



**Minority Media &
Telecom Council**

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March 14, 2014

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

RE: Notice of *Ex Parte* Communication, WT Docket No. 05-211 (Modernization of Competitive Bidding Rules); WT Docket No. 13-135 (Wireless Competition); GN Docket No. 13-185 (Amending Commercial Operation Rules in 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands); GN Docket No. 12-268 (Incentive Auction); GN Docket No. 09-51 (National Broadband Plan); GN Docket No. 09-191 (Preserving the Open Internet); WC Docket No. 07-52 (Broadband Industry Practices); MB Docket No. 09-182 (2010 Quadrennial Regulatory Review); MB Docket No. 07-294 (Broadcast Diversity Proceeding)

Dear Ms. Dortch:

This letter reports on a series of five meetings held on March 12, 2014. S. Jenell Trigg, MMTC Advisory Board Member and Member of Lerman Senter, PLLC and Dr. Nicol Turner-Lee, Vice President and Chief Research & Policy Officer, MMTC, and Jacqueline Clary, Senior Counsel and John W. Jones Fellow represented MMTC at each meeting. The first meeting was with Roger Sherman, Acting Chief of the Wireless Telecommunications Bureau, Jessica Almond, Chief of Staff, Wireless Bureau, Gary Epstein, Chair of the Incentive Auction Task Force, Howard Symons, Vice Chair of the Incentive Auction Task Force, Edward Smith, Special Counsel of the Incentive Auction Task Force, Gary Michaels, Deputy Chief of Legal and Policy for the Auctions and Spectrum Access Division of the Wireless Bureau, Sue McNeil, Special Counsel for the Auctions and Spectrum Access Division of the Wireless Bureau, and David Valdez, Special Counsel for the Spectrum & Competition Policy Division of the Wireless Bureau. The second meeting was with Adonis Hoffman, Chief of Staff and Senior Legal Advisor for Commissioner Clyburn and Louis Peraertz, Legal Advisor on Wireless, International, and Public Safety for Commissioner Clyburn. The third meeting was with Gigi Sohn, Special Counsel for External Affairs for Chairman Wheeler. The fourth meeting was with Thomas Reed, Director of the Office of Communications Business Opportunities. The fifth meeting was with Maria Kirby, Legal Advisor on Media, Consumer and Governmental Affairs, and Enforcement for Chairman Wheeler.

The purpose of each meeting was to brief the FCC on the recommendations presented in MMTC's recently released White Paper to promote Designated Entity (DE) participation in upcoming spectrum auctions¹ and to request a status update on the Mobile Wireless Competition proceeding, specifically, with respect to the role of Minority and Women-Owned Business Enterprises (MWBEs) in determining the state of mobile wireless competition.²

During each meeting, we emphasized that the Joint Letter of Support filed by twenty civil rights and public interest organizations, DEs, and individuals in support of the White Paper, applied to all auction and spectrum ownership proceedings, not just those related to the spectrum incentive auction.

We highlighted the need for the FCC to increase ownership opportunities for MWBEs to meet the statutory mandate in Section 309(j)³ and to promote competition. The White Paper examines the many successes and failures of the DE program from the perspective of a DE and provides practical ideas on how the DE program can be improved. As a result of consolidation and an unstable regulatory climate after the 2006 DE Rule changes, DEs encountered, and continue to encounter, unique market entry barriers that prevent meaningful DE participation, and especially MWBE participation, in spectrum auctions. While the 2006 DE Rules were in effect, DE participation drastically declined.⁴ As the Commission prepares for the upcoming AWS and incentive auctions, it is critical for the FCC to send a clear signal to the wireless industry (and to the financial industry) that the DE program is important to the FCC and that the FCC is making improvements that will foster diversity and competition in spectrum ownership and provide the regulatory stability that is required for investment.

While the White Paper outlines nine public policy recommendations to boost DE participation, we discussed three priority recommendations that can generate immediate and measurable improvement in the DE program; we urged the FCC to implement the following:

¹ See S. Jenell Trigg and Jeneba Jalloh Ghatt, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry* (Feb. 25, 2014) ("MMTC White Paper"). See also Letter to Chairman Wheeler and Commissioners, *Modernization of Competitive Bidding*, WT Docket No. 05-211 et al. (March 7, 2014) (a coalition of 20 organizations and individuals submitted a letter of support for the recommendations put forth in the MMTC White Paper) (Joint Letter of Support).

² See *Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Rule of Minority and Women-Owned Business Enterprises and Extends Period for Reply Comments, Public Notice*, WT Docket No. 13-135 (rel. July 1, 2013). See also Reply Comments of the Minority Media and Telecommunications Council, *The State of Mobile Wireless Competition*, WT Docket No. 13-135 (July 25, 2013).

³ See 47 U.S.C. §309(j).

⁴ See *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010) (subsequent history omitted) (The court vacated two of the three rule changes upon finding "serious" violations of notice and comment obligations under the Administrative Procedure Act). See also White Paper at 12-16.

- **Eliminate the Attributable Material Relationship Rule.** A DE should be able to retain its DE status when entering into leasing, wholesaling, and resale agreements for more than 25% of its spectrum capacity to one entity. This rule is a major impediment to implementation of viable and flexible business plans, especially for new entrants, and it unreasonably restricts capital that is generated by leasing, wholesaling, or reselling, an industry standard practice. Since 2006, there have been many requests and support for the FCC to repeal all of the 2006 DE Rule changes. Moreover, with respect to creating efficiencies and flexibilities for DEs in its 2003 Report and Order on Secondary Markets, the FCC sought to expand spectrum efficiency through secondary market transactions and foster increased opportunities for DEs to expand and raise capital.⁵ In response to concerns about ensuring bona fide DE participation, the FCC already has the means to address claims of fraud or abuse through current regulatory tools such as random audits, affiliate control rules, or reviewing the actual structure of a transaction and relationship of companies on a case-by-case basis rather than relying on a blanket arbitrary 25% cut off between two entities, including between two DEs that wish to maximize spectrum efficiency in reaching underserved and unserved communities.

We believe that there is ample administrative record support for the immediate repeal of the Attributable Material Relationship Rule under the mandates of Section 309(j) and the Regulatory Flexibility Act (RFA), as amended, to remove a market entry barrier with a significant economic impact. However, if time does not allow full deliberation before the immediate auction proceedings, we suggest that the FCC inform DEs that the FCC will readily consider waivers.

- **Increase bidding credits.** Increase bidding credits to at least 40% at the highest level (and raise the lower tiers incrementally in proportion to the current bidding credit levels under 47 C.F.R. 1.2110(f)(2)) to offset the harms caused by the 2006 DE Rules (two which were ruled unlawful and vacated by the Third Circuit). This change will help to fulfill Section 309(j)'s mandate to protect against an excessive concentration of licenses. The FCC has increased bidding credit levels in previous auctions as a means to offset a regulatory change that was detrimental to DEs. (*See, e.g., Local Multipoint Distribution Service Auction # 17*). Since 2006, nothing has been more detrimental to DEs than the 2006 DE Rules and the unstable regulatory environment those rules continue to create for DEs and DE investors. Various entities have filed comments in various auction proceedings requesting increased bidding credits, and there is broad support for this recommendation among various classifications of DEs.
- **Prioritize diversity and inclusion in secondary markets.** Incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions. To fulfill the mandate of Section 309(j) to avoid excessive concentration of ownership of spectrum, the FCC should prioritize diversity and inclusion in its public interest analysis of these transactions and include this

⁵ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604, 20607 ¶2 (2003).

documentation as part of the annual Wireless Competition Report to Congress.

DEs and, in particular, MWBEs have successfully raised capital, as demonstrated in the White Paper. The current rules restrict the ability of qualified DEs to participate in certain secondary market transactions and at auction to acquire spectrum. The Commission should harmonize and stabilize its regulatory rules and policies to promote DE participation at all levels.

In each meeting, MMTC representatives discussed the FCC's statutory authority to expediently implement any and all of these high priority recommendations through authority granted in Section 309(j) and the RFA. DEs are able to participate in the auctions when they are able to raise capital by relying on a stable regulatory climate and rules that don't handicap DEs. Finally, while acknowledging the pressure to raise Federal revenue in auctions, we noted that Congress has already balanced the interests as it relates to the DE provisions under Section 309(j), which specifically prohibits the FCC from considering auction revenue when creating regulations that impact DE bidding credits, geographic areas, and other DE incentives.⁶

MMTC and its coalition of supporters fully support the Commission's efforts to revitalize the DE program to provide *meaningful* DE participation. We stand ready to serve as a resource in this effort.

Respectfully submitted,

Jacqueline Clary

Jacqueline Clary
Senior Counsel and John W. Jones Fellow

Attached:
Handout on 47 U.S.C. 309(j)(7)(A)
Joint Letter of Support
MMTC Reply Comments on the State of Mobile Wireless Competition
White Paper

⁶ See 47 U.S.C. §309(j)(7)(A).