

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

In the Matter of)	
)	
Updating Part I Competitive Bidding Rules)	WT Docket No. 14-170
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	

PETITION FOR PARTIAL RECONSIDERATION

Kim M. Keenan, Esq.
President and CEO
David Honig, Esq.
President Emeritus and Senior Advisor
Nicol Turner-Lee, Ph.D.
Vice President and Chief Research and
Policy Officer
Charlyn Stanberry, Esq.
Cathy Hughes Fellow
3636 16th Street NW, Suite B-366
Washington, DC 20010
(202) 332-0500
kkeenana@mmtconline.org

October 19, 2014

Table of Contents

INTRODUCTION	3
BACKGROUND	3
ADDITIONAL EVIDENCE IN SUPPORT OF SECONDARY MARKET INCENTIVES.....	7
A. Consideration of Secondary Market Transactions in the M&A Waiver Context.....	9
B. Consideration of Secondary Market Transactions in the Mobile Wireless Competition Reports...	10
C. Recommendation to Congress for a Revised Tax Certificate Policy that Encompasses Secondary Market Transactions	10
D. Bidding Credits and Installment Payment Options for Companies that Perform Secondary Market Transactions with DEs	12
CONCLUSION.....	12

INTRODUCTION

The Multicultural Media, Telecom and Internet Council (“MMTC”), pursuant to 47 C.F.R. §1.429, respectfully petitions for partial reconsideration of *Updating Part I Competitive Bidding Rules, WT Docket No. 14-170 et al., Report and Order and Order on Reconsideration, FCC 15-80* (released July 21, 2015) (“*Competitive Bidding R&O*”) insofar as it declines to consider implementing four potential incentives for secondary market transactions.

In this Petition, MMTC presents the Declaration of Dr. Coleman Bazelon, one of the nation’s leading wireless economists and an expert on secondary market transactions. Dr. Bazelon describes the criticality of secondary market transactions in enabling the FCC to administer a competitive and diverse wireless marketplace. Further, he explains why each of MMTC’s four potential incentives for secondary market transactions would operate in practice to advance competition and diversity. Dr. Bazelon concludes that MMTC’s four incentive proposals “provide potent tools for the FCC to encourage and incentivize minority participation in wireless transactions.”¹

The *Competitive Bidding R&O* identified the need for secondary market incentives, but did not approve any. Armed with the evidence in this Petition, the Commission is now better empowered to convene all stakeholders and flesh out incentives that will advance the Commission’s objectives of competition and diversity with minimal need for agency oversight.

BACKGROUND

Reconsideration is sought in order to give effect to the agency’s longstanding recognition of the need for secondary market transaction incentives in promoting competition and diversity. As the Commission recognized in 2000, “a robust and effective secondary market for spectrum

¹ Bazelon Declaration at 10.

usage rights could help alleviate spectrum shortages by making unused or underutilized spectrum held by existing licensees more readily available to other users to help promote the development of new, spectrum efficient, technologies.”² The leading scholarly article on secondary markets in wireless found that such transactions can help new entrants “that could succeed in the market but for access to spectrum” and can promote efficient spectrum utilization when secondary markets have low transaction costs.³

In 2014, the Commission sought comment on mechanisms to enable designated entities (“DEs”) to participate fully in the wireless industry.⁴ In response, several parties encouraged the Commission to take steps to encourage secondary market transactions. Notably, one of the largest carriers, AT&T, suggested that providing incentives for secondary market transactions may offer a more direct path to including small businesses in the telecommunications industry, and may be a more effective mechanism for DE participation in wireless markets than facilitating participation in auctions due to the cost of licenses and capital needed to build networks.⁵

Thereupon the Commission sought further comment on, *inter alia*, the question of “whether there are alternative frameworks that the Commission should consider to promote a diverse telecommunications ecosystem, including incentives for secondary market transactions

² *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, Policy Statement*, 15 FCC Rcd 24,178 ¶2 (2000).

³ John Mayo and Scott Wallsten, *Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets*, Information Economics and Policy 22 (2010) at 63.

⁴ See also *Updating Part I Competitive Bidding Rules, Notice of Proposed Rulemaking*, 29 FCC Rcd 12426, 12440 ¶36, 12443-44 ¶47, 12444 ¶50, 12471 ¶127 (2014) (*Part I NPRM*).

⁵ See AT&T Reply Comments in Response to the *Part I NPRM*, WT Docket 14-170 *et al.* (filed March 6, 2015), at pp. 11-12.

or virtual networks that could provide a more direct path into the industry for all entities, including DEs.”⁶

In response, MMTC offered that “the Commission would perform a great public service by considering proposals that would add to a reformed DE program by offering alternatives to auction participation that advance telecom ownership diversity, such as incentives for secondary market transactions or the sale of wireless spectrum to DE’s or minority or women owned business enterprises (MWBEs), which could then operate facilities or lease the spectrum.”⁷

MMTC explained:

While many MWBEs enter the wireless marketplace through the DE program, their growth into sizeable, sustainable institutions will depend on their ability to access spectrum through the secondary markets. Through this initiative, some MWBEs have been successful in raising capital to acquire licenses, especially when the seller actively seeks DE or MBE participation.

Moreover, the promotion and extension of largely regulation-free secondary market transactions enables MWBEs to attain scale through leasing and wholesaling some of their spectrum – thus providing the MWBEs with a springboard to attain facilities-based status and scale without discriminatory limitations on these practices. Specific proposals to foster more secondary market transactions by the Commission could include:

1. Consideration of secondary market transactions as a factor in whether to give a carrier rule waivers relating to ownership, including the mergers and acquisitions (“M&As”) context, and possibly attendant to the IP Transition.
2. Consideration of secondary market transactions as a factor in determining whether to report to Congress that the wireless marketplace is competitive.
3. Restoration and refinement of the Tax Certificate so that it would apply to secondary market transactions, enabling the seller to defer payment of the capital gains taxes on the sale upon reinvestment in comparable property.
4. Giving carriers that engage in secondary market transactions a bidding credit

⁶ *Updating Part I Competitive Bidding Rules, Public Notice*, 30 FCC Rcd 4153, 4163-64 ¶¶ 23-24 (2015) (“*Part I PN*”).

⁷ MMTC Comments in Response to the *Part I PN*, WT Docket 14-170 *et al.* (filed May 15, 2015) (“*MMTC Part I PN Comments*”).

in wireless auctions, or an opportunity to pay for the spectrum in installments.⁸

In the *Competitive Bidding R&O*, the Commission rejected all four of these incentive proposals:

We decline to adopt MMTC's recommendation that we consider secondary market transactions as a factor in deciding whether to grant a carrier rule waivers relating to ownership.⁹ In its Mobile Spectrum Holdings proceeding, the Commission addressed commenters' recommendations that the Commission adopt a similar consideration in the spectrum holdings context, namely, that elements of a proposed transaction that facilitate diversity be considered in balancing the benefits and harms of the transaction. We declined in the *Mobile Spectrum Holdings Report and Order* [29 FCC Rcd 6133, 6138-39 ¶¶281-82 (2014)] to adopt a formal set of guidelines, noting that the Commission retains the authority to consider all factors that could affect the likely competitive impact of a proposed transaction. We find that the limited record in this proceeding does not provide sufficient justification to support adopting such a requirement, and therefore decline to adopt MMTC's recommendation. We note again that the Commission retains the right to consider such factors in evaluating specific future transactions, as the Commission has "encouraged the use of secondary market transactions ... to transition unused spectrum to more efficient use and allow network providers to obtain access to needed spectrum for broadband deployment" [citing *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd 10698, 10715 ¶46 (2012) (citing Federal Communications Commission, *Connecting America: The National Broadband Plan*, Recommendation 5.7, at 83 (rel. Mar. 16, 2010)).]

We also decline to adopt MMTC's recommendation that we consider secondary market transactions as a factor in determining whether to report to Congress that the wireless marketplace is competitive. We note that the Wireless Telecommunications Bureau recently sought comment on the role of secondary market transactions in a public notice in connection with the annual report on the state of competition in mobile wireless [citing *Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, Public Notice*, 30 FCC Rcd 5062, 5066 (2015).] Accordingly, we will address the issue of secondary market transactions as a factor in determining whether access to sufficient spectrum exists for multiple service providers to be able to provide robust competition in the context of that proceeding.

⁸ MMTC *Part I PN* Comments at 18-19 (fns. omitted). The National Urban League filed an *ex parte* letter in support of Proposal 4 – *i.e.*, that a carrier that participates in secondary market transactions with designated entities could be provided a bidding credit for future auctions. See National Urban League *Ex Parte* Letter in Response to the Part I PN, WT Docket 14-170 *et al.* (filed July 9, 2015) at 2.

⁹ *Id.*

With regard to MMTC's other recommendations, MMTC did not offer any specific details about how they might be implemented, nor did we receive any comment from other commenters on this topic or on MMTC's recommendations. Moreover, we observe that MMTC's recommendation that we restore our previous tax certificate policy appears to be outside the scope of our authority [citing Congress' repeal of the policy in Pub. L. No. 104-7 §2, 109 Stat. 93 (1995).] We therefore conclude that the record is not sufficiently developed to allow us to act on this suggestion.¹⁰

A party presenting a new idea to an administrative agency cannot always guess in advance when its idea will capture the agency's attention, or whether the agency will regard the record as sufficiently developed to enable the agency to consider the idea. In this instance, the agency clearly agrees with MMTC that more should be done to promote secondary market transactions as a mechanism to advance competition and diversity in a capital-intensive industry vital to the nation's economy.

ADDITIONAL EVIDENCE IN SUPPORT OF SECONDARY MARKET INCENTIVES

To flesh out the record, MMTC respectfully attaches the Declaration of Dr. Coleman Bazelon, an expert on the economics of secondary markets in wireless. Dr. Bazelon frequently advises regulatory and legislative bodies, including the Commission and Congress, on spectrum policy.¹¹

In his expert testimony, Dr. Bazelon states that secondary market transactions are a critical tool in the FCC's administration of competitive markets in spectrum.¹²

Spectrum is a scarce and valuable economic resource that will remain in high demand for years to come. As a consequence, licensed spectrum prices have experienced a significant upward trend over the past decade. As spectrum is a necessary input into any wireless or spectrum-based services, increasing costs of this asset create a growing

¹⁰ *Competitive Bidding R&O*, FCC 15-80 at 68-69 ¶158 (fns. omitted).

¹¹ For Dr. Bazelon's full bio, see <http://www.brattle.com/experts/coleman-d-bazelon>

¹² Bazelon Declaration at 3-4 (fns. omitted).

barrier to entry for minority entrepreneurs and businesses who endeavor to provide such services.

To address this impediment and correct for past market failures, the FCC instituted a program of bidding credits in spectrum license auctions. But auctions are not the only way that firms gain access to licensed spectrum. As auctions become less of an opportunity for new entrants, secondary market transactions provide carriers—and potential carriers—the access to spectrum needed to facilitate entry into the wireless sector.

As stated in the MMTC White Paper [S. Jenell Trigg and Jeneba Jalloh Ghatt, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry* (Feb. 25, 2014) (“White Paper”), available at http://mmtconline.org/wp-content/uploads/2014/02/Web-Unembargo-MMTC-WHITEPAPER_WIRELESS-OWNERSHIP_2.24.14_FINAL-2.pdf (last visited October 19, 2015) (“White Paper”)], the FCC broadened opportunities for secondary market transactions by permitting licensees to lease their licensed spectrum to third parties dating back to 2003. In its 2003 Section 257 Triennial Report to Congress, the Commission lauded its secondary markets initiatives as a major accomplishment stating that the changes helped “further the ability of licensees and entities that seek to gain access to spectrum, including entrepreneurs and small businesses, to enter into arrangements best suited [to] the parties’ respective needs and business models.” Further, spectrum leasing arrangements have been vital to the business models utilized by MWBEs. These types of arrangements provide increased access to capital, which in turn helps firms become facilities-based competitors – a goal also shared by the FCC.

The secondary markets policy also helps the FCC meet its obligation to promote efficient spectrum use of a scarce commodity among a wide range of competitors, including MWBEs. Further, the FCC can facilitate these transactions attendant to mergers or acquisitions. As activity peaks in the wireless industry, especially around mergers and acquisitions, I agree with the findings of MMTC’s White Paper that the FCC should put its best effort forward to ensure that diversity and inclusion are more compelling factors in their determination of whether any transaction meets the public interest standard. Such action can further MWBE ownership of commercial wireless spectrum.

Dr. Bazelon describes the importance of secondary market transactions to minority entrepreneurship:¹³

Historically, minorities have not fully participated in the wireless sector. According to MMTC’s White Paper, media ownership within the burgeoning sectors of the media and telecommunications industries—radio, broadcast, cable and satellite—is still a pressing policy concern. In the FCC’s first decade of its auction authority, it implemented three congressionally-approved tools and regulatory initiatives to promote participation by

¹³ Bazelon Declaration at 7-8 (fns. omitted).

designated entities such as minority- and women-owned businesses: bidding credits, installment payment plans, and special closed auctions for DEs only. Over a ten-year span, more than 1,400 small businesses, including MWBEs, won spectrum licenses as a result of the competitive bidding process. Yet in more recent times and over the course of fifty-six wireless auctions during the past twenty years, the majority of designated entities that currently hold wireless licenses are incumbent rural telephone companies, very few of which are new entrants, and even fewer are MWBEs.

More broadly, past discriminatory policies have impeded wealth accumulation in minority communities. This historic lack of access to capital and its legacy today creates a market failure—minority investors are at a disadvantage when making capital intensive investments, such as required for wireless broadband networks.

To remedy this market failure, the FCC instituted programs that provide economic advantage to minorities, or small businesses, and those who do business with them. One such program was the Tax Certificate Policy (1998-2005) which allowed firms that sold broadcast stations and cable systems to minorities to defer capital gains tax payments. Another program to remedy market failures has been bidding credits in spectrum license auctions; and some of these updates have been adopted under the FCC's current *Report and Order*. These are discussed in more detail below.

As further discussed in more detail in the following section, I believe that there are additional tools the FCC could deploy in the wireless sector to correct the market failure of minority access to capital—all of which are addressed in MMTC's White Paper. Generally, each proposal below creates direct or indirect economic incentives for industry players to partner or transact with minority businesses. Such economic incentives are important to level the playing field and promote minority involvement in the wireless sector.

Here is Dr. Bazelon's analysis of MMTC's four incentives:¹⁴

A. Consideration of Secondary Market Transactions in the M&A Waiver Context

Merger activity in the telecommunications industry, including the wireless sector, remains strong. As the industry consolidates, increasing scrutiny is placed on each subsequent proposed merger or acquisition. Consequently, anything that weighs in favor a particular deal will become increasingly valuable. Here, consideration of secondary market transactions that involve minorities by the parties under review can create an independent incentive to engage in such transactions with minorities.

When deciding whether or not a license transfer is in the public interest, the FCC considers many different factors. Much attention is focused on the competitive effects of a merger, but other elements can enter the decision process. In broadcast regulation,

¹⁴ Bazelon Declaration at 8-10 (fns. omitted).

there is a strong line of precedent for this type of consideration to create incentives to promote the interests of minorities [citing *Stockholders of Infinity Broadcasting Corporation*, 12 FCC Rcd 5012, 5036 ¶47 (1996) and other authorities]. Adding consideration of secondary market transactions with minorities would create similar incentives in the wireless sector.

Merger applicants should be encouraged to describe, in the Public Interest Statements accompanying their merger applications, how the parties' secondary market transactions have promoted minority entrepreneurship. Clearly, spectrum license transactions that involve minorities, especially ones where minorities are the assignees of a license transfer, would be foremost in any recitation of merging party activities in this area.

B. Consideration of Secondary Market Transactions in the Mobile Wireless Competition Reports

Shining a light on voluntary secondary market transactions reinforces their importance to the Commission. The mandated Mobile Wireless Competition Reports (formerly, Annual CMRS Competition Reports) serve as the FCC's evaluation of wireless industry competition. The reports are widely read and regularly cited as authority on the wireless industry. What the FCC includes in the reports speaks to what it considers important in the industry. Consequently, adding information about secondary market transactions involving minorities would signal the importance the FCC places on this issue. Furthermore, greater involvement in the wireless sector by minority businesses would certainly add support to any future finding by the FCC of a competitive wireless industry.

To include this information, the FCC would need to include questions about minority participation in secondary market transactions in its Public Notice that solicits information for its Annual CMRS Competition Report. The Commission has precedent with this type of proceeding through its Video Competition Report.

The FCC shining a light on secondary market transactions involving minorities, and publicizing companies involved in such transactions, would create a new positive externality associated with those transactions, while surfacing the market entry barriers experienced by MWBEs. The positive publicity from the FCC is valuable to any firm. The statements from the Mobile Wireless Competition Reports can then be used in all Public Interest statements, whether for M&A or other purposes, as well as more general corporate image promotion.

C. Recommendation to Congress for a Revised Tax Certificate Policy that Encompasses Secondary Market Transactions

Tax certificates, where as a result of being involved in a favored transaction a party can defer capital gains tax obligations, are a powerful policy tool. They confer real financial value to firms and therefore create significant incentives. The FCC's minority tax certificate program provided such incentives to effectively promote minorities in broadcasting and cable; such tax certificates applied to wireless secondary market transactions would be expected to be similarly effective.

D. Bidding Credits and Installment Payment Options for Companies that Perform Secondary Market Transactions with DEs

Bidding credits in FCC auctions are understood to be an effective method to compensate for historical discrimination and to promote competitive new entry. Bidding credits and installment payments usable in forthcoming FCC auctions are a direct financial benefit to bidders. A bidding credit of five percent would provide a carrier doing secondary market transactions a modest but significant advantage over otherwise similarly situated carriers without significantly diluting the advantage conferred on designated entities on account of the historic disadvantages they have faced in securing access to spectrum.

CONCLUSION

In light of the critical nature of this issue and the pendency of the DTV Incentive Auction, MMTC encourages the Commission to convene subject matter experts and stakeholders in order to rapidly gather any additional information the agency would need to have before it. Further, the Commission should issue a further Public Notice that encourages stakeholders to file comments on the issues raised in this Petition.

Respectfully submitted,

Kim M. Keenan, Esq.
President and CEO
David Honig, Esq.
President Emeritus and Senior Advisor
Nicol Turner-Lee, Ph.D.
Vice President and Chief Research and
Policy Officer
Charlyn Stanberry, Esq.
Cathy Hughes Fellow
3636 16th Street NW, Suite B-366
Washington, DC 20010
(202) 332-0500
kkeenan@mmtconline.org

October 19, 2015

Attachment (Declaration of Dr. Coleman Bazelon, electronically filed concurrently with this Petition)