

June 8, 2015

**Via Electronic Filing**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

***RE: Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding rules; WT Docket No. 14-170.***

Dear Ms. Dortch:

The Office of Advocacy, U.S. Small Business Administration (“Advocacy”) respectfully submits this *ex parte* filing regarding a number of proposed changes to the Federal Communications Commission’s Part 1 competitive bidding rules. On June 4, 2015, Assistant Chief Counsel for Advocacy Jamie Saloom met with the following staff in the FCC’s Wireless Telecommunications Bureau: Gary Michaels, Sue McNeil, Margaret Wiener, and Leslie Barnes. During the meeting Advocacy discussed ways in which the FCC can amend its rules to improve its auction policies to encourage greater competition and small business entry and growth in the wireless marketplace.

**The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small business is not lost within the regulatory process.<sup>1</sup> Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.<sup>2</sup>

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<sup>1</sup> Pub. No. 96-354, 94 Stat. 1164 (1980).

<sup>2</sup> Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

## **Background**

Section 309(j) of the Communications Act of 1934 seeks to specifically include small entities in the FCC's competitive bidding process.<sup>3</sup> Section 309(j) states that in designing a competitive bidding system, the FCC must consider the following objective: "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."<sup>4</sup> The FCC has advanced this goal by providing eligible small business "designated entities" (DEs) with bidding credits.

In 2009, Advocacy expressed concerns to the FCC that its rules were significantly inhibiting participation by small entities and minority businesses in spectrum auctions. Advocacy attributed declining DE participation to rules that barred any entity that leased or sold more than 50 percent of the spectrum capacity won at auction from DE eligibility, as well as its "Ten Year Hold" rule.<sup>5</sup> The Third Circuit vacated both of those rules in 2010, and in 2014 the FCC initiated the current proceeding to evaluate its competitive bidding rules. Earlier this year, the FCC conducted Auction 97 under its existing competitive bidding rules, and recently requested additional public comments on this proceeding following that auction.

## **Advocacy Comments**

In its meeting with Wireless Bureau staff, Advocacy expressed strong support for the use of small business bidding credits in spectrum auctions, and expressed the position that the FCC should incentivize further DE participation in its future auctions by updating its rules regarding DE eligibility to ensure increased opportunities for small businesses. Specifically, Advocacy recommended that the FCC eliminate its Attributable Material Relationship (AMR) rule, and evaluate DE eligibility using a case by case approach to determine whether an eligible small business licensee retains control over the spectrum for which it received small business benefits. Advocacy also recommended that the FCC allow DEs more flexibility, not less, in their ability to lease spectrum. Finally Advocacy recommended that the FCC limit the availability of bidding credits to small entities, as defined by SBA-approved size standards, and decline to institute arbitrary caps on DE credits.

While acknowledging that the FCC must safeguard against abuses of the DE program that would have a negative impact on small businesses and consumers, Advocacy expressed concerns that the FCC is considering proposals that would actually deter competition, and restrict the ability of small businesses to grow and innovate.

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<sup>3</sup> 47 U.S.C. § 309 (j).

<sup>4</sup> 47 U.S.C. § 309 (j)(3)(B).

<sup>5</sup> The "Ten Year Hold Rule" doubled the unjust enrichment penalty repayment period from five to ten years and required 100 percent repayment obligation, plus interest, on the sale of spectrum licenses during the first five years. Currently, the unjust enrichment period is set at 5 years.

Advocacy highlighted a key feature of the DE program—its ability to bring competition to large markets, increasing auction revenues, and ultimately consumer choice. Increased DE participation in Auction 97 drove much greater than expected auction revenues for taxpayers, and has benefited consumers, including small businesses, by bringing meaningful competition to the largest bidders and therefore curtailing excessive concentration of spectrum licenses. Advocacy expressed concerns that placing a cap on the total credit available to a DE is likely to undermine this aspect of the DE program, and ultimately reduce the benefits of the program to consumers and small businesses.

Some commenters have suggested that the FCC expand the universe of businesses eligible for bidding credits to include certain large businesses. Advocacy expressed opposition to these proposals. If the FCC adopts policies that give small business DE's adequate flexibility, large businesses seeking to participate in the wireless market should have ample opportunity, incentive, and means to invest in the wireless market; giving those businesses an additional advantage over small entities will make it more difficult for small businesses to attract capital.

Finally, Advocacy reminded the Wireless Bureau staff of the FCC's obligation to analyze the economic impact of any proposals that would have a significant economic impact on a substantial number of small entities, as required under the RFA. The FCC has conducted an Initial Regulatory Flexibility Act Analysis (IRFA) for this proceeding, but the IRFA has not estimated the economic impact of any of the alternatives for which it has sought public comment. If the FCC plans to adopt more restrictive rules for DEs, or plans to expand the use of bidding credits to entities that are not small businesses, it should conduct a supplemental IRFA analyzing the economic impact of those specific provisions on small entities, and publish it for public comment.

## **Conclusion**

Advocacy recommends that the FCC preserve the intent of Section 309(j) and enable small business winners of auction licenses to expand their operations to promote innovation and economic growth. For additional information or assistance, please contact Jamie Saloom at 202.205.6890 or [Jamie.Saloom@sba.gov](mailto:Jamie.Saloom@sba.gov).

Respectfully submitted,



Jamie Belcore Saloom  
Assistant Chief Counsel  
SBA Office of Advocacy