

STATEMENT OF COMMISSIONER AJIT PAI

Re: 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, File No. 0006670613, File No. 0006670667, Report No. AUC-97AUC.

When the FCC's Wireless Telecommunications Bureau disclosed that DISH Network Corp. (DISH)—a Fortune 250 corporation with annual revenues of \$14 billion and a market capitalization of over \$32 billion—owned 85% of two companies that claimed over \$3 billion in small business discounts in the AWS-3 auction, I called for the FCC to conduct a thorough investigation.¹

Having completed that investigation, my colleagues and I now conclude that the two companies—Northstar Wireless, LLC (Northstar) and SNR Wireless LicenseCo, LLC (SNR)—are controlled by DISH and thus are ineligible for any small business discounts. They now owe the U.S. government \$3.3 billion. This is the right answer under the law, and it is a win for taxpayers and legitimate small businesses.

At the outset, I want to thank the staff of the Wireless Telecommunications Bureau and the Office of General Counsel for their expertise and attention to detail in handling this matter. When I proposed an investigation, I had an open mind as to the proper outcome. After all, what should be unlawful and what actually is unlawful can be two different things. I hoped FCC staff would offer sober, meticulous analysis of the complex relationships and conduct at play in the AWS-3 auction. They did exactly that, scouring many pages of contractual arrangements, studying the bidding during the auction, and unearthing all relevant precedents. I'm grateful for the work they have done and for Chairman Wheeler's decision to devote the resources necessary for the agency to do its due diligence.

Here is what the staff found and what we ratify today: DISH maintains an extensive level of control over SNR and Northstar, thus eliminating any possibility that they are independent small businesses. To begin, SNR and Northstar are deeply indebted to DISH. Combined, the two companies generated revenues of \$0 leading up to the FCC's spectrum auction. But as a result of their spectrum purchases, they now owe DISH approximately \$10 billion. This leverage alone could lead many reasonably to conclude that DISH would control these entities. But DISH went even further to cement its dominance. DISH entered into about two dozen separate contracts with the two companies. Those agreements give DISH control over nearly every aspect of SNR and Northstar, including decisive input into their policy, financial, employment, business, marketing, technology, and deployment decisions.

Take just one of those agreements—what is referred to as the “LLC Agreement.” One part of that agreement contains 19 wide-ranging provisions that specify decisions that the companies cannot make without DISH's prior written consent. For example, the companies cannot deviate by more than 10% from any line item in an annual budget without first obtaining DISH's consent. Thus, if an annual budget included \$10,000 for office supplies, Northstar or SNR would need DISH's concurrence to spend more than \$11,000 or less than \$9,000. Nor could these two companies—which purport to be independent wireless licensees—obtain any additional spectrum (regardless of the cost) without first getting clearance from DISH. Taken as a whole, these and the many other controls DISH put in place go far beyond any legitimate protections for an arm's length investor. They smack instead of the wizard controlling the entire show from behind the curtain.

In addition to its dense web of contractual controls over the supposedly independent small businesses, DISH used those businesses to carry out an unparalleled level of coordination during the

¹ Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program, Press Release, <http://go.usa.gov/3fcXj> (Feb. 2, 2015); Statement of Commissioner Ajit Pai on How Abuse of the FCC's Small Business Program Hurts Small Businesses, Press Release, <http://go.usa.gov/3fcXH> (Mar. 16, 2015).

auction. Analysis shows that they engaged in nearly 4,000 instances of coordinated bidding. This includes hundreds of cases where all three companies placed the exact same bid on the exact same license in the exact same round. This and other forms of coordination gave the DISH entities a significant advantage over every other bidder in the auction. This conduct not only sent false signals regarding the level of demand in particular markets, but also allowed the DISH entities to maintain bidding eligibility deeper into the auction and raise costs on other bidders.

It bears mentioning that this *Order* does not necessarily end the government's inquiry. As we made clear before the auction started, "[r]egardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace."² I leave it to the U.S. Department of Justice's Antitrust Division to decide whether any conduct exhibited during the auction and described herein runs afoul of the Sherman Act's proscriptions.

But for the FCC's part, we are taking strong action to ensure that companies adhere to the letter of the law. This *Order* represents an important step toward ensuring that our designated entity program benefits legitimate, independent small businesses and respects American taxpayers and consumers alike.

² *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, AU Docket No. 14-78, Public Notice, 29 FCC Rcd 8386, 8398-99, para. 35 (WTB 2014); see also *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures*, WT Docket No. 97-82, Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 21558, 21560-61, para. 4 & n.17 (1999); *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7689, para. 12 (1994) (“[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws.”); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6869 n.134 (1994) (“[A]pplicants will also be subject to existing antitrust laws.”).