

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

In the Matter of

Recommendation of the Advisory Committee)	
on Diversity for Communications in the)	GN Docket 10-244
Digital Age for a New Auction Preference for)	
Overcoming Disadvantage)	
)	

To The Commission

**COMMENTS OF THE
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL**

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SUMMARY AND BACKGROUND

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these Comments to further examine components of a new designated entity (“DE”) or other preference for overcoming disadvantages. These Comments are submitted in response to the December 27, 2010 Notice issued by the Media and Wireless Telecommunications Bureaus, seeking comments on a new preference program in its competitive bidding process, as recommended by the Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”).¹

The Overcoming Disadvantages Preference (“ODP”) is the culmination of two years of work by the Commission’s Diversity Committee and its Constitutional Issues and Eligible Entities subcommittees. The ODP would, inter alia, amend the Commission’s current DE rules² in an effort to enhance the pool of qualified applicants for licenses. Currently, the rules allow small and rural businesses to qualify as DEs for auction purposes. The ODP would assist additional candidates to compete effectively in the auction process. ODP could also be applied to broadcast auctions and to non-auction decisions such as non-comparative waivers.

As discussed in detail herein, the ODP is a race and gender-neutral preference that would focus solely on the experiences and efforts of an individual person. These experiences could be physical and mental disabilities, disadvantages flowing from socioeconomic status, or from unequal access to education and jobs. Creating an ODP standard would meet the Commission’s

¹ See 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, DA 10-2259, 75 Fed. Reg. 81274 (December 27, 2010) (“Notice”) (citing Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (October 14, 2010), available at <http://www.fcc.gov/DiversityFAC/meeting101410.html>) (“Recommendation”) (last visited February 7, 2011).

² 47 C.F.R. §1.2110 (2011).

longstanding goals of promoting diversity and competition in spectrum licensing, while fitting squarely within the Commission's authority to establish competitive bidding or spectrum auctions.³

MMTC applauds the bureaus for acting rapidly on the Diversity Committee's Recommendation, and we wish to underscore the need to continue the expedited momentum on this proceeding. Since many of the Commission's current priorities focus on the availability of spectrum, it is imperative that diverse and highly qualified candidates are eligible to compete in future spectrum auctions.

³ 47 U.S.C. §309(j)(4)(D) (2010).

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these comments in reply to the Media and Wireless Telecommunications Bureaus’ Notice, which requests information to assist the Commission in considering the desirability of a new preference program in its competitive bidding process.⁴ This new preference was recommended by the Advisory Committee on Diversity for Communications in the Digital Age (the “Advisory Committee”),⁵ which has explored this issue for over two years.

I. AUTHORITY AND OBJECTIVES

A. The Commission’s Authority To Establish The Overcoming Disadvantages Preference

The Commission has clear authority to establish an ODP preference.⁶ Pursuant to Section 309(j)(4)(D) of the Act, the agency may consider the use of “bidding credits, and other procedures” to ensure that small businesses have the opportunity to participate in spectrum auctions.⁷ Additionally, Section 309(j)(3) directs the Commission to:

[Promote] economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.⁸

The language in the statute is inclusive, not limiting. Many disadvantaged entrepreneurs own and operate small businesses. Therefore, the ODP preference addresses these small businesses, within the meaning of the statute, without triggering any race or gender preferences.

⁴ See Notice at ¶1.

⁵ Id.

⁶ Notice at ¶1.

⁷ 47 U.S.C. §309(j)(4)(D).

⁸ 47 U.S.C. §309(j)(3)(B) (emphasis added).

Authority to adopt the ODP preference is also found in three other statutory provisions: Section 309(a), providing the Commission power to grant licenses if such a grant would serve the public interest, convenience, and necessity;⁹ Section 154(i), which empowers the Commission to design rules and regulations necessary to execute its mandate;¹⁰ and Section 303(g) of the Act, requiring the Commission to “encourage the larger and more effective use of radio in the public interest.”¹¹

B. Assessment Of Disadvantaged Individuals In The Existing Auction Process

The Commission seeks information to assess how individuals who have overcome substantial disadvantages have fared under the existing auction process and the designated entity benefits.¹² The traditional classes of designated entities (“DEs”) include persons who have overcome disadvantages. As broadcast auctions are concerned, the Commission noted in the 2008 Broadcast Diversity Order that many small businesses are minority and women owned businesses.¹³

The Commission’s available studies, though dated, indicate that certain groups have a history of difficulty obtaining an FCC license due to market entry barriers, discrimination, and changes in broadcast and wireless licensing procedures.¹⁴ This is especially true after 1997 when

⁹ 47 U.S.C. §309(a).

¹⁰ 47 U.S.C. §154(i).

¹¹ 47 U.S.C. §303(g).

¹² Notice at ¶2.

¹³ See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, 5925-27 ¶¶6-9 (2008) (“Broadcast Diversity Order”).

¹⁴ See Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present, Ivy Planning Group, at 126-131(December 2000), available at http://www.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited February 6, 2011). The study, prepared for the Commission’s Office of General Counsel, contains over 100 interviews with minority licensees that detail the massive barriers to entry. Overcoming such

auction proceedings became the norm for all spectrum allocations.¹⁵ Further, the Commission altered the DE rules in 2006 in a manner that had the effect of virtually eliminating minority, women, and small business participation and success in spectrum auctions. Prior to the changes in these rules, DE's secured \$23 billion, or 50% of the licenses, which plummeted to 3% or \$1 billion after the change.¹⁶

Those who overcome disadvantages are said to have “grit,” or the perseverance and passion to achieve over the long haul.¹⁷ While some may not fully overcome disadvantages, they persevere “despite failure, adversity, and plateaus in progress. The gritty individual approaches achievement as a marathon; his or her advantage is stamina. Whereas disappointment or boredom signals to others that it is time to change trajectory and cut losses, the gritty individual stays the course.”¹⁸

barriers requires perseverance in the face of the considerable disadvantages associated with winning a license. See also Supplemental Ex Parte Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 et al., at Appx. D (November 20, 2007) (where seventeen minority broadcasters submitted testimony regarding how lack of access to capital and lack of access to opportunity hindered business growth).

¹⁵ See William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes*, at vi-vii (2000), available at http://www.fcc.gov/opportunity/meb_study/capital_market_study.pdf (“It was found that minority broadcast [and wireless] license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision.”)

¹⁶ See FCC Diversity Advisory Committee, Telecom and Broadband Issues Subcommittee, *Proposal to Restore the FCC’s Designated Entity Program*, at 1 (September 14, 2009). Several petitioners, including MMTC, successfully challenged the Commission’s actions. See Council Tree Communications v. FCC, 619 F.3d 235 (3d Cir. 2010), petition for cert. filed (Dec. 22, 2010) (No. 10-834) (vacating the impermissible material relationship rule and the 10-year-hold rule, and remanding the matter to the FCC for further proceedings).

¹⁷ See Recommendation at 3 (citing Angela L. Duckworth, et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 *J. of Personality & Soc. Psychol.* 1087, 1087–1101 (2007), available at <http://www.sas.upenn.edu/~duckwort/images/Grit%20JPSP.pdf> (last visited February 6, 2011) (finding that “grit” is a better predictor of success than IQ score or conscientiousness)).

¹⁸ Id. at 1088.

There is a wealth of literature that supports the proposition that persons who have overcome substantial disadvantages are more likely than others to use Commission licenses in the public interest. People who overcome disadvantages are more likely to value social justice, a clear component of the public interest mandate.¹⁹ People who overcome disadvantages related to stigmatization are also likely to be sensitive to the needs of others who are stigmatized.²⁰

Nobel-laureate economist James Heckman has combined personality psychology's analyses of how non-cognitive factors determine success with economic modeling of capability formation.²¹ Heckman shows that only the most non-cognitively-talented socioeconomically disadvantaged children are able to escape poverty by persevering in the attainment of personal goals. As it turns out, the personality trait of persistence contributes as much or more than the contributions of education to the of already existing cognitive ability.²²

¹⁹ See generally, M.J. Lerner, *The Belief In A Just World: A Fundamental Delusion* (Plenum Press 1980) (finding that people need to believe in a just world and do so by responding to instances of injustice in two primary ways: by blaming the victim for inviting the harm of injustice, or by responding compassionately by compensating the victims in order to redress the harm of injustice). Some research suggests that persons who suffer from a disadvantage are more likely to respond to injustice with compassion. See also Kristin Laurin *et al.*, *Social Disadvantage and the Self-Regulatory Function of Justice Beliefs*, 100 *J. of Personality & Soc. Psychol.* 149, 149-171 (2011). “We predicted and found that the more members of disadvantaged groups believe in societal fairness, the more they believe in their own personal fair treatment, and thus the more motivated they are to pursue long-term goals.” *Id.* at 161. “Relative to members of advantaged groups, members of disadvantaged groups may have more riding on long-term goals that are also more difficult to achieve. Because members of disadvantaged groups have larger stakes associated with their long-term goals, they might be especially interested in calibrating their motivation to factors that will impact their success, such as societal fairness.” *Id.* at 156.

²⁰ See E.C. Pinel, *Stigma Consciousness: The Psychological Legacy of Social Stereotypes*, 76 *J. of Personality & Soc. Psychol.* 114, 114–128 (1999); C.M. Steele, *A Threat In the Air: How Stereotypes Shape Intellectual Identity and Performance*, *American Psychologist*, 52, 613–629 (1997).

²¹ *See* Flavio Cunha & James J. Heckman, *The Economics and Psychology of Inequality and Human Development*, National Bureau of Economic Research Working Paper No. 14695 (2009).

²² James Heckman, *Skill formation and the economics of investing in disadvantaged children*. 132 *Science*, 1900–1902 (2006) (available at

C. The Proposed Preference Will Provide Additional Opportunities For Disadvantaged Individuals

Under the current Rules, small and rural businesses qualify for bidding credits.²³ While the Notice limits its inquiry to changes in the DE program,²⁴ ODP could also provide opportunities for disadvantaged individuals in the form of waivers. For any entity, maintaining a media or telecommunications business is no small task. ODP would provide additional consideration for those that are in the market, or are attempting to enter the market, and are facing disadvantages beyond those that the average entrepreneur may experience.

For example, physically disabled persons are very likely face high health insurance costs, diverting resources from educational and professional development. The result is that many disabled people are denied the opportunity for employment due to lack of training or fear of losing preexisting health benefits upon employment.²⁵ Therefore, having completed a four-year degree faced with financial and physical hardship, a disabled person has demonstrated an ability to overcome a substantial disadvantage. Similar costs may be related to treatment of emotional or mental trauma, such as that resulting from military service.²⁶ ODP may also take into account

http://www.earlychildhoodnm.com/attachments/249_Heckman%20%202006%20Valuing%20prevention%20.pdf (last visited February 7, 2011).

²³ 47 C.F.R. §1.2110.

²⁴ Notice at ¶1.

²⁵ See e.g. Joshua M. Wiener, Medicaid and Work Incentives for People with Disabilities Background and Issues, Urban Institute at 2, 24-37 (2003), available at http://www.urban.org/UploadedPDF/410814_Medicaid_Incentives.pdf (last visited February 6, 2011). “Historically, Medicaid eligibility for persons with disabilities has been tied to an inability to work, which means that individuals had to choose between receiving the medical and long-term care services that they needed and participating in the workforce... For good reasons, people with disabilities were unwilling to risk losing their health coverage.” Id. Although these trends are beginning to change, there is still much work to be done.

²⁶ See Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* at 45-48 (Little, Brown 1995) (the psychological costs of killing include: confusion, conversional hysteria, anxiety, obsessive and compulsive behaviors and other character disorders resulting not just in long-term disability zone, but generally negatively affecting the veterans’

unequal access to institutions of higher education due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or the inequalities that result from discrimination.²⁷ For example, unequal educational opportunities contribute to income immobility. Persons who overcome substantial disadvantages related to lack of income succeed in college because of “persistence.”²⁸

D. The Overcoming Disadvantages Preference Will Serve A Number Of Public And Governmental Interests

As discussed in the Recommendation, an ODP preference must be rationally related to a legitimate government interest.²⁹ Two government issues ODP squarely addresses are diversity of ownership and competition. As discussed above, certain groups have a history of difficulty in obtaining an FCC license due to market entry barriers such as discrimination, and changes in broadcast and wireless licensing procedures.³⁰ ODP would encourage competition by expanding the pool of Commission licensees, thereby providing additional opportunities to highly qualified applicants with challenging personal experiences and possess the drive to succeed. As stated in the Recommendation, ODP does not raise Equal Protection issues that would trigger strict scrutiny review because award preferences are race and gender neutral. Race or gender would

post-combat social integration); Charles W. Hoge, *Once a Warrior, Always a Warrior: Navigating the Transition from Combat to Home – Including Combat Stress, PTSD, and mTBI* at xiii, 177-78 (GPP Life 2010) (arguing throughout that mTBI and PTSD often misdiagnosed and overdiagnosed and that veterans who are diagnosed with especially PTSD are forced to overcome considerable stigmatization).

²⁷ This is not an exhaustive list, but is meant to demonstrate a variety of impediments to accessing higher education.

²⁸ See Stacy Dickert-Conlin, Ross H Rubenstein, *Economic Inequality and Higher Education: Access, Persistence, and Success*, New York, Russell Sage Foundation at 1, 194 (2007) (noncognitive skills and persistence to overcome an initial disadvantage tend to be positively correlated to higher family incomes, suggesting that economically disadvantaged students who persist in the face of considerable initial disadvantages are extraordinary students).

²⁹ Recommendation at 12 (citing Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

³⁰ See pp. 4-5 *supra*.

not create a presumption of disadvantage; and experiencing disadvantage, standing alone, would not trigger a benefit. Rather it is the individual's efforts to overcome the disadvantage – a factor twice removed from race or gender – that would give rise to the credit.³¹

II. ELIGIBILITY FOR THE OVERCOMING DISADVANTAGES PREFERENCE

A. Categories And Assessment Of Disadvantages

The Commission asks what disadvantages may qualify an ODP applicant and how the disadvantages should be assessed and weighed against each other.³² MMTC cites a number of potential disadvantages above, many of which are listed in the Recommendation.³³ While a comprehensive list would add certainty and should be included in the final rule, it may omit disadvantages not currently on the record. Therefore, the Commission should leave itself some flexibility to determine disadvantage on a case-by-case basis.

The Commission should assess applicants' efforts to overcome rather than simply live with such disadvantages. For example, minorities, women, and the disabled have historically faced unequal treatment in hiring.³⁴ These groups have experienced exclusion, without cause,

³¹ See Recommendation at 11-12 (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 555 U.S. 701, 743 (2007) (criticizing the dissenting justices for believing that “individualized scrutiny is simply beside the point” in school assignments); Gratz v. Bollinger, 539 U.S. 244, 276 (2003) (striking down public university’s pro-diversity admissions policy where the admissions review “d[id] not provide for a meaningful individualized review of applicants”); Miller v. Johnson, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class” (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting))).

³² See Notice at ¶¶6-7.

³³ See Recommendation at 4.

³⁴ See Howard Aldrich, Networking Among Women Entrepreneurs, in Women-Owned Businesses 114–118 (Oliver Hagan, Carol Rivchun & Donald Sexton eds., Praeger Publishers 1989) (discussing how women suffer professionally from a lack of access to management positions). A recent study shows that women’s access to management positions – a crucial factor/indicator of women’s ability to overcome a substantial disadvantage – has declined since

from business and professional organizations, thus hindering opportunities to learn from colleagues and network for new business.³⁵ When such individuals speak out against discrimination on the job or in the industry, they may be met with retaliatory behavior from an employer or the institution in question. Those who have faced discrimination, socioeconomic disadvantage, been a victim of a hurricane or any other natural disaster, or have fought for our country and returned home after serving in the military, may have trouble accessing capital or credit necessary to start or maintain a business.³⁶ In these scenarios, unfair hiring and lack of access to capital could be considered the results of disadvantage.

The Commission may also consider subcategories of disadvantage. One example is the distinction some states use for workers compensation claims between permanent partial disability and permanent total disability.³⁷ The inquiry is two-fold, asking whether an applicant

the 1990s. See Philip N. Cohen, et al., Stalled Progress? Gender Segregation and Wage Inequality Among Managers, 1980-2000, 36 *Work and Occupations* 318, 318–342 (2009).

³⁵ See Alan L. Carsrud et al., Entrepreneurs–Mentors, Networks, and Successful New Venture Development: An Exploratory Study, in *Frontiers of Entrepreneurship Research: 1986*, Center for Entrepreneurial Studies, Babson College, at 234–235 (1986) (finding that limited use of mentors by women entrepreneurs was a significant detractor from a successful business launching).

³⁶ The lack of access that minorities, especially African Americans and women, have to capital markets and credit, is well-documented. Analyzing Survey of Consumer Finance data, Blacks pay one percentage point more for mortgages and three percentage points more for car loans than do their White counterparts. See N.S. Chiteji, *Journal of Black Studies*, vol. 41 no. 2, 351-366 (December 15, 2010). Women similarly have problems accessing credit in spite of 1970s legislation like the Equal Credit Opportunity Act. See Alicia Robb, *The Role of Race, Gender, and Discrimination in Business Survival at 20* (2000) (unpublished Ph.D. dissertation, U.N.C.) (finding that although the researchers did not find differences in demand for credit, the lending patterns of these small businesses indicate that women were supplied less credit from the various credit sources); see e.g., Small Business Admin., *Small Business Administration Goaling Report* (2008) available at http://archive.sba.gov/idc/groups/public/documents/sba_homepage/fy2008official_goaling_report.html (last visited February 7, 2011) (women are disproportionately disadvantaged with respect to access to government contracts – women own nearly 29% of all small businesses, but are awarded less than 3.5% of all federal contracting dollars).

³⁷ State disability classificatory schemes define disability as a physical or mental ailment resulting in socioeconomic loss. Therefore, there is a constitutive relation between financial loss

is progressing while continuing to face the disadvantage, or whether the applicant succeeded and overcame the disadvantage. The applicant who continues to face the disadvantage may gain a higher preference than one who has completely overcome the disadvantage and, thus, is not in need of government assistance.

Creating a schedule of substantial disadvantages could include a list and description of circumstances that often result in socioeconomic disadvantage. For example, research shows that women, minorities, and persons who are disabled experience considerable socioeconomic disadvantages as a result of a membership in these classes. Intra-class distinctions also occur, e.g., persons with paraplegia have a higher workforce participation rate than do quadriplegics; and generally, the severity of a physically-limiting disability reduces opportunities for employment.³⁸

To reduce arbitrariness, the Commission may also consider linking the degree to which the person's circumstances caused further socioeconomic disadvantage.³⁹ Socioeconomic-based

and an injury. See Peter S. Barth, Compensating Workers For Permanent Partial Disabilities, Social Security Bulletin, Vol. 65 No. 4, 2003/2004, available at <http://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html> (last visited February 6, 2011). In order to calculate compensation for partial disability, states establish permanent partial disability schedules that rank the severity of disability and the amount of compensation. An example among many is Wisconsin's Permanent Partial Disability schedule, available at http://dwd.wisconsin.gov/wc/medical/ppd_schedule.htm (last visited February 6, 2011).

³⁸ See Christopher Pflaum, et al., Worklife After Traumatic Spinal Cord Injury, 29 J Spinal Cord Med., 377–386 (2006); Bruce D. Meyer and Wallace K. C. Mok, Disability, Earnings, Income and Consumption, University of Chicago, Harris School of Public Policy Studies Working Paper No. 06-10 (2008), available at http://harrisschool.uchicago.edu/faculty/articles/wp_06_10_dec08.pdf (last visited February 7, 2011).

³⁹ Linking socioeconomic disadvantage can help the commission to create empirically detailed guidelines for the determination of a preference. This would advance an individualized, holistic view of *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003). See also EEOC Uniform Guidelines on Employee Selection Procedures, Sec. 13(A), available at <http://www.uniformguidelines.com/uniformguidelines.html#16> (last visited February 6, 2011) (“Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.”) The guidelines support the focus on socioeconomic disadvantage

assessments of disadvantage may be preferable so long as the assessments are narrow and serve the specific purpose of the Commission's action.⁴⁰

B. Overcoming Disadvantages

When measuring the degree of success in overcoming a substantial disadvantage necessary to assess an applicant's eligibility for such a preference,⁴¹ the Commission should not institute a bright line test for disadvantage. Instead, the Commission could compare the net socioeconomic status of the applicant to other persons who have suffered a similar substantial disadvantage.

An example of this is found when comparing the success of college graduates from various socioeconomic backgrounds. A recent Gates Foundation study shows that the completion rate for part-time students who work is far lower than full-time students at community four-year institutions.⁴² Full-time, non-working students graduate more often on time, and therefore earn more income on average. In addition, a Century Foundation Study found that 73% of all college admissions were dominated by the top socioeconomic status quartile.⁴³

because remedying the effects of socioeconomic disadvantage influenced by individual disadvantages is the primary goal of the policy proposal.

⁴⁰ See Richard H. Fallon, Affirmative Action Based on Economic Disadvantage, 43 UCLA L. Rev. 1913, 1950 (1996). Guidelines could be narrowly tailored to address Fallon's three main concerns: (i) the nature of the disadvantages that poverty creates and that affirmative action is intended to offset; (ii) the precise justification, if any, for viewing particular affirmative action preferences as appropriate remedies for poverty-based disadvantages; and (iii) the relationship between affirmative action preferences for the poor and the "merit" principles that normal schemes for distributing benefits and opportunities are usually thought to embody. Id. at 1950.

⁴¹ Notice at ¶8.

⁴² See With Their Whole Lives Ahead of Them, Public Agenda, Bill and Melinda Gates Foundation at 5-8 (2009), available at <http://www.publicagenda.org/files/pdf/theirwholelivesaheadofthem.pdf> (last visited February 6, 2011).

⁴³ Anthony P. Carnevale, Stephen J. Rose, Socioeconomic Status, Race/Ethnicity, and Selective College Admissions at 13 (2003), available at <http://tcf.org/publications/2003/3/pb252/pdf> (last

Examining these factors, an applicant could be found to have overcome a substantial disadvantage if she can show that when entering college her income or the income of her parents put her in the lowest quartile of socioeconomic status. Nevertheless, she graduated in four years, and earned income commensurate to those working in the first years after graduation who were members of the highest socioeconomic quartile. She could claim to have, through dint of effort, taken substantial steps to at least partly overcome a substantial disadvantage: an ideal candidate for the preference.

The Notice questions whether applicants should be disqualified from ODP consideration based on wealth and access to capital. As discussed above, most ODP candidates are likely small businesses or new entrepreneurs who fall within the qualifications of the DE rules. While there should not be a bright-line limit to wealth or capital of an applicant, the Commission should be able to use its discretion when granting ODP certification to individuals and businesses that are outside the small business size standards, especially when considering waivers and benefits not related to the auction process.

Under the current system of preferences awarded to designated entities, a person who can demonstrate the ability to overcome a substantial disadvantage would be subject to all the restrictions of eligibility currently required by the Commission. There is no reason to anticipate that persons who overcome substantial disadvantage will require the Commission to modify the threshold of attributable interests needed for eligibility for bidding credits or designated entity qualification for payment of licenses by installment. Nor is there a reason to anticipate that

visited February 6, 2011) (“While those from families in the lowest SES quartile had a graduation rate of 55 percent, those from the highest SES quartile had a much higher rate, 73 percent. Virtually all of this 18 percentage point difference is determined by factors prior to enrolling in college – i.e., SAT scores, high school grades, rigor of high school courses taken, etc.”)

corporations will require the FCC to modify the threshold of equity ownership or the management role needed to qualify for bidding credits.

C. Unjust Enrichment

If the Commission were to adopt the OPD preference, there would be no need to modify existing unjust enrichment rules for designated entities who overcome substantial disadvantage. The new preference would not alter the definition of designated entity in any way. Even if the basis of the determination of eligibility is based on socioeconomic factors, the unjust enrichment rules aim to mitigate the problem of arbitrage, so that the difference between a subsidized cost of the license purchased under the bidding preference and the market price of the same license, is recaptured by the Commission. Regardless of whether the designated entity is a woman applicant, a minority applicant, or another individual who has overcome a substantial disadvantage, the rules addressing the problem of unjust enrichment would equally apply.

III. ADMINISTRATION OF THE OVERCOMING DISADVANTAGES PREFERENCE

The Commission presents a number of questions going to whether and how the ODP qualifications process would differ from the current process for small and rural businesses.⁴⁴ When applied to competitive bidding, we see no reason why ODP qualification during the auction process would differ from that presently applicable to DE's. ODP waivers would also be administered similar to the current waiver process.

As stated in the Recommendation, assessment and review of ODP applications will require time, and prequalification would avoid delay in the auction process.⁴⁵ Therefore, the Commission could consider establishing a window of time, prior to the auction, to pre-certify all entities that wish to be considered ODP eligible for any license. This window would be separate

⁴⁴ See Notice at ¶¶10-12.

⁴⁵ See Recommendation at 9.

from any specific proceeding and would be open to the public, either periodically or on a rolling basis. Then, upon application for specific auctions, an ODP applicant would only need to certify her continued eligibility at the same stage as small/rural entities would certify their eligibility. This would ensure that ODP would not lengthen the auction process for all applicants.

The Recommendation suggests three options to manage the Commission's review of qualifications.⁴⁶ These include: "(1) establishing a special cadre of FCC officials to evaluate each applicant's qualifications for the preference, (2) designing a modified [Administrative Law Judge] procedure for this purpose, and (3) assigning the function to the FCC Bureau that exercises oversight over the service in question."⁴⁷ Given the subjective but balanced nature of reviewing disadvantage claims, a combination of the three may be beneficial, especially as it concerns oversight from the bureau responsible for the service in question.

CONCLUSION

The ODP preference is a rational, race and gender-neutral method of expanding opportunities for current and potential Commission licensees. MMTC urges the Commission to initiate a rulemaking proceeding without delay. The National Broadband Plan includes a strategy to repurpose 500 MHz of spectrum in the next ten years. It is imperative that this spectrum be licensed to a diverse pool of well-qualified service providers who will use the spectrum in the public interest and who will be unlikely to return it to the Commission for re-auction. As such, the Commission must act now to make the OPD preference available for future spectrum auctions and for waivers associated with Commission licensees.

⁴⁶ Notice at ¶13 (citing Recommendation at 9-10).

⁴⁷ See Recommendation at 9-10.

Respectfully submitted,⁴⁸

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⁴⁸ MMTC sincerely thanks Dean Colby, Ph.D, Adjunct Professor at the School of Journalism & Mass Communications at the University of Colorado at Boulder, for his valuable guidance and assistance with research for these Comments.