MMTC

Multicultural Media, Telecom and Internet Council

Incentives for Secondary Market Transactions to Facilitate Wireless Entrepreneurship for Minority and Women Owners

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About the Multicultural Media, Telecom and Internet Council

The Multicultural Media, Telecom and Internet Council (MMTC) is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications. www.mmtconline.org.

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INCENTIVES FOR SECONDARY MARKET TRANSACTIONS TO FACILITATE WIRELESS ENTREPRENEURSHIP FOR MINORITY AND WOMEN OWNERS

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PREFACE

As the Federal Communications Commission ("FCC") embarks on the most ambitious federal spectrum auction in history, the Multicultural Media, Telecom and Internet Council ("MMTC") recognizes the need to lift up the importance of facilitating diversity in wireless ownership. Our new report, "Incentives for Secondary Market Transactions to Facilitate Wireless Entrepreneurship for Minority and Women Owners," highlights the steps needed to ensure inclusion at the ownership level. This report considers the impact of diversity and inclusion in the ownership of commercial wireless spectrum and offers immediate strategies to effectively engage minority- and women-owned business enterprises (collectively, "MWBEs").

For more than three decades, MMTC has been the leading proponent of effective public policy that promotes media and telecom ownership for women and people of color. Diverse consumers are demonstrating their demand for new technology through extraordinary wireless adoption and increased use of wireless assets, from mobile phones to internet-enabled tablets and devices. Their unparalleled participation in the mobile economy should be complemented by an equally engaged playing field of owners that license, lease, build, and operate the wireless assets from which these devices run.

This White Paper is an extension of our research on minority ownership of commercial wireless spectrum and offers four public policy incentives that both Congress and the FCC can implement to foster more transactions for MWBEs in the secondary markets. In the 1996 Telecommunications Act, Congress mandated that the FCC encourage sales of spectrum to MWBEs, as well as small businesses and rural telephone companies. While the FCC reformed the congressionally-mandated Designated Entity ("DE") rules to foster greater MWBE participation in federally-sponsored auctions, the changes are not nearly enough to eliminate the barriers to entry for these businesses.

At MMTC, we believe that spectrum purchases made on the secondary market provide another efficient pathway to minority ownership. Secondary market transactions were endorsed and successful during the Clinton Administration under the leadership of FCC Chairman William Kennard. Selling spectrum to minorities, women, and other new entrants in secondary market transactions can help level the playing field in this capital-intensive, burgeoning industry – especially for MWBEs that seek to do business with larger incumbents.

The four policy incentives outlined in the White Paper are concise, clear, and transparent. Our goal is to present a playbook on how to strategically and effectively increase the number of MWBEs that are successfully engaged as spectrum owners in our new economy. The law supports this, and our policy goals should aim for nothing less than substantive ownership participation for the benefit of all Americans.

Kim M. Keenan,

President and CEO
Multicultural Media, Telecom and Internet Council

EXECUTIVE SUMMARY

Congress and the Federal Communications Commission ("FCC" or "Commission") must develop market-based incentives to advance competition and innovation, while increasing minority and women entrepreneurship in the wireless communications space. Federal incentives that cultivate entrepreneurs' access to capital should be a priority in the burgeoning wireless marketplace, particularly in the areas of spectrum ownership and operations support.

This White Paper outlines the policy rationale for increased engagement of minority- and women-owned business enterprises (collectively, "MWBEs") and recommends to Congress and the FCC the following four incentives to increase spectrum ownership:

1. Restore and refine the Tax Certificate Policy for immediate application to secondary market transactions, enabling sellers to defer payment of the capital gains taxes on the sale upon reinvestment in comparable property. **This initiative requires legislation.**
2. Consider voluntary secondary market transactions with MWBEs as factors in determining whether to report to Congress that the mobile wireless marketplace is competitive. **This initiative can be adopted by the FCC under its existing statutory authority.**
3. Incorporate voluntary secondary market transactions with MWBEs as part of mergers and acquisitions ("M&A") regulatory review, including whether to give carrier rule waivers relating to ownership. **This initiative can be adopted by the FCC under its existing statutory authority.**
4. Award carriers a bidding credit when, or after, they engage in voluntary secondary market transactions with MWBEs in wireless auctions. **This initiative can be adopted by the FCC under its existing statutory authority.**

This paper demonstrates how to generate diversity-enhancing secondary market transactions by applying time-tested tax and regulatory incentives to business transactions that occur naturally in well-working markets. These incentives can be applied using command-and-control regulation consistent and within established legal precedent. Further, the paper shows that secondary market transactions are attractive to businesses, legislators, and regulators who are interested in fostering competition and innovation, as well as promoting diversity in telecommunications.

I. DIVERSITY AND WELL-WORKING MARKETS

A. How Restrictions on MWBEs Frustrate Well-Working Markets

Well-working markets occur when resources are leveraged to their highest and most valuable use.[1] Unfortunately, the historic legacy of discrimination means that some parts of the economy have not been served. In these cases, the market signals normally relied upon to allocate resources are distorted and do not properly reflect the opportunity costs of the affected resources.

Classic economic analysis similarly suggests that it is economically inefficient when competition is limited to a chosen few and fails to provide opportunities for a significant and growing segment of the population. Marketplace inefficiencies also surface when legacy discrimination creates artificial limits to participation. Within limited markets, access to entrepreneurial, managerial, creative, and innovative skills restricts competition, Gross Domestic Product ("GDP"), and economic growth. Impediments Facing MWBEs in Telecommunications Industries

Wireless spectrum is a critical, scarce, and valuable economic resource that will remain in high demand for years to come as national and global economies continue to embrace the digital age. As an economic asset, licensed spectrum prices have significantly trended upward over the past decade. As spectrum is necessary for any wireless services, the increasing cost of this asset creates a growing barrier to entry for MWBEs who endeavor to provide such services. Further, the ability of MWBEs to compete in the telecommunications industries is vital to the nation's

[1] *See* Friedrich A. Hayek, *The Market Order or Catallaxy*, in *Law, Legislation and Liberty, Volume 2* (Chicago: University of Chicago Press, 1976).

economic health in light of the growing shift in the nation's demographics, where people of color are projected to become the majority of the nation's populace before mid-century. Nonetheless, MWBEs experience significant barriers to participation in FCC-regulated industries, including wireless,[2] often due to limited access to capital,[3] the presence of discrimination, or the present effects of past discrimination.[4]

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[2] In the communications arena, MWBEs have significant longstanding known barriers to entry. *See, e.g.*, *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report to Congress, 12 FCC Rcd 16802, 16824-46 ¶¶35-81 (1997). The latest comprehensive GAO report on minority media ownership is United States Government Accountability Office, *Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, 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 August 6, 2016).

[3] Minorities in particular have historically lacked access to capital, in both the equity and debt markets. *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) ("Bates and Robb"), *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 August 6, 2016); *see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5537-38 ¶¶10-11 (1994) ("The record clearly demonstrates that the primary impediment to participation [in FCC licensing] by designated entities is lack of access to capital. This impediment arises for small businesses from the highest costs they face in raising capital and for businesses owned by minorities and women from lending discrimination as well. … Congress further found that women and minorities face particularly severe problems in raising capital.") This can be seen in the distribution of wealth between minority and non-minority groups in the U.S. For instance, the U.S. Census reports that the 2011 median net worth of white (non-Hispanic) households was $110,500, while for African American households, the 2011 median net worth was $6,314. U.S. Census, "Net Worth and Asset Ownership of Households: 2011," available at http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx (last visited August 6, 2016). In addition, it can be more difficult for minority households to build wealth even as income rises: one study found that each $1 of additional income yielded an additional $5.19 in wealth for white households but only $0.69 in wealth for African American households over a 25 year period. Thomas Shapiro, Tatjana Meschede and Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide* (February 2013), Figure 3, *available at* http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf (last visited August 6, 2016) ("Shapiro *et al.*")

[4] The communications industry was created and developed in a rigid culture of discrimination

MWBEs who work within the telecommunications industries as licensees, service providers, call center intermediaries, and other occupations, experience limited access to "patient

and segregation. *See* Federal Communications Commission, Minority Ownership Task Force, Minority Ownership Report (1978) at 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 ("FCC" or "the Commission"), after the passage of the 1964 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." Ivy Planning Group LLC, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* (2000) at 17, *available at* http://transition.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited August 6, 2016); *see also* David Honig, *How the FCC Helped Exclude Minorities from Ownership of the Airwaves, McGannon Lecture on Communications Practices and Ethics, Fordham University*, October 5, 2006, *available at* http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf (last visited August 7, 2016). Women, too, have faced discrimination in the marketplace, the best known elements of which are the lingering and deep pay gap and the historic inability of women to accumulate wealth in "traditional" marriages. *See* Erin Ruel and Robert M. Hauser, *Explaining the Gender Wealth Gap*, U.S. National Library of Medicine, National Institutes of Health (December 21, 2012), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3686840/ (last visited August 11, 2016).

capital,"[5] while simultaneously being subjected to a widening racial wealth gap,[6] educational disparities, and "an opportunity divide."[7] Moreover, MWBE telecommunications ownership is negligible, at best, and the FCC does not even measure it.[8]

Fortunately, Congress and the FCC can address the persistence of negligible minority and women representation in the wireless industry through the development and support of incentives for MWBEs. The next section of this paper describes gained and lost opportunities for MWBEs in the wireless sector, followed by a discussion on what both the FCC and Congress have already done in support of secondary market transactions. This paper concludes with details on four proposed public policy incentives to advance diversity and inclusion in the ownership of wireless assets.

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[5] "'Patient capital' is a financial investment that provides sufficient time and support for an entity to grow the business, and does not require a relatively quick sale of the business to capture a return on investment. To attract patient capital, the regulatory environment needs to be stable and allow a business flexibility to address new developments in market conditions and/or compete on the same level as other entities in its industry." S. Jenell Trigg and Jeneba Ghatt, *Digital Déjà Vu – A Road Map to Promoting Minority Ownership in the Wireless Industry,* MMTC White Paper (Feb. 25, 2014), at 22 note 80, *available at* http://mmtconline.org/wp-content/uploads/2014/02/Web-Unembargo-MMTC-WHITE-PAPER_WIRELESS-OWNERSHIP_2.24.14_FINAL-2.pdf (last visited August 7, 2016) ("*Digital Déjà Vu")*. "The FCC was very much concerned about the stability of the regulatory process and the impact on the financial and investment community when it restructured C block, remarking that '[t]hese elements [*i.e.*, maintaining the integrity for future auctions and ensuring that all participants are treated fairly and impartially] are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.'" *Id.* (citing to *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees,* Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436, 16438 ¶3 (1997)).

[6] *See* Shapiro *et al.*, *supra* note 4, Figure 1.

[7] *See* Reply Comments of the Minority Media and Telecommunications Council, *State of Mobile Wireless Competition*, WT Docket No. 13-135 (filed July 25, 2013) at 5, *available at* https://ecfsapi.fcc.gov/file/7520933675.pdf (last visited August 7, 2016).

[8] "What gets measured gets managed" – Peter Drucker.

B. How Greater MWBE Participation in Telecommunications Facilitates Well-Working Markets and Benefits Consumers

Competition must be the core goal of wireless policy. Diversity advances competition by facilitating well-working markets. The economic value of entrepreneurial initiative, creativity, and innovative thinking,[9] coupled with the target market knowledge of minority entrepreneurs and their ventures, brings additional experiences and customers to the marketplace. Specifically, MWBEs benefit the marketplace and consumers in three ways:

1. **Minority- and Women-Owned Businesses Bring Innovation to the Marketplace**. The Minority Business Development Agency ("MBDA"), the federal agency responsible for fostering business diversity, has noted how minority business development contributes to the innovative economy. A 2010 MBDA report stated:

> Barriers to entry and expansion faced by MBEs are very costly to U.S. productivity, especially as minorities represent an increasing share of the total population.…[B]y limiting the business success to only a few groups and not the broad range of diverse groups that comprise the United States we are constraining innovative ideas for new products and services, and access to global markets where many minority entrepreneurs have a competitive advantage based on cultural knowledge, social and familial ties, and language capabilities.[10]

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[9] In media policy, the goal of ownership diversity is to ensure diverse voices. *See* authorities cited in note 41 *infra.* Although wireless companies are not yet leaders in producing content, they occupy a space in which innovation enhances the likelihood that minority and women's voices can be heard, and minority and women consumers can find information and culture at an affordable price point. Thus, for example, we have witnessed wireless companies differentiating themselves from one another through innovative "zero rating" programs, many of which emphasize service to underserved populations. *See* Cecilia Kang, *F.C.C. Asks Comcast, AT&T and T-Mobile About 'Zero-Rating' Services,* The New York Times (December 17, 2015), *available at* http://bits.blogs.nytimes.com/2015/12/17/f-c-c-asks-comcast-att-and-t-mobile-about-zero-rating-services/ (last visited August 7, 2016). As the wireless industry becomes more invested with content production and content decision-making, diversity in wireless ownership becomes especially justified to ensure a well-working market – *i.e.,* one not burdened by the inefficiencies flowing from discrimination or its present effects.

[10] *See* Robert W. Fairlie, Ph.D. and Alicia M. Robb, Ph.D., *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, U.S. Department of Commerce, Minority Business

In sum, MBDA's research suggests that the nation's economy is missing out on furthering equal opportunity if these businesses continue to be undervalued.

2. **MBEs Serve Unserved and Underserved Populations.** Minority-owned businesses (collectively, "MBEs"), in particular, regularly invest in communities that other companies overlook, ignore, or underserve.[11] Often these are the communities in which the MBEs are headquartered or have offices.[12] Service to unserved and underserved markets can provide a means of entry for entrepreneurs who cannot afford to directly compete with large carriers that have established retail and distribution channels, large marketing and advertising budgets, an existing subscriber base, and incumbency privileges. Although there is likely a large overlap in minority- and non-minority-developed telecommunications investment opportunities, MBEs generally will have more experience with unserved and underserved communities and their unique investment opportunities. Such underserved communities may be very rural communities without access to high broadband speeds, or dense urban areas characterized by low household income,

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Development Agency (Jan. 2010) at 8, *available at* http://www.mbda.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf (last visited August 7, 2016).

[11] "[Minority] business owners have the potential to create more jobs and revitalize distressed communities." *See* Melissa Bradley, *Investing in Minority Entrepreneurs: An Economic Imperative for the U.S.*, Erwin Marion Kaufman Foundation (February 10, 2016), *available at* http://www.kauffman.org/blogs/growthology/2016/02/investing-in-minority-entrepreneurs-an-economic-imperative-for-the-us (last visited August 7, 2016); *see also Digital Déjà Vu* at 11 note 44 (highlighting TriCo Wireless PCS, Inc. low cost service to communities larger carriers ignored).

[12] *See Minority Owned Businesses Critical Measure of the Nation's Economic Health*, National Minority Supplier Development Council, *available at*: http://www.nmsdc.org/minority-owned-businesses-critical-measure-nations-economic-health/ (last visited August 20, 2016).

which is generally correlated with lower rates of internet adoption.[13] MBEs are also more likely than non-minority-owned businesses to export and conduct business in languages other than English.[14]

3. **MWBEs Bring Diverse Employees to the Industry Workforce.** Because they represent communities of color and women, MWBEs often are sensitive to the recruitment and training of minority and women employees and future industry leaders. Additionally, MBEs frequently hire more people of color because they locate in or recruit from geographically segregated communities that other companies overlook or underserve.[15] These important access

[13] For example, in Washington, DC, areas in the lowest quintile of household income are likewise in the lowest quintile of internet adoption. *See* Council of Economic Advisers, *Mapping the Digital Divide* (July 2015) at 3, *available at* https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf (last visited August 6, 2016).

[14] "Minority-owned firms are five times more likely (33% to 41% of firms) to conduct business in a language other than English compared to non-minority-owned firms (5% to 7% of firms)." *See* Minority Business Development Agency, *Minority-Owned Firms Lead the Nation in Exporting*, *available at* http://www.nist.gov/ineap/upload/MBDA-Export-FACT-SHEET-2012.pdf (last visited August 7, 2016).

[15] *See e.g.*, Bates and Robb, *supra* note 4 ("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.") *See also* Timothy Bates and Alicia Robb, *An Analysis of Small-Business Viability in Urban Minority Communities* (Jan. 13, 2013) at 8, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989448 (last visited August 6, 2016) (internal citations omitted) ("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.")

services have special value in the wireless industry given the massive demographic transition to a majority-minority population that is reshaping our country.[16]

As this transformation takes place, wireless has become the first technology in the U.S. for which people of color are the earliest adopters. According to the Pew Research Center, people of color rely more heavily than others on their cell phones for internet access.[17] Wireless-only telephone use in households is also increasing among communities of color. While national wireless-only household use measured at 44.0%, wireless-only household use among African Americans and Hispanics measured at 60.5% and 48.5% respectively.[18] Thus, wireless is poised to become one of the few telecommunications industries in the U.S. in which the consumer base is majority-minority.

Notably, woman business enterprises (collectively, "WBEs") hire more female employees than male owners: WBEs hire women at a rate of 52% compared to male-owned businesses' hiring rate of 39% women.[19] Finally, the growing influence of women in the telecommunications

[16] *See, e.g.*, William H. Frey, *Shift to a Majority-Minority Population in the U.S. Happening Faster than Expected,* The Brookings Institution (June 19, 2013), *available at* https://www.brookings.edu/2013/06/19/shift-to-a-majority-minority-population-in-the-u-s-happening-faster-than-expected/ (last visited August 7, 2016).

[17] *See* Monica Anderson, *Racial and ethnic differences in how people use mobile technology,* Pew Research Center (April 30, 2015), *available at* http://www.pewresearch.org/fact-tank/2015/04/30/racial-and-ethnic-differences-in-how-people-use-mobile-technology/ (last visited August 7, 2016).

[18] *See* Stephen Blumberg and Julian Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2015*, National Center for Health Statistics (2015) at 1, 2, *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf (last visited August 10, 2016).

[19] *See* U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *Two Different Worlds: Men and Women from 9 to 5*, Statistical Brief (Feb. 1995) (most recent Census data), *available at* https://www.census.gov/prod/1/statbrief/sb94_24.pdf (last visited August 11, 2016).

marketplace, and particularly in wireless,[20] underscores the importance of building opportunities for WBEs.

II. <u>HOW SECONDARY MARKET WIRELESS TRANSACTIONS WITH MWBES CAN PROMOTE COMPETITION AND INNOVATION</u>

Many MWBEs entered the wireless industry through spectrum auctions (*see* pp. 16-18 *infra*). However, this transition has not come without challenges. Generally, the scale of MWBEs in this marketplace is largely dependent upon their access to spectrum through the secondary market. As MMTC detailed in a 2014 White Paper, MWBEs or the FCC's Designated Entities (collectively, small businesses, MWBEs, and rural telcos) greatly benefit from gains on the secondary market.

> Secondary market transactions are those in which an operator gains access to spectrum through private commercial transactions. While access to capital remains a major obstacle, some MWBEs have been successful in raising large sums of capital to acquire spectrum on the secondary market, especially when the seller actively seeks the participation of Designated Entities (DEs) or MWBE participation. MBEs can raise significant capital when regulatory barriers are few. In 2013, for example, businesses controlled by wireless business pioneer David Grain completed the largest MBE spectrum acquisition, valued at $287 million and involving large incumbents Verizon Wireless and AT&T.[21]

[20] *See* Kelly Hill, *Women in Wireless*, RCR Wireless News (July 2014), *available at* http://www.about.att.com/content/dam/snrdocs/women_in_wireless.pdf (last visited August 12, 2016) (reporting that in 2012, overall telecom employment including wireless and wireline had a gender breakdown of 58% men and 42% women in 2012. Among executives and senior level managers, the breakdown for 2012 was 80% men and 20% women.

[21] *Digital Déjà Vu*, *supra* note 6, at 26-27. *See also id.* at 27 note 99 ("In September 2012, the FCC granted the Grain Spectrum, LLC and Grain Spectrum II, LLC (collectively, Grain Spectrum) applications to assign and lease a number of Lower 700 MHz Band B Block and full advanced wireless services licenses from Verizon Wireless and AT&T. In making its decision, the FCC determined that the transaction would meet its Section 257 obligation to further its "goal of extending opportunities in the wireless market to small and minority-owned businesses. *Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC and Grain Spectrum II, LLC For Consent To Assign and Lease AWS-1 and Lower 700 MHz Licenses, Order*, 28 FCC Rcd 12878, 12905 ¶65 (2013).")

In the wireless space, secondary market transactions are largely used to facilitate the leasing or sale of large companies' non-core spectrum holdings. Large carriers routinely engage in secondary market transactions, exchanging, selling, and leasing spectrum to each other.

Where secondary spectrum markets have been permitted to operate – most notably in the U.S. market for mobile wireless spectrum – licenses worth billions of dollars have been exchanged. These trades have allowed spectrum to be transitioned between technologies and uses (*e.g.*, AT&T's 2011 acquisition of spectrum Qualcomm had used for its ultimately unsuccessful MediaFlo service) or even from owners who were not using all of their spectrum to those who would could put it quickly to productive use (as in Verizon's 2012 acquisition of spectrum from SpectrumCo).[22]

The FCC has long favored these types of transactions. In its 2000 *Secondary Market Policy Statement*,[23] the Commission set forth its plans to encourage licensees to make all or portions of their assigned frequencies and/or service areas available to other entities and for other uses. The Commission envisioned that secondary markets could flourish by facilitating arrangements such as leasing, franchising, and joint operating agreements, and by improving the conditions for transferability of spectrum usage rights through, for example, the partition or disaggregation of spectrum.[24] The Commission has sought "to significantly expand and enhance the existing secondary markets for spectrum usage rights to permit spectrum to flow more freely among users

[22] Jeffrey Eisenach, *The Equities and Economics of Property Interests in TV Spectrum Licenses*, Navigant Economics (January 14, 2014), *available at* http://www.nab.org/documents/newsRoom/pdfs/011614_Navigant_spectrum_study.pdf) (last visited August 6, 2016).

[23] *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178 (2000).

[24] *Id.* at 24178 ¶1.

and uses in response to economic demand, to the extent consistent with our other statutory mandates and public interest objectives."[25] Further, it has recognized that "a robust and effective secondary market for spectrum usage rights could help alleviate spectrum shortages by making unused or underutilized spectrum held by existing licensees more readily available to other users to help promote the development of new spectrum efficient, technologies."[26]

In 2003, the FCC broadened opportunities for secondary market transactions by permitting licensees to lease their licensed spectrum to third parties, in an effort to achieve "more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country."[27] These spectrum leasing arrangements have been vital to the business models used by MWBEs. Generally, these arrangements provide increased access to capital, which in turn can help these firms ultimately gain the scale necessary to become facilities-based competitors – a goal shared by the FCC.[28]

While spectrum is often transferred from one large company to another, incentives can be created to facilitate the sale or leasing of spectrum to MWBEs, thereby enabling them to gain a foothold in the wireless marketplace. Although Congress has not yet created specific incentives

[25] *Id.*

[26] *Id. at* 24178 ¶2.

[27] *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).

[28] *Id.* at 20607 ¶2 ("Facilitating the development of these secondary markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition amongst service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.")

for secondary market spectrum sale or leasing to MWBEs, legislators have long been on record as recognizing the need for increased participation by minorities and women in the wireless spectrum marketplace. In a 1993 amendment to the Communications Act of 1934, as amended ("Communications Act"), Congress authorized the Commission to allocate scarce public radiofrequency spectrum via competitive bidding (auctions).[29] In Section 309(j), Congress mandated that the agency "promot[e] economic opportunity and competition and ensur[e] 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.*"[30]

Congress granted the FCC auction authority as a more efficient and expedient means to allocate new licenses.[31] Congress also recognized that small businesses, rural telephone companies, and businesses owned by members of minority groups and women – collectively referred to as "designated entities" or "DEs" – faced longstanding market entry barriers such as access to capital due to discriminatory practices in equity and debt markets.

> [MWBEs] could easily be priced out of auctions because they would have to compete directly with incumbents that were often large, well-capitalized, entrenched and experienced communications companies. At that time, Congress asserted that "unless the Commission [was] sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[32]

[29] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §6002 (codified at 47 U.S.C. §309(j)).

[30] 47 U.S.C. §309(j)(3)(B) (emphasis added).

[31] *See* FCC, *About Auctions, available at* http://wireless.fcc.gov/auctions/default.htm?job=about_auctions (last visited August 10, 2016).

[32] *Digital Déjà Vu*, *supra* note 6, at 2 (citing to H.R. REP. NO. 103-111, at 254 (1993)).

Developing new incentives that fulfill the purpose of Section 309(j), the purpose of which is ultimately to promote competition and innovation, should not be inherently difficult for Congress or the FCC. Indeed, while many MWBEs enter the wireless marketplace through the DE program, their growth into sizeable, sustainable institutions will depend on their ability to access spectrum through the secondary markets using largely regulation-free mechanisms to attain scale through leasing and wholesaling some of their spectrum. When secondary market transactions are leveraged, MWBEs have a springboard to obtain facilities-based status. A leading scholarly article on secondary markets in wireless found that such transactions can help new entrants "that could succeed in the market but for access to spectrum" and can promote efficient spectrum utilization when secondary markets have low transaction costs.[33]

In 2014, the Commission sought comment on mechanisms to enable MWBEs and other DEs to participate fully in the wireless industry.[34] In response, several parties encouraged the Commission to take steps to encourage secondary market transactions.[35] Notably, one of the largest carriers, AT&T, suggested that providing incentives for secondary market transactions may offer a more direct path to including small businesses in the telecommunications industry, and may be a more effective mechanism for their participation in wireless markets than

[33] John Mayo and Scott Wallsten, *Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets*, 22 Information Economics and Policy 61, 63 (2010) (subscription only), *available at* http://www.sciencedirect.com/science/article/pii/S0167624509000766 (last visited August 9, 2016).

[34] *Updating Part I Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, 12440 ¶36, 12443-44 ¶47, 12444 ¶50, 12471 ¶127 (2014) ("*Part I NPRM*").

[35] *See* Comments of United States Cellular Corporation, Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170 *et al.* (filed May 14, 2015), at 16-17, *available at* https://ecfsapi.fcc.gov/file/60001047442.pdf (last visited August 11, 2016); Comments of the National Urban League, Incentive Auction, GN Docket No. 12-268 *et al.* (filed July 9, 2015) at 2-3, *available at* https://ecfsapi.fcc.gov/file/60001114407.pdf (last visited August 11, 2016).

facilitating participation in auctions due to the cost of licenses and capital needed to build networks.[36]

The Commission has also sought further comment on, *inter alia*, the question of "whether there are alternative frameworks that the Commission should consider to promote a diverse telecommunications ecosystem, including incentives for secondary market transactions or virtual networks that could provide a more direct path into the industry for all entities."[37]

Generally, Congress and the FCC must continue to consider market-based incentives to encourage MWBE engagement in the wireless marketplace, and incentivize commercial partners to support their goals. The next section outlines one legislative and three regulatory incentives that would advance diversity and inclusion in the wireless industry.

III. FOUR POTENTIAL INCENTIVES FOR SECONDARY MARKET WIRELESS TRANSACTIONS WITH MWBES

Of the four potential public policy incentives for secondary market transactions shared in this paper, only one would require congressional action: restoration and refinement of the Tax Certificate Policy, (*see* pp. 15-18 *infra)*. The FCC can implement the other three under its existing statutory authority, one of which it can adopt without the need for disparity studies required under strict scrutiny.[38] Specifically, the Commission can consider voluntary secondary market

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[36] *See* AT&T Reply Comments in Response to the *Part 1 NPRM*, WT Docket 14-170 *et al.* (filed March 6, 2015), at 11-12, *available at* https://ecfsapi.fcc.gov/file/60001039473.pdf (last visited August 7, 2016).

[37] *Updating Part I Competitive Bidding Rules*, Public Notice, 30 FCC Rcd 4153, 4163-64 ¶¶23-24 (2015).

[38] The gathering of statistics about diversity does not place on any individual or entity an inducement to perform an action, nor does it provide benefits to any individual or entity. Thus it has no potential impact on equal protection or due process and, consequently, it does not implicate strict scrutiny. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551

transactions with MWBEs as a factor in determining whether to report to Congress that the mobile wireless marketplace is competitive (*see* pp. 18-20 *infra*). The FCC an adopt two other potential incentives under its existing authority once the agency completes the disparity studies a federal appellate court has required the agency to undertake:[39] consideration of voluntary secondary market transactions with MWBEs as part of M&A regulatory review (*see* pp. 20-21 *infra*), and auction bidding credits for companies when, or after, they voluntarily sell assets to MWBEs in secondary market transactions (*see* pp. 21-22 *infra*).

More details on each of the four proposed incentives are presented below.

A. Restore and Refine Tax Certificate Policy

The Tax Certificate Policy, in effect from 1978-1995, was the most effective minority communications ownership initiative ever implemented. With the goal of promoting the diversity of media ownership that often leads to diversity of media voices,[40] the Tax Certificate Policy

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U.S. 701, 788 (2007) (Kennedy, J., concurring). ("Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including ... tracking enrollments, performance, and other statistics by race"); *see also United States v. New Hampshire*, 539 F.2d 277, 279- 280 (1st Cir. 1976), *cert. denied*, 429 U.S. 1023 (1976) (raw, statistical data on race and ethnicity may be collected, regardless of a party's fear of misuse).

[39] A federal program, even if voluntary, that incentivizes assistance to minority entrepreneurs must be evaluated under strict scrutiny, requiring research (colloquially, "*Adarand* studies") documenting that the initiative serves a compelling governmental interest and that the means chosen are narrowly tailored to advancing that interest. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). (Initiatives aimed at promoting women's ownership are evaluated under intermediate scrutiny; *see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). A federal court of appeals has (actually three times) required the FCC to conduct the *Adarand* studies that would enable the agency to consider implementing a number of proposed media ownership initiatives aimed at promoting minority and women ownership. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 48 (3d Cir. 2016). Based on our experience in the *Prometheus* litigation, we presume that the FCC's studies would cover all regulated industries.

[40] *See Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *see also TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert denied*, 418 U.S. 986 (1974) (holding that minority ownership must be a factor in broadcast licensing) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (holding that minority ownership must be a factor in the FCC's administration of its spectrum management policies).

allowed the seller of a broadcast station or cable system to a minority-controlled buyer to receive "a certificate permitting deferral of capital gains tax in cases where a licensee sells to a minority buyer."[41] Thus the initiative created an "economic incentive for current broadcast licensees to sell their interests to minority-controlled business entities."[42] The Policy – a classic "win-win," was adopted unanimously with the support of industry and civil rights organizations.[43] The Tax Certificate Policy benefited buyers and sellers, and it did so without imposing significant costs on the Treasury or on non-minority licensees. During the 17 years in which it operated, minority broadcast ownership quintupled.[44]

After Congress repealed the policy in 1995,[45] legislation reformulating the policy was introduced in both the House and Senate. The new template would enable companies that sell

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[41] *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 981 (1978) ("*Minority Ownership Policy Statement").* In 1982, as a means of assisting minority broadcasters to secure financing, the Commission extended the Tax Certificate Policy to apply to entities controlled by minorities who held at least 20% of the entity's equity. *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC2d 849 (1982).

[42] *See* Wilde, Bruce R., *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-Examination Policy,* 138 University of Pennsylvania Law Review 979, 980 (1990), *available at* http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3804&context=penn_law_review) (last visited August 8, 2016).

[43] The proposal was adopted unanimously under the leadership of FCC Chairmen Richard Wiley and Charles Ferris. It enjoyed broad support from the industry and public interest groups. *See Minority Ownership Policy Statement, supra* note 42, 68 FCC2d *at* 983 (the proposal "was advanced to us by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General Electric Broadcasting Company and the National Black Media Coalition.")

[44] *See* Erwin G. Krasnow and Lisa M. Fowlkes, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death,* 51 Federal Communications Law Journal 665, 669 -71 (1999), *available at* http://www.repository.law.indiana.edu/fclj/vol51/iss3/8 (last visited August 10, 2016) (discussing Congressional enactments in 1992 and 1993 that endorsed and built upon the policy as a means of promoting media ownership diversity.)

[45] *Deduction for Health Insurance Costs of Self-Employment Individuals*, Pub. L. No. 104-7 §2, 109 Stat. 93 (1995). The policy was repealed based on entirely unsupported claims of abuse; the repeal was effectuated by attaching the repeal language to must-sign legislation (a tax bill on the

broadcast stations, cable systems, or spectrum to small or socially disadvantaged businesses, in primary or secondary market transactions, to defer capital gains taxes on the sale upon reinvestment in comparable property. The Senate language is found in Senator John McCain's Telecommunications Ownership Diversity Act of 2003, which proposed renaming the policy the "Tax Deferral Program," extending it to telecommunications, imposing a cap on the amount of tax that could be deferred in a transaction, and imposing a cap on the total deferred taxation for all transactions within a year. While the original Tax Certificate Policy conferred benefits on minorities specifically, the new proposed policy resulted in race-neutral language and a focus on small disadvantaged businesses. In his remarks introducing the legislation, Senator McCain stated:

> The bill would institute market-based, voluntary measures designed to achieve this goal. It would provide sellers of telecommunications assets a tax deferral when those assets are bought for cash by certain small businesses. It also would provide investors an incentive to consider certain small businesses by providing a reduction in the tax on gains from investment in these companies…
>
> Too often, new entrants and small businesses lose out on opportunities to purchase telecom assets because they don't offer sellers the same tax treatment as their larger competitors. A small purchaser's cash offer triggers tax liability, while a larger purchaser's stock offer may be accepted effectively tax-free. When an entity chooses to sell a telecom business, our tax laws should not make one bidder more attractive than another.
>
> The goal of viewpoint diversity has been at the center of recent debate over media ownership rules. While it is important to discuss the relative merits of ownership restrictions, we also must consider market-based, voluntary methods of facilitating entry and diversity of ownership. And that's what this legislation would do."[46]

In the 110th Congress in 2007, Congressman Bobby Rush introduced H.R. 600 as the companion bill in the House.[47]

President's desk April 13, 1995 affecting self-employment returns due April 15, 1995).

[46] *McCain Bill Diversifies Ownership in Telecommunication Industry*, *available at* http://www.mccain.senate.gov/public/index.cfm/2003/1/post-a68170be-e070-4f83-a236-2631dbefed45 (last visited August 6, 2016).

[47] H.R. 3003 - To amend the Internal Revenue Code of 1986 to provide tax incentives to encourage diversity of ownership of telecommunications businesses, and for other purposes,

Notably, the legislation drew no public opposition, and the National Association of Broadcasters offered an endorsement.[48] In 2015, the FCC encouraged Congress to adopt favorable tax deferral legislation.[49] Such bipartisan and overwhelming support for restoration and reform of the Tax Certificate Policy suggests that this incentive should be revisited as a means to advance diversity and inclusion in the ownership of wireless assets.

B. Consider Secondary Market Transactions with MWBEs as a Factor in Determining Whether to Report to Congress that the Mobile Wireless Marketplace is Competitive

The FCC has a tremendous responsibility to ensure that the influential industries it regulates are competitive. Given the importance of the wireless industry for all consumers, and given the increasingly diverse demographics of the U.S. population, the FCC should collect and study data on MWBE participation in the wireless industry, and especially secondary market transactions, in order to have a clear picture of the competitiveness of the industry.

Shining a light on voluntary secondary market transactions would reinforce their importance to the FCC. The mandated *Mobile Wireless Competition Reports* (formerly, Annual CMRS Competition Reports) serve as the agency's evaluation of wireless industry competition. The reports are widely read and regularly cited as authority on the wireless industry.

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available at https://www.congress.gov/bill/110th-congress/house-bill/3003/text?resultIndex=1) (last visited August 6, 2016).

[48] *See Comments of the National Association of Broadcasters*, 2006 Quadrennial Regulatory Review, MB Docket No. 06-121 *et al.* (filed Oct. 1, 2007) at 3-4, *available at* https://ecfsapi.fcc.gov/file/6519738884.pdf (last visited August 7, 2016).

[49] *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4513-14 (2014), *reversed and remanded in part on other grounds sub nom. Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016).

Consequently, adding information about secondary market transactions involving MWBEs would signal the importance the FCC places on this issue.

In these reports, Congress requires the Commission to annually review and report on whether the mobile market is competitive.[50] In analyzing the competitiveness of the market, the Commission is directed to consider the number of competitors, whether there is effective competition, whether there is a dominant competitor, and whether any additional providers would increase competition.[51]

MWBEs should be factored into this equation to efficiently gauge the level of industry competition, especially given that the wireless industry is providing a unique access point for people of color.[52] MWBEs provide an important input of inherent entrepreneurial and innovative capabilities; if the market is successful in encouraging the deployment of these valuable assets in the hands of MWBEs, the industry becomes inherently more efficient and competitive.

The Commission can also use this data to determine the specific barriers to new entry in addition to access to capital issues[53] and provide necessary MWBE incentives and initiatives for

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[50] *See* 47 U.S.C. §332(c)(1)(C).

[51] *See id.*

[52] *See Initial Comments of the Incentive Auction Advocates, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (filed Jan. 25, 2013), *available at* https://ecfsapi.fcc.gov/file/7022112344.pdf (last visited August 7, 2016).

[53] 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) at 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.")

future auctions and other regulatory actions to ensure that sufficient competition exists in the marketplace.

C. Consider Secondary Market Transactions with MWBEs as a Part of M&A Regulatory Review

Merger activity in wireless is likely to accelerate dramatically in the wake of the DTV incentive auction, thereby providing an opportunity for numerous secondary market transactions to occur. Attendant to mergers, the FCC and the Department of Justice ("DOJ") must make somewhat subjective judgment calls about the impact of transactions on competition. Since secondary market transactions to MWBEs can enhance competition, it would be reasonable for the FCC or DOJ to announce that they will consider such transactions as a pro-competitive factor in their merger analyses.

There is longstanding precedent for FCC consideration of MBE ownership as a factor in granting rule waivers to facilitate broadcast transactions.[54] Adding consideration of secondary market transactions with MWBEs could create a similar incentive in the wireless sector.

[54] *See Stockholders of Infinity Broadcasting Corporation*, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as part of CBS' showing in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity "has already filed an application to assign one of the stations it will divest to a minority-controlled entity") and *Viacom, Inc.,* 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver"); *cf. Midwest Communications, Inc.,* 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities) and *Combined Communications Corp.*, 72 FCC2d 637, 656 ¶45 (1979) (declaring that the opportunity to approve the spinoff from the Gannett/Combined Communications Corp. merger of WHEC-TV, Rochester, New York to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties").

To operationalize this incentive, merger applicants can be encouraged to include, in the Public Interest Statements accompanying their merger applications, how the parties' voluntary secondary market transactions have promoted entrepreneurship by MWBEs or other disadvantaged new entrants.

In the 2014 *Competitive Bidding R&O*, the Commission declined to adopt a general policy of granting a carrier rule waivers in recognition of secondary market transactions.[55] However, the Commission did leave open the possibility that in the context of a particular transaction it would consider secondary market transactions as a competitive factor,[56] noting that the Commission has "encouraged the use of secondary market transactions … to transition unused spectrum to more efficient use and allow network providers to obtain access to needed spectrum for broadband deployment."[57]

As activity peaks in the wireless industry, especially around mergers and acquisitions, the FCC should affirmatively state that competition promoted via diversity and inclusion will be compelling factors in its determination of whether a transaction meets the public interest standard. Such action would go a long way toward furthering MBE and WBE ownership of commercial wireless spectrum.

[55] *Updating Part I Competitive Bidding Rules, WT Docket No. 14-170 et al.*, Report and Order and Order on Reconsideration, FCC 15-80 (released July 21, 2015) ("*Competitive Bidding R&O*").

[56] *Id. (citing Policies Regarding Mobile Spectrum Holdings Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, 6138-39 ¶¶281-82 (2014)).

[57] *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent To Assign AWS-1 Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 10698, 10715 ¶46 (2012) (citing Federal Communications Commission, Connecting America: The National Broadband Plan, Recommendation 5.7, at 83 (Mar. 16, 2010)).

D. Provide Bidding Credits to Carriers When, or After, They Engage in Secondary Market Transactions with MWBEs

Bidding credits in FCC auctions have proven to be an effective method to compensate for historic discrimination and to promote competitive new entry. In describing its Designated Entity Program, the FCC stated that its "primary method of promoting the participation of designated entities in competitive bidding has been to award bidding credits – percentage discounts on winning bid amounts – to small business applicants."[58] Thus, bidding credits usable in forthcoming FCC auctions are direct financial benefits to bidders.

In recent auctions, the Commission has offered bidding credits of 15 percent to businesses with average annual gross revenues for the preceding three years not exceeding $40 million, and 25% to businesses with average annual gross revenues not exceeding $15 million.[59] The recently revised standardized schedule of bidding credits set forth in Part 1 of the Commission's rules now provides bidding credits of 15% for businesses with average annual gross revenues for the preceding three years not exceeding $55 million, a 25% bidding credit for revenue that does not exceed $20 million, and a 35% bidding credit for revenue that does not exceed $4 million over the preceding three years.[60]

A bidding credit of five percent to a carrier that sells spectrum to an MWBE in a secondary market transaction would give the carrier a modest but significant advantage over

[58] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, 4756 ¶9 (2006).

[59] *See, e.g., Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands, GN Docket No. 13-185,* Report and Order, 29 FCC Rcd 4610, 4680-81 ¶189 (2014).

[60] *See* 47 C.F.R. §1.2110(f)(2)(i) (2015).

otherwise similarly situated bidders. The advantage is not too large to fail a cost-benefit test, nor too small to have a meaningful impact.

IV. CONCLUSION

The growth in mobile use among consumers of color is a significant factor in narrowing disparities in digital access and use, yet the challenge of building significant spectrum ownership among members of underrepresented groups still persists. It is vital for MWBEs to not only be consumers of wireless technology, but to have opportunities to be producers – by owning and controlling public infrastructure-related resources such as wireless spectrum licenses.

The full inclusion of MWBEs in the wireless communications sector – as licensees and ultimately as facilities-based spectrum owners – is vital to fulfilling the promise of innovation, competition, and universal deployment of the advanced wireless services that are transforming the nation. As the wireless industry continues to be an essential element of the nation's economic growth, the aspiration to own and operate the assets that enable and empower this leading industry holds profound importance to MWBEs and the people and communities they represent. The four incentives recommended in this paper are market-driven, light-touch initiatives that would facilitate an efficient, well-working wireless market open to all entrepreneurs and serving all Americans.

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