

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <http://commerce.senate.gov>

April 29, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Dear Chairman Wheeler:

I am writing regarding the recent wireless spectrum auction, Auction 97 for Advanced Wireless Services (Auction 97), that the Federal Communications Commission (FCC) held from November 2014 through January 2015. Specifically, the Committee wishes to examine the FCC's supervision of this auction and the behavior of one of the major bidders, DISH Network Corporation (DISH), and its majority-owned bidding partners, Northstar Wireless, LLC (Northstar) and SNR Wireless LicenseCo, LLC (SNR). While the auction and the conduct of the various participants may have complied fully with all applicable statutes and regulations, questions have arisen that require serious consideration. A recent report indicates that you also have concerns with the conduct of this auction.¹ In order to ensure that the bidding in Auction 97 was indeed fair, competitive, and lawful, the Committee hopes to work together with the FCC to examine the process and determine whether any misconduct occurred.

Since Congress granted the FCC authority to conduct auctions in 1993, the Commission has used auctions to allocate scarce spectrum resources, which are public assets, among competing private users. Because spectrum auctions such as Auction 97 are anonymous, companies bidding on any particular license can see the number of competitors they face and their competitors' bid amounts, but not the other bidding parties' identities. Such anonymity is necessary to preserve the integrity of the auctions by guarding against the formation of bidding rings and other collusive practices.

More than twenty years ago, Congress instituted the Designated Entity (DE) program, which aims to give small businesses the opportunity to compete against large companies in FCC spectrum auctions. Because both Northstar and SNR are "very small businesses" under FCC rules, they may be entitled to a 25% discount of the final bidding price for licenses they won at auction.² DISH, a company with a market capitalization of approximately \$32 billion, acquired

¹ Ryan Knutson, *Regulators May Reject Dish Entities' Spectrum Discount Claims*, WALL ST. J., Apr. 27, 2015.

² According to the FCC's rules, "A very small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an

an 85% economic interest in both Northstar and SNR in advance of Auction 97.³ Also before the auction, Northstar and SNR each filed with the FCC notices of joint bidding arrangements⁴ they had reached with DISH through an entity called American AWS-3 Wireless I LLC.⁵ These agreements are intended to allow small companies to pool their resources and buy spectrum as a consortium as long as they disclose the arrangements to the FCC. FCC rules make clear, however, that companies are not permitted to communicate and collude during the auction.⁶ Moreover, compliance with FCC coordinated bidding arrangement rules does not insulate an entity from liability for violations of federal antitrust laws.⁷

After Auction 97 closed on January 29, 2015, the FCC released detailed data about the auction. Based on analysis of the data, several parties have raised questions about the bidding behavior of DISH, Northstar, and SNR.⁸ In fact, the data shows that these entities would frequently bid on the same licenses, and after all other competitors ceased bidding, they would not continue to compete among themselves. DISH itself appears to have bid aggressively on hundreds of licenses in the early rounds of the auction before dropping out when it was only competing against Northstar or SNR.⁹ In numerous instances, Northstar and SNR appear to have entered bids on the same license at the same price after not bidding on that license for, in some cases, hundreds of rounds.

attributable material relationship, has average gross revenues not exceeding \$15 million for the preceding three (3) years.” 47 C.F.R. § 27.1106. *See also* Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Red 6567, 6762-67 (June 2, 2014).

³ *See* Northstar Wireless, LLC, FCC Form 175, Ex. A (Sept. 12, 2014), *available at* <https://auctionfiling.fcc.gov/form175/search175/index.htm>; SNR Wireless LicenseCo, LLC, FCC Form 175, Ex. A (Sept. 12, 2014), *available at* <https://auctionfiling.fcc.gov/form175/search175/index.htm>.

⁴ *See* Northstar Wireless, LLC, FCC Form 175, Ex. C (Sept. 12, 2014), *available at* <https://auctionfiling.fcc.gov/form175/search175/index.htm>; SNR Wireless LicenseCo, LLC, FCC Form 175, Ex. E (Oct. 13, 2014), *available at* <https://auctionfiling.fcc.gov/form175/search175/index.htm>.

⁵ American AWS-3 Wireless I LLC is a wholly-owned, direct subsidiary of DISH Wireless Holding LLC, which is a wholly-owned, direct subsidiary of DISH Network Corporation. *See* FCC Form 175, FCC Auction No. 97. American AWS-3 Wireless I LLC, Ex. A (Sept. 12, 2014).

⁶ *See* 47 C.F.R. §§ 1.2105(c)(1), (c)(4)(i).

⁷ Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for Nov. 13, 2014, Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97, AU Docket No. 14-78. *Public Notice*, DA 14-1018, 60 (2014) [hereinafter Auction 97 Procedures]. *See also* Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, *Public Notice*, DA 95-2244, 11 FCC Red. 9645, 9646 ¶ 35 (1995); Competitive Bidding, Fourth Memorandum Opinion and Order, 9 FCC Red. 6858 at ¶ 59 FN 134 (1994).

⁸ *See, e.g., In re* Updating Part 1 Competitive Bidding Rules, Comments of AT&T, WT Docket No. 14-170 (Feb. 20, 2015), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=60001018945>.

⁹ Letter from Ms. Tamara Preiss, Vice President, Fed. Reg. Affairs, Verizon, to Ms. Marlene H. Dortch, Sec’y, FCC, WT Docket No. 14-170 (Feb. 27, 2015), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=60001024322>.

When the last two bidders for a license stay at the same bid level, FCC auction procedures provide for a tiebreaker method that uses a random number generator to award the license to one party unless the other party raises its bid.¹⁰ During Auction 97, when companies other than SNR and Northstar were tied, the two companies accepted the result of the random number generator without bidding further only five times. When SNR and Northstar were the last two companies bidding, however, the tiebreaker stood 190 times.¹¹

In the end, DISH did not win a single spectrum license. “Very small businesses” Northstar and SNR, however, won 702 spectrum licenses, representing over 40% of the total licenses on auction, at a cost of \$13.3 billion.¹² As DISH owns an 85% ownership stake in both companies, it is no surprise that news reports on Auction 97 often cite DISH as a big winner.¹³ In addition, the 25% discount on the licenses to which Northstar and SNR may be entitled would amount to \$3.3 billion.

The practical effect of the bidding activity of DISH, Northstar, and SNR may have been to suppress rival bidders. Many of these rival bidders were small rural wireless companies, and some of them were not even eligible for a discount under the FCC’s small business discount program. In fact, several small rural telcos indicated in a recent FCC filing that DISH, Northstar, and SNR bidding against each other in the same market during Auction 97 had a “devastating impact” on the vast majority of small rural telcos.¹⁴ The small telcos contend that multiple identical bids by DISH, Northstar, and SNR gave a distorted impression of heavier competition than actually existed and effectively pushed smaller companies out of the auction.

If DISH, Northstar, and SNR engaged in behavior in violation of FCC auction rules, then the integrity of the auction process and the goal of spectrum auctions – to allow market forces to allocate scarce spectrum resources to entities that will put them to the highest and best use – are at risk. In addition, this behavior may have prevented other companies – large and small – urban

¹⁰ Auction 97 Procedures, *supra* note 6, at 13. *See also* FCC, Public Notice, Request For Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170 (Apr. 17, 2015), <http://www.fcc.gov/document/competitive-bidding-public-notice>; *In re* Updating Part 1 Competitive Bidding Rules, Comments of T-Mobile USA, Inc., WT Docket No. 14-170 (Feb. 20, 2015), *available at* <http://apps.fcc.gov/ecfs/document/view?id=60001032010>.

¹¹ Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Sec’y, FCC (Apr. 27, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001030047>.

¹² Thomas Gryta, Ryan Knutson, & Shalini Ramachandran, *DISH Network Surprise Winner in Spectrum Auction*, WALL ST. J., Jan. 30, 2015.

¹³ *Id.* at 3.

¹⁴ 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, Sec’y, FCC (Mar. 25, 2015), <http://go.usa.gov/3WRJm>.

and rural – from competing on a level playing field. In examining the behavior of DISH, SNR, and Northstar as well as its effects, it is not difficult to draw comparisons to the activities described in Justice Department guidelines on common antitrust violations such as bid rigging, complementary bidding, and bid suppression.¹⁵ There may be acceptable explanations for these similarities, but the American public and Congress must be certain that no prohibited practices allowed some parties to derive an unfair benefit from Auction 97 and the public airwaves that the auction distributed.

I understand the FCC is currently reviewing the applications of Northstar and SNR, and I ask that you keep the Committee informed of the progress of your review. A thorough examination of the auction and the issues discussed in this letter must precede the awarding of any licenses to these companies. In addition, consistent with the Committee's oversight responsibilities and to inform its understanding of the FCC's supervision of Auction 97 and the bidding activity of DISH, Northstar, and SNR, please provide responses to the following:

1. Is the FCC aware of any coordinated bidding activity between DISH, Northstar, and SNR? If so, when did FCC first become aware of such coordinated bidding activity, and does the FCC have any reason to believe that improper communication occurred between and among DISH, SNR, and Northstar during Auction 97?
2. At any point during Auction 97, did any FCC officials, staff, consultants, or contractors seek to intervene to prevent anti-competitive conduct, such as suspected bid-rigging, by DISH, SNR, Northstar, or any other participants? If not, why not?
3. Has the FCC conducted an investigation into the contractual arrangements and any potential coordinated Auction 97 bidding activity between DISH, Northstar, and SNR? If so, on what date did the investigation formally begin? If the FCC has not yet conducted an investigation as of the date of this letter, please explain why not.
4. Please provide all communications, including e-mails, between and among FCC officials, staff, and contractors regarding the participation in Auction 97 of DISH, SNR, and Northstar from May 1, 2014 until the date of this letter.
5. Please provide all communications relating to Auction 97, including e-mails, between the FCC and DISH, SNR, and Northstar from May 1, 2014 until the date of this letter.

¹⁵ See U.S. Dep't of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, <http://www.justice.gov/atr/public/guidelines/211578.htm> (last visited Apr. 29, 2015).

6. Does the FCC actively monitor the conduct of bidders during the course of spectrum auctions for signs of signaling, coordination, or collusion? If not, please explain why. If so, what are the policies and procedures in place to detect such practices? Please provide a summary of these policies and procedures, and how they have been used to detect and prevent such activities in FCC auctions.
7. According to the FCC's rules regarding prohibited communications reflected in 47 C.F.R. §1.2105(c), any applicant that makes or receives a communication of bids or bidding strategies prohibited under the rule shall report such communications in writing to the Commission immediately, and in no case later than five business days after the communication occurs. An applicant's obligation to make such a report continues until the report has been made. What are the penalties for failure to disclose such communications? Has the FCC received any reports of prohibited communications made by any applicants in Auction 97? If so, please provide copies of those reports.
8. In its joint bidding agreement with DISH and SNR for Auction 97, Northstar stated that it planned to "coordinate" bidding with SNR and DISH and that such coordination "will be effected by **communications among authorized representatives of the parties at regular intervals during the auction**, which intervals shall be established by the parties." (Emphasis added). Please explain whether or not Northstar's communications with DISH and SNR during Auction 97 violated the FCC's prohibition of communications during an auction.
9. In its joint bidding agreement with DISH and Northstar for Auction 97, SNR stated that it planned to "coordinate" bidding with Northstar and DISH and that such coordination "will be effected by **communications among authorized representatives of the parties at regular intervals during the auction**, which intervals shall be established by the parties." (Emphasis added). Please explain whether or not SNR's communications with DISH and Northstar during Auction 97 violated the FCC's prohibition of communications during an auction.
10. Did the FCC have procedures in place to address any instances of actual or suspected collusion during Auction 97 to prevent unfair outcomes? If so, please provide a summary of these procedures.
11. After the conclusion of Auction 97, did the FCC review the auction data to detect signs of collusion? Please provide a summary of the FCC's review process.
12. If the FCC were to conclude that collusion had taken place during Auction 97, what steps would the FCC take to remedy the harm caused by the collusion?

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Please provide an exhaustive list of remedies available to the FCC when collusion is found.

13. Does the FCC have any mechanism for reclaiming spectrum licenses from entities that won those licenses through improper collusive methods?
14. What recourse is available to non-colluding bidders when collusive actions occur?

Thank you for your cooperation and prompt attention to this matter. I look forward to working with you. Please provide your responses as soon as possible, but by no later than May 15, 2015.

The Committee is making this request pursuant to its authority under Senate Rules XXV and XXVI. An attachment to this letter provides additional information about how to respond to the Committee's request.

Sincerely,



JOHN THUNE
Chairman

Enclosure

cc: The Honorable Bill Nelson, Ranking Member