

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	GN Docket No. 12-268
Expanding the Economic and Innovation)	
Opportunities of Spectrum Through Incentive)	
Auctions)	AU Docket No. 14-252
)	
Comment Sought on Competitive Bidding)	
Procedures for Broadcast Incentive Auction 1000,)	
Including Auctions 1001 and 1002)	WT Docket No. 12-269
)	
Policies Regarding Mobile Spectrum Holdings)	

ORDER

Adopted: February 3, 2016

Released: February 3, 2016

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order we dismiss two petitions for reconsideration of the Wireless Telecommunications Bureau's (Bureau) *Application Procedures for Broadcast Incentive Auction Public Notice (Application Procedures Public Notice)*.¹ PBP Group, LLC, Bulloch Cellular, Inc., Pineland Cellular, Inc., and Planters Rural Cellular, Inc. (collectively PBP) seek reconsideration of the eligibility requirements for a rural service provider bidding credit.² T-Mobile USA, Inc. (T-Mobile) requests that the Commission reconsider the *Application Procedures Public Notice* by declaring that certain identified entities are considered "former defaulters" under the Commission's Part 1 competitive bidding rules that require a 50 percent larger upfront payment from former defaulters participating in Commission spectrum auctions.³ T-Mobile requests in the alternative that the Commission issue a declaratory ruling that those entities are "former defaulters" under the Commission's competitive bidding rules. For the reasons stated below, we dismiss the PBP Petition and the T-Mobile Petition. We also deny T-Mobile's alternative request for a declaratory ruling.

¹ *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Technical Formulas for Competitive Bidding*, Public Notice, 30 FCC Rcd 11034 (WTB 2015) (*Application Procedures Public Notice*). The incentive auction is composed of a reverse auction (Auction 1001) in which broadcasters will offer to voluntarily relinquish some or all of their spectrum usage rights and a forward auction (Auction 1002) of new, flexible-use licenses. The petitions for reconsideration and request for declaratory ruling addressed by this order raise questions relating to the application of the Commission's general competitive bidding rules at Sections 1.2101 *et seq.*, which in the context of the broadcast incentive auction pertain only to the forward auction.

² Petition for Reconsideration of PBP Group, LLC, Bulloch Cellular, Inc., Pineland Cellular, Inc., and Planters Rural Cellular, Inc., AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (filed Nov. 30, 2015) (PBP Petition).

³ Petition for Reconsideration or Request for Declaratory Ruling of T-Mobile USA, Inc., AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (filed Nov. 30, 2015) (T-Mobile Petition).

II. BACKGROUND

2. In July 2015, the Commission released the *Part 1 Report and Order*, in which it modernized and reformed the Commission's Part 1 competitive bidding rules to reflect changes in the wireless industry over the last decade.⁴ Among other steps, the Commission adopted for the first time a bidding credit for eligible rural service providers.⁵ To be eligible for a rural service provider bidding credit, an applicant "must be in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and must also serve predominantly rural areas."⁶

3. In the *Part 1 Report and Order*, the Commission also modified its competitive bidding rules in certain other respects.⁷ Among these modifications were changes to the rule governing former defaulters.⁸ Former defaulters are required by Section 1.2106 to pay a 50 percent larger upfront payment to participate in an auction.⁹ The Commission narrowed the application of the existing rule by allowing applicants to exclude from this requirement any cured default on a Commission license or delinquency on a non-tax debt owed to a federal agency that met any of four criteria.¹⁰ The Commission expressly stated that its revisions to the Part 1 rules were intended to be effective for the broadcast incentive auction.¹¹

4. Subsequently, the Commission and the Bureau released various public notices to establish final procedures for the broadcast incentive auction.¹² One such notice was the *Application Procedures Public Notice*, which was released on October 15, 2015.¹³ Pursuant to the Commission's direction, the *Application Procedures Public Notice* established final application procedures for the

⁴ *Updating Part 1 Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493 (2015) (*Part 1 Report and Order*).

⁵ *Id.* at 7530-31, para. 88. The Commission concluded the new bidding credit could help rural service providers "to compete for spectrum licenses more effectively and to provide consumers in rural areas with competitive offerings." *Id.*

⁶ *Id.* at 7534-35, para. 98.

⁷ *Id.* at 7497, para. 7.

⁸ The Commission revised the former defaulter rule to simplify the auction process and minimize administrative and implementation costs for bidders. *Id.* at 7566-67, para. 173.

⁹ 47 CFR § 1.2106(a).

¹⁰ *Part 1 Report and Order*, 30 FCC Rcd at 7566-67, para. 173 ("[W]e exclude any cured default on a Commission license or delinquency on a non-tax debt owed to a Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than \$100,000; (3) the default or delinquency was paid within two quarters (i.e., six months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding.").

¹¹ *Id.* at 7533, para. 95 ("This [rural service provider] bidding credit is particularly important in advance of the Incentive Auction, a once-in-a-generation opportunity for small and rural providers to gain access to below-1-GHz spectrum."), and 7567, para. 173 ("Additionally, we will implement our revised rules on a prospective basis, including for the Incentive Auction.").

¹² See, e.g., *Broadcast Auction Scheduled to Begin March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, Public Notice, 30 FCC Rcd 8975 (2015) (*Auction 1000 Bidding Procedures Public Notice*).

¹³ *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Technical Formulas for Competitive Bidding*, Public Notice, 30 FCC Rcd 11034 (WTB 2015) (*Application Procedures Public Notice*).

reverse and forward auctions, provided detailed information, instructions, and deadlines for filing applications, and finalized certain post-auction procedures established by the Commission's prior orders.¹⁴ With respect to the forward auction application, the *Application Procedures Public Notice* stated the Commission's rule regarding eligibility for the new rural service provider bidding credit and explained the disclosures required in the application.¹⁵ The *Application Procedures Public Notice* also indicated that each forward auction applicant must certify whether it is a current or former defaulter or delinquent under the Commission's rules and notified prospective bidders of the Commission's revisions to the former defaulter rule in the *Part 1 Report and Order*.¹⁶ The Bureau's Public Notice did not purport to modify the Commission's former defaulter rule or apply it to particular circumstances.

III. DISCUSSION

A. PBP Group, LLC Petition for Reconsideration

5. In its Petition for Reconsideration,¹⁷ PBP maintains that the Bureau's *Application Procedures Public Notice* limits eligibility for the rural service provider bidding credit to applicants that are "service provider[s]...in the business of providing commercial communications services," thus making ineligible an entity that is wholly owned by rural service providers, but not a service provider itself.¹⁸ PBP further contends that extending eligibility for a rural service provider bidding credit to such entities would be consistent with the Commission's objectives in adopting the rule, and recommend that the Bureau issue a new public notice revising the language regarding eligibility for the bidding credit as specifically suggested by PBP.¹⁹

6. The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP filed comments on behalf of its clients (the "Blooston Rural Carriers") supporting the PBP Petition.²⁰ The Blooston Rural Carriers urge the Commission to issue an explicit clarification that an applicant seeking a rural service provider bidding credit "does not itself need to be in the business of providing commercial communications services, so long as its owners are providers of commercial communication services, and so long as the applicant otherwise meets the eligibility criteria for the credit."²¹ NTCA also filed a reply in support of the PBP Petition.²²

¹⁴ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6574, para. 15 (*Incentive Auction Report and Order*) (preserving Wireless Telecommunications Bureau's authority to adopt final incentive auction procedures "concerning those matters that it typically handles under existing delegations of authority"); *Auction 1000 Bidding Procedures Public Notice*, 30 FCC Rcd at 8979-80, para. 3 (describing the incentive auction and post-auction procedure matters that the Bureau would address in the *Application Procedures Public Notice*).

¹⁵ *Application Procedures Public Notice*, 30 FCC Rcd at 11074-75, paras. 123-24.

¹⁶ *Id.* at 11079-80, paras. 137-138.

¹⁷ Petition for Reconsideration of PBP Group, LLC, Bulloch Cellular, Inc., Pineland Cellular, Inc., and Planters Rural Cellular, Inc., AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (filed Nov. 30, 2015) (PBP Petition).

¹⁸ *Id.*

¹⁹ *Id.* at 3 n.10.

²⁰ Comments of the Blooston Rural Carriers (filed Dec. 28, 2015). The Blooston Rural Carriers contend that the rules are broad enough and were intended to allow a rural service provider seeking to participate in an auction through a subsidiary or related entity to demonstrate eligibility for a rural service provider bidding credit even if that entity is not itself currently in the business of providing commercial communications services. See *id.* at 1.

²¹ *Id.* at 2.

²² NTCA Reply at 2-3.

7. We dismiss the PBP Petition as procedurally defective. PBP asserts that the *Application Procedures Public Notice* limits eligibility for the rural service provider bidding credit.²³ PBP bases this assertion on its claim that the *Application Procedures Public Notice*, contrary to the Commission's expressed intent in adopting the rural service provider bidding credit, prevents applicants that are not service providers from qualifying for the credit even if they are wholly owned by eligible service providers.²⁴ Although the *Application Procedures Public Notice* discussed the Commission's revised Part 1 competitive bidding rules,²⁵ including the eligibility requirements for an applicant seeking a rural service provider bidding credit,²⁶ the *Application Procedures Public Notice* did not expand, limit, or otherwise change any Part 1 rules or the rights of applicants under the Commission's rules, as amended in the *Part 1 Report and Order*.

8. The *Application Procedures Public Notice* provided detailed information and instructions for potential auction applicants.²⁷ In the paragraphs cited by PBP, the Bureau stated the Commission's new rule regarding eligibility for the rural service provider bidding credit, and explained the disclosures required in the application.²⁸ The Bureau did not modify the Commission's definition of an eligible rural service provider. Nor did the Bureau apply the eligibility requirements to any factual circumstances, such as those proposed in the PBP Petition. Indeed, since the *Application Procedures Public Notice* addressed auction issues typically handled by the Bureau on delegated authority, any rule changes would have been beyond the scope of the public notice.²⁹ Accordingly, the PBP Petition amounts to a late-filed petition for reconsideration of the *Part 1 Report and Order*, which adopted the rules on eligibility for a rural service provider bidding credit.³⁰

9. Petitions for reconsideration of the *Part 1 Report and Order* were due by October 19, 2015.³¹ Consistent with long-standing Commission precedent, we find that the PBP Petition, filed on November 30, 2015, is an indirect challenge to a decision that was adopted in proceedings in which the right to review has expired, and is therefore an impermissible collateral attack and is properly rejected.³² Accordingly, we dismiss the PBP Petition.

²³ PBP Petition at 1-2.

²⁴ PBP Petition at 2-3. PBP offers specific language to amend the rule. *Id.* at 3.

²⁵ *Updating Part 1 Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493 (2015) (*Part 1 Report and Order*).

²⁶ *Application Procedures Public Notice*, 30 FCC Rcd at 11074-75, paras. 123-24.

²⁷ *Id.* at 11036-37, para. 1.

²⁸ *Id.* at 11074-75, paras. 123-24.

²⁹ We further note that PBP's petition seeks to modify the language of Section 1.2110(f)(4)(i) insofar as they propose specific textual changes to that rule. PBP Petition at 3 n.10, 5.

³⁰ The substantive allegations of the petition dictate its treatment as a petition for reconsideration. *See, e.g., Association of College and Univ. Telecommunications Administrators, American Council on Educ., and Nat'l Assoc. of College and Univ. Business Officers*, Memorandum Opinion and Order, 8 FCC Rcd 1781 (1993) (Commission dismissed self-styled petition for clarification as untimely filed petition for reconsideration).

³¹ The *Part 1 Report and Order* was published in the Federal Register on September 18, 2015. 80 FR 56764. A party must file a petition for reconsideration within thirty days from the date of public notice of Commission action. 47 U.S.C. § 405(a); 47 CFR §§ 1.106(f), 1.429(d). The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission cannot extend or waive this statutory thirty-day filing period, except where "extraordinary circumstances indicate that justice would thus be served." *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976); *see also Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

³² *See, e.g., Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations* (continued....)

10. Further, to the extent that PBP suggests that we should rule at this stage on the eligibility of any hypothetical applications for the rural service provider bidding credit, we decline to do so. Consistent with established precedent, final determinations of eligibility for a designated entity bidding credit are made during the post-auction application review process when winning bidders must demonstrate their qualifications on FCC Form 601, based on Section 1.2110 of the Commission's rules and in light of all of the facts and circumstances of their business structure and related agreements.³³ PBP is concerned that, as a threshold matter to claim eligibility for a rural service provider bidding credit, an applicant seeking the credit must itself directly provide service and have its own subscribers.³⁴ We note that whether or not they are affiliated, rural service providers seeking a rural service provider bidding credit may also bid as a single applicant by forming a consortium or joint venture, so long as the consortium or joint venture meets the Part 1 eligibility requirements.³⁵ PBP would also be free to rely on "many [other] options to structure [its] business[] in a manner that complies with our eligibility rules."³⁶ Whether a specific entity wholly owned by qualified rural service providers may demonstrate that it is "in the business of providing commercial communications services" will depend upon the facts and circumstances, and the application of the updated rules on bidding credit eligibility, including their application to spectrum use agreements.³⁷ In determining eligibility for the rural service provider bidding credit, the Commission stated that it would follow an approach similar to the approach used to attribute revenues in the small business bidding credit context.³⁸ The rural service provider rules provide for aggregating the subscribers of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests for determining eligibility.³⁹ Typically, those with interests in an applicant that are affiliates of each other are treated as one and aggregated with each other to determine eligibility.⁴⁰

B. T-Mobile Petition for Reconsideration or Request for Declaratory Ruling

11. T-Mobile's petition seeks reconsideration of the *Application Procedures Public Notice*, and in the alternative, requests a declaratory ruling.⁴¹ In its petition, T-Mobile asks the Commission to

(...continued from previous page)

(*Seaford, Delaware*), Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769, 4722, para. 9 (MB Vid. Div. 2014) ("The Commission has stated in the past that indirect challenges to decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied."); *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12752, 12757, para. 11 (1999); *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, para. 41 n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

³³ *Application Procedures Public Notice*, 30 FCC Rcd at 11090, paras. 173, 177; 47 CFR §§ 1.2112(b), 1.2110(a)-(g).

³⁴ See PBP Petition at 2.

³⁵ *Part 1 Report and Order*, 30 FCC Rcd at 7576-77, para. 198; 47 C.F.R. §§1.2110(c)(6), 1.2110(c)(5)(x), 1.2105(a)(4).

³⁶ *Part 1 Report and Order*, 30 FCC Rcd at 7535-36, para. 101.

³⁷ Cf. *Application of Telecorp PCS, Inc.*, 16 FCC Rcd 3716, 3725-26, paras. 19-23 (2000) (finding commonly controlled affiliates of existing C and F block PCS licensees represented the same real parties-in-interest and were therefore eligible to be transferees of such licenses where holding C or F block licenses was an eligibility requirement).

³⁸ *Part 1 Report and Order*, 30 FCC Rcd at 7535-36, at paras. 99, 102.

³⁹ 47 CFR § 1.2110(f)(4)(i)(C).

⁴⁰ See 47 CFR § 1.2110(b)(2).

⁴¹ T-Mobile Petition at 1.

declare DISH Network Corporation (DISH) and the two entities that the Commission previously found it controlled, Northstar Wireless, LLC (Northstar) and SNR Wireless LicenseCo, LLC (SNR), to be “former defaulters” under the Commission’s rule and therefore require them to pay 50 percent larger upfront payments to participate in the broadcast incentive auction.⁴² T-Mobile argues that DISH, SNR, and Northstar (collectively, the DISH entities) engaged in practices in the AWS-3 auction that are contrary to the Commission’s rules and policies.⁴³ In particular, T-Mobile focuses on SNR’s and Northstar’s decisions to selectively default on certain AWS-3 licenses after the Commission denied them small business bidding credits.⁴⁴ T-Mobile claims that this conduct deprived competitors of the spectrum they need to compete and allowed DISH to reap substantial economic benefits.⁴⁵ T-Mobile asserts that its requested relief would punish DISH for this conduct and protect the integrity of the auction process.⁴⁶

12. On December 28, 2015, the DISH entities filed a joint opposition to T-Mobile’s petition. The DISH entities argue that T-Mobile’s petition is an untimely challenge to the Commission’s new former defaulter policies and prior Commission findings relating to the SNR and Northstar’s conduct in the AWS-3 auction.⁴⁷ The DISH entities claim that in any event, they are not former defaulters under the Commission’s rule since they paid all default payments due to the Commission within the relevant six-month window.⁴⁸ Furthermore, the DISH entities accuse T-Mobile of seeking an unfair advantage over potentially competing bidders in the broadcast incentive auction.⁴⁹

13. AT&T filed a reply in support of T-Mobile’s alternative request for a declaratory ruling.⁵⁰ AT&T asserts that the Commission should declare the DISH entities to be former defaulters under the Commission’s rule.⁵¹ However, AT&T essentially opposes T-Mobile’s request for reconsideration, arguing that an Order on Reconsideration of the *Application Procedures Public Notice* is not necessary or appropriate because that public notice did not alter the former defaulter rule nor apply the rule to DISH, SNR or Northstar.⁵²

14. On January 7, 2016, T-Mobile filed a reply to the DISH entities’ opposition.⁵³ While acknowledging that the Commission need not reconsider the *Application Procedures Public Notice* to provide relief, T-Mobile argues that a declaratory ruling clarifying how the former defaulter rule applies in the context of SNR’s and Northstar’s selective defaults and other conduct in the AWS-3 auction would serve the public interest, “[w]hether or not [such conduct] resulted in any technical violations of the Commission’s prior auction rules.”⁵⁴ T-Mobile further contends that the declaratory ruling should

⁴² *Id.* at 1.

⁴³ *Id.* at 2-4.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3-4.

⁴⁶ *Id.* at 8-9.

⁴⁷ Joint Opposition to T-Mobile Petition for Reconsideration or Request for Declaratory Ruling, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, at 6-7 (filed Dec. 28, 2015) (DISH Opposition).

⁴⁸ *Id.* at 8. See *Part 1 Report and Order*, 30 FCC Rcd at 7566-67, para. 173.

⁴⁹ *Id.* at 1.

⁵⁰ Reply of AT&T to Petition for Reconsideration, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, at 6-7 (filed Dec. 28, 2015) (AT&T Reply).

⁵¹ AT&T Reply at 2.

⁵² *Id.* at 2-3.

⁵³ Reply to Opposition to Petition for Reconsideration or Request for Declaratory Ruling of T-Mobile USA, Inc., AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269 (filed Jan. 7, 2016) (T-Mobile Reply).

⁵⁴ T-Mobile Reply at 1, 2, 5, 7.

address whether entities in which DISH has a disclosable ownership interest should also be considered former defaulters.⁵⁵ Also on January 7, 2016, the DISH entities filed a reply to AT&T's reply, opposing AT&T's support for a declaratory ruling and asserting that neither controversy nor uncertainty that requires a declaratory ruling is present.⁵⁶

15. For the reasons set forth below, we dismiss the T-Mobile's Petition as procedurally defective and deny its request for a declaratory ruling.

16. SNR and Northstar were winning bidders in Auction 97 on licenses for AWS-3 spectrum.⁵⁷ SNR and Northstar each asserted that it had average gross revenues of less than \$15 million over the past three years and therefore qualified as a "very small business" under the rules adopted for Auction 97.⁵⁸ In a Memorandum Opinion and Order (*MO&O*) released on August 18, 2015, the Commission found, *inter alia*, that DISH has a controlling interest in and is an affiliate of SNR and Northstar under the Commission's rules governing eligibility for small business bidding credits.⁵⁹ Based on this finding, the Commission concluded that SNR and Northstar were not eligible for a very small business bidding credit and that they were required to pay the full amount of their winning bids.⁶⁰

17. SNR and Northstar subsequently notified the Commission that they would be paying the full bid amount for some of the licenses they won in Auction 97 and defaulting on others. The Commission allows winning bidders at auction to default selectively on licenses where the applicant has a sufficient amount of money on deposit to cover the licenses the bidder wishes to retain, plus the associated interim default payment obligations.⁶¹ On October 1, 2015, the Commission issued letters to SNR and Northstar notifying them of their interim default payment obligations.⁶² Also on October 1, 2015, SNR and Northstar remitted to the Commission funds which, when added to the funds they already had on deposit with the Commission, were sufficient to satisfy their interim default payment and to purchase those licenses they wished to retain.

18. T-Mobile's request that the DISH entities be considered "former defaulters" is premised on its claims that the conduct of the DISH entities in Auction 97 "disrupted" the auction, undermined the integrity of the auction process, falsely drove up prices and forced other bidders to overpay for spectrum licenses offered in that auction, and likely harmed bona-fide small businesses that desired to place bids by preventing them from competing.⁶³ T-Mobile also asserts that SNR's and Northstar's decisions to

⁵⁵ *Id.* at 5.

⁵⁶ DISH Entities Joint Response to Reply of AT&T Services Inc., AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, at 2 (filed Jan. 7, 2016) (DISH Reply).

⁵⁷ See *Auction of Advanced Wireless Services (AWS-3) Licenses Closes; Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630, para. 24 (WTB 2015) (*Closing Public Notice*).

⁵⁸ Although the Commission recently adopted certain changes to its competitive bidding rules, Auction 97 took place under the Commission's prior rules. See *Part 1 Report and Order*, 30 FCC Rcd 7493 (2015).

⁵⁹ *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015) (*MO&O*).

⁶⁰ *MO&O*, 30 FCC Rcd at 8909 para. 49, 8948-49 para. 151.

⁶¹ See, e.g., *LMDS Communications, Inc., Request for Waiver of Sections 1.2109(a) and (c), 1.2104(g) and 101.1105(b) of the Commission's Rules Regarding BTA117, BTA122, BTA203, BTA215, BTA218, BTA287, BTA317, BTA328, BTA330, BTA335, BTA375 and BTA416*, Order, 15 FCC Rcd 8618, 8622 n.30 (2000).

⁶² See Letter to Mark F. Dever, Esq., Counsel for Northstar Wireless, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, 30 FCC Rcd 10700 (rel. Oct. 1, 2015), and Letter to Ari Q. Fitzgerald, Esq., Counsel for SNR Wireless LicenseCo, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, 30 FCC Rcd 10704 (rel. Oct. 1, 2015); 47 CFR § 1.2104(g).

⁶³ T-Mobile Petition at 2-4, 6.

selectively default on a portion of the licenses they won deprived other bidders of needed spectrum and delayed its deployment.⁶⁴ T-Mobile further argues that the DISH entities “gamed” the auction process such that if they ultimately acquire the defaulted licenses in a re-auction, DISH will have been provided with a substantial economic benefit.⁶⁵

19. Based on these claims, T-Mobile urges the Commission to declare the DISH entities to be “former defaulters” as part of its process of “finalizing the incentive auction application procedures.”⁶⁶ T-Mobile argues that if the Commission finds that the *Application Procedures Public Notice* does not contemplate application of the former defaulter rule to the DISH entities’ conduct or that the Public Notice stands in opposition to application of that rule to the DISH entities’ conduct, the Commission should reconsider the Public Notice.⁶⁷

20. We find that T-Mobile’s request that we declare the DISH entities to be former defaulters and require them to make a larger upfront payment in the incentive auction is outside the scope of the *Application Procedures Public Notice* and therefore we dismiss its Petition for Reconsideration. The Auction *Application Procedures Public Notice* referred to the current Part 1 former defaulter rule, and generally described what it and the accompanying *Part 1 Report and Order* require, but the Public Notice did not adopt the rule, or purport to amend it. Nor did the Public Notice make any determinations on whether specific types of conduct by auction applicants would constitute a default or on whether specific conduct, once cured, would render a defaulter a former defaulter. Finally, the *Application Procedures Public Notice* did not apply the former defaulter rule to the factual circumstances of any specific applicant.⁶⁸ It would be outside the scope of the *Application Procedures Public Notice* to make any determination on whether a specific entity that might apply to participate in the auction would be subject to the requirement of the former defaulter rule. T-Mobile cannot seek reconsideration of the *Application Procedures Public Notice* to obtain a determination on a matter that is not within the scope of the Public Notice because there is nothing in the Public Notice as to which T-Mobile has been “aggrieved or [as to which its] interests are adversely affected.”⁶⁹

21. As an alternative to its petition for reconsideration, T-Mobile seeks a declaratory ruling that for purposes of the DISH entities’ participation in the incentive auction, they are “former defaulters” under section 1.2106(a) of the competitive bidding rules. In its reply, T-Mobile argues that the Commission “need not consider” its petition for reconsideration, and should issue a declaratory ruling “addressing the former defaulter rule” in this context.⁷⁰ We find that a declaratory ruling in this instance would be inappropriate. We also find that T-Mobile’s requested declaratory ruling would be an improper way of amending Section 1.2106(a), and in any event would be inconsistent with the Commission’s prior findings with respect to the DISH entities’ conduct. Accordingly, we decline to issue the declaratory ruling T-Mobile requests.

⁶⁴ T-Mobile Petition at 3.

⁶⁵ T-Mobile Petition at 4.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 7.

⁶⁸ See AT&T Reply at 3-4 (An order on reconsideration of the *Application Procedures Public Notice* is not “necessary or appropriate”).

⁶⁹ 47 U.S.C. § 405(a). The Commission’s rules provide for dismissal of petitions for reconsideration that “relate to matters outside the scope of the order for which reconsideration is sought,” and therefore “plainly do not warrant consideration.” See 47 CFR §§ 1.106(p)(5), 1.429(l)(5).

⁷⁰ T-Mobile Reply at 5, 9.

22. The window for filing short form applications to participate in the forward auction opened on January 27, 2016, and the filing deadline is February 10, 2016.⁷¹ At this junction, it is unknown whether any of the DISH entities will submit an application to participate in the forward auction. Moreover, it remains to be seen what the applicant submitting such an application will state in its application with regard to its status under the former defaulter rule. The Commission may exercise its discretion to issue a declaratory ruling when it will terminate a controversy or remove uncertainty.⁷² Here, the controversy is of T-Mobile's own making, in advance of any determination by any of the DISH entities to submit an application and become a qualified bidder in the forward auction. The uncertainty a prospective applicant faces in not knowing whether a potentially competing bidder will be required to make a larger upfront payment is inherent in the pre-auction process and faced by all competing bidders in our spectrum auctions.⁷³

23. The Commission is not obligated to issue advisory opinions in response to a request for declaratory ruling and in numerous cases has found it inappropriate to do so.⁷⁴ In the particular context of the Commission's spectrum auctions program, the Commission has previously refused to issue a declaratory ruling in advance of an auction about how certain rules will be applied to particular circumstances of individual applications, noting that it would be premature to do so.⁷⁵ T-Mobile presents no circumstance or argument that persuades us to depart from this precedent.

24. Moreover, even if we were inclined to issue declaratory rulings on individual applications in advance of an auction, we would not do so in this instance. T-Mobile argues that the Commission must

⁷¹ *Forward Auction Application Filing Window Opens Today at Noon After One-Day Weather Delay; FCC Form 175 Deadline Extended to February 10, 2016*, Public Notice, DA 16-89 (WTB rel. Jan. 27, 2016).

⁷² See 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). T-Mobile suggests that a declaratory ruling would be appropriate because the DISH entities engaged in what it terms "controversial behavior." T-Mobile Reply at 2. Section 1.2(a) gives the Commission discretion to issue a declaratory ruling when doing so will resolve a bona fide question or dispute concerning a Commission rule, policy or decision. The term "controversy" does not include subjective characterizations of a party transacting business with the Commission.

⁷³ The Commission established a streamlined pre-auction review process to promote efficiency across the board in all auctions, rather than permit applicants to fully adjudicate all issues relating to prospective competing bidders. See *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 12 (D.C. Cir. 2009) (upholding the two-phase application process in which the Commission conducts a streamlined and limited pre-auction review that relies largely on certifications in the short-form application, and defers a more thorough review until after the auction). See also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, GEN Docket No. 90-264, First Report and Order, 13 FCC Rcd 15920, 15953, para. 90 (1998) ("We believe that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualification issues as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualification of all pending applicants . . .").

⁷⁴ See *Adapso, the Computer Software and Services Industry Ass'n, Inc. et al.*, Order, 10 FCC Rcd 12128, 12128-29 ¶ 5 (1995); *Petition of Motorola Satellite Communications for Declaratory Ruling Concerning Participation of Comsat Corporation in a New Inmarsat Satellite System Designed To Provide Service to Handheld Communications Devices*, Memorandum Opinion and Order, 9 FCC Rcd 7693, 7699 para. 20 (1994).

⁷⁵ *In the Matter of Intelligent Transp. & Monitoring Wireless LLC & AMTS Consortium, LLC*, Order, 21 FCC Rcd 5117, 5120 (WTB 2006), petition for recon. denied, Memorandum Opinion and Order, 22 FCC Rcd 4788 (WTB 2007), application for review denied, Memorandum Opinion and Order, 27 FCC Rcd 7720 (2012).

declare the DISH entities to be “former defaulters” as an “appropriate remedy” that will hold them “accountable for their improper behavior” and cause them to suffer “meaningful consequences.”⁷⁶ T-Mobile admits, however, that it seeks to have the Commission apply the rule to the DISH entities even though neither the former defaulter rule nor several other competitive bidding rules address the conduct of which T-Mobile complains.⁷⁷ This amounts to an argument that the larger upfront payment requirement should be a sanction imposed on the DISH entities as a type of punishment for their actions in Auction 97 and a deterrent to taking similar action in the incentive auction. But T-Mobile makes no attempt to show how the actions of the DISH entities in Auction 97 fall within the language of the rule.⁷⁸

25. Grant of T-Mobile’s request would effectively amend Section 1.2106(a) to fashion a new category of former defaulter that is required to make a larger upfront payment. T-Mobile asks that the DISH entities be declared former defaulters for purposes of the incentive auction based on their bidding activity in Auction 97, and selective default on winning bids afterwards. T-Mobile claims that the DISH entities’ activity in Auction 97 drove up prices to other bidders and prevented some bidders from winning licenses they otherwise would have put to use promptly.⁷⁹ Requiring a larger upfront payment from applicants based on our analysis of their specific practices during a past auction would create a new definition of “former defaulter” and we find that a declaratory ruling is not the proper vehicle by which to amend the Commission’s former defaulter rule.⁸⁰

26. Moreover, the actions of the DISH entities in Auction 97 that serve as the basis for T-Mobile’s arguments were addressed in detail in the Commission’s August 18, 2015, *MO&O*. In that decision, the Commission concluded that while the DISH entities were not entitled to the bidding credits that they claimed, there were no grounds to render an adverse decision on SNR’s and Northstar’s basic qualifications to hold licenses, or to grant any of the relief requested by the parties that had filed petitions

⁷⁶ T-Mobile Petition at 6, 8.

⁷⁷ T-Mobile Petition at 6-7. In its Reply, T-Mobile acknowledges that the former defaulter rule does not address application of the rule to a winning bidder that selectively defaults on its winning bids “coupled” with “auction-altering practices” by the bidder. T-Mobile Reply at 4. We do not find that to be an appropriate basis for issuing a declaratory ruling. Whatever the basis for such a characterization notwithstanding the prior orders of the Commission and the Bureau with respect to the DISH entities’ conduct, the argument begs the question of whether the Commission intended the former defaulter’s larger upfront payment requirement to apply to the specific circumstances T-Mobile cites regarding the DISH entities’ participation on Auction 97, and whether imposition of the requirement in such circumstances would be tantamount to an amendment of the rule.

⁷⁸ T-Mobile has previously acknowledged that “the Commission has taken a narrow view of Section 1.2106(a),” finding that the larger upfront payment requirement “covers only those entities that have been notified of a debt and failed to pay it.” T-Mobile October 30 Letter at 4 n.10 (citing *Application Procedures Public Notice* at 11080, para. 138 n.270).

⁷⁹ T-Mobile Petition at 3-4; T-Mobile Reply at 3-4.

⁸⁰ See *supra* note 32. We note that in its most recent Part 1 rulemaking proceeding, the Commission narrowed the scope of the individuals and entities to be considered for purposes of the former defaulter rule. See 47 CFR § 1.2105(a)(2)(xii), (a)(4); see also *Updating Part 1 Report and Order*, 30 FCC Rcd at 7568, para. 175. For purposes of the certification under section 1.2105(a)(2)(xii), the applicant may exclude from consideration any cured default on a Commission license or delinquency on a non-tax debt owed to a Federal agency for which any of the following criteria are met: (1) the notice of the final payment deadline or delinquency was received more than seven years before the FCC Form 175 filing deadline; (2) the default or delinquency amounted to less than \$100,000; (3) the default or delinquency was paid within two quarters (i.e., six months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding. In their Opposition, the DISH entities assert that they fall under the “cured default” exception to the former defaulter rule, having paid all of the applicable interim default payments within the relevant six-month period. DISH Opposition at 8. T-Mobile did not address this point in either its Petition or its Reply. Given our determination that a declaratory ruling is inappropriate in any event, we need not address this question.

to deny their applications.⁸¹ The Commission further found that SNR's and Northstar's bidding activity did not violate the Commission's rules governing Auction 97.⁸² T-Mobile did not file a petition to deny or otherwise participate in either the SNR or Northstar license application proceedings and it therefore lacks standing to challenge the determinations in the *MO&O*. However, even if T-Mobile had participated in the licensing proceedings, its Petition filed on November 30, 2015, would have been untimely. Under the Communications Act of 1934 and the Commission's rules, any petition for reconsideration was required to be filed within thirty days from the date upon which the *MO&O* was released.⁸³ For these reasons, T-Mobile may not challenge the Commission's determinations in the *MO&O* with respect to the DISH entities, nor may T-Mobile seek a declaratory ruling to raise anew issues that have already been decided in that order.⁸⁴

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, as amended, 47 C.F.R. §§ 0.131(c), 0.331, the Petition for Reconsideration filed by PBP Group, LLC, Bulloch Cellular, Inc., Pineland Cellular, Inc., and Planters Rural Cellular, Inc., is DISMISSED.

28. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, as amended, 47 C.F.R. §§ 0.131(c), 0.331, the Petition for Reconsideration filed by T-Mobile USA, Inc., is DISMISSED and its Request for Declaratory Ruling is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman
Chief
Wireless Telecommunications Bureau

⁸¹ 30 FCC Rcd at 8951, para. 156.

⁸² 30 FCC Rcd at 8890-91, para. 9.

⁸³ 47 U.S.C. § 405(a) provides that a "petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Section 1.106(f) of the Commission's rules implements section 405(a) and provides that the "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action" 47 CFR § 1.106(f).

⁸⁴ In addition, the factual basis for T-Mobile's effort to create a new kind of former defaulter based upon the nature of the DISH entities' conduct in the AWS-3 auction is inconsistent with the Bureau's prior determination that such conduct did not "constitute gross misconduct, misrepresentation, or bad faith." See Letter to Mark F. Dever, Esq., Counsel for Northstar Wireless, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, 30 FCC Rcd 10700 (rel. Oct. 1, 2015), and Letter to Ari Q. Fitzgerald, Esq., Counsel for SNR Wireless LicenseCo, LLC, from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, 30 FCC Rcd 10704 (rel. Oct. 1, 2015).