

SUPPORTING STATEMENT

The Federal Communications Commission (Commission) requests an extension from the Office of Management and Budget (OMB) for a currently approved collection under OMB Control Number 3060-0995.

A. Justification:

1. *Circumstances that make the collection necessary.* 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) (*Seventh R&O*), 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.

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 broadcast incentive auction (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

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 BIA has 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).

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) 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 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 was redesignated as section 1.2105(c)(6) from section 1.2105(c)(8) when originally adopted.³

On July 21, 2015, the Commission released a Report and Order in which it updated many of its Part 1 competitive bidding rules (*Part 1 R&O*).⁴ 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,

³ The redesignation of the section reference for this rule became effective on November 17, 2015 (see 80 Fed. Reg. 56764 (Sept. 18, 2015)).

⁴ 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*).

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[.]”⁵ 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 was redesignated as section 1.2105(c)(4) from section 1.2105(c)(6).⁶

In November 2015, the Commission sought approval OMB under its Paperwork Reduction Act (PRA) emergency processing provisions, 5 U.S.C. § 1320.13, for a revision to its approved collection of information under OMB Control Number 3060-0995 to permit the collection of reports concerning prohibited communications required by sections 1.2105(c)(4), 1.2105(c)(6), 1.2205(c) and 1.2205(d) of the Commission's rules. 47 C.F.R. §§ 1.2105(c)(4), (c)(6), 1.2205(c), (d). On December 10, 2015, the Commission received emergency approval from OMB for the revised information collection. The information collection requirements under OMB Control Number 3060-0995 have not changed since the approval of the revised collection on December 10, 2015. The Commission is requesting continued OMB approval for the information collection requirements under OMB Control Number 3060-0995 that were approved in the Commission's November 2015 emergency submission.

Statutory authority for this 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), 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), 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 reporting requirement allows the Commission to enforce the prohibition on covered parties 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 the Commission's auctions and enabling the Commission to ensure that no bidder gains an unfair advantage over other bidders. 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.

⁵ *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 became effective on November 17, 2015 (see 80 Fed. Reg. 56764 (Sept. 18, 2015)).

⁶ 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 became effective on November 17, 2015 (see 80 Fed. Reg. 56764 (Sept. 18, 2015)).

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 the bidding that was the subject of the reported communication or, 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), 1.2205(d). The Commission has centralized the reporting of this information to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, and permits the reporting and collection of this information by e-mail to reduce both public and agency administrative burden. Because parties must respond in writing by the most expeditious means available, the Commission expects that in almost all cases, parties will submit their reports by e-mail.

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 Analyses included in the *Seventh R&O* and 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 Commission believes that the filing requirement places a *de minimis* reporting burden upon covered parties because it merely requires those who make or receive a communication prohibited by the Commission's rules 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. Moreover, 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 and other covered parties 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 (see, e.g., *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, 30 FCC Rcd 10794 (2015)).

6. *Consequences if information is not collected.* The Commission believes that the reporting requirement acts as a deterrent to would-be disseminators of prohibited information and thereby enhances the competitiveness and fairness of the incentive auction. The Commission also believes generally that any burden associated with this 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 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 of the reporting requirement. The Commission cannot further reduce the burden of this requirement by exempting certain parties such as small businesses. The Commission cannot 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 as currently approved does not have any of the characteristics that would require separate justification under 5 C.F.R. § 1320.5(d)(2). Covered parties that make or receive a communication prohibited by the Commission's rules are required to report such a communication to the Commission 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.* Pursuant to 5 C.F.R. § 1320.8, the Commission published a 60-day notice in the Federal Register on March 30, 2016 (see 81 FR 17710) regarding the extension of the information collection requirements under OMB Control Number 3060-0995. No comments were received from the public.

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 covered party may request confidential treatment pursuant to section 0.459 of the Commission's rules for any report of a prohibited communication submitted to the Commission that is not already being treated as confidential. See 47 C.F.R. § 0.459.

11. *Questions of a sensitive nature.* This information collection does not ask questions of a sensitive nature.

12. *Estimate of the time burden of the collection on respondents.* The reporting requirement only arises when covered parties make or receive a communication prohibited under the Commission's rules. 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 and consult with in-house staff regarding the communication.

Further, where consultation with outside counsel regarding the information to be reported is necessary, the Commission believes that it will take each party approximately **1.5 hours** to consult with outside counsel.

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 investigate and consult with in-house staff = 20 hours

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

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

Total: 50 hours

In-house Cost: Where in-house staff is used, assuming a rate equivalent to the hourly rate of a GS-15, Step 5 government staff member (\$69.56/hour), the cost of consultation and/or submission preparation will be:

10 respondents x 2 hours for legal investigation and consultation x \$69.56/hour = **\$1,391.20.**

10 respondents x 1.5 hours to consult with outside counsel as necessary x \$69.56/hour = **\$1,043.40.**

10 respondents x 1.5 hours for legal document preparation/submission x \$69.56/hour = **\$1,043.40.**

Total In-House Cost: \$1,391.20 + \$1,043.40 + \$1,043.40 = \$3,478.00.

13. *Estimate of the cost burden of the collection on respondents.* Some respondents may work exclusively with in-house staff to prepare and file the report, however, the Commission anticipates that respondents may also consult with outside counsel regarding the information to be reported, and may have outside counsel prepare and submit the report. Where outside counsel is used, the Commission estimates that it will take outside counsel approximately **1.5 hours** for consultation and **1.5 hours** for preparation and submission of the report.

Assuming a **\$300/hour** rate for outside counsel, the cost of consultation and/or preparation and submission of the report 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 collection on the Commission.* The Commission estimates that four staff attorneys (GS-15, Step 5, at \$69.56/hour) will each review these filings for approximately 1 hour.

Four (4) attorneys x \$69.56/hour x 10 responses = \$2,782.40

Total Annual Cost to the Federal Government is: \$2,782.40

15. *Program changes or adjustments from the collection.* The Commission is reporting no change in burden for the collection. Therefore, there are no program changes or adjustments to this collection.

16. *Collections of information whose results will be published.* The information collected under this collection will not be published.

17. *Display of expiration date for OMB approval of information collection.* The Commission seeks continued approval to not display the expiration date for this information 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:

This information collection does not employ any statistical methods, and the use of such methods would not reduce the burden or improve accuracy of results.