid); Blooston Rural Reply Comments at 2-4; Cerberus Comments at 4 (proposing a 35% bidding credit; NTCA Comments at 3-4 (proposing a 25% bidding credit for rural telephone companies); NTCA Reply Comments at 4-5; RWA Comments at 3 (proposing a 25% bidding credit for rural telephone companies); RWA Reply Comments at 4-6; *see also* Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel for RWA et al., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, at 2 (Mar. 18, 2015).

⁸⁸ Blooston Rural Comments at 9; Blooston Rural Reply Comments at 2-3; Cerberus Comments at 4; NTCA Comments at 4; NTCA Reply Comments at 4; RWA Comments at 3; RWA Reply Comments at 5.

⁸⁹ NTCA Comments at 4; RWA Comments at 4.

⁹⁰ *See, e.g., Part 1 NPRM*, 29 FCC Rcd at 1249-50 ¶¶ 66, 69.

⁹¹ Blooston Rural Comments at 3-5.

⁹² *See, e.g., Part 1 NPRM*, 29 FCC Rcd at 12440 ¶ 36

⁹³ *See, e.g., id.* at 1249-50 ¶¶ 66, 69.

⁹⁴ *See, e.g., id.*

⁹⁵ *See Part 1 NPRM*, 29 FCC Rcd at 12440 ¶ 36, 12443-44 ¶ 47, 12444 ¶ 50, 12471 ¶ 127.

⁹⁶ *See, e.g., AT&T Reply* at 11-12.

⁹⁷ *See, e.g., Blooston Rural Comment* at 11-12; WISPA Comment at 3 (arguing the "substantial service" build-out rules "have acted as a disincentive to secondary market transactions because licensees can simply hold on to their licenses without making any real investment").

⁹⁸ AT&T Reply at 12.

and capital needed to build networks.⁹⁹ Other incentives may include Blooston Rural's proposal which advocates for a change that would allow a winning bidder to deduct from the auction purchase price the *pro rata* portion of its winning bid payment of any area that is partitioned to a rural telephone company or cooperative.¹⁰⁰ ARC would expand Blooston Rural's proposal to DEs and argues that this change would "benefit DEs by providing incentives for partitioning and promot[ing] secondary market transactions."¹⁰¹ Additionally, would strengthening the Commission's build-out requirements and improving processes to reclaim licenses provide opportunities for small businesses to gain access to spectrum and increase diversity of license holders? Interested parties should provide specific instances where they think improvements could be made and options the Commission could pursue.

24. We seek comment on these proposals. In particular, commenters should address whether and how Blooston Rural's proposal could be implemented in light of the Commission's rules prohibiting certain communications¹⁰² and payment timeframes. Are there alternative frameworks that the Commission should consider to promote a diverse telecommunications ecosystem, including incentives for secondary market transactions or virtual networks that could provide a more direct path into the industry for all entities, including DEs? Pursuant to the Commission's statutory objectives, what role(s) can and should small businesses play in the "provision of spectrum-based services" in today's telecommunications industry?

IV. OTHER PART 1 CONSIDERATIONS

A. Former Defaulter Rule

25. The *Part 1 NPRM* proposed to tailor the former defaulter rule by balancing concerns that the current application of the rule is overbroad against the Commission's continued need to ensure that auction bidders are financially reliable.¹⁰³ Specifically, consistent with the terms of a general waiver it granted for Auction 97, we proposed to exclude any cured default on any Commission license or delinquency on any non-tax debt owed to any Federal agency 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 relevant short-form application deadline; (2) the default or delinquency amounted to less than \$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 and was cured upon resolution of the proceeding.¹⁰⁴

26. Nearly all of the commenters support our proposal, some with modest additions, noting that the proposed former defaulter rule strikes the right balance between ensuring that winning bidders are capable of meeting their financial obligations and limiting costly and overbroad application of the rule.¹⁰⁵ AT&T suggests that we should also "include an exemption based on an applicant's credit-rating," because "applicants with an investment grade credit rating pose no meaningful risk of defaulting on a Commission obligation and thus should not be required to submit an additional 50 percent upfront payment penalty."¹⁰⁶ NTCH, however, suggests that we eliminate the former defaulter rule altogether because it is ineffective,

⁹⁹ See AT&T Reply at 11-12.

¹⁰⁰ See Blooston Rural Comments at 11-12; Blooston Rural Reply at 1, 2.

¹⁰¹ ARC Reply at 4.

¹⁰² 47 C.F.R. § 1.2105(c).

¹⁰³ *Part 1 NPRM*, 29 FCC Rcd at 12457 ¶ 86.

¹⁰⁴ *Id.*

¹⁰⁵ AT&T Comments at 18-21; CCA Comments at 11-12; Chugach Comments at 2-3; CTIA Comments at 2-3.

¹⁰⁶ AT&T Comments at 5, 21-22.

unnecessary, and counterproductive.¹⁰⁷ We seek comment on these alternative proposals. To the extent commenters support the proposal to eliminate the former defaulter rule altogether, we seek specific comment on how the Commission can adequately ensure that bidders are capable of meeting their financial commitments.

B. Commonly Controlled Entities

27. The *Part 1 NPRM* proposed to codify the Commission's longstanding competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application, and to establish a new rule to prohibit entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction based on more than one short-form application.¹⁰⁸ Commenters addressing this issue largely support the Commission's proposals,¹⁰⁹ although some encourage the Commission to take a step further and consider whether to apply the proposals to entities with common, non-controlling interests.¹¹⁰ T-Mobile notes, for example, that "it is critical that the Commission also address the potential for coordinated bidding behavior by bidders that are linked by common attributable interests," noting that otherwise these entities would "have unfair advantages in an auction and [could] manipulate bidding to the detriment of other participants and the public."¹¹¹ For example, Spectrum Financial implies that allowing an entity with ownership in more than one auction bidder which exceeds a certain percentage (e.g., 50% or more) to participate in an auction promotes collusion.¹¹² To address this concern, one commenter recommends that the Commission "adopt a requirement in addition to its existing [section 1.2105's] rules [prohibiting certain communications] that individuals or entities listed as disclosable interest[]holders on more than one short-form application certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant."¹¹³ AT&T proposes that "each applicant should certify that it has not entered into any agreements with [any] other applicant regarding their bids or bidding strategy, and that they are not privy to any other applicant's bids or bidding strategy"¹¹⁴ in lieu of the current disclosure requirements under the Commission's rules.¹¹⁵

¹⁰⁷ NTCH Comments at i, 7 (asserting that the former defaulter rule "should either be deleted altogether or be modified to eliminate small, dated, non-final, and non-FCC defaults"); *see also* Sprint Comments at 15-16; Sprint Reply at 7-8.

¹⁰⁸ *Part 1 NPRM*, 29 FCC Rcd at 12463 ¶ 98.

¹⁰⁹ AT&T Comments at 9; Sprint Comments at 17-18; T-Mobile Comments at 3, 8; CCA Comments at 12-13; *see also* CCA Reply at 11-12 (stating that in lieu of joint bidding restrictions, the Commission's proposals "would be effective in curbing anticompetitive behavior"); KSW Reply at 3 (advocating for "a reasonable prohibition on multiple auction entries by related parties").

¹¹⁰ T-Mobile Comments at 8-9; CCA Comments at 13; C Spire Reply at 3.

¹¹¹ T-Mobile Comments at 3.

¹¹² Spectrum Financial Reply at 3.

¹¹³ T-Mobile Comments at 9; *see also* T-Mobile Comments at 4; T-Mobile Reply at 5-6; Blooston Rural Reply at 9-10; CCA Reply at 12; C Spire Reply at 3. Pursuant to section 1.2112(a) of the Commission's rules, each auction applicant, regardless of whether it is seeking DE eligibility, is required to disclose information concerning its disclosable interest holders ("DIH"), i.e., individuals or entities that have certain direct and/or indirect ownership and controlling interests in the applicant or application. *See* 47 C.F.R. § 1.2112(a). For non-DE applicants, this disclosure requirement is limited to their DIHs. *See id.* DE applicants must disclose their affiliates along with DIHs and, depending on the nature of the relationship, a DIH can also be an affiliate under 47 C.F.R. § 1.2110(c)(5). The Commission attributes to the DE applicant the gross revenues of the applicant's affiliates, its controlling interests, and the affiliates of its controlling interests. *See* 47 C.F.R. § 1.2110(b).

¹¹⁴ *See* AT&T Comments at 3-4, 10-11; AT&T Reply at 8; *see also* T-Mobile Comments at 9 (proposing that "any individuals or entities that have a 10 percent or greater interest in more than one applicant would be required to submit the certification with each of these applicants' short-form applications."); T-Mobile Reply at 5-6.

Commenters also suggest that applicants be limited in holding ownership interests in multiple auction applicants.¹¹⁶ If we were to set an ownership limit, what is the appropriate limit? Should entities be restricted from having an interest (direct or indirect) in more than one applicant for a license in a geographic license area? Alternatively, would establishing a limit on financial investments that an entity may make in other auction participants address commenters' concerns? Should such entities be restricted from directing or participating directly in the bidding of more than one applicant, regardless of whether there is common control? We seek comment on these concerns and suggestions and any alternatives. In particular, commenters are invited to address what attribution standards the Commission should use in the context of any such rule. Finally, we observe that the adoption of some of the alternatives by commenters may directly or indirectly conflict with other Part 1 competitive bidding rules. For instance, one commenter proposed an additional certification on certain prohibited communications for disclosable interest holders,¹¹⁷ which may conflict with an exception in our current rules on prohibiting certain communications.¹¹⁸ We seek comment on these potential conflicts and how to harmonize the proposals with our competitive bidding rules, while fulfilling our statutory goals.

C. Joint Bidding Arrangements

28. In light of the evolution of the mobile wireless marketplace since the Commission last adopted joint bidding rules in 1994,¹¹⁹ the *Part 1 NPRM* proposed to prohibit joint bidding and other arrangements among nationwide providers, including agreements to participate in an auction through a newly formed joint entity.¹²⁰ For purposes of the Commission's joint bidding rules, the Commission proposed to distinguish nationwide providers from non-nationwide providers because of the increased likelihood that joint bidding arrangements between nationwide providers would lead to competitive harm or otherwise harm the public interest.¹²¹ In contrast, the Commission observed a reduced likelihood for competitive harm if non-nationwide providers entered into joint bidding agreements with other non-nationwide providers.¹²² Accordingly, the Commission tentatively concluded that it should continue to permit joint bidding arrangements among non-nationwide providers and asked commenters proposing any changes to the joint bidding rules for arrangements among non-nationwide providers to discuss why such changes are necessary.¹²³ Additionally, the Commission sought comment on the policies and procedures that should apply to bidding arrangements between nationwide and non-nationwide providers.¹²⁴ Finally, the Commission also sought comment on its analysis of the harms and benefits of joint bidding arrangements generally, and on whether its proposals "provide an effective framework for

(Continued from previous page) _____

¹¹⁵ Under section 1.2105(a)(2)(viii), an auction applicant must identify on its FCC Form 175, "parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure." 47 C.F.R. § 1.2105(a)(2)(viii).

¹¹⁶ See C Spire Reply at 3 (proposing that the Commission prohibit investors holding an "interest in multiple auction participants from directing or participating directly in the bidding of more than one of those participants, regardless of whether there is common control of the bidding entities."); see also KSW Reply at 8 (proposing that the Commission adopt a one-to-a-market rule, prohibiting a person from having an interest, direct or indirect, in more than one applicant for a license in a geographic license area).

¹¹⁷ T-Mobile Comments at 4, 9; T-Mobile Reply at 5-6.

¹¹⁸ 47 C.F.R. §§ 1.2105(c)(1) and (c)(4).

¹¹⁹ *Part 1 NPRM*, 29 FCC Rcd at 12468-69 ¶¶ 114-119.

¹²⁰ *Id.* at 12472-74 ¶¶ 131-134.

¹²¹ *Id.*

¹²² *Id.* at 12472 ¶ 129.

¹²³ *Id.*

¹²⁴ *Id.* at 12474-75 ¶¶ 135-138.

addressing the[se] relative harms and benefits.”¹²⁵

29. Commenters are divided on these proposals, with some offering additional recommendations. Sprint opposes prohibiting bidding arrangements between nationwide providers because such a rule would not account for differences in the relative market power of the four current nationwide providers.¹²⁶ T-Mobile opposes instituting bright-line rules at all, advocating for adherence to the Commission’s existing practice of addressing all bidding agreements on a case-by-case basis.¹²⁷ RWA, ARC, and CCA support continuing to allow joint bidding by non-nationwide providers,¹²⁸ with ARC arguing that such arrangements “can enable smaller companies to pool their resources and compete effectively for licenses that they would be unable to acquire on their own.”¹²⁹ Likewise, RWA contends that “joint bidding arrangements can provide some small and rural wireless carriers with opportunities that might otherwise be unavailable due to limited financial resources.”¹³⁰

30. AT&T, Taxpayer Advocates, and T-Mobile contend that the Commission should place greater limitations on joint bidding than proposed in the *NPRM* based upon perceived negative effects of non-nationwide providers using joint bidding arrangements in Auction 97.¹³¹ These commenters argue that certain bidders exploited the Commission’s rules to the detriment of other bidders and the public interest.¹³² Accordingly, some of these commenters submit alternative proposals, which they believe are less likely to lead to competitive harm or otherwise harm the public interest. We seek comment on these alternative proposals, set forth below:

- Prohibit all joint bidding agreements between DEs and non-DEs;¹³³
- Prohibit all joint bidding arrangements and require instead that entities seeking to coordinate their bidding activities form a bidding consortium or joint venture and divide the licenses acquired after the auction is over;¹³⁴
- Prohibit all joint bidding arrangements between commonly controlled or affiliated entities;¹³⁵
- Generally prohibit parties that are privy to others’ bidding information during the auction from placing multiple coordinated bids on a common license;¹³⁶
- Prohibit an individual from serving as an authorized bidder for more than one auction participant;¹³⁷

¹²⁵ *Id.* at 12472 ¶¶ 126-127.

¹²⁶ Sprint Comments at 4-8; Sprint Reply at 2; *see also* T-Mobile Comments at 18-23; T-Mobile Reply at 11-12.

¹²⁷ T-Mobile Comments at 18-23; T-Mobile Reply at 12; *see also* ARC Reply at 10.

¹²⁸ ARC Comments at 25; CCA at 13-14; CCA Reply at 11; RWA Comments at ii; RWA Reply at ii, 10.

¹²⁹ ARC Comments at 25.

¹³⁰ RWA Comments at ii; *see also* RWA Reply at 10.

¹³¹ AT&T Comments at 6-8; AT&T Reply at 2-3; Taxpayer Advocates Comments at 11; T-Mobile Comments at 2-3, 6-7; *see also* KSW Reply at 7; Spectrum Financial Reply at 3; Verizon Reply at 4-5.

¹³² AT&T Comments at 6-8; AT&T Reply at 2-3; Taxpayer Advocates Comments at 11; T-Mobile Comments at 2-3, 6-7; *see also* Verizon Reply at 4-5.

¹³³ CAGW Comments at 3; Taxpayer Advocates Comments at 11.

¹³⁴ AT&T Comments at 6-8; AT&T Reply at 2, 6-7; Verizon Reply at 4-5.

¹³⁵ *See* AT&T Comments at 9 (arguing “that commonly controlled entities should not be permitted to participate in Commission auctions” as multiple entities); *see also* T-Mobile Comments at 6-10; T-Mobile Reply at 3-4.

¹³⁶ ARC Comments at 6; *see also* T-Mobile Comments at 7.

¹³⁷ T-Mobile Comments at 9.

- Permit bidding agreements between all providers in rural Partial Economic Areas where the providers involved have less than 45 MHz* of below-1-GHz spectrum;¹³⁸
- Modify the definition of “joint bidding and other arrangements” to include only arrangements that are directly related to the coordination of bidding strategies or mechanics;¹³⁹
- Require a more comprehensive certification concerning bidding agreements and bidding strategies in addition to, or in lieu of, current disclosure requirements,¹⁴⁰ such as a requirement that all disclosable interest holders on more than one application certify that they do not have knowledge of the bidding strategy of more than one applicant.¹⁴¹
- Implement a prior approval process for joint bidding arrangements before the short-form deadline, including how to implement the process in an efficient manner.¹⁴²

31. In addition, we seek to expand the record and request comment on the following proposals:

- Prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market;¹⁴³
- Prohibit communications among joint bidders when bidding on licenses in any of the same markets;¹⁴⁴
- Prohibit any individual or entity from serving on more than one bidding committee.¹⁴⁵

32. We request comment on whether and how all of the proposals offered above would better protect against anti-competitive behavior – such as preserving bidding eligibility and limiting bid exposure and distortion of demand – or other harms to the public interest. Commenters are also requested to address specifically how such proposals could be implemented to preserve auction integrity.

IV. PROCEDURAL MATTERS

A. Supplement to Initial Regulatory Flexibility Analysis

33. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴⁶ the *Part 1 NPRM* included an Initial Regulatory Flexibility Analysis (IRFA) exploring the potential impact on small entities of the Commission’s proposals.¹⁴⁷ Section 309(j)(4)(D) of the Communications Act requires that when the Commission prescribes regulations in designing systems of competitive bidding, it shall “ensure that small businesses, rural telephone companies, and businesses owned by member of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”¹⁴⁸

¹³⁸ Sprint Comments at 11-12; Sprint Reply at 4.

¹³⁹ CCA Comments at 15-16.

¹⁴⁰ 47 C.F.R. § 1.2105(a)(2)(viii).

¹⁴¹ AT&T Comments at 10-13; AT&T Reply at 8; T-Mobile Comments at 4, 9; T-Mobile Reply at 3, 5.

¹⁴² CCA Comments at 15.

¹⁴³ See *Part 1 NPRM*, 29 FCC Rcd at 12471 ¶ 127.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ 5 U.S.C. § 603. The Regulatory Flexibility Act, see 5 U.S.C. §§ 601-12, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁴⁷ *Part 1 NPRM*, 29 FCC Rcd at 12488 Appendix B; see also 79 Fed. Reg. 68172, 68194-99 (Nov. 14, 2014).

¹⁴⁸ 47 U.S.C. § 309(j)(4)(D).

Consistent with this statutory objective, the Commission sought written public comment on the proposals in the *Part 1 NPRM*, including comment on the IRFA. Though numerous responses were directed at the small business aspects of the *Part 1 NPRM*, the Commission received no comments in direct response to the IRFA. This supplemental IRFA addresses the possible incremental significant economic impact on small entities of the alternative proposals set forth in this *Public Notice*. Interested parties are invited to submit written public comments on this supplemental analysis. Any such comments must be filed in accordance with the same filing deadlines set forth on the first page of this document and have a separate and distinct heading designating them as responses to this supplemental analysis. The Commission will send a copy of the *Public Notice*, including this supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹⁴⁹ In addition, the *Public Notice* and supplemental IRFA (or summaries thereof) will be published in the Federal Register.¹⁵⁰

34. **Need for, and Objectives of, the Proposed Competitive Bidding Procedures.** This *Public Notice* seeks additional comment on a number of specific changes to the Commission's Part 1 competitive bidding rules suggested by commenters in response to the questions and proposals set forth in the *Part 1 NPRM*. Specifically, it seeks comment on alternative proposals for evaluating DE eligibility for bidding credits and for updating other Part 1 competitive bidding rules governing auction participation by former defaulters, commonly controlled entities, and entities with joint bidding arrangements. The *Public Notice* continues to advance the Commission's statutory directive to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "DEs")¹⁵¹ are given the opportunity to participate in the provision of spectrum-based services, and fulfill the commitment made in the *BIA Report & Order*.¹⁵² Soliciting further input on these alternative proposals will provide a more complete record to evaluate and act upon the concerns raised in the *Part 1 NPRM*.

35. As described in greater detail above, this *Public Notice* seeks comment on the following alternative proposals that would modify the Commission's rules concerning DE eligibility:

- Modify the attributable material relationship ("AMR") rule to distinguish between pure spectrum leasing arrangements and network-based wholesale arrangements and/or to allow DEs to lease spectrum to rural carriers or other DEs without attribution.
- Retain or eliminate the AMR rule and continue to require DEs to provide facilities-based service.
- Eliminate the requirement that DEs provide facilities-based service.

¹⁴⁹ See 5 U.S.C. § 603(a).

¹⁵⁰ See *id.*

¹⁵¹ In 1995, the Supreme Court decided *Adarand Constructors*, holding that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of review. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–30 (1995) (*Adarand Constructors*). The Court subsequently held in *VMI* that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (*VMI*). In response to the Court's holding, the Commission decided that it would use race- and gender-neutral provisions until it had developed a record that would provide the evidentiary support necessary to withstand this standard of review, and maintain provisions for small businesses. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975–77 ¶¶ 1–3 (1996). The Commission has noted that many minority- and women-owned businesses qualify for the provisions that the Commission has adopted for small businesses. 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, 15318–19 ¶¶ 45–48 (2000), citing *Adarand Constructors*, 515 U.S. at 227.

¹⁵² See, e.g., Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6567, 6762 ¶ 474 (2014) (*BIA Report and Order*).

- Strengthen the AMR rule by prohibiting DEs from leasing more than 25 percent of their spectrum in the aggregate, across one or more licenses or to any one wireless operator.
- Modify the applicable attribution, controlling interest, or affiliation rule to alter the types of equity arrangements available to a DE applicant, by:
 - Attributing to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than 10 percent;
 - Restricting larger nationwide and regional carriers, entities with a certain number of end-user customers, and/or other large companies, from providing a material portion of the total capitalization of DE applicants or otherwise exercising control over such applicants as part of the definition of “material relationship;”
 - Adopting a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of the DE company; and
- Adopt a 25 percent minimum equity requirement for DEs and ensure that any loans to achieve minimum equity thresholds should be negotiated at arms-length.
- Limit the total dollar amount of DE benefits that any DE (or group of affiliated DEs) may claim during any given auction, based on some multiple of its annual revenues, or a set cap of \$32.5 million; alternatively, base this limit on some multiple times the applicable small business definition in the Part 1 schedule,¹⁵³ or another metric like population to tie bidding credits more closely to a typical small business plan.
- Narrow the scope of the affiliation rules to exclude individuals and entities whose revenues are currently attributable to a DE if they are unlikely to exercise control over the applicant entity, such as directors and certain family members, including in-laws, siblings, step-siblings, and half-siblings, unless the applicant has more than incidental business relationships with a particular relation.
- Clarify the affiliation rules to prevent rural telephone companies from losing DE status by holding a fractional interest in a cellular partnership where the rural telephone company has no control over the partnership’s day-to-day operations and/or strategy.
- Treat the revenues of Alaska Native Corporations the same way as attributable revenues for purposes of DE eligibility under the Commission’s rules.¹⁵⁴
- Retain the existing unjust enrichment rules or strengthen the rules by (1) changing the unjust enrichment period to encompass the entire license term, for a specified number of years, or linking it to an interim construction milestone; and (2) requiring licensees that profit from the sale of a license obtained at a discount to repay that windfall profit, plus interest, in addition to the bidding credit discount.
- Require DEs to show some evidence of build-out activity within one year of acquiring the license or upon clearing spectrum incumbents and require repayment of some percentage of its bidding credit discount if it fails to meet the build-out milestone.
- Require DEs to pay back all or part of its bidding credit if it chooses to lease or sell a significant portion of spectrum within the first five years of ownership.
- Adjust the percentage amounts associated with the Commission’s unjust enrichment repayment schedule.
- Decline to increase the *NPRM*’s proposed gross revenue thresholds defining the three tiers of small business bidding credits and to increase the scale of the DE program prior to reform.
- Modify the definition of small business for acquiring bidding credits by: (1) increasing the gross revenue thresholds above the original proposed amounts in the *Part 1 NPRM*; (2) indexing the gross revenue tiers to the costs of auctioned spectrum on a MHz per pop basis

¹⁵³ See 47 C.F.R. § 1.2110(f).

¹⁵⁴ See 47 C.F.R. § 1.2110(c)(5)(xi); see also 47 C.F.R. §§ 1.2110(b) and (c)(5).

- (rather than using the Gross Domestic Product price index); and (3) increasing the bidding credit percentages across all three tiers or solely for the lowest tier (the largest credit).
- Consider the adoption or review of other bidding preferences/types of credits by: (1) adopting a bidding credit for rural telephone companies to be awarded in addition to any small business bidding credit for which an applicant may qualify; (2) adopting a bidding credit for parties that commit to serve unserved and underserved areas; (3) reviewing the tribal land bidding credit; (4) establishing a mechanism for a winning bidder to deduct from its auction purchase price the *pro rata* portion of its winning bid payment of any area partitioned to a rural telephone company or cooperative or any DE; and (5) adopting a "localism" bidding credit for any DE applicant with an 10% or greater interest holder that has been a resident of an unserved, underserved, or persistent poverty area for more than a year.
 - Provide incentives for secondary market transactions or virtual networks.

36. This *Public Notice* also seeks comment on alternatives proposed for other Part 1 competitive bidding rules relating to former defaulters, commonly controlled entities, and entities with joint bidding arrangements. Specifically, these alternative proposals would:

- Modify the former defaulter rule to include an exemption based on an applicant's investment grade rating or eliminate the former defaulter rule altogether.
- Apply also, common, non-controlling entities to the *Part 1 NPRM's* proposed rule to prohibit commonly controlled entities from qualifying to bid on licenses in the same or overlapping geographic areas based on more than one short-form application.
- Limit the ownership interests or financial investments an auction applicant may have in other auction applicants.
- Adopt a requirement in addition to the Commission's existing section 1.2105's rules that individuals or entities listed as disclosable interest holders on more than one short-form application certify that they are not, and will not be, privy to, or involved in, the bidding strategy of more than one auction participant.
- Modify the Commission's rules governing the treatment of joint bidding arrangements by: (1) prohibiting all joint bidding agreements between DEs and non-DEs and between commonly controlled or affiliated entities; (2) prohibiting all joint bidding arrangements and requiring instead that entities seeking to coordinate their bidding activities form a bidding consortium or a joint venture and divide the licenses acquired after the auction is over; (3) permitting bidding agreements between all providers in rural Partial Economic Areas where the providers involved have less than 45 MHz*pop of below-1-GHz spectrum; (4) modifying the definition of "joint bidding and other arrangements" to include only arrangements that are directly related to the coordination of bidding strategies or mechanics; and (5) prohibiting parties to a joint bidding agreement from bidding separately on licenses in the same market and from communicating about bidding information when bidding on licenses in any of the same markets.
- Prohibit parties that are privy to others' bidding information during the auction from placing multiple coordinated bids on a common license.¹⁵⁵
- Prohibit an individual from serving as an authorized bidder for more than one auction participant;
- Prohibit any individual or entity from serving on more than one bidding committee.
- Implement a prior approval process for joint bidding arrangements before the short-form

¹⁵⁵ Under section 1.2105(a)(2)(viii), an auction applicant must identify on its FCC Form 175, "parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure." 47 C.F.R. § 1.2105(a)(2)(viii).

deadline, including how to implement the process in an efficient manner.

37. **Legal Basis for Proposed Rules.** This *Public Notice* is adopted pursuant to sections 1, 4(i), 303(r), 309(j), 316 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), 309(j), 316.

38. **Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply.** The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by rules proposed in that rulemaking proceeding, if adopted.¹⁵⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁵⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁵⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. If adopted, the alternative proposals in the *Public Notice* may, over time, affect small entities that are not easily categorized at present. However, the alternative proposals described in this *Public Notice* will affect the same individuals and entities described in paragraphs 7 through 17 of the IRFA associated with the underlying *Part 1 NPRM*.¹⁵⁹

39. **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.** This *Public Notice* seeks additional comment on a number of rule changes proposed by commenters that will affect reporting, recordkeeping, and other compliance requirements for small entities. However, the majority of these alternatives are outgrowths of the *Part 1 NPRM*'s proposals and policies in which a description was previously provided under paragraphs 19 through 33 of the IRFA.¹⁶⁰ To the extent the alternative proposals discussed in this *Public Notice* differ from the *Part 1 NPRM*, we discuss these changes below.

40. **Eligibility for Bidding Credits.** The proposals advanced by commenters in the proceeding would distinguish for purposes of establishing DE qualifications between pure spectrum leasing and network-based wholesale arrangements. Other new proposals described in greater detail in paragraphs 35 through 36 above would modify the attribution rules to restrict the types of equity arrangements available to a DE applicant, limit the amount of DE benefits that a DE may claim or the overall amount that a small business can bid, narrow the entities whose revenues are attributable to a DE, prevent certain rural telephone companies from losing DE status, treat ANC revenues the same way as attributable revenues, lengthen the unjust enrichment period, require licensees that profit from the sale of a DE license to repay such profit with interest, require forfeiture of DE benefits for all licenses if a DE forfeits DE eligibility for one license, and require DEs to show some evidence of build-out under the DE annual reporting requirement within one year of acquiring the license or upon clearing spectrum incumbents.

41. **Bidding Credits.** The *Public Notice* also seeks comments on alternative proposals that would include additional bidding credits for rural telephone companies, for companies committed to

¹⁵⁶ 5 U.S.C. § 603(b)(3).

¹⁵⁷ 5 U.S.C. § 601(6).

¹⁵⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹⁵⁹ *Part 1 NPRM*, 29 FCC Rcd at 12490-94 ¶¶ 7-17 Appendix B.

¹⁶⁰ *Part 1 NPRM*, 29 FCC Rcd at 12494-500 ¶¶ 19-33 Appendix B.

providing service to unserved or underserved areas, and for any DE applicant with a 10 percent or greater interest holder that has been a resident of an unserved, underserved, or persistent poverty area for more than a year. Another suggestion would establish an auction mechanism which would allow a winning bidder to deduct from its auction purchase price the *pro rata* portion of its winning bid payment of any area partitioned to a rural telephone company or cooperative, or any DE.

42. **Other Part 1 Rules.** In the *Public Notice*, we seek comment on alternative suggestions to modify other Part 1 competitive bidding rules concerning former defaulters, commonly controlled entities, and entities with joint bidding agreements. With respect to the former defaulter rule, one commenter suggested that the Commission adopt an exemption based on an applicant's investment grade rating, while another commenter suggested eliminating the former defaulter rule altogether. In regards to the *NPRM*'s proposal concerning commonly controlled entities, several commenters urged the Commission to apply its proposal to entities with common, non-controlling interests as well. One commenter proposed that the Commission adopt a certification to prohibit certain communications on the Commission's short-form application, while another commenter submitted a similar proposal but would use the certification in lieu of the Commission's disclosure requirements.¹⁶¹

43. As described in greater detail above, the Commission received several alternative suggestions concerning joint bidding agreements and other arrangements. Several commenters opposed the Commission's proposal to prohibit bidding arrangements between nationwide providers; instead, these commenters advocated for adherence to the Commission's existing practice of analyzing bidding arrangements on a case-by-case basis. Other commenters urged the Commission to adopt proposals that would: (1) prohibit joint bidding agreements between DEs and non-DEs and between commonly controlled or affiliated entities; (2) prohibit all joint bidding arrangements and require instead the formation of a bidding consortium or a joint venture which would divide the licenses acquired after the auction is over; (3) permit bidding agreements between all providers in rural PEAs where the providers involved have less than 45 MHz*pop of below-1-GHz spectrum; (4) narrow the definition of "joint bidding agreement and other arrangements" to arrangements directly related to coordination of bidding strategies or mechanics; (5) prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market and from communicating about bidding information when bidding on licenses in any of the same markets; (6) prohibit parties that are privy to others' bidding information during the auction from placing multiple coordinated bids on a common license; (7) prohibit an individual from serving as an authorized bidder for more than one auction participant; (8) prohibit any individual or entity from serving on more than one bidding committee; (9) implement a prior approval process for joint bidding arrangements before the short-form deadline, including how to implement the process in an efficient manner; and (10) limit an auction applicant's ownership interest or financial investment in other auction applicants.

44. **Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives beneficial to small entities considered in reaching a proposed approach, which may include the following four alternatives (among others): (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;¹⁶² (2) clarification, consolidation, or simplification for small entities of compliance and reporting requirements; (3) use of performance, rather than design, standards; and (4) an exemption for small entities.¹⁶³

45. Most of the alternative proposals in this *Public Notice* correlate to the *Part 1 NPRM*'s proposals and policies for modifying the Commission's Part 1 competitive bidding rules. As such, a

¹⁶¹ See 47 C.F.R. § 1.2105(a)(2)(viii).

¹⁶² We note that all references to small entities in this IRFA apply also to minority-and women-owned small businesses.

¹⁶³ 5 U.S.C. § 603(c)(1) through (c)(4).

description of the steps taken to minimize the significant economic impact and the alternatives considered for these proposals can be found under paragraphs 34 through 38 of the *NPRM*'s IRFA.¹⁶⁴ To the extent that some of the alternative proposals may be distinguishable from the *Part 1 NPRM*, the Commission seeks additional comment on these suggestions to fully evaluate the alternatives raised in the record to date. In doing so, the Commission remains mindful of its statutory obligations which require the Commission to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”¹⁶⁵ The statute also directs the Commission to promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses.”¹⁶⁶

46. As described in greater detail above, in this *Public Notice*, we continue to explore alternative proposals for establishing DE eligibility and modifying other Part 1 competitive bidding rules. With respect to the DE rules concerning attribution and unjust enrichment, the Commission seeks to provide small businesses with the flexibility to engage in business ventures that include increased forms of leasing and other spectrum use agreements. In pursuing these goals, however, the Commission also remains mindful of its responsibility to ensure that DE benefits are provided only to qualifying entities. Accordingly, the Commission also aims to employ adequate safeguards against unjust enrichment.

47. As part of this proceeding, the Commissions took a fresh look at its bidding credit program since its inception in 1997 to ensure that it continues to be a viable mechanism for small businesses in light of the current wireless marketplace. The Commission’s bidding credit program is the primary way it facilitates participation by small businesses at auction. As a general matter, most of the alternative proposals would provide small businesses with an economic benefit by providing a percentage discount on auction winning bids and therefore make it easier for small businesses to compete in auction and acquire spectrum licenses.

48. To clarify and streamline our competitive bidding rules in advance of BIA, we also explore the need for other revisions to our Part 1 competitive bidding rules to improve transparency and efficiency of the auction process. As noted in the *Part 1 NPRM*, most of the proposed changes to the Part 1 rules would apply to all entities in the same manner as the Commission would apply these changes uniformly to all entities that choose to participate in spectrum license auctions.¹⁶⁷ Applying the same rules equally in this context provides consistency and predictability to the auction process, and minimizes administrative burdens for all auction participants including small businesses. In fact, many of the proposed rule revisions clarify the Commission’s competitive bidding rules, including short-form application requirements. For instance, nearly all commenters supported the Commission’s proposal to modify the former defaulter rule by balancing concerns that the current application of the rule is overbroad with the Commission’s continued need to ensure that auction bidders are financially responsible. Finally, the Commission continues to focus its attention on joint bidding agreements and other arrangements to preserve and promote robust competition in the mobile wireless marketplace and facilitate competition among bidders at auction, including small entities.

49. **Federal Rules Which Duplicate, Overlap, or Conflict With the Proposed Rules.**

50. None.

B. Ex Parte Presentations

51. *Requests for Ex Parte Meetings.* This matter shall be treated as a “permit-but-disclose”

¹⁶⁴ *Part 1 NPRM*, 29 FCC Rcd at 12500-51 ¶¶ 34-38 Appendix B.

¹⁶⁵ 47 U.S.C. § 309(j)(4)(D); *see also id.* at 12428 ¶ 4.

¹⁶⁶ 47 U.S.C. § 309(j)(3)(B); *see also Part 1 NPRM*, 29 FCC Rcd at 12501 ¶ 37 Appendix B.

¹⁶⁷ *See Part 1 NPRM*, 29 FCC Rcd at 12428 ¶ 4.

proceeding in accordance with the *ex parte* rules,¹⁶⁸ as set forth in paragraph 145 of the *Part I NPRM*.¹⁶⁹ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.¹⁷⁰ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.¹⁷¹

C. Comment Period and Filing Procedures

52. Pursuant to sections 1.415(d) and 1.419 of the Commission's rules, 47 CFR §§ 1.415(d), 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments, please reference **WT Docket Nos. 14-170 and 05-211, GN Docket No. 12-268, and RM-11395**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹⁷²

- Electronic Filers: Comments may be filed electronically using the Internet by accessing ECFS: <http://www.fcc.gov/cgb/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption in this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

53. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). Parties are strongly encouraged to file comments electronically using the Commission's ECFS. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours at this location are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

54. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

55. The complete text of this document, including any attachment, is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street

¹⁶⁸ 47 C.F.R. §§ 1.1200 *et seq.*

¹⁶⁹ *Part I NPRM*, 29 FCC Rcd at 12476 ¶ 145.

¹⁷⁰ *See* 47 C.F.R. § 1.1206(b)(2).

¹⁷¹ 47 C.F.R. § 1.1206(b).

¹⁷² *See* Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, 13 FCC Rcd 11322 (1998).

SW, Room CY-A257, Washington, DC 20554.

D. Paperwork Reduction Act Analysis

56. This *Public Notice* contains proposed new or modified information collection requirements. The *Part I NPRM* included a separate request for comment from the general public and the Office of Management and Budget on the information collection requirements contained therein, as required by the Paperwork Reduction Act of 1995, Public Law 104-13, and the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4). We invite parties to file supplemental comments on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees in the light of the alternative proposals set forth in this *Public Notice*.

E. Further Information

57. For further information, contact Leslie Barnes, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau at (202) 418-0660.

58. For further information on the proposals in this proceeding regarding joint bidding, contact Michael Janson, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau at (202) 418-1310.

59. For questions concerning small business inquiries, contact the Office of Communications Business Opportunities at (202) 418-0990.

Action by the Commission on April 16, 2015 by Commissioners Clyburn, Pai and O’Rielly issuing separate statements.

-FCC-

APPENDIX A

Short Names of Commenters Cited in this Public Notice

| Name of Filer | Short name |
|--|--------------------|
| Americans for Tax Reform, Center for Individual Freedom, National Taxpayers Union, and Taxpayers Protection Alliance | Taxpayer Advocates |
| AT&T, Inc. or AT&T Services, Inc. | AT&T |
| Auction Reform Coalition | ARC |
| Blooston Rural Carriers | Blooston Rural |
| Cellular South, Inc. d/b/a (C Spire) | C Spire |
| Chugach Alaska Corporation | Chugach |
| Cerberus Communications Limited Partnership | Cerberus |
| Citizens Against Government Waste (Thomas A. Schatz) | CAGW |
| Competitive Carriers Association | CCA |
| Council Tree Investors, Inc. | Council Tree |
| CTIA - The Wireless Association | CTIA |
| DE Opportunity Coalition | DE Coalition |
| King Street Wireless, LP | KSW |
| MediaFreedom.org | MediaFreedom |
| NTCA-The Rural Broadband Association | NTCA |
| NTCH, Inc. | NTCH |
| Rural Wireless Association, Inc. | RWA |
| Spectrum Financial Partners, LLC (Stephen Wilkus) | Spectrum Financial |
| Sprint Corporation | Sprint |
| T-Mobile USA, Inc. | T-Mobile |
| Wireless Internet Service Providers Association | WISPA |
| Council Tree Investors, Inc. | Council Tree |

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211.

Since 2010, I have been calling on the Commission to establish innovative and legally sustainable approaches for greater participation by new entrants and small businesses in the communications industry. This proceeding, initiated in part to update our designated entity rules so that small businesses have the flexibility needed to secure financing and develop business models to effectively compete in an increasingly consolidated wireless market, also includes suggestions on ways to encourage more build-out in persistent poverty counties. I am grateful to parties that filed comments as we consider much needed comprehensive reforms of our competitive bidding rules.

As this Public Notice makes plain, the most contentious issue in the docket thus far, is what rules we should adopt to deter large companies, who hold equity stakes in designated entities, from circumventing the purposes of the designated entity rules. The plain language of Section 309(j) of the Communications Act requires the Commission to balance several policy goals objectives when designing auctions. Our rules should “promot[e] economic opportunity and competition,” “disseminat[e] licenses among a wide variety of applicants, including small businesses,” and avoid “unjust enrichment.” The best way to comply with Congress’s mandate is to carefully craft rules that strike the proper balance and promote all of these goals. In 2006, the Commission tried to impose more stringent unjust enrichment rules on designated entities. The United States Court of Appeals for the Third Circuit struck down a number of rules for lack of notice and strongly suggested that the rationale for adopting them was flawed.¹ In our zeal to prevent unjust enrichment, I hope we do not lose sight of the other policy goals Congress requires us to promote. This rulemaking gives us the opportunity to address any bidding coordination problems caused by the current rules as we consider the comments in response to the NPRM’s proposals. If we are careful and approach this proceeding in a fair and objective manner, I am confident that we will strike the proper balance and realize all of these important public interest goals.

¹ *Council Tree v. F.C.C.*, 619 F.3d 235, 255 & n.8, 256 & n.10 (3rd Cir. 2010).

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211.

The AWS-3 auction taught us some important lessons. One of them is that our small business, or “designated entity” (DE), program has become a playpen for corporate giants. Indeed, allowing a company like DISH—with annual revenues of approximately \$14 billion and a market capitalization of over \$32 billion—to benefit from over \$3 billion in taxpayer-funded discounts on AWS-3 spectrum makes a mockery of this small-business program.¹ And DISH was not alone.

Abuse of the DE program has robbed actual small businesses of the spectrum they need to serve their local communities.² Small, rural operators from Missouri to North Carolina recently explained that the DE program is having a “devastating impact” on their ability to obtain spectrum and compete.³ Think about that. This taxpayer-funded program is now being used by Fortune 500 companies to disadvantage the very small companies it was intended to help. This must end.

The results of the AWS-3 auction have spurred a broad-based consensus against this anticompetitive arbitrage.⁴ And this Public Notice tees up a wide range of proposals that, if adopted, would end this corporate welfare. I want to thank my colleagues for accommodating my request that we put all options on the table, including strictly limiting how much large companies can invest in a designated entity, capping the taxpayer subsidy that any designated entity can obtain during an auction, prohibiting coordinated bidding, and fundamentally revising our attribution rules.

If we are going to heed the lessons of the AWS-3 auction, the work cannot end with this Public Notice. I look forward to working with my fellow Commissioners and Congress to ensure that we implement fundamental reforms to the program. We must have a singular focus in this proceeding: We must close any loopholes that could allow big business to rip off the American taxpayer, not create new

¹ See Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program (Feb. 2, 2015), <http://go.usa.gov/h4ER>.

² See, e.g., Statement of Commissioner Ajit Pai on How Abuse of the FCC’s Small Business Program Hurts Small Businesses (Mar. 16, 2015) (discussing examples of the negative impact that abuse of the small business program has had on actual small businesses), <http://go.usa.gov/3CZ8P>.

³ See Letter from Donald L. Herman, Jr., on behalf of RSA 1 Limited Partnership d/b/a Chat Mobility, Horry Telephone Cooperative, Inc., Paul Bunyan Rural Telephone Cooperative and Piedmont Rural Telephone Cooperative Inc., Atlantic Seawinds Communications, LLC, Chester Telephone Company, FTC Management Group, Grand River Communications, Inc., MobiNet, LLC, Palmetto Rural Telephone Cooperative, Inc., Texas RSA 7B3, L.P. d/b/a Peoples Wireless Services, and Sandhill Communications, LLC, to Marlene H. Dortch, Secretary, FCC (Mar. 25, 2015), <http://go.usa.gov/3WRJm>.

⁴ See, e.g., Senator Kelly Ayotte and FCC Commissioner Ajit Pai, Ending Welfare for Telecom Giants, *The Wall Street Journal* (Feb. 4, 2015), <http://on.wsj.com/1DAYt5f>; Letter from Senator Claire McCaskill, to Hon. Tom Wheeler, Chairman, FCC, (Feb. 26, 2015), <http://go.usa.gov/3CTp5>; Letter from Representative Frank Pallone, Jr., to Hon. Tom Wheeler, Chairman, FCC (Feb. 19, 2015), <http://go.usa.gov/3CTpj>; Letter from Larry Cohen, President, Communications Workers of America, and Hilary O. Shelton, Director, NAACP Washington Bureau, to Hon. Tom Wheeler, Chairman, FCC, (Mar. 12, 2015), <http://go.usa.gov/3CTpx>; Americans for Tax Reform, Center for Individual Freedom, National Taxpayers Union, & Taxpayers Protection Alliance Comments at 4, 5 (Feb. 20, 2015), <http://go.usa.gov/3CTVe>; Citizens Against Government Waste Comments (Feb. 20, 2015), <http://go.usa.gov/3CbmG>.

avenues for abuse, as the FCC proposed last year over my dissent.⁵

Moreover, it remains imperative that we closely scrutinize whether participants in the AWS-3 auction complied with our rules. Serious questions have been raised on this score, and my position is simple. Any entity that violated the Commission's DE regulations must not be allowed to receive taxpayer-funded discounts.

⁵ See *Updating Part 1 Competitive Bidding Rules et al.*, WT Docket No. 14-170 *et al.*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, 12510-17 (2014) (Statement of Commissioner Ajit Pai Concurring in Part and Dissenting in Part), <http://go.usa.gov/wVvA>.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211.

Today's public notice seeks further comment on issues raised in response to the October NPRM proposing certain changes to our designated entity (DE) and competitive bidding rules. In reality, the Commission is seeking additional information because of the outrage that occurred after the announcement of the AWS-3 results. This auction put a spotlight on the questionable uses of the FCC's designated entity program. And, although the Commission is taking the first steps to consider rule deficiencies, this does not substitute for the distinct and thorough review of the AWS-3 designated entity applications, which must occur to ensure that the entities receiving government subsidies are in compliance with our rules.

By way of background, I dissented to the vast majority of the NPRM because the proposals to eliminate both the DE leasing restrictions contained in the Attributable Material Relationship (AMR) rule and the facilities-based requirement are contrary to Congressional intent as expressed in the law. Additionally, I have warned that weakening the designated entity rules is likely to increase the abuses that have plagued this program in the past, such as allowing "small businesses" to acquire spectrum at a discount that is subsequently "flipped" to larger providers, including to the DE's own passive investors, for substantial profit. I also cautioned that these proposals would allow a DE to lease all of its spectrum holdings and pocket the money without ever offering service to the public. I raised similar concerns in my dissent to a July waiver of these rules adopted prior to the recent AWS-3 auction.

Although I remain vehemently opposed to the proposals in the underlying NPRM, I support this public notice because it approaches the issue in a more holistic and well-rounded way in order to review the entirety of the designated entity program. All sides of the debate are presented and additional questions asked so that we can get a fulsome record upon which to base future decisions. But, my overall view will not alter; I will not support any changes that could increase the likelihood that ineligible entities get spectrum discounts or that the program is used in an inappropriate way.

Specifically, I am relatively pleased that not only does the PN seek comment about maintaining the facilities-based requirement for DEs and retaining restrictions on leasing, but it also expands the inquiry to ask important questions about the controlling interest and unjust enrichment rules. I asked for such a review in October, so this is a welcome line of inquiry. These current regulations date back to the Clinton administration and, although they were modified in 2006 in an attempt to deter program abuse, many of the rules, except for the AMR rule, were overturned on procedural grounds. After this court decision, the Commission did not take any action to reinstate these preventative measures. We will never know whether those common sense policies, such as the stricter unjust enrichment rules, would have prevented future DE controversies.

Overall, I see value in the Commission taking this opportunity to evaluate the success or failure of the DE program since 2000. The Commission would be wise to study the results auction by auction, identify which entities won licenses with small business benefits, determine the current holder of these licenses, establish whether or not these licenses remain in the hands of small businesses, investigate whether licenses were transferred to passive investors or other large companies, and the amount of unjust enrichment paid, if any, and revenues lost to the American taxpayer. In sum, a designated entity audit, which is allowed for under our rules but to my knowledge has never been done, may be appropriate.

In the meantime, I would be hesitant to support an increase in revenue thresholds and bidding credit percentages, or to consider adopting new categories of designated entities given the recent controversies. The Commission certainly should not create circumstances that would allow for cumulative bidding credits, especially exceeding an unfathomable 50 percent of the gross bid.

Further, I support expanding our inquiry into whether we should codify Commission precedent prohibiting commonly controlled entities from participating in the same auction to also include those entities with common ownership. We also need to seriously consider whether the joint bidding rules are in need of significant changes. It is common sense to ask the overarching question of whether there are other ways to facilitate small business participation besides auction bidding credits, such as through secondary market incentives and the partitioning of licenses. These are all important questions that need to be answered.

Finally, there is one final avenue of inquiry that that the Commission must pursue. The Commission must impose and strictly enforce its buildout rules. We should inquire whether our current performance requirements are sufficient. Spectrum should not be allowed to lie fallow and, if licensees are not providing service to benefit Americans, the spectrum should be reclaimed so that another entity can put it to use. This is more likely to provide opportunities for small businesses and increase diversity of ownership than the flawed provision of subsidies that has historically benefited some of this nation's largest communications companies. While there is some language in the item, at my request, pertaining to this, I plan to give some attention to reviewing this aspect of spectrum policy on a more macro level to ensure that our buildout requirements are as clear and enforceable as necessary.