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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Broadband PCS Spectrum Auction Scheduled for January 12, 2005,
Comment Sought on Reserve Prices Or Minimum Opening Bids And Other
Auction Procedures, *Public Notice* DA 04-1639**

**Petition for Rulemaking or, Alternatively, a Waiver of the
Entrepreneur Eligibility Restrictions on C Block Licenses in the
Broadband Personal Communications Services, RM-11019**

**Petition for Amendment of Part 1 of the Commission's Rules to
Include a Personal Net Worth Limitation for Competitive Bidding Small
Business Preference Eligibility, RM-10956**

Notice of Ex Parte Meetings

Dear Ms. Dortch:

On behalf of the Minority Media and Telecommunications Council ("MMTC"), and pursuant to Section 1.1206 of the Commission's rules, this is to notify you of *ex parte* meetings held in connection with the above-captioned proceedings.

On September 15, 2004, Frank Montero, a member of the Board of Directors of MMTC, and the undersigned met with Commissioner Martin, his Legal Advisor, Sam Feder, and Sheryl Wilkerson, Legal Advisor to Chairman Powell. In the meetings the representatives of MMTC reiterated their support, as evidenced by MMTC's pleadings in these proceedings, for the retention in Auction 58 of the Commission's Designated Entity ("DE") rules, including the Commission's current C-Block eligibility rules.

During the meetings, the representatives of MMTC noted that the C-Block eligibility restrictions were originally created to satisfy Sections 309(j) and 257 of the Communications Act, 1/ provisions that require the Commission to create meaningful

1/ 47 U.S.C. §§309(j), 257.

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opportunities for small, minority-owned and women-owned businesses to acquire the spectrum needed to provide wireless services. When promulgating the rules the Commission indicated that a broadband PCS spectrum set-aside (“C-Block spectrum set-aside”) was essential to satisfying its statutory obligations. ^{2/}

The representatives of MMTC also noted that the Commission’s August 2000 decision to modify the C-Block rules ^{3/} eliminated more than half of the C-Block spectrum set-aside and that a further erosion of the C-Block spectrum set-aside would make it impossible for the Commission to satisfy its statutory obligations. Although opponents of the DE rules contend that even more cutbacks in the DE program — on top of those already made in 2000 — ought to be regarded as a fair “compromise,” the representatives of MMTC pointed out that calling a cutback a “compromise” does not make it lawful. Two federal courts of appeals have made it clear that severe cutbacks in the Commission’s only applicable civil rights policy would most likely be impermissible. A generation ago, in *Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529, 534 (2d Cir. 1977), the Second Circuit reversed a Commission rulemaking decision that would have significantly reduced the number of stations subject to outreach requirements, holding that the Commission did not contend, “nor could it,” that the need for equal employment opportunity had diminished since the EEO rule was adopted in 1969. This summer, in *Prometheus Radio Project v. FCC*, Slip Op., pp. 96 n. 38 (3d Cir., June 26, 2004), the Third Circuit reversed the Commission’s repeal of its Failing Station Solicitation Rule, holding that “[r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make the broadcast spectrum available to all people ‘without discrimination on the basis of race,’” citing 47 U.S.C. §151.

In its meetings MMTC also noted that in the pending Section 257 proceeding, the Commission is considering whether race-conscious means to advance minority ownership are constitutionally sustainable. See *Ways to Further Section 257 Mandate and to Build on Earlier Studies* (MB Docket 04-228), DA 04-1690 (MB, June 15, 2004). Race-neutral means need not be entirely exhausted before race-conscious initiatives may be considered. *Grutter v. Bollinger*, 123 S.Ct. 2325, 2344 (2003). However, failure to allow a race-neutral initiative such as the existing DE program a reasonable chance to succeed could undermine a subsequent effort to develop constitutionally sustainable race-

^{2/} Implementation of Section 309(j) of the Communication Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 414-15 ¶16 (1994).

^{3/} See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000).

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conscious means of advancing minority ownership. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (set-aside plan not narrowly tailored where “there does not appear to be any consideration of the use of race-neutral means”); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 (1986) (narrow tailoring “requires consideration” of “lawful alternative and less restrictive means.”)

MMTC also noted that, if anything, the Commission’s DE program needs to be strengthened. Like most federal programs, the DE program is imperfect and can be improved. If a “compromise” is to be struck, then, it should be for the Commission to continue the DE program in its present form, while at the same time taking note of legitimate criticisms of the DE program raised by both its supporters and its opponents, and referring these criticisms to the Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Advisory Committee”). The Diversity Advisory Committee can then hear the views of advocates of both sides, and develop recommendations to either strengthen and improve the DE program, or develop alternative programs likely to advance Congress’ ownership diversification goals, as expressed in Sections 151, 257 and 309(j)(1) of the Communications Act.

The representatives of MMTC also took the opportunity during the meetings to refute some of the false contentions made in these proceedings by CTIA and the larger carriers that would not qualify to bid on the closed C-Block licenses under the existing DE rules as follows:

- False Contention: DE companies do not build out their licenses, but merely flip them to the larger companies.

Truth: Numerous DEs have successfully built out their networks after having acquired their licenses through closed bidding. Examples of successful DE build outs include: Omnipoint, Cook Inlet, Leap, Metro PCS, Chase, ClearComm, TeleCorp and Tritel, just to name a few. Many successful DEs initially built out and provided service in areas where the larger carriers did not initially wish to operate.

- False Contention: Spectrum partitioning, disaggregation and leasing now afford minority-owned businesses viable alternatives for gaining a foothold in the wireless market place.

Truth: Although MMTC appreciates the steps the Commission has taken to create more secondary market opportunities to access spectrum,

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the fact remains that many of the larger carriers are reluctant to make their spectrum holdings available to potential competitors such as DEs. Once these programs mature, they may become more effective at promoting minority ownership. However, they should not be viewed today as adequate substitutes for the DE spectrum set-aside.

In addition to the discussion summarized above, the representatives of MMTC distributed a resolution on Auction 58 passed by the Emerging Technology subcommittee of the Diversity Advisory Committee and forwarded to the full committee for consideration and passage. The resolution is attached.

Finally, the representatives of MMTC indicated that any proceeding to modify the existing C-Block eligibility rules would unnecessarily delay Auction 58 and introduce a level of uncertainty into the market place that would impair significantly the ability of small, minority-owned and women-owned businesses to secure Auction 58 financing.

An original and one copy of this letter are being submitted for inclusion in the proceeding record.

Sincerely,



Ari Q. Fitzgerald
Counsel for Minority and Media
Telecommunications Council

AQF/bgg
Enclosures

cc: Commissioner Martin
Sam Feder
Sheryl Wilkerson

Description of Auction 58 C-Block Resolution Proposal

The Emerging Technology Subcommittee of the FCC's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Advisory Committee") should recommend to the full Diversity Advisory Committee that it pass a resolution urging the FCC in Auction 58 (scheduled to begin on January 12, 2005) to enforce its existing Designated Entity ("DE") rules, including the rules setting aside certain C-Block broadband PCS spectrum for bidding only by "entrepreneurial" companies (i.e., small, minority or women-owned companies whose gross revenues and total assets are less than \$125 million and \$500 million respectively).^{1/} The Commission should be requested to maintain the existing C-Block rules despite recent requests by the Cellular Telecommunications and Internet Association ("CTIA") and the nation's larger wireless carriers to allow bidding on these licenses by the larger, non-entrepreneurial companies.

The PCS C-Block was initially established by the FCC for bidding exclusively by entrepreneurial companies. Under the original C-Block rules, the larger nationwide wireless carriers could not qualify to participate as applicants in any auction for C-Block licenses. The FCC barred the larger carriers from acquiring C-Block licenses in an effort to satisfy sections 257 and 309(j) of the Communications Act, which mandated that the FCC ensure that small businesses and businesses owned by minorities and women have meaningful opportunities to participate in the provision of spectrum-based services.^{2/}

In 2000, the FCC, in a compromise, modified its C-Block eligibility rules to allow all auction applicants, including the larger wireless carriers, to bid on C-Block licenses covering geographic areas with 2.5 million POPs or greater^{3/} that were taken away from bankrupt company Nextwave on account of Nextwave's inability to pay required license installment payments. That decision effectively made more than half of the C-Block licenses available for bidding by the larger wireless carriers.

Despite the presence of a large number of successful entrepreneurial company bidders, the C-Block spectrum auction held immediately following modification of the C-Block eligibility rules was largely unsuccessful. This was due to the fact that the U.S. Supreme Court in its Nextwave bankruptcy decision subsequently invalidated the auction and required the FCC to reinstate Nextwave's licenses. Thus, none of the entrepreneurial companies that ended up as high bidders for the Nextwave C-Block spectrum were able to realize their dreams of accessing the spectrum.

Earlier this year, however, Nextwave and the FCC reached a bankruptcy settlement providing that Nextwave would return some of its reinstated C-Block licenses to the FCC. Soon thereafter the FCC announced that it would put these C-Block licenses up for auction, indicated its intention to apply the existing C-Block eligibility rules and set an auction

^{1/} See 47 C.F.R. § 24.709.

^{2/} Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 414-15 ¶ 16 (1994).

^{3/} See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000).

date of January 12, 2005. Despite the presence of clear language in the 2000 C-Block decision indicating that the bidder eligibility rules established in that decision would apply to any subsequent auction of C-Block spectrum, ^{4/} CTIA and several of the larger wireless carriers are now urging the FCC to eliminate completely the C-Block spectrum set-aside for entrepreneurial companies and allow the larger wireless carriers to bid on all available C-Block licenses.

If the request to eliminate the C-Block spectrum set-aside is granted, small, minority-owned and women-owned businesses will lose their last and best opportunity to gain a foothold in the wireless market place. Because this issue goes to the heart of the Diversity Advisory Committee's mandate, it is incumbent upon the Diversity Advisory Committee to take a strong and principled position against any further erosion of the FCC's C-Block rules, including the current C-Block spectrum set-aside.

^{4/} See *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd at 16267 ¶1.

Draft Resolution Supporting Retention of C-Block Eligibility Rules for Auction 58

Whereas:

The Commission's Designated Entity ("DE") rules, including the broadband PCS C-Block spectrum set-aside, 47 C.F.R. § 24.709, were developed to satisfy the Commission's obligations under Section 309(j) of the Communications Act to provide small and minority and women-owned businesses ("Entrepreneurial Companies") with meaningful access to the spectrum needed to provide wireless services;

The capital-intensive nature of broadband PCS and the difficulties experienced by Entrepreneurial Companies in accessing capital make it virtually impossible for Entrepreneurial Companies to secure broadband PCS licenses when bidding against well-capitalized incumbents;

Decisions by the Commission since the promulgation of the original C-Block rules have eroded the opportunity of Entrepreneurial Companies to offer broadband PCS;

Notwithstanding significant market challenges, Entrepreneurial Companies have successfully launched and expanded broadband PCS businesses and stand ready to participate in the FCC's upcoming Auction 58;

Entrepreneurial Companies will be successful in raising the capital needed to acquire and build out broadband PCS licenses only if the capital markets perceive that the FCC's C-Block eligibility rules will remain stable and certain;

Therefore, be it

RESOLVED that the Advisory Committee on Diversity for Communications in the Digital Age strongly urges the Commission to maintain in Auction 58 its current DE rules, including the C-Block eligibility rules established in 2000.

Outline of the Arguments in Favor of Maintaining Existing C-Block Rules for Auction 58

- ❖ **An overwhelming Number of Parties, Representing a Breadth of Interests, Have Urged the Commission to Continue to Enforce the C-Block Set-Aside As Is**
 - **32 of 43 parties commenting have endorsed the Commission’s existing C-Block rules**
 - **The Commission heard from a broad cross-section of interested parties**
 - Individual designated entities (“DEs”), DE carriers, rural carriers and investors
 - “DE Supporters” coalition representing 11 national minority organizations, including League of United Latin American Citizens, NAACP and National Urban League support the existing rules
 - American Women in Radio and Television support the existing rules
- ❖ **The Commission Should Not Undertake to Weaken These Rules Even Further**
 - **The Commission already scaled-back the DE rules for C-Block licenses in 2000**
 - Very substantially reduced the number of Closed licenses in Auction No. 35
 - **Auction No. 35 would have been highly successful (entrepreneurial businesses won 45% of spectrum) had the Supreme Court not required the FCC to reinstate the Nextwave licenses**
 - **The Commission is now merely enforcing the decisions reached in 2000**
 - With Auction No. 35, the Commission announced that those rules “*will apply to any subsequent actions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future*”
 - **“Changed circumstances” widely cited by CTIA and the larger carriers to eliminate Closed licenses actually point to the need to increase, or at least maintain, Closed licenses**
 - Increasing demand for spectrum by the larger carriers places even more pressure on small, minority-owned and women-owned business participation, as does continuing industry consolidation
 - Closed licenses are critical to DE participation, as the Commission originally recognized
 - **39% fewer Closed licenses are available today vs. Auction No. 35**
 - Closed licenses stayed with Nextwave or were assigned to Cingular
 - **Current DE rules fulfill Congress’s mandate under 47 U.S.C. §§ 257 and 309(j) to enhance small business presence and participation of women and minorities**
 - At a time marked by the decline of such participation in communications

- **Rule changes at this time would delay the C-Block auction, disrupt the capital markets and disrupt DE financing plans**