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Summary and Background

The Minority Media and Telecommunications Council (MMTC) respectfully urges the Commission to begin collecting minority and women-owned business enterprise (MWBE) data as a necessary component to determine whether the mobile wireless industry is competitive.

The presence of MWBEs in a market boosts competition and often serves the unique needs of communities that are traditionally underserved by major carriers. Robust wireless service, particularly in diverse communities, is imperative given our nation's shifting demographics and the role wireless has in providing an onramp to broadband Internet access for minority communities. In order to develop a complete snapshot of the number of MWBEs in the industry and to fulfill its statutory directives, the Commission should immediately begin collecting MWBE data from carriers.

By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. The [EEO] program we adopt today therefore should promote not just diversity, but also *true competition*.²

In the broadband era, much emphasis has been placed on the importance of entrepreneurship and global competitiveness in fostering our nation's growth.³ The presence of MWBEs boosts competition and benefits consumers, particularly those in traditionally underserved communities.⁴ Entrepreneurs often serve niche markets.⁵ Entry by niche market allows entrepreneurs to take advantage of service needs that are left unmet by large carriers, providing a means of entry for entrepreneurs who cannot afford to directly compete with large carriers who have established retail and distribution channels, large marketing and advertising budgets, an existing subscriber base, and incumbency privileges. In addition to benefiting diverse communities, MWBEs also provide an avenue to boost diverse competition by recruiting, hiring, and developing minority and women employees. Just as MWBEs play a significant role in

² See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM, 17 FCC Rcd 24018 (2002) (Separate Statement of Commissioner Kevin J. Martin) (emphasis added).

³ See e.g., Remarks of FCC Chairman, Julius Genachowski, U.S. Chamber of Commerce (Oct. 14, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310395A1.pdf (last visited July 25, 2013) (delivering remarks on how broadband innovation is enabling opportunities and increasing competitiveness).

⁴ See e.g., Reply Comments of MVNO Association, WT Docket No. 130135 (July 15, 2013). See also Public Notice at 1 (The Commission seeks comment on whether "MWBEs provide services to consumers who might otherwise be overlooked by others in the marketplace").

⁵ See e.g., Larry Myler, The Two-Step Method For Finding Your Entrepreneurial Niche, *Forbes* (April 23, 2013), available at <http://www.forbes.com/sites/larrymyler/2013/04/23/the-two-step-method-for-finding-your-entrepreneurial-niche/> (last visited July 25, 2013).

creating opportunities for women and minorities, they regularly invest in communities that other companies overlook or underserve.⁶

II. MWBE Participation Data is a Necessary Factor in Calculating Whether the Wireless Market is Competitive

The participation and success of MWBEs are important factors in determining whether any market is competitive. Data illustrates that our nation is becoming majority-minority - a massive demographic transition that is already starting to reshape our country.⁷ The nation is unprepared for this transition from a social or business perspective. MWBEs experience significant barriers to participate in our economy and in FCC regulated industries,⁸ often due limited access to

⁶ See e.g., Timothy Bates and Alicia Robb, Minority-Owned Businesses Come Up Short in Access to Capital: It's Time to Change the Equation for MBEs, *Forbes* (July 30, 2012), available at <http://www.forbes.com/sites/kauffman/2012/07/30/minority-owned-businesses-come-up-short-in-access-to-capital-its-time-to-change-the-equation-for-mbes/> (last visited July 25, 2013) (“Since MBEs are geographically concentrated in minority neighborhoods and often cater to local shoppers, new jobs created would be filled largely by minority employees, extending the benefits into communities plagued by high unemployment and underemployment.”) “Available empirical evidence on MBE geographic locational patterns indicates that most minority-owned businesses are indeed located in minority neighborhoods... 57.6% of these [neighborhood-oriented urban small firms] ventures – largely retail and consumer-service firms – operating in minority residential areas were minority owned, versus an ownership incidence of 15.1% in adjacent white neighborhoods. The predominant pattern was one of MBEs operating in minority neighborhoods and white-owned firms in white residential areas.” Timothy Bates and Alicia Robb, *An Analysis of Small-Business Viability in Urban Minority Communities* (Jan. 13, 2013), p. 8, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989448 (last visited July 25, 2013) (internal citations omitted).

⁷ See e.g., William H. Frey, Shift to a Majority-Minority Population in the U.S. Happening Faster than Expected, *Brookings* (June 19, 2013), available at <http://www.brookings.edu/blogs/up-front/posts/2013/06/19-us-majority-minority-population-census-frey> (last visited July 25, 2013).

⁸ In 2007 of 27.1 million businesses in the United States, there were 1.9 million African American owned businesses, 2.3 million were Hispanic American owned businesses, and 7.8 million women-owned businesses. SBA Office of Advocacy, *Frequently Asked Questions* (Sept. 2012), p. 2, available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited July 25, 2013). In the communications arena, MWBEs have significant known barriers to entry. See e.g., United States Government Accountability Office, *Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce,*

capital, the presence of discrimination, or the present effects of past discrimination.⁹ In addition to the increasingly precarious position MWBEs and entrepreneurs occupy in the capital-intensive mobile broadband sector, MWBEs also have to contend with a widening racial wealth gap,¹⁰ educational disparities,¹¹ and an opportunity divide.¹²

House of Representatives, Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess (March 2008), available at <http://www.gao.gov/assets/280/273671.pdf> (last visited July 25, 2013).

⁹ The communications industry was born and raised in a rigid culture of discrimination and segregation. See Federal Communications Commission’s Minority Ownership Task Force, Minority Ownership Report (1978), p. 3. “In 1934 when the Communications Act was signed into law, public policy on the assimilation of minorities into the communications industry was nonexistent. Indeed, Blacks, Latin Americans, Asians and American Indians were isolated from the mainstream of American life by generations of racial discrimination and disadvantage. The notion of minority ownership was, therefore, undoubtedly a foreign concept to the communications industry. Yet, even then minority people generally understood the importance of radio to their quest for equality; even though “[t]he radio [was] closed to all speeches for racial equality...””. *Id.* (quoting Dr. Charles Houston, “Don’t Shout Too Soon,” 43 *Crisis* 79 (1936), also quoted by J. Clay Smith, Jr., “For A Strong Howard University Press,” Vol. 121, Part 21, Cong. Rec. 27790, 94th Cong. 1st Sess. (Sept. 5, 1975)). Despite early attempts by the Federal Communications Commission, after the passage of the Civil Rights Act, to alleviate the resulting dearth of minority participation in the industry, persistent structural discrimination continues to be reflected in the Commission’s ownership data as a result of “discrimination in the capital markets, in communities, in the advertising industry, and in the competitive marketplace; by the effects of deregulation and market consolidation precipitated by the 1996 Act; and by various actions and inaction on the part of the FCC, the courts, and Congress.” *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, LLC (2000), p. 17, available at http://transition.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited July 25, 2013).

¹⁰ See Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, Brandeis University IASP Research and Policy Brief (Feb. 2013), available at <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> (last visited July 25, 2013).

¹¹ See Robert Balfanz et al., *Building a Grad Nation, Progress and Challenge in Ending the High School Dropout Epidemic* (Feb. 2013), available at <http://new.every1graduates.org/wp-content/uploads/2013/02/Building-A-Grad-Nation-2013-Full-FINAL-web.pdf> (last visited July 25, 2013). “Significant “graduation gaps” impede progress, as graduation rates among states are uneven for students of different races, ethnicities, family incomes, disabilities and with limited English proficiency.... Although there has been progress in boosting graduation rates for

As observed by U.S. Senator Kristen E. Gillibrand, promoting the talent of women and minority businesses and the next generation of entrepreneurs is critical to U.S. economic recovery.¹³ Classic economic analysis suggests that it is economically inefficient to fail to prepare or provide opportunities for a significant and growing proportion of our population, or to allow legacy discrimination to artificially limit production. Limiting inherent entrepreneurial, managerial, creative, and innovative skills based on race or gender restricts competition, GDP,

Hispanic and African American students in recent years, the four-year graduation rate is still 66 percent or less for African American students in 20 states and for Hispanic students in 16 states.... By contrast there are no states in which the graduation rate for white students is below 66 percent and only four states in which it is 75 percent or less. Moreover, there are eleven states in which the graduation rate for white students is 89 percent or higher, but no state where this is true for African American, Hispanic, or economically disadvantaged students.” *Id.* at 6. See also Daniel J. Losen and Tia Elena Martinez, Out of School & Off Track: The Overuse of Suspensions in American Middle and High Schools, *The Center for Civil Rights Remedies, UCLA* (April 8, 2013) <http://www.eric.ed.gov/PDFS/ED541735.pdf> (last visited July 25, 2013). Illustrating civil rights complications in academic suspension policies. “... the recent 24.3% suspension rates for Blacks represents an increase of 12.5 percentage points since the 1970s; in the same period, the rate increased only 1.1 points for White students, from 6% to 7.1% —an increase more than 11 times as high for Blacks as for Whites. In short, the Black/White gap that once stood at 5.7 points has grown to a difference of more than 17 points at the secondary level.” *Id.* at 1-2.

¹² See e.g., Timothy Bates and Alicia Robb, Minority-Owned Businesses Come Up Short in Access to Capital: It’s Time to Change the Equation for MBEs, *Forbes* (July 30, 2012), available at <http://www.forbes.com/sites/kauffman/2012/07/30/minority-owned-businesses-come-up-short-in-access-to-capital-its-time-to-change-the-equation-for-mbes/> (last visited July 25, 2013).

¹³ See e.g., U.S. Senator Kristen E. Gillibrand, *A Guide to Women and Minority-Owned Business Funding Opportunities* (2013), p. 5, available at <http://www.gillibrand.senate.gov> (search for “A Guide to Women and Minority-Owned Business Funding Opportunities”) (last visited July 25, 2013) (“America’s economic recovery will, in part rest on our ability to unlock the economic potential of women and minority entrepreneurs. If we can promote the talent of women and minority business leaders and foster the success of a new generation of entrepreneurs, then America’s economy will be stronger than ever. Today, there are nearly 20 million women and minority-owned businesses in the United States. During these difficult economic times, the costs of doing business can sometimes become a tremendous burden for our entrepreneurs and small business owners, particularly for women and minority owners that continue to face unfair disadvantages.”)

and economic growth. Economist Andrew F. Brimmer¹⁴ effectively calculated the cost that racial discrimination placed on our economy in billions of dollars – and that was 20 years ago.¹⁵ For example, the failure to fully utilize the *existing* skills of African Americans and the failure to improve education for African Americans costs the U.S. billions in societal growth.¹⁶ As a result of the failure to use and improve the education and employment skills of minorities, racial discrimination cost our nation approximately 3.8 percent of our GDP or \$241 billion in 1993.¹⁷

A similar phenomenon exists as a result of the gender gap. In recent article appearing in the Harvard Business Review, Carly Fiorina, contributor in the Center for Strategic and International Studies (CSIS) report on a vision for global prosperity, noted that the gender gap limits economic development.¹⁸ “Even in the most developed economies, gross domestic product could be increased by as much as 16% if the gender gap were closed.”¹⁹

¹⁴ See Stephanie Strom, Andrew Brimmer, First Black Member on Fed Board, Dies at 86, New York Times (Oct. 12, 2012), available at http://www.nytimes.com/2012/10/12/business/andrew-brimmer-first-black-on-fed-board-dies-at-86.html?_r=0 (last visited July 25, 2013).

¹⁵ See e.g., Andrew F. Brimmer, The Economic Cost of Discrimination Against Black Americans, in Economic Perspectives on Affirmative Action, Joint Center for Political and Economic Studies (Margaret C. Simms ed., 1995).

¹⁶ See id. at 12-13.

¹⁷ See id. at 11-12. “... for many years, the U.S. Postal Service employed thousands of black men with college degrees in mathematics, chemistry, and other sciences who could not find jobs in the private sector....Even today, despite the lessening of restrictions because of equal opportunity laws and the spread of affirmative action practices in industry, many blacks are still concentrated in positions which do not make full use of their talents. If racial discrimination were to be eliminated, blacks could migrate more freely from low to high productivity occupations where their contribution to total production would be increased. The result would be a gain in the nation’s total output of goods and services.” Id. at 13.

¹⁸ See Carly Fiorina, To Change the World, Invest in One Woman, Harvard Business Review (July-August 2013), available at http://hbr.org/2013/07/to-change-the-world-invest-in-one-woman/ar/1?utm_campaign=Socialflow&utm_source=Socialflow&utm_medium=Tweet (last visited July 25, 2013).

¹⁹ See id. See also Thomas A. Daschle et al., Our Shared Opportunity, A Vision for Global Prosperity: A Report of the CSIS Executive Council on Development (2013), available at

The first step that the Commission can take to create effective wireless policy as the Commission contemplates the opportunities available for MWBE participation²⁰ is to determine the number of MWBEs competing in the wireless marketplace. The limited available data already indicates that this statistic is a tiny fraction of the industry.²¹ The Commission can then use this data to determine the specific barriers to new entry in addition to access to capital issues²² and provide necessary MWBE incentives and initiatives to ensure that sufficient competition exists in the marketplace.²³

http://csis.org/files/publication/130304_Nesseth_DevCouncilReport_Web.pdf (last visited July 25, 2013). “Failing to engage women in the formal economy has real costs, with some reports estimating that a gender gap can restrict a developing country’s national GDP by up to 16 percent. Although women have increased their economic participation, opportunity still lags well behind that of men and stunts the full potential of a nation. The economic gender gap results from converging factors, including outdated institutional and regulatory processes; limited access to financing; insufficient or irrelevant education or training; and demanding household obligations.” *id.* at 14.

²⁰ See Public Notice at 1. MMTC is developing information on the experiences of current and former MWBEs.

²¹ See e.g., Commissioner Jonathan S. Adelstein Comment on Lack of Diversity Among Winners of the 700 MHz Auction, FCC News Release (March 20, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280973A1.pdf (last visited July 25, 2013) (“Adelstein 2008 Statement on Diversity”). “Preliminary FCC data regarding winning bidders in the 700 MHz auction indicated that, based on self-reporting, women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%), despite the fact that women constitute over half the U.S. population and minorities around one-third of the U.S. population.” *Id.*

²² For example, the Commission could use this data on the presence of MWBEs in the wireless marketplace to determine whether lack of MWBE participation and competition in legacy communications platforms acts as a barrier for MWBEs to transition into wireless. For example, did MWBE participation in broadcast or cable lead to opportunities in the wireless industry? See Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, Public Notice, WT Docket No. 13-135 (rel. May 17, 2013), p. 2, 5 (explaining that in formulating the last report, the Commission sought to analyze “the ease or difficulty with which new providers can enter the marketplace.”)

²³ Some examples of initiatives that the Commission might consider creating new incentives for carriers to partner with MWBEs. For example, granting a tangible benefit, such as a one-year construction build-out extension, to carriers with a demonstrated track record of partnering with MWBEs. The Commission’s public interest review of transactions should also explicitly

III. The Commission Should Collect MWBE Data From Carriers to Determine Whether the Wireless Market is Competitive

Anecdotal data on MWBE participation and how that did, or had the potential, to boost wireless competition has been developed in case law. For example, in its successful judicial challenge of the Commission's Designated Entity (DE) rules,²⁴ Council Tree Communications explained that prior to the implementation of the 2006 rule changes, it had secured a mix of investors and partners to acquire licenses for a new national low-cost, wireless broadband and voice service.²⁵ However, immediately after the Commission announced its rule changes, investors pulled out of the project and, as a result, consumers and the economy lost the benefit of having a new potential competitor before the start of Auction 66.²⁶ Council Tree's challenges

recognize MWBE participation and inclusion as a material benefit. The Commission should eliminate the 25% DE attribution rule to allow MWBEs that qualify as DEs to retain bidding credits despite entering into leasing, management, and/or resale arrangements with larger firms as these arrangements are an important vehicle for MWBEs to gain access to capital and acquire the experience necessary to compete in the mobile industry. The Commission should also consider increasing the size of auction bidding credits to 45% while restoring the decimated DE program. Finally, as the Commission moves forward with the incentive auctions, they should ensure opportunities for meaningful MWBE participation.

²⁴ See Council Tree Communications, Inc. et al. v. FCC, 619 F.3d 235, 259 (3rd Cir 2010) (vacating the 2006 rule changes with respect to the 10-year holding period and the 50% material relationship rule and upholding the 25% attribution rule that was found to have been implemented after sufficient notice and opportunity to comment). See also Implementation of the Commercial Spectrum Enhancement Act et al., Order, 27 FCC Rcd 908 (2012) (implementing the court's decision). See also 47 C.F.R. §§1.2110, 1.2111, 1.2112.

²⁵ See Supplemental Brief for Petitioners (Case No. 08-2036), Council Tree Communications, Inc. et al. v. FCC, 619 F.3d 235 (3d Cir. 2010), (filed Aug. 11, 2008), p. 29.

²⁶ Investors pulled out of the project due to the irreparable damage that the Lease/Resell Restriction and 10-Year Hold Rule caused to the business plan and liquidity of the company. "Council Tree was denied the opportunity to build a business projected to create \$26 billion in shareholder value over a ten-year time frame. More importantly, public consumers were denied the tangible benefits a new national entrant would have brought, comparable to the benefits historically associated with new wireless entrants.... The demise of Council Tree's business plan meant that millions of subscribers lost the opportunity to access innovative, high quality new service at levels discounted from those charged by the incumbents." Id. at 29-30.

were not unique. Many MWBEs and DEs including Frontline,²⁷ Business Intelligence Solutions, Faithfone Wireless Incorporated, and Gilbert H. Scott among others were unable to participate in Auction 73 as a result of the Commission's DE policies.²⁸ Prior to the rule changes, the DE program had been very successful in introducing new competition. For example, T-Mobile USA, Inc. grew out of the DE program and went on to become a leading competitor offering a diverse range of products and affordable plans.²⁹ While this information demonstrates that the Commission has the ability, with the cooperation of wireless carriers, to develop a useful record on MWBE participation to inform its competition policies, existing anecdotal data should supplement – not replace – quantitative data on MWBE participation in the wireless industry.³⁰

The Commission already considers data collection a central diversity policy tenet³¹ but, as explained above, data on MWBEs is not only useful to create diversity policy, it is useful to ensure that competition is accurately measured. To ensure that its policies are well informed, the

²⁷ See Petitioners' Brief, Council Tree Investors, Inc. et al. v. FCC (Case No. 12-9543) (filed June 18, 2012), p. 12-13. Days before the short form auction participation applications were due, the Commission issued a Waiver Order waiving the 50 Percent Rule for D Block auction bidders. Though Frontline, a DE headed by former FCC and NTIA officials, had engaged in a campaign for relief of the 50 Percent DE Rule as a result of the late decision the company folded prior to the start of Auction 73. See id. at 13-17. See also Supplemental Brief of Petitioners (Case No. 08-2036), Council Tree Communications, Inc. et al. v. FCC, 619 F.3d 235 (3d Cir. 2010), (filed Aug. 11, 2008), p. 8-10.

²⁸ See Brief of Amici Curiae Arizona Hispanic Newswire et al. in Support of Petitioners, Council Tree Investors, Inc. et al. v. FCC (Case No. 12-9543) (filed June 25, 2012), p. 6-7.

²⁹ See Petitioners' Brief, Council Tree Investors, Inc. et al. v. FCC (Case No. 12-9543) (filed June 18, 2012), p. 7.

³⁰ The Commission seeks comment on the number of MWBEs active in the industry, their function in the industry, and the number of MWBEs spectrum licensees and carriers. See Public Notice at p. 1. As in the broadcast context, with the revision of Form 323, many of these questions can only be answered once the Commission has collected and analyzed current data.

³¹ See e.g., Steven Waldman et al., The Information Needs of Communities; The changing media landscape in a broadband age, Federal Communications Commission Report (July 2011), at p. 313, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf (last visited July 25, 2013).

Commission should begin collecting information on organizations' race and gender composition via Form 175 (Application to Participate in an FCC Auction) and Form 602 (Wireless Telecommunications Service Ownership Disclosure Form).

The Commission began collecting race, ethnicity, and gender broadcast ownership data in 1998 via Form 323 to support its statutory directives under Sections 257 and 309(j) of the 1996 Communications Act.³² Responding to wide criticism regarding the availability of accurate minority and women broadcast ownership data, the Commission adopted significant reforms to its data collection process in 2009.³³ In doing so, the Commission recognized the value of reliable racial, ethnicity, and gender data in broadcast ownership to fulfilling its statutory duties, to allowing accurate analysis by third parties, and to providing a quantitative basis to measure the impact of Commission policies to promote diversity.³⁴ Further, the Commission recognized the need for leadership in collecting this data, as it wasn't available from other sources.³⁵ When the Commission released its first report on the data collected from its revised 323 Form,³⁶ it conceded that the report on low-levels of minority and women ownership warranted a delay in

³² See Promoting Diversification of Ownership in the Broadcasting Services et al., Report and Order and Fourth FNPRM, 24 FCC Rcd 5896, 5897 ¶2, 5899 ¶6 (2009).

³³ See id. at 5898 ¶¶2-3.

³⁴ See id. at 5902 ¶12.

³⁵ See id. (“Because comprehensive data on minority and female ownership of broadcast licensees are not available from other government and commercial sources, the quality and comprehensiveness of the Commission’s database materially affects the Commission’s and the public’s ability to achieve these goals.”)

³⁶ See 2010 Quadrennial Regulator Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Promoting Diversification of Ownership in the Broadcasting Services, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13814 (rel. Nov. 14, 2012).

the ownership proceeding to allow for public analysis and response.³⁷ But the need to collect MWBE data is not exclusive to the broadcast industry; to create effective wireless policies the Commission needs this same data on MWBEs in wireless telecommunications. MWBE data is especially important in determining wireless competition given that wireless service is providing unique broadband access channel for people of color.³⁸

The Commission should not repeat the mistakes made in the DE proceeding or broadcasting context. The Commission should begin collecting data on MWBE participation now in order to identify ownership trends, barriers to entry, and opportunities to advance diversity and competition.³⁹

³⁷ See Commission Seeks Comment on Broadcast Ownership Report, Public Notice, 27 FCC Rcd 15036 (rel. Dec. 2, 2012). “The Ownership Report represents the latest step in the Commission's ongoing efforts to collect and publicly release minority and female ownership data. Although refinements to the collection and assessment of these data are ongoing, the recently released Ownership Report signifies a substantial improvement in minority and female ownership data. We anticipate going forward that these and additional ownership reports will provide useful periodic ‘snapshots’ of minority and female ownership in the broadcast industry. **We expect that our continuing efforts to reform and refine our ownership data collection will yield more and better data to support trend analyses in the future.** The Ownership Report was released to the public on November 14, 2012 and parties have submitted material in the record concerning the data. Several parties have requested an additional, formal opportunity to comment on the Ownership Report. Thus, while this proceeding has provided numerous opportunities for public input and participation, we will establish a further comment cycle for this limited purpose.” *Id.* at 15037 (emphasis added).

³⁸ See Initial Comments of the Incentive Auction Advocates, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Docket No. 12-268 (Jan. 25, 2013) (“IAA Comments”).

³⁹ See 47 U.S.C. §309(j)(3)(B) (in authorizing a system for competitive bidding, Congress directed the Commission to protect the public interest and promote specific objectives including, “promoting 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**”) (emphasis added).

IV. The Commission has a Statutory Mandate to Collect MWBE Data

Without data, the Commission cannot accurately determine who is impacted by its rules and policies, as required by the Communications Act⁴⁰ and the Regulatory Flexibility Act.⁴¹ Given the well-known barriers to entry that uniquely impact MWBEs in telecommunications industries, data gathered on Commission-regulated industries must include race and gender, not just the size of an entity. As discussed briefly above, Congress included several measures in the Communications Act – including Sections 257⁴² and 309(j)⁴³ – to ensure continued efforts to boost diversity in the regulated communications industries. Further, the Regulatory Flexibility Act requires agencies to generate an initial regulatory flexibility analysis and a final regulatory flexibility analysis that discuss the impact of the rule on small businesses.⁴⁴ Accurate statistics

DEs and public interest groups are not the only organizations that commented on the Commission’s failure to fulfill this congressional mandate. Commissioner Jonathan Adelstein expressed his frustration with Auction 73:

It’s appalling that women and minorities were virtually shut out of this monumental auction. It’s an outrage that we’ve failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse. This gives whole new meaning to ‘white spaces’ in the spectrum. Adelstein 2008 Statement on Diversity.

⁴⁰ See Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §151 et seq.)

⁴¹ See Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. §601 et seq.)

⁴² See 47 U.S.C. §257 (requiring the Commission to submit a triennial report to Congress identifying barriers to entry and describing its efforts to eliminate entry barriers).

⁴³ See 47 U.S.C. §309(j)(3)(B). See also *supra* at n. 39.

⁴⁴ See 5 U.S.C. §603(b)(3) (the statute requires an agency to include “a description of and, where feasible, an estimate of the number of small entities to which the rule would apply” in its initial regulatory flexibility analysis). See also 5 U.S.C. §604(a)(4) (agencies must also include “a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available” in the final regulatory flexibility analysis).

are thus necessary at each stage of the Commission’s rulemaking process. Moreover, agencies are also required to periodically review their rules that economically impact a substantial number of small businesses “to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such entities.”⁴⁵ The Commission cannot adequately fulfill these statutory requirements without accurate information on all entities that are – or should be – participating in its regulated industries.

⁴⁵ 5 U.S.C. §610(a). See also Exec. Order 13,579, 76 Fed. Reg. 41587 (July 13, 2011) (“To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.”)

V. Conclusion

The Commission has a tremendous responsibility to ensure that the influential industries it regulates are competitive. Given the importance of the wireless industry for minority consumers⁴⁶ and given the increasingly diverse demographics of our population, the Commission should collect and study data on MWBE participation in the wireless industry in order to have a clear picture of the competitiveness of the industry.

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⁴⁶ See e.g., IAA Comments (illustrating the importance of wireless service to minority communities).