

**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.