



**Minority Media &
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April 25, 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 meeting held on April 23, 2014 with the members of the Wireless Bureau, including Margaret Wiener, Chief of the Auctions and Spectrum Access Division, Nese Guendelsberger, Chief of the Spectrum and Competition Policy Division, Blaise Scinto, Chief of the Broadband Division, John Schauble, Deputy Chief of the Broadband Division, and David Valdez, Special Counsel for the Spectrum and Competition Policy Division. 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, Maurita Coley, Vice President and Chief Operating Officer, MMTC and Jacqueline Clary, Senior Counsel and John W. Jones Fellow represented MMTC.

The purpose of the meeting was to discuss opportunities and concerns about minority and women-owned business enterprises (MWBES) participation in the upcoming spectrum auctions, including the AWS-III and the Incentive Auctions.

We highlighted the need for the FCC to increase ownership opportunities for MWBES to meet the statutory mandate in Section 309(j)¹ and to promote competition. MMTC recently released a White Paper that examines the many successes and failures of the Designated Entity (DE) program from the perspective of a DE and provides practical ideas on how the DE program can

¹ See 47 U.S.C. §309(j).

be improved.² 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.³ 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:

- **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.⁴ Further, we question the FCC's rationale for the AMR rule.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

² 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).

³ 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.

⁴ 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).

⁵ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second R&O and Second FNPRM*, 21 FCC Rcd 4753, 4760 ¶15 (2006) ("... we seek to improve our ability to achieve Congress's directives with regard to designated entities and to ensure that, in accordance with the intent of Congress, every recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."). Note, Congress did not require a DE to provide direct retail service to the public. See e.g. H.R. Rep. No. 103-111, at 257 (1993).

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, as our main goal is to facilitate greater DE participation in the upcoming auctions of “beachfront” spectrum, as well as emerging opportunities to own “non-beachfront” spectrum, we do not rely on an all or nothing approach. If time does not allow full deliberation of the AMR 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). 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. Increasing bidding credits, even to the third-tier 35% threshold will help qualified DEs participate in the auctions.
- **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 data as part of its industry analysis in 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 bona fide DEs to participate in auctions and in transactions in the secondary market. While we share the Commission’s concern about ensuring that only qualified DEs participate at auction and want to prevent shams, we don’t agree with the breadth of the current rules, which hinder the ability of bona-fide DE participation.

Respectfully submitted,

Jacqueline Clary

Jacqueline Clary
Senior Counsel and John W. Jones Fellow