

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Media and Wireless Telecommunications)	GN Docket No. 10-244
Bureaus Seek Comment on Recommendation)	
of the Advisory Committee on Diversity for)	
Communications in the Digital Age for a New)	
Auction Preference for Overcoming)	
Disadvantage)	

COMMENTS OF
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.
MEDIA ALLIANCE
NATIONAL ORGANIZATION FOR WOMEN
NATIONAL HISPANIC MEDIA COALITION
FREE PRESS
RAINBOW PUSH COALITION
BENTON FOUNDATION

The Office of Communication of the United Church of Christ, Inc. (“UCC”), Media Alliance, National Organization for Women (“NOW”), National Hispanic Media Coalition, Free Press, Rainbow PUSH Coalition, and the Benton Foundation (collectively, “*UCC et al.*”), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the Public Notice seeking comment on the recommendation of the Advisory Committee on Diversity for Communications in the Digital Age (the “Advisory Committee”) for a new auction preference.¹

To supplement the Commission’s existing bidding credit programs that provide preferences for small businesses and new entrants, the Advisory Committee recommends that the

¹ Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, Public Notice, GN Docket No. 10-244 (Dec. 2, 2010) (“Public Notice”).

Commission implement an additional preference for individuals who have overcome substantial disadvantages. This new preference aims to enable otherwise-qualified persons or entities who can show that they have overcome substantial disadvantages to compete on comparable footing with other applicants for FCC licenses.²

UCC et al. are pleased that the Media and Wireless Telecommunications Bureaus are considering a proposal to further the interests of underrepresented groups in its competitive bidding process. Under the mandates of Sections 257 and 309(j) of the Communications Act, the Commission is bound to review and eliminate barriers to entry for underrepresented groups and to develop policies to encourage their acquisition of broadcast licenses.³ More specifically, the Commission must “promot[e] economic opportunity and competition . . . [and] disseminat[e] licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women.”⁴ The Commission has long recognized that “minorities and women have experienced serious obstacles in attempting to participate in the telecommunications industry and that their greater participation would enhance the public interest.”⁵

The current proposal for a new auction preference has the potential to be a race- and gender-neutral remedy for the difficulties faced by these groups in the highly competitive auction process. At this early stage, the Advisory Committee has acknowledged that a number of issues concerning the design and implementation of its proposal remain. Rather than addressing the

² Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (Oct. 14, 2010), *available at* <http://www.fcc.gov/DiversityFAC/meeting101410.html>.

³ 47 U.S.C. § 257 (2007); 47 U.S.C. § 309(j)(3)(B) (2007).

⁴ 47 U.S.C. § 309(j)(3)(B).

⁵ See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, 12 FCC Rcd 16802, 16930, ¶ 221 (1997).

specifics of the proposal, *UCC et al.* emphasize that more information is needed to assess the impact of the existing preferences as well as any other preference that may ultimately be adopted. To this end, the Commission must collect and analyze data on current spectrum auction participants and beneficiaries of the existing credits. This information is vital to any future rulemaking proceeding to assess whether existing and proposed preferences further the goals of the Commission as stated under Sections 257 and 309(j).

I. THE COMMISSION NEEDS TO COLLECT DATA ON THE AUCTION PROCESS IN ORDER TO ASSESS EXISTING AND PROPOSED DIVERSITY INITIATIVES

In the Public Notice, the Media and Wireless Telecommunications Bureaus ask how the proposed preference would “provide additional opportunities to individuals and entities that differ from those available under our current bidding credit programs.”⁶ *UCC et al.* believe that it is impossible to answer this question without data on the entities currently participating in and winning auctions.

A. The Commission Lacks Data on the Effectiveness of Existing Bidding Credit Programs

Diversity initiatives similar to the proposed new auction preference have been implemented by the Commission to benefit small businesses and businesses owned by minorities and women.⁷ Despite its stated goals, the Commission has never analyzed whether women or

⁶ Public Notice, at ¶ 3.

⁷ Both the small business credit in wireless auctions and the new entrant bidding credit for broadcast auctions were implemented with the understanding that these preferences would give minorities and women additional opportunities to participate in the auction process. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136, 140, ¶ 5 (1995); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, ¶ 189 (1998) (“*New Entrant Credit Order*”).

minorities have actually benefitted from the bidding preferences.⁸ Unfortunately, anecdotal evidence suggests that bidding credits are not serving their intended purposes in both broadcast and wireless auctions.

In the broadcast context, a number of white men who cannot reasonably be considered “new entrants” have been able to take advantage of the new entrant credit.⁹ For example, Bigglesworth Broadcasting, LLC, an entity founded by long-time radio owners Jeffrey Warshaw and Mike Driscoll, had no attributable media interests at the time of auction because Warshaw and Driscoll had sold all 39 of their broadcast stations for \$256 million shortly before the auction.¹⁰ Upon the sale, Bigglesworth Broadcasting was able to qualify as a “new entrant.” As such, Bigglesworth Broadcasting received a 35% reduction on the cost of 10 prime FM licenses for a total cost reduction of nearly \$10 million.¹¹

In another example, Randy Michaels, former CEO of Clear Channel Radio and founder of Radioactive, Inc., was able to take advantage of the new entrant credit in a 2004 auction of FM radio licenses. Because Radioactive had no attributable interests in any other communications media, it qualified for the new entrant bidding credit.¹² Further, because the discount applies to every license purchased in a single auction, Radioactive received a 35%

⁸ *New Entrant Credit Order*, at ¶ 189.

⁹ See e.g., Gregory F. Rose and Mark Lloyd, *The Failure of FCC Spectrum Auctions*, at 3, available at http://www.americanprogress.org/kf/spectrum_auctions_may06.pdf (concluding that the auction process favors incumbents and auction outcomes skew in favor of “a small subset of bidders – and those bidders are not small entrepreneurs”).

¹⁰ See *Jeff Warshaw is a Connoisseur of Fine Radio*, RADIO INK, March 27, 2006, at 17, available at <http://connoisseurmedia.com/ARCHIVE/content/radioink.pdf>.

¹¹ See Federal Communications Commission, *Auction 37 Applicant Information for Bigglesworth Broadcasting, LLC*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for “Bigglesworth”).

¹² See Federal Communications Commission, *Auction 37 Applicant Information for Radioactive, Inc.*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for “Radioactive”).

reduction on each of the 21 licenses it purchased, resulting in a total cash discount of nearly \$5 million.

Because of a loophole in the credit scheme, the new entrant credit inexplicably favors incumbent bidders who can amass enough capital to purchase multiple licenses in a single auction, rather than women and minorities, who are more likely to be true “new entrants” with limited access to capital. For example, women and minority entities that own four or five stations are not eligible for the credit regardless of their financial status. Thus, rather than helping minority and female entities with limited access to capital, the new entrant credit has made it more difficult for them to compete in broadcast auctions.

Similar evidence in the wireless context suggests that the small business credit is not working to promote participation of minorities and females. Indeed, participation by designated entities in wireless auctions, measured by net value of licenses won, plummeted from an average of more than 70% in six major commercial mobile radio service auctions from 1996 to 2005, to 4% in Auction 66, the first auction after the adoption of new designated entity rules.¹³ Abysmal results again appeared in the very next major auction, Auction 73, where only 2.6% of participants were designated entities.¹⁴ Moreover, “women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses.”¹⁵

The Commission has never undertaken a serious review of the bidding credit programs. This is especially troubling given that the new entrant bidding credit was adopted as a stop-gap

¹³ See Brief for Antares Holding, LLC et al. as Amici Curiae Supporting Petitioners, Council Tree Commc’ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010) (No. 08-2036), at 5 (citation omitted).

¹⁴ *Id.*

¹⁵ Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction, FCC News Release (Mar. 20, 2008).

measure that the Commission vowed to fine-tune “after further development of the record.”¹⁶

Without any such record, it is also unclear how the Commission intends to comply with its legal obligation to continually evaluate auction rules and to adjust those rules “in light of actual experience.”¹⁷

B. Any New Preference Must Be Monitored to Ensure that Policy Goals are Met

Given the lack of oversight with regard to the existing bidding credits, *UCC et al.* stress the need for mechanisms to monitor the effectiveness of any new preference that the Commission may adopt. Moving forward, the Commission should establish a system to keep track of the entities participating and prevailing in spectrum auctions to see if intended groups are in fact benefitting from the preferences. This data will assist the Commission in assessing the efficacy of its regulatory scheme and making adjustments to meet the mandates of Sections 257 and 309(j). Further, if the Commission finds that its policy goals are not being accomplished through race- and gender-neutral means, this data will help to establish an empirical basis to show that race- and gender-based preferences are narrowly tailored to serve a compelling governmental interest, a showing that the Commission would need to make to support the constitutionality of a race-based preference.¹⁸

¹⁶ *New Entrant Credit Order*, at ¶ 189.

¹⁷ *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) (Commission has “duty to finetune its regulatory approach as more information becomes available”); *see also Nat’l Ass’n of Theatre Owners v. FCC*, 420 F.2d 194, 203 (D.C. Cir. 1969) (“[W]hen the premises of [the FCC’s] regulatory approach change, the Commission can and should consider the issues involved.”).

¹⁸ *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-38 (1995) (noting that the question of narrow tailoring in strict scrutiny cases includes an inquiry into whether race-neutral means were considered).

