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On March 29, 2016, the Federal Communications Commission ("FCC") will begin its Television Broadcast Incentive Auction. Television broadcasters will first bid in a "reverse" auction to return their spectrum to the government for cash, and wireless carriers then will bid in a "forward" auction to purchase the returned spectrum. This is the only major spectrum auction currently planned in the US, and some parties are estimating that total auction proceeds could reach $60B. The total amount of spectrum available for wireless purchase will not be known until the end of the broadcaster "reverse" auction, but estimates range from 84 to 120 MHz.

In an attempt to inject new competition into the wireless industry, spectrum set-asides and discounts will be available to forward auction bidders that qualify as new entrants and/or small businesses. With applications to participate in the auction due in October, now is the time for qualifying entities to consider whether they want to bid for spectrum and also for investors to consider whether an investment in an auction participant is an attractive business opportunity.

New entrant benefits

The FCC will reserve up to 30 MHz of spectrum in each license area for entities that currently have less than 45 MHz of below-1-GHz spectrum in that license area. This spectrum set-aside essentially forecloses AT&T and Verizon Wireless from bidding on the reserved spectrum in most markets, leaving Sprint and T-Mobile, along with new market entrants and smaller carriers, free to bid for it. The exact amount of reserved spectrum will be determined by the total amount of spectrum returned by broadcasters, and the reserve will not be triggered until the auction bidding has met certain revenue and pricing thresholds on a national basis.

Small business benefits

For the incentive auction, the following benefits are available:

- 25% bidding credit for a very small business (average gross revenues for the preceding 3 years of $20M or less)
- 15% bidding credit for small businesses (average gross revenues for the preceding 3 years of $55M or less)
- 15% bidding credit for rural telecommunications carriers (less than 250,000 total customers for wireless, wireline, broadband and cable service), regardless of revenues

To determine whether a company meets the gross revenue threshold for small or very small business eligibility, the company's revenues must be aggregated with the revenues of its attributable owners. In general, attributable parties include all parties that hold controlling interests and all commonly-controlled affiliates of an entity that holds a controlling interest, under the FCC's expansive definition of "control." The company's controlling parties must also hold more than 50% of the voting interests and actually control the company. There is no bright-line limit on the amount of equity interest a non-controlling party may hold.

Aside from organic growth, a party's bidding credit status must be maintained for 5 years (the "unjust enrichment" period), or the party will need to pay back its bidding credits on a declining scale. This is the same rule that is currently in effect that applies to prior auctions—once a license has been held for 5 years, the party does not need to maintain its bidding credit status.

For the incentive auction, there will be a $150M cap on the amount of total bidding credits available to small/very small businesses, with a subcap of $10M for bidding credits in smaller markets (defined as markets with a population of 500,000 or less).

Parties that win spectrum in the incentive auction using bidding credits may lease up to 100% of the spectrum to third parties—there is no independent requirement that they build out or use any spectrum themselves. A spectrum lease for more than 25% of the spectrum to an entity with a 10% or greater ownership interest in the licensee does, however, trigger an attribution threshold which could affect a party's continuing eligibility for bidding credits.

If you have any questions about this alert or the FCC's spectrum auction plans, please contact one of your Cooley team members or one of the attorneys identified above.

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