



**Minority Media &
Telecom Council**

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March 17, 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. 14-25 (FCC Process Reform); GC Docket No. 10-43 (Amending Ex-Parte Rules); 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 13, 2014 and March 14, 2014. MMTC Representatives at the meetings on March 13, 2014 were David Honig, President; Maurita Coley, Vice President and Chief Operating Officer; and Nicol Turner-Lee, Ph.D, Vice President and Chief Research & Policy Officer. David Honig and Maurita Coley represented MMTC at the meetings on March 14, 2014.

On Thursday, March 13, MMTC representatives met with Hon. Mignon Clyburn, FCC Commissioner; Adonis Hoffman, Chief of Staff and Senior Legal Advisor for Commissioner Mignon Clyburn, Louis Peraertz, Legal Advisor on Wireless, International, and Public Safety for Commissioner Mignon Clyburn, Stefanie Frank, Law Clerk for Commissioner Mignon Clyburn's office. The second meeting was with Diane Cornell, Special Counsel to FCC Chairman Tom Wheeler and Jennifer Tatel, Associate General Counsel, FCC. On Friday, March 14, MMTC representatives met with Hon. Jessica Rosenworcel, FCC Commissioner and Clint Odom, Policy Director for Commissioner Jessica Rosenworcel. The second meeting was with Matthew Berry, Chief of Staff for Commissioner Ajit Pai. The third meeting was with Courtney Reinhard, Chief of Staff and Senior Legal Advisor for Commissioner Michael O'Rielly.

The purpose of these meetings was to brief FCC representatives on the following issues: 1) increasing minority spectrum ownership via the FCC's Designated Entity (DE) program and through secondary markets transactions; 2) Shared Services Agreements (SSAs) and Joint Services Agreements (JSAs); and 3) the unintended consequences of process reform recommendation 5.44 entitled "Transparency as to Real Party in Interest."

1) Increasing Minority Spectrum Ownership via the FCC's Designated Entity (DE) Program and through Secondary Markets Transactions

In each meeting, MMTC shared the recommendations presented in MMTC's recently released White Paper to promote Designated Entity participation in upcoming spectrum auctions¹ and requested 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

MMTC made the following points about these issues:

- A Joint Letter of Support was recently filed by twenty civil rights and public interest organizations, DEs and individuals in support of the White Paper that emphasized that the recommendations in the White Paper applied to all auction and spectrum ownership proceedings, not just those related to the spectrum incentive auction.
- The FCC needs to increase ownership opportunities for MWBEs to meet the statutory mandate in Section 309(j)³ and to promote competition. Sharing the highlights from the White Paper, MMTC reiterated the many successes and failures of the DE program from the perspective of DEs and provided practical ideas on how the FCC DE Program can be improved to facilitate meaningful DE participation. 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

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).

DE Rules were in effect, DE participation drastically declined.⁴ MMTC representatives shared that as the Commission prepares for the upcoming AWS and incentive auctions, it is critical for the agency 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.

- The White Paper outlined nine public policy recommendations, but MMTC highlighted three priority recommendations that can generate immediate and measurable improvements in the DE Program; we urged the FCC to implement the following:
 1. 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 much support for the FCC to repeal all of the 2006 DE Rule changes. Moreover, with respect to creating efficiencies and flexibility 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. These tools are far superior to relying on a blanket arbitrary 25% cut off between two entities, such as an arbitrary cut off 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, in the interest of regulatory certainty, 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.

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.

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).

2. 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.
3. 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 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. 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.

2) **Shared Services Agreements (SSAs) and Joint Services Agreements (JSAs)**

In each meeting, MMTC shared its support for Chairman Wheeler's position on SSAs and JSAs. However, in the case of the JSA involving Tougaloo College in Tougaloo, Mississippi, MMTC conducted our own investigation of station WLOOTV 35 with Station General Manager, Pervis

⁶ *See* 47 U.S.C. §309(j)(7)(A).

Perkins. MMTC sent a staff member for a site visit to the station, and conducted an extensive telephone interview with the General Manager. As a result of our independent due diligence, which also included having conversations with James Winston, Executive Director of NABOB, as well as Angela Campbell and Andy Schwartzman of the Institute for Public Interest Representation, MMTC believes a “nuanced” approach is warranted with respect to this station; one that will preserve the College’s ability to operate a broadcast television station and create a better model for improving ownership diversity.

3) The Unintended Consequences of Process Reform Recommendation 5.44, “Transparency as to Real Party in Interest”

MMTC applauds the FCC Staff’s efforts to further the Commission’s valid interest in reforming its processes to improve participation and enhance the records compiled in Commission proceedings. MMTC expects to file comments focused on the FCC’s proposed recommendations prior to the filing deadline. MMTC initiated a conversation about its concerns with Recommendation 5.44 in the FCC Staff Working Group’s Report on FCC Process Reform, entitled “Transparency as to Real Party in Interest,” that would require groups seeking to participate in Commission proceedings to disclose all those persons whose financial or other support facilitates their advocacy.

MMTC made the following points about this issue:

- Civil rights organizations and other groups that seek to advance and protect the interests of small businesses, whistleblowers, and underrepresented interest holders should take issue with this Recommendation. By requiring detailed disclosures of those who support our organizations as a condition of participation, the Commission would discourage contributions from donors. Moreover, imposing “enhanced disclosure” requirements as a condition of an organization’s advocacy before the Commission could have unintended consequences that could result in a marked decline in participation by civil rights groups and others that protect and promote less-powerful viewpoints, and an overall reduction in the quality, quantity, and diversity of voices that would be heard in Commission proceedings.
- MMTC also noted the paucity of evidence in the record to support adoption of Recommendation 5.44. Aside from vague allegations, parties in the underlying rulemaking have provided no proof that there is any need for “enhanced disclosure” requirements. And the recommendation itself is based on a theoretical possibility that organizations “may” represent or receive support from members of an industry affected by Commission regulation.
- Finally, the FCC is duty-bound to consider the constitutional implications of adopting Recommendation 5.44, which would interfere with well-established freedoms of speech, association, and liberty. The Supreme Court and other courts have long recognized that disclosure requirements such as those proposed here constitute an “effective [] restraint on freedom of association” and impede the exercise of protected constitutional rights. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The right of anonymity traditionally

afforded civil rights organizations is a right of the highest order, and the Commission must respect it. The constitutional infirmity of Recommendation 5.44 is yet another reason – and perhaps the most powerful one – why the Commission should reject it.

MMTC appreciated the opportunity to meet with FCC representatives and looks forward to serving as a resource on any and all of these issues.

Respectfully submitted,

David Honig

President

Attachments/Handouts:

- DE Joint Letter of Support
- Process FCC Reform Letter
- MMTC White Paper by S. Jenell Trigg and Jeneba Jalloh Ghatt, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*