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## United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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

DAVID SCHWIETERT, STAFF DIRECTOR  
KIM LIPSKY, DEMOCRATIC STAFF DIRECTOR

April 29, 2015

Mr. Charles W. Ergen  
President and Chief Executive Officer  
Chairman, Board of Directors  
DISH Network L.L.C.  
9601 South Meridian Boulevard  
Englewood, Colorado 80112

Dear Mr. Ergen:

I am writing regarding the participation of DISH Network Corporation (DISH) in 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 seeks to learn more about the actions of DISH, one of the major bidders, 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, including DISH, may have complied fully with all applicable statutes and regulations, questions have arisen that require serious consideration to ensure that the bidding in Auction 97 was indeed fair, competitive, and lawful.

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.<sup>1</sup> DISH, a company with a market capitalization of approximately \$32 billion, acquired

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<sup>1</sup> 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 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

an 85% economic interest in both Northstar and SNR in advance of Auction 97. DISH's ownership of Northstar is through a wholly-owned subsidiary known as American AWS-3 Wireless II LLC (American II), and its ownership of SNR is through a wholly-owned subsidiary known as American AWS-3 Wireless III LLC (American III).<sup>2</sup> Also before the auction, Northstar and SNR each filed with the FCC notices of joint bidding arrangements<sup>3</sup> they had reached with DISH through an entity called American AWS-3 Wireless I LLC (American I).<sup>4</sup> 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.<sup>5</sup> Moreover, compliance with FCC coordinated bidding arrangement rules does not insulate an entity from liability for violations of federal antitrust laws.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.

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of Spectrum Through Incentive Auctions, GN Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6567, 6762-67 (June 2, 2014).

<sup>2</sup> 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>.

<sup>3</sup> 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>.

<sup>4</sup> 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).

<sup>5</sup> See 47 C.F.R. §§ 1.2105(c)(1), (c)(4)(i).

<sup>6</sup> 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 Rcd. 9645, 9646 ¶ 35 (1995); Competitive Bidding, Fourth Memorandum Opinion and Order, 9 FCC Rcd. 6858 at ¶ 59 FN 134 (1994).

<sup>7</sup> See, e.g., *In re* Updating Part I 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>.

<sup>8</sup> 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>.

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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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>9</sup> 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>.

<sup>10</sup> 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>.

<sup>11</sup> Thomas Gryta, Ryan Knutson, & Shalini Ramachandran, *DISH Network Surprise Winner in Spectrum Auction*, WALL ST. J., Jan. 30, 2015.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> 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.<sup>14</sup> 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.

Therefore, consistent with the Committee's oversight responsibilities and in order to inform its understanding of DISH's relationship to Northstar and SNR as well as its behavior in Auction 97, please provide responses to the following:

1. 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 it makes the report. Has DISH provided any reports of prohibited communications to the FCC regarding Auction 97? If so, please provide copies of those reports.
2. Did any DISH board member, shareholder, investor, employee, officer, partner, consultant, or contractor engage in any prohibited communications with SNR during Auction 97?
3. Did any SNR board member, shareholder, investor, employee, officer, partner, consultant, or contractor engage in any prohibited communications with DISH during Auction 97?
4. Did any DISH board member, shareholder, investor, employee, officer, partner, consultant, or contractor engage in any prohibited communications with Northstar during Auction 97?
5. Did any Northstar board member, shareholder, investor, employee, officer, partner, consultant, or contractor engage in any prohibited communications with DISH during Auction 97?
6. Please provide all communications, including text messages and e-mails between and among DISH board members, shareholders, investors, officers, employees, partners, contractors, and consultants, and SNR board members, shareholders,

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<sup>14</sup> 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).

investors, officers, employees, partners, contractors, and consultants relating to Auction 97 from May 1, 2014, to the date of this letter. These communications should include, but not be limited to text messages and e-mails between and among DISH bidders Charles Ergen, Jeffrey Blum, and Thomas Cullen; SNR bidders John Muleta, Nathaniel Klipper, and Patrick Q. Riordan; and DISH shareholder Cantey Ergen.

7. Please provide all communications, including text messages and e-mails, between and among DISH board members, shareholders, investors, officers, employees, partners, contractors, and consultants, and Northstar board members, shareholders, investors, officers, employees, partners, contractors, and consultants relating to Auction 97 from May 1, 2014, to the date of this letter. These communications should include, but not be limited to text messages and e-mails between and among DISH bidders Charles Ergen, Jeffrey Blum, and Thomas Cullen; Northstar bidders Allen M. Todd, Patrick M. Duke, and Jamie Marunde; DISH shareholder Cantey Ergen; and Northstar partner Stephen Hillard.
8. Please provide all documents relating to the contractual and bidding arrangements between DISH and SNR for Auction 97.
9. Please provide all documents relating to the contractual and bidding arrangements between DISH and Northstar for Auction 97.
10. Please provide all documents relating to the auction and bidding strategies of DISH for Auction 97.
11. DISH requested that the FCC hold an extra mock session before the Auction 97 bidding began, and also asked the FCC to provide a software link so that DISH could more closely monitor bidding in real-time. Please provide all internal communications, including text messages and e-mails, between and among DISH board members, shareholders, investors, officers, employees, consultants and contractors regarding DISH's efforts to seek an extra mock session and a software linkup with the FCC from May 1, 2014 to the date of this letter.
12. Why didn't American II and American III file joint bidding arrangement applications with the FCC?
13. Please provide all communications, including text messages and e-mails, between and among American I, American II, and American III representatives during Auction 97.

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Thank you for your cooperation and prompt attention to this matter. 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,

A handwritten signature in blue ink, appearing to read "John Thune", with a large, sweeping flourish at the end.

JOHN THUNE  
Chairman

Enclosure

cc: The Honorable Bill Nelson, Ranking Member