



August 20, 2014

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: EX PARTE NOTICE

Amendment of the Commission's Rules With Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185

Auction of Advanced Wireless Services Licenses, Competitive Bidding Procedures for Auction 97, AU Docket No. 14-78

Dear Ms. Dortch:

The Competitive Carriers Association ("CCA"), CTIA – The Wireless Association® ("CTIA") and NTCA – The Rural Broadband Association's ("NTCA") (collectively, "Wireless Industry Representatives") submit this letter to supplement their recent proposal for a limited, interim waiver of the Commission's "former defaulter" rule for the upcoming auction of AWS-3 spectrum.¹

The Commission should note that relief from the former defaulter rule has the strong support of three industry trade associations and the hundreds of diverse companies that they represent. No party has opposed a waiver. This consensus underscores the importance of granting immediate relief.

¹ See *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA; Jill Canfield, Assistant General Counsel, NTCA; and Scott Bergmann, Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU docket No. 14-78 (filed Aug. 14, 2014) ("August 14 Letter").

The Commission should also note that the AWS-3 auction is fast approaching. We urge the Commission to grant a limited waiver promptly and in any event no later than August 27, the day before the short-form application filing window opens. The industry's request for limited relief has been pending since May 30, more than two and a half months. Many applicants will need to file their applications as early as possible and must determine whether they are former defaulters before they can file. Delaying action beyond August 27 will only exacerbate the current uncertainty among potential bidders that, as the Commission has often noted, is the enemy of a successful auction.

In their August 14 letter, the Wireless Industry Representatives proposed that the Commission waive the former defaulter rule for any AWS-3 auction applicant that has not received, within the seven years prior to the date applications are due, a notice that it is in default on any Commission license or any debt of \$100,000 or more owed to the FCC or other Federal agency. For purposes of the waiver, an applicant is not in default if any debt was paid within two quarters of receiving the notice or is the subject of a good faith dispute or a pending legal or arbitration proceeding. Defaults will expressly include any debt that is currently subject to debt collection procedures. As is currently the case under the former defaulter rule, no interest will be paid on the upfront payment.

This proposal, like the Wireless Industry Representatives' previous waiver proposal,² meets the standard for waiver set forth in Section 1.925 of the Commission's Rules.³

First, the underlying purpose of the former defaulter rule would not be served by its application to the AWS-3 auction. The rule's purpose was to provide more assurance that future auction winners which had previously defaulted or were delinquent on a debt would pay for new licenses they win. It was in direct response to the outcome of the initial PCS auction, when several winning bidders for PCS spectrum were allowed to pay for their licenses in installments over a period of years but then defaulted on those installments. That purpose is not relevant here. The AWS-3 auction will not allow installment payments, and bidders must pay for the licenses they win in full, before they receive the licenses. The risk that the rule was intended to avoid cannot occur in this auction. Even if there were concern that a substantial past default

² See *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA; Jill Canfield, Assistant General Counsel, NTCA; and Scott Bergmann, Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU docket No. 14-78 (filed Aug. 1, 2014) ("August 1 Letter").

³ Section 1.925(a)(3) states: "The Commission may grant a request for waiver if it is shown that (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." Because the Wireless Industry Representatives' request for waiver meets the standard set forth in subsection (i), it is not necessary to address the alternative basis for waiver in subsection (ii). Nevertheless, that latter subsection also would be met under the factual circumstances here where a bidder will have to pay *before* receiving its licenses, which are fundamentally different from the factual circumstances the rule was designed to address, where the bidder would pay in installments *after* receiving its licenses which is what gave rise to the risk of default.

could be probative of a bidder's ability to pay for the licenses at the close of the auction, that concern is fully addressed by the very limited scope of the waiver: it would only waive the rule for debts that are under \$100,000 or that were more than seven years ago.

Second, grant of this limited waiver will serve the public interest by promoting robust and broad participation in the AWS-3 auction and thereby maximizing auction revenues. The Wireless Industry Representatives have previously explained how application of the former defaulter rule could dampen participation in and depress revenues from the AWS-3 auction, in clear contravention of the public interest.⁴ Because the rule imposes a substantial financial penalty on any bidder who may have been delinquent on any non-tax debt owed to any federal agency – no matter how long ago, and no matter how small – bidders could be deterred from participating, or participating as vigorously as they otherwise would have. This is particularly true for smaller companies bidding in the auction. A more targeted application of the former defaulter rule to significant recent debts that were not resolved promptly will promote a robust auction in furtherance of the public interest. For these reasons and those outlined previously,⁵ the proposal meets the conditions for a waiver under Section 1.925.

The proposal does not waive the former defaulter rule entirely, but instead limits the waiver to debts that are under \$100,000 or for which the applicant received notice more than seven years ago, yet failed to resolve or dispute within two calendar quarters of receiving the notice. Each element of this proposal draws support from other contexts.

\$100,000 Limit. This is the same amount that DirecTV and EchoStar proposed in their 2007 petition for waiver and rulemaking as a cap on the size of a debt that would not trigger former defaulter status.⁶ The Commission sought comment on that petition. All comments filed supported the petition, and none opposed it. Limiting the waiver to this amount would thus be consistent with the record on the petition.

Moreover, \$100,000 is the amount that the FCC and other agencies have used for various purposes to distinguish between less significant or material issues and more significant ones. For example:

- Section 0.311(a)(4) of the Commission's Rules provides that the Enforcement Bureau can issue a forfeiture notice against a common carrier of up to \$100,000 on delegated authority, but must refer to the full Commission a higher forfeiture.

⁴ See August 1 Letter.

⁵ See DirecTV Group, Inc. and EchoStar, LLC Petition for Expedited Rule Making to Amend Sections 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver, RM-11395 at 11-12 (filed June 8, 2007) ("DirecTV-EchoStar Petition"). See also *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA, Julie Kearney, VP, Regulatory Affairs, Consumer Electronics Association, Scott Bergmann, Vice President, Regulatory Affairs, CTIA, and Jill Canfield, Director, Legal & Industry, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-185, AU docket No. 14-78 (filed May 30, 2014).

⁶ DirecTV-EchoStar Petition at 1.

- The Universal Service Administrative Company (USAC) includes a \$100,000 cutoff in its guidelines for determining when a recipient of high cost USF support is in “material noncompliance” with the Commission’s rules. Those guidelines provide that any noncompliance which results in a monetary impact greater than 5 percent of funds disbursed or \$100,000 is considered material.⁷
- Arbitration rules have materiality levels at \$100,000 for some issues. For example, under Article 1(4) of the International Arbitration Rules, in cases where no claim or counterclaim exceeds \$100,000, the dispute can be resolved entirely through written submissions, unless the arbitrator decides that an oral hearing is necessary.⁸

Seven Year Period. The Wireless Industry Representatives initially proposed that the waiver cover debts occurring more than three years ago because such debts provided no probative information on an applicant’s ability to pay for licenses. In response to discussions with Commission staff, the August 14 letter proposes that this period be extended to seven years. This period is the same length that Congress enacted in the Fair Credit Reporting Act for limiting credit agencies’ disclosure of certain information about consumers. Section 1691c of that Act generally provides that “no consumer reporting agency may make any consumer report” containing information about tax liens, accounts placed for collection or “any other adverse item of information, other than records of convictions of crimes, which antedates the report by more than seven years.”⁹ Congress determined that such adverse financial information about a consumer is stale after seven years and is not probative of a consumer’s creditworthiness. Similarly, an applicant’s default on a debt to a federal agency that was noticed more than seven years ago is not probative of its ability to pay for licenses today.

Six-Month Grace Period. Finally, the proposal would waive any debt that is resolved or disputed through appropriate procedures within two calendar quarters of receiving the notice. This makes sense because it addresses situations where, due to incorrect addresses, delivery problems or internal issues, applicants may not timely pay a bill sent by USAC or other agencies, but resolve them once the bill is discovered or brought to their attention by the agency or by the Commission’s “red light” system. These situations are clearly not relevant to an applicant’s ability to pay for spectrum licenses it wins at auction.

Moreover, the Commission’s rules grant the same two calendar quarter period for late installment payments on licenses. As the Wireless Bureau advised an applicant in a previous auction, “By rule, the Commission provides that if late installment payments, together with

⁷ Independent Auditor’s Report No. CH2007BE087, New Cingular Wireless PCS, LLC, at 6, attached to Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, CC Docket No. 96-45, WC Docket No. 05-337, filed April 24, 2009.

⁸ International Dispute Resolution Procedures, Article 1(4), *available at* www.icdr.org.

⁹ Fair Credit Reporting Act, 7 U.S.C. § 1691c. This section allows a consumer report to disclose cases under Title 11 of the Bankruptcy Act that antedate the report by more than ten years. However, the report cannot disclose any civil suits or judgments that antedate the report by the longer of seven years or until the governing statute of limitations has expired.

associated late fees, are not paid within two quarters of the original payment deadline, the license shall be in default and subject to debt collection procedures. Section 1.2105(a) or, in the event the default/delinquency is later resolved, section 1.2106(a) [the former defaulter rules], only will apply at this point.”¹⁰

Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Rebecca Murphy Thompson

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Competitive Carriers Association

/s/ Scott Bergmann

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¹⁰ Letter from Margaret Wiener, Chief, Auction and Spectrum Access Division, Wireless Telecommunications Bureau, to Cheryl A. Tritt, Esq., November 23, 2004, DA 04-3685.