

SUPPORTING STATEMENT

The Federal Communications Commission (Commission) is seeking approval from the Office of Management and Budget (OMB) for a revision to a currently approved collection, with no change in burden estimates. The currently approved collection requires a minor revision to implement new collection requirements resulting from the Commission's adoption of new and modified rules prohibiting certain communications for full power and Class A television broadcast licensees and for applicants seeking to participate in the forward auction component of the broadcast incentive auction (BIA), and requiring such covered parties to file a report with the Commission within a specified period of time if they make or receive a prohibited communication. The Commission also requests that the title of this information collection be changed to "Section 1.2105(c), Bidding Application and Certification Procedures; Sections 1.2105(c) and Section 1.2205, Prohibition of Certain Communications" to reflect the revised information collection.

A. Justification:

1. *Circumstances that make the revised collection necessary.* The Commission seeks emergency processing under the Paperwork Reduction Act (PRA), 5 U.S.C. § 1320.13. The Commission is requesting approval from OMB for this revised information collection no later than twenty six (26) days after it is received at OMB.

Current Information Collection Requirement Which Received OMB Review and Approval:

Section 1.2105(c)(1) of the Commission's rules prohibits auction applicants from cooperating or collaborating with respect to, discussing or disclosing to each other in any manner the substance of their bids or bidding strategies from the short-form application filing deadline to the post-auction down payment deadline. On September 27, 2001, the Commission released a Seventh Report and Order, *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, WT Docket No. 97-82, FCC 01-270, 16 FCC Rcd 17546 (2001), amending section 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited under section 1.2105(c)(1) to report such a communication to the Commission in writing immediately, but in no case later than five business days after the communication occurs.

Statutory authority for this currently approved information collection is contained in sections 154(i) and 309(j) of the Communications Act, as amended, and section 1.2105(c) of the Commission's rules. See 47 U.S.C. §§ 4(i), 309(j)(5); 47 C.F.R. § 1.2105(c).

Revised Information Collection Requirement Which Requires OMB Review and Approval:

On February 22, 2012, the President signed the Spectrum Act, which, among other things, authorized the Commission to conduct incentive auctions, and directed that the Commission use this innovative tool for an incentive auction of broadcast television spectrum to help meet the Nation's growing spectrum needs.¹

On June 2, 2014, the Commission released a Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, FCC 14-50, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*), in which it adopted general rules to govern the reverse and forward components of the BIA.² The rules include new requirements for parties that might participate in the reverse auction, similar to those in section 1.2105(c) that have long applied to applicants in most prior Commission auctions, prohibiting certain communications and requiring a covered party that makes or receives a prohibited communication to file a report of such a communication with the Commission, along with procedures for reporting potentially prohibited communications. Subject to certain exceptions, section 1.2205(b) of the Commission's rules provides that, beginning on the deadline for submitting applications to participate in the reverse auction and until the results of the incentive auction are announced by public notice, all full power and Class A broadcast television licensees are prohibited from communicating directly or indirectly any incentive auction applicant's bids or bidding strategies to any other full power or Class A broadcast television licensee or to any forward auction applicant. See 47 C.F.R. § 1.2205(b). Section 1.2205(c) requires any party that makes or receives a communication prohibited by section 1.2205(b) to report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. See 47 C.F.R. § 1.2205(c). Section 1.2205(d) provides the procedures for filing any reports required under section 1.2205(c). See 47 C.F.R. § 1.2205(d).

The Commission also adopted a corresponding rule in the *Incentive Auction R&O* for forward auction applicants prohibiting certain communications in the context of the BIA, in addition to the Commission's existing prohibited communications rules that have long applied to applicants in most prior Commission auctions under section 1.2105(c)(1) and that will apply to forward auction applicants in the BIA. Subject to certain exceptions, the Commission's rules provide that, beginning on the deadline for submitting applications to participate in the forward auction and until the results of the incentive auction have been announced by public notice, all forward auction applicants are prohibited from communicating directly or indirectly any incentive

¹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (Spectrum Act), codified at 47 U.S.C. §§ 309(j)(8)(G), 1452.

² The broadcast incentive auction (BIA) will have three main components: (1) a "reverse auction" in which broadcast television licensees will submit bids to voluntarily relinquish their spectrum usage rights in exchange for defined shares of proceeds from the "forward auction"; (2) a "repacking" of the broadcast television bands; and (3) a "forward auction" of initial licenses for flexible use of the newly available spectrum. See Spectrum Act § 6403(a), (b) and (c) (codified at 47 U.S.C. § 1452(a), (b), (c)); see also Spectrum Act § 6001(16) and (30) (defining "forward auction" and "reverse auction," respectively).

auction applicant's bids or bidding strategies to any full power or Class A broadcast television licensee. In connection with adopting the new rule section, the Commission amended its rules to require forward auction applicants that make or receive a communication that is prohibited under the new rule to file a report of such a communication with the Commission. As a result of amendments to various other provisions in section 1.2105(c) adopted in the *Part 1 R&O* discussed below, the rule prohibiting certain communications for forward auction applicants that will apply specifically in the context of the BIA has been redesignated as section 1.2105(c)(6) from section 1.2105(c)(8).

On July 21, 2015, the Commission released a Report and Order in which it updated many of its Part 1 competitive bidding rules.³ Of relevance to the information collection at issue here, the Commission amended the prohibited communications rule in section 1.2105(c)(1) of its rules that has long applied to applicants in most prior Commission auctions, and which will be applicable to forward auction applicants in the BIA, to provide that, "all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider [of communications services] that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline[.]"⁴ The Commission made no changes in the *Part 1 R&O* to the scope or substance of the reporting requirement. However, as a result of amendments to various other provisions in section 1.2105(c) adopted in the *Part 1 R&O*, the prohibited communications reporting requirement has been redesignated as section 1.2105(c)(4) from section 1.2105(c)(6).⁵

The Commission seeks approval for a revision to its previously approved collection of information under OMB Control Number 3060-0995 to permit the collection of reports concerning prohibited communications required by new sections 1.2205(c) and 1.2205(d), redesignated section 1.2105(c)(4), and new and redesignated section 1.2105(c)(6), of the Commission's rules. 47 C.F.R. §§ 1.2105(c)(4), (c)(6), 1.2205(c), (d).

Statutory authority for the revised information collection is contained in sections 154(i), 309(j), and 1452(a)(3) of the Communications Act, as amended, and sections 1.2105(c)(4)(as

³ See *Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, and Third Report and Order, 30 FCC Rcd 7493 (2015), modified by Erratum, DA 15-959 (rel. Aug. 25, 2015) (*Part 1 R&O*).

⁴ *Part 1 R&O*, 30 FCC Rcd 7493, 7577, para. 199 (as modified by Erratum); 47 C.F.R. § 1.2105(c)(1). The changes to this rule adopted by the Commission will become effective on November 17, 2015 (see 80 Fed. Reg. 56764 (Sept. 18, 2015)).

⁵ As discussed above, section 1.2105(c)(6)(as redesignated) contains provisions applicable to communications between forward auction applicants and full power or Class A broadcast licensees with respect to the bids or bidding strategies of BIA applicants. The redesignation of the section reference for this rule will become effective on November 17, 2015 (see 80 Fed. Reg. 56764 (Sept. 18, 2015)).

redesignated), 1.2105(c)(6)(as redesignated), 1.2205(c), and 1.2205(d) of the Commission's rules. See 47 U.S.C. §§ 4(i), 309(j)(5), 1452(a)(3); 47 C.F.R. §§ 1.2105(c)(4)(as redesignated), (c)(6)(as redesignated), 1.2205(c), (d).

2. *Use of information.* The Commission's rules prohibiting certain communications in Commission auctions are intended to reinforce existing antitrust laws, facilitate detection of collusive conduct, and deter anticompetitive behavior, without being so strict as to discourage pro-competitive arrangements between auction participants. They also help assure participants that the auction process will be fair and objective, and not subject to collusion. The information collected through the Commission's existing reporting requirement under section 1.2105(c) allows the Commission to enforce the prohibition on forward auction applicants by making clear the responsibility of parties who receive information that potentially violates the rules to promptly report to the Commission, thereby enhancing the competitiveness and fairness of its spectrum auctions. The revised information collection under redesignated section 1.2105(c)(4), new and redesignated section 1.2105(c)(6), and new sections 1.2205(c) and 1.2205(d) will likewise help the Commission enforce the prohibition on reverse and forward auction applicants, further assuring incentive auction participants that the auction process will be fair and competitive. The prohibited communication reporting requirement required of covered parties with respect to the forward and reverse auctions will enable the Commission to ensure that no bidder gains an unfair advantage over other bidders in its auctions and thus enhances the competitiveness and fairness of Commission's auctions.

The information collected will be reviewed and, if warranted, referred to the Commission's Enforcement Bureau for possible investigation and administrative action. The Commission may also refer allegations of anticompetitive auction conduct to the Department of Justice for investigation.

3. *Technological collection techniques.* Pursuant to the Commission's rules, parties that make or receive a prohibited communication must file reports "as directed in public notices detailing procedures for bidding in the incentive auction. If no public notice provides direction, the party making the report shall do so in writing to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available, including electronic transmission such as email." See 47 C.F.R. §§ 1.2105(c)(4) (as redesignated), 1.2205(d). The Wireless Telecommunications Bureau recently released a public notice, *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, DA 15-1129 (rel. Oct. 6, 2015) (*Prohibited Communications PN*), clarifying that the "reports must be filed with Margaret W. Wiener, the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available. Any such report should be submitted by email to Ms. Wiener at the following e-mail address: auction1000@fcc.gov. Any report in hard copy must be delivered only to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 6423, Washington, D.C. 20554." The Commission developed a centralized e-mail address for collecting the information to reduce both public and agency administrative burden. Because parties must respond by the most

expeditious means available, the Commission expects that in almost all cases, parties will submit their reports by email.

4. *Efforts to identify duplication.* There will be no duplicative information collected. The information sought is unique to covered parties and is not already available because the Commission does not impose a separate similar information collection on such parties. Thus, there is no similar data available under another information collection.

5. *Impact on small entities.* As explained in the Final Regulatory Flexibility Analysis included in the *Incentive Auction R&O*, the Commission does not believe that the costs and/or administrative burdens associated with the reporting requirements will unduly burden small entities. The prohibited communications reporting requirement adopted for covered parties with respect to the reverse auction, and the corresponding reporting requirement for forward auction applicants specifically in the context of the BIA, extends to such covered parties the same reporting obligation that has long been in place for applicants in most prior Commission auctions. The Commission believes that applying the same prohibited communications reporting requirement equally to all covered parties promotes fairness. Moreover, the Commission believes that the filing requirement places a *de minimis* reporting burden upon auction participants because it merely requires those who make or receive a communication prohibited by sections 1.2105(c)(1), 1.2105(c)(6)(as redesignated), and 1.2205(b) to send an e-mail or letter to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau describing the facts of a communication that appears to be prohibited. Finally, despite the large number of small businesses that have participated in the auctions program since its inception, an extremely small percentage of auction participants have made or received communications that have violated the prohibited communications rule. The Commission believes that the vast majority of applicants comply with the Commission's rules and do not engage in prohibited behavior, and that this will continue to be the case. Therefore, the Commission expects this reporting requirement to have little impact on small businesses generally.

The Commission is committed to reducing regulatory burdens on small businesses whenever possible, consistent with the Commission's other public interest responsibilities. In conformance with the Paperwork Reduction Act of 1995, the Commission is making an effort to minimize the burden on all respondents. The Commission has therefore made available tutorials and related information to assist respondents, including small entities, in understanding their reporting obligations. Recognizing that a number of broadcasters may not previously have participated in a Commission auction, and that all broadcasters are new to the reverse auction process, the Commission has also indicated that it will continue to conduct extensive efforts to educate broadcasters about important aspects of the auction process, including the prohibition of certain communications. To that end, the Commission recently released the *Prohibited Communications PN*, which provides guidance regarding the prohibition of certain communications during the BIA and the reporting requirements for parties that make or receive any prohibited communications.

6. *Consequences if information is not collected.* The Commission believes that, like the currently approved reporting requirement, the revised reporting requirement will act as a deterrent to would-be disseminators of prohibited information and thereby enhance the

competitiveness and fairness of the incentive auction. The Commission also believes generally that any burden associated with the revised reporting requirement is outweighed by the advantages presented by a fair auction process that does not allow some bidders to gain an advantage over others through collusive behavior. The revised reporting requirement benefits all bidders, including small businesses. First, it enhances the competitiveness and fairness of the auction process. Second, general confidence in the integrity of the Commission's auctions should increase. In short, the Commission concludes that the public policy benefits substantially outweigh the minimal impact the reporting requirement imposes. The Commission cannot further reduce the burden of this requirement by exempting certain parties such as small businesses. The Commission has found that it cannot in good conscience alter the uniform standards of behavior required of all auction participants, even if to do so might assist small businesses.

7. *Special circumstances.* The reporting requirement in section 1.2105(c) of the Commission's rules as currently approved do not have any of the characteristics that would have required separate justification under 5 C.F.R. § 1320.5(d)(2), and the reporting requirement in sections 1.2105(c)(4)(as redesignated), 1.2205(c), and 1.2205(d) of the Commission's rules do not change the characteristics such that a separate justification is now required. Covered parties that make or receive a prohibited communication under sections 1.2105(c)(1), 1.2105(c)(6)(as redesignated), or 1.2205(b) are required to report such a communication to the Commission pursuant to section 1.2105(c)(4)(as redesignated) or 1.2205(c) and (d), as applicable, immediately, but in no case later than five business days after the communication occurs. Covered parties are required only to submit a report to the Commission describing the facts of a communication that appears to be prohibited.

8. *Federal Register notice; efforts to consult with persons outside the Commission.* Emergency approval is being sought for this revised information collection, and the Commission seeks a waiver of the 60-day notice requirement in 5 C.F.R. § 1320.8(d) due to the emergency nature of this request. However, the Commission has published a 21-day emergency PRA notice in the Federal Register seeking public comments on the revised information collection (*see* 80 FR 69663 [Nov. 10, 2015]).

The Commission will follow all of the regular OMB clearance processes and procedures for the revised information collection upon approval of its emergency request, and will publish the necessary notices in the Federal Register when seeking regular OMB approval.

9. *Payments or gifts to respondents.* Respondents will not receive any payments or gifts.

10. *Assurances of confidentiality.* The Commission will take all reasonable steps to protect the confidentiality of all Commission-held data of a reverse auction applicant consistent with the confidentiality requirements of the Spectrum Act and the Commission's rules. *See* 47 U.S.C. § 1452(a)(3); 47 C.F.R. § 1.2206. In addition, to the extent necessary, a full power or Class A television broadcast licensee may request confidential treatment of any report of a prohibited communication submitted to the Commission that is not already being treated as confidential pursuant to section 0.459 of the Commission's rules. *See* 47 C.F.R. § 0.459. Forward auction applicants are entitled to request confidentiality in accordance with section 0.459 of the Commission's rules, 47 C.F.R. § 0.459.

11. *Questions of a sensitive nature.* Neither the currently approved nor the revised information collection asks questions of a sensitive nature.

12. *Estimate of the time burden of the revised collection on respondents.* The reporting requirement only arises when covered parties make or receive a communication prohibited under section 1.2205(b) of the Commission's rules that is reportable under section 1.2205(c). See 47 C.F.R. §§ 1.2205(b), (c). The Commission expects there to be few instances of prohibited communications to be reported. Thus, while it is difficult to estimate the number of respondents, the Commission expects that there will be no more than **10 respondents filing and 10 responses** in any given year.

With regard to the time burden, the Commission believes that, depending on the complexity and level of communication involved, it will take each party approximately **2 hours** to investigate the communication with in-house staff.

Further, the Commission believes that it will take each party approximately **1.5 hours** to consult with in-house counsel regarding the information to be reported.

The Commission also believes that it will take each party approximately **1.5 hours** to prepare and file a report with the Commission regarding the prohibited communication.

10 respondents x 2 hours to consult with in-house staff = 20 hours

10 respondents x 1.5 hours to consult with outside counsel = 15 hours

10 respondents x 1.5 hours to prepare and file a report with the FCC = 15 hours

Total: 50 hours

13. *Estimate of the cost burden of the revised collection on respondents.* The Commission estimates that respondents will prepare the submission with in-house staff, such as in-house counsel or the equivalent. Respondents will also consult with outside counsel and need legal assistance for them as well.

Where outside counsel is used, the Commission believes that the time burden will be approximately **1.5 hours** for consultation and **1.5 hours** for preparation of the submission. Assuming a **\$300/hour** rate for outside counsel, the cost of consultation and/or submission preparation will be:

10 respondents x 1.5 hours for legal consultation x \$300/hour = **\$4,500.**

10 respondents x 1.5 hours for legal document preparation/submission x \$300/hour = **\$4,500.**

Total Annual Cost: \$4,500 + \$4,500 = \$9,000.

14. *Estimate of the cost burden of the revised collection on the Commission.* The Commission estimates that four staff attorneys (GS-15/5, at \$68.56/hour) will review these filings for approximately 1 hour = \$68.56.

(4) attorneys @ \$68.56/per hour x 10 responses = \$2,742.40

Total Annual Cost to the Federal Government is: \$2,742.40

15. *Program changes or adjustments from the revised collection.* The Commission is reporting no change in burden for the revised collection. The currently approved collection requires a minor revision to implement a new Commission rule requiring a covered party with respect to the reverse auction that makes or receives a prohibited communication to file a report of such a communication with the Commission that is similar to the requirement that has long been applied to applicants in most prior Commission auctions under section 1.2105(c), and to implement a modification to section 1.2105(c)(4)(as redesignated) of the Commission's rules to require forward auction applicants that make or receive a communication that is prohibited under 1.2105(c)(6)(as redesignated) to file a report of such a communication with the Commission. The Commission believes that applying the new reporting requirement concerning a prohibited communication to covered parties with respect to the reverse auction and applying the modified reporting requirement to forward auction applicants will not measurably increase the estimated average amount of time for respondents to comply with the reporting requirement across the range of covered parties or for Commission staff to review reports of prohibited communications. Therefore, there are no program changes or adjustments to this collection.

16. *Collections of information whose results will be published.* Neither the currently approved information collection nor the revised collection will be published for statistical use. As discussed above, the Commission will take all reasonable steps to protect the confidentiality of all Commission-held data of a reverse auction applicant consistent with the confidentiality requirements of the Spectrum Act and the Commission's rules. See 47 U.S.C. § 1452(a)(3); 47 C.F.R. § 1.2206. In addition, to the extent necessary, a full power or Class A television broadcast licensee may request confidential treatment of any report of a prohibited communication submitted to the Commission that is not already being treated as confidential pursuant to section 0.459 of the Commission's rules. See 47 C.F.R. § 0.459. As discussed above, forward auction applicants are entitled to request confidentiality in accordance with section 0.459 of the Commission's rules.

17. *Display of expiration date for OMB approval of information collection.* The Commission has approval under the currently-approved information collection to not display the expiration date for the information collection. The Commission seeks continued approval to not display the expiration date for the revised collection. The Commission publishes a list of OMB-approved information collections in section 0.408 of the Commission's rules, 47 C.F.R. § 0.408, and will continue to publish the OMB control number and OMB expiration date for this collection in the list contained in section 0.408 of its rules.

18. *Exceptions to certification statement for Paperwork Reduction Act submissions.* There are exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods:

Neither the currently approved information collection nor the revised collection employ statistical methods, and the use of such methods would not reduce the burden or improve accuracy of results.