



**Minority Media &
Telecom Council**

3636 16th Street N.W. Suite B-366
Washington, D.C. 20010
Phone: 202-332-0500 Fax: 202-332-0503
www.mmtconline.org

December 3, 2012

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Ms. Dortch:

RE: Notice of Ex Parte Communication, Docket No. 12-268 (Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)

This letter reports on a meeting that occurred Friday, November 30, with Commission Staff including: Gary Epstein, Senior Advisor to the Chairman; William Scher, Office of the General Counsel; and Edward Smith, Special Counsel. Attending from MMTC were: Maurita Coley, Chief Operating Officer; Joycelyn James, Senior Attorney; and myself, David Honig, President.

- The topic of our discussion was a letter sent to Mr. Epstein from me on November 20, 2012,¹ requesting that the Commission issue a brief supplement to the incentive auctions NPRM that would specifically seek comment on the Diversity Committee's race- and gender-neutral proposal for an Overcoming Disadvantages Preference ("ODP").² The NPRM omitted any discussion of specific diversity proposals, asking only for comment on "additional provisions to ensure participation by minority-owned or women-owned

¹See Letter From David Honig, MMTC, to Hon. Julius Genachowski, Chairman, Federal Communications Commission, *et. al.*, re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Sep. 19, 2012) ("Letter").

²See 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, 25 FCC Rcd 16854 (Dec. 27, 2010) ("ODP Notice"). The ODP proposal was adopted unanimously by the Diversity Committee on October 14, 2010, after some two years of effort. It can be found on the Committee's webpage at <http://transition.fcc.gov/DiversityFAC/meeting101410.html> (then follow link to "Recommendation on Preference for Overcoming Disadvantage") (last visited Nov. 19, 2012). The undersigned was privileged to chair the Diversity Committee's Constitutional Issues Subcommittee, which offered the ODP proposal.

businesses” and “how such provisions should be crafted to meet the relevant standards of judicial review[.]”³ This omission hinders the Commission’s ability to compile a more complete record upon which it may craft new auction rules that comply with Sec. 309(j) directives.

- We continue to believe that a bidding credit based on a small business size standard is insufficient to increase participation for minorities and women in the forward incentive auctions.⁴ One possible solution discussed was to narrow the focus of a supplemental NPRM to determine how the ODP proposal could apply to a limited number of diversity initiatives that rely on a particular class of eligible or designated entities.
- I raised the point that appropriate notice and comment on ODP is critical during the incentive auction proceeding because we cannot afford to miss opportunities for diverse participation that may be offered by the newly available spectrum for commercial wireless services. While final rules need only be a “logical outgrowth” of the proposed regulations, it cannot be assumed that parties will naturally understand, from nothing more than the passive language of paragraph 296 of the NPRM, that the Commission specifically meant to solicit comment on, or to consider, a proposal as unique as ODP.⁵ None of ODP’s factors, nor the race-neutral, individual initiative-based concept underlying ODP, are mentioned in the NPRM.

The Commission must do its part to demonstrate the importance of inclusion in the forward auctions process and show leadership on this issue through meaningful exploration of diversity initiatives. Issuing a short supplement to the NPRM, with reference to the OPD proposal will do more to accomplish the agency’s diversity goals than the current NPRM, which is lacking in this regard. Further, a supplemental NPRM will clearly satisfy what the courts consider to be sufficient notice, as discussed in the November 20 letter.⁶ With the comment period recently extended in this proceeding, we believe now is the time to issue a supplement to the NPRM.

³NPRM at ¶296.

⁴Id. at ¶295.

⁵See Council Tree Communications v. FCC, 619 F.3d 235, 249-50 (3d Cir. 2010) (discussing how the substance of an agency rule may not stray too far away from the initial description); Prometheus Radio Project v. FCC, 652 F.3d 431, 449 n. 23 (3d Cir. 2011) (“Prometheus II”) (“The logical outgrowth doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing.”).

⁶See Letter at pp. 2-3 (citing Council Tree, 619 F.3d at 254-56 (parties could not be required “to divine the agency’s unspoken thoughts[.]” where the Commission did “not appear to have thoroughly considered the impact” of its rules on Designated Entities (“DE’s”)); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983) (“notice necessarily must come – if at all – from the Agency”); Prometheus Radio Project v. FCC, 373 F.3d 372, 421 n. 59 (3d Cir. 2004) (“Prometheus I”) (subsequent history omitted) (requiring the Commission, on remand, to consider specific proposals that parties made that could advance minority ownership)).

Epstein Ex Parte

Dec. 3, 2012

Page 3 of 3

Respectfully submitted,

David Honig

David Honig
President