

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:

Auction of FM Broadcast Construction        )        PN Rpt. AUC-04-37-K (Auction No. 37)  
Permits Scheduled for November 3, 2004    )        DA 04-1699

TO THE COMMISSION

**SECOND MOTION FOR STAY**

The Minority Media and Telecommunications Council (“MMTC”), pursuant to 47 C.F.R. §1.429(k), respectfully moves for a stay of Auction 37, including all pre-auction deadlines, events and procedures, as described in Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, PN Rpt. No. 04-37-K (Auction 37), DA 04-1699 (June 10, 2004), as supplemented by schedule announcements, supplements and errata (Auction 37 Second PN).<sup>1/</sup>

This is MMTC’s second motion for stay of the Auction 37 rules. On June 16, 2003, MMTC filed a Motion for Stay (“MMTC First Motion for Stay”) in MM Docket No. 95-31, Reexamination of the Comparative Standards for Noncommercial Educational Applicants, where this matter then resided procedurally. On that day, MMTC also lodged a petition for reconsideration (“Petition for Reconsideration”) of the Second Report and Order in the same docket, 18 FCC Rcd 6691 (2003). The Auction 37 Second PN states that MMTC’s Petition for Reconsideration remains pending, id. p, 5 n. 9, but the Auction 37 Second PN neither rules upon nor mentions the existence of the MMTC First Motion for Stay.<sup>2/</sup>

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<sup>1/</sup> This Motion reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

<sup>2/</sup> In the omnibus broadcast multiple ownership proceeding, MMTC also requested a stay, and that request, too, was neither ruled upon nor mentioned. The Commission’s failure to mention or rule on MMTC’s request for stay in that proceeding was among the reasons a court of appeals invoked the rarely-used futility doctrine to impose a stay of its own. See Prometheus Radio Project v. FCC, No. 03-3388, Order #E-59 (per curiam, September 3, 2003) (“under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.”) It is almost unbelievable that after the Prometheus stay order, the Commission would commit exactly the same error in another docket.

One week ago today, MMTC appealed the Auction 37 Second PN to the full Commission by filing an Application for Review under 47 C.R.R. §1.115 (“Application for Review”).

Therein, MMTC demonstrated that the Auction 37 rules and procedures would lead to substantial gamesmanship and fraud, imperiling fatally the Commission’s only significant policy aimed at fostering minority radio ownership – auction bidding credits:

The bidding credits program offers two benefits: (1) a new entrant will receive a payment discount after it wins a permit; and (2) a new entrant can discourage competing bids by holding itself out, during the auction, as an entity that ultimately will be entitled to the discount. A loophole in the auction rules eviscerates the second of these benefits of the bidding credits program. The loophole allows an applicant, after changing its structure so as to disentitle itself to bidding credits, to conceal that critical fact from its opponents while the auction is underway.

In particular, as the auction rules are written now, an applicant can claim new entrant bidding credits, deploy the credits in the auction against other applicants, and then, during or after the auction, quietly and non-transparently abandon the attributes that gave rise to those credits. Sometimes this will happen when inexperienced applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. However, all too many applicants will realize that the rules allow them to scheme in advance to retain their diversification attributes only long enough to claim bidding credits. An applicant that does not plan ultimately to be structured as a new entrant can simply create a shell new-entrant structure, claim the bidding credits, and then, during the auction, revert to its long-planned permanent structure. It could then quietly disclose that fact 30 days later, after the auction is over, when the competing bidders can do nothing about it.

To be sure, a bidder cannot use these undeserved bidding credits to claim a payment discount after the auction. However, due to the non-transparency of the bidding process, fraud artists can create the false impression that they continue to possess the enhanced financial capability that derives from an entitlement to bidding credits. In this way, a fraud artist can bluff an honest bidder into folding its bidding early or pursuing a different and sub-optimal allotment....

In sum, by relying detrimentally on false information, the genuine applicants will be harmed in three ways. First, they will waste resources bidding on allotments they cannot win. Second, they will overbid to win their desired allotments. Third, in a multiple allotment, multiple round auction, they will abandon their optimal allotments and pursue inferior allotments that they would not have pursued had they enjoyed timely and accurate information on their opponents’ entitlements to bidding credits.

Application for Review, pp. 5-7 (footnotes and internal citations omitted).<sup>3/</sup>

The remedy could not be more straightforward:

Acceptance of an auction password and submission of a bid should constitute affirmative reaffirmation of a bidder's ownership structure and entitlement to bidding credits. If a bidder downgrades comparatively after the filing of Form 175 but before the end of the auction, it should be required to post that fact on the auction website fact at the start of each round of bidding, and thereafter should enjoy only those bidding credits that correspond with its actual structure. Requiring such reports and adjustments to bidding credits would ensure that no bidding credit continues to be deployed after its diversification predicate becomes inoperative. It is a complete and virtually cost-free remedy.

Id., p. 9 (quoting MMTC Petition for Clarification, Amendment of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional

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<sup>3/</sup> The Auction 37 procedures on amendments to Form 175 are ambiguous and hollow, to say the least. They state that a “major modification,” including a change of control as defined in 47 C.F.R. §1.2105(b), is impermissible. Auction 37 Second PN, p. 19 (Minor Modifications to Short-Form Applications); see also id., p. 35 (Maintaining the Accuracy of FCC Form 175). However, Section 1.2105(b), designed for wireless and other telecom auctions, requires dismissal based on “changes in an applicant’s size which would affect eligibility for designated entity provisions.” The designated entity provisions are inapplicable for Auction 37, where bidding credits are based on new entry, not size. See discussion in MMTC’s Application for Review, p. 5 n. 7. Therefore, Section 1.2105(b), albeit unintentionally, leaves the Commission powerless against bidding credit fraud in broadcast auctions. Further, the Auction 37 Second PN states that modifications to Form 175 are permissible if they include “revision of certain exhibits,” without saying whether one of these “certain exhibits” is the exhibit showing who has a non-controlling interest in the applicant, or the exhibit identifying the applicant’s entitlement to bidding credits. Id., p. 19 (Minor Modifications to Short-Form Applications). Moreover, the Auction 37 Second PN states that an amendment “reporting substantial changes of possible decisional significance...will not be accepted and may in some instances result in the dismissal of the FCC Form 175 application” without saying whether entitlement to bidding credits is of “decisional significance” and without stating what “instances” could result in the dismissal of the Form 175 application. Id. (Maintaining Current Information in Short-Form Applications). Finally, ownership changes that could “affect the applicant’s qualifications for a new entrant bidding credit...must be clearly stated in the bidder’s amendment,” id. at 19 n. 76, but nowhere is it stated that these changes would be disqualifying. Instead, such changes need only be reported, under Section 1.65, “within 30 days of any substantial change that may be of decisional significance to that application” (emphasis supplied), meaning – at best -- that during an auction, an applicant can sit for a month on an amendment modifying its Form 175. Id., p. 19 (Maintaining Current Information in Short-Form Applications).

Television Fixed Service Licenses, MM Docket No. 97-234 (filed April 19, 2001) (“Petition for Clarification”).

Pre-auction events commence this Thursday, July 22, with a seminar. Registration for the seminar begins today, July 19. Id., pp. 19-20. Form 175’s are due by August 6. Id., p. 20. Since time is of the essence, the Commission should act on this Second Motion immediately.

In determining whether there is good cause to stay the effective date of Auction 37 until the Commission revises its auction procedures to prevent fraud and gamesmanship, the Commission should apply the criteria set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) as explained in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) (“Holiday Tours”). Under the Holiday Tours test, MMTC must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if a stay is granted; and (4) that the public interest favors a stay. Holiday Tours, 559 F.2d at 842. That showing is provided below.

(1) MMTC will prevail on the merits. Throughout the three years in which MMTC has sought the relief advocated in the Application for Review, no party has lodged an objection. As shown above, the rules plainly contain a major flaw: they allow an auction bidder to conceal from its opponents that it is actually not entitled to bidding credits it has claimed and has notified the public that it intends to deploy. Further, this flaw could not be easier to cure: the Commission can simply require same-day reporting of bidding credit entitlements. This approach is virtually cost-free, since bidding is to be handled over the Internet, with bids considered round-by-round. See Auction 37 Second PN, p. 25 (Remote Electronic Bidding); id., p. 26 (Simultaneous Multiple Round Auction). The cost of full transparency is nearly zero, since the web-based auction process already is designed to report the previous day’s bidding at the start of each day. The Bureaus’ preferred option – the expensive and time-consuming petition to deny process – will result in no anti-fraud protection. Petitions to deny are intended to address intentional violations of the rules. Since fraud in the auctions would result from a loophole in the

rules themselves, no petition to deny will ever be granted, and few if any good-faith petitions to deny will even be filed. Thus:

- no one – including the Bureaus -- disagrees that the potential for fraud is real;
- the Bureaus' chosen remedy is tedious, expensive, post-hoc and will cure no fraud; and
- MMTC's chosen remedy is immediate, virtually free, preventive, and will virtually eliminate any potential fraud.

(2) MMTC (specifically, its members and constituents who are minority broadcasters, new entrants, and broadcast consumers desirous of receiving diverse program service) will suffer irreparable harm absent a stay. It is a national scandal that only 1.3% of the asset value of the radio industry is in the hands of minorities. To correct this, new entrants must have every opportunity to participate meaningfully in the last opportunities to secure access to the FM spectrum. With 288 construction permits on the line, Auction 37 is by far the greatest opportunity for new FM ownership since the Docket 80-90 comparative hearings began in 1985. Today's generation of genuine new entrants, including many minorities, will be unable to raise financing to participate in an easily corruptible auction system; or if they do participate, their chances of prevailing against well-financed fraud artists will be minimal. Thus, the harm if the Commission conducts a flawed auction will be irreparable. Once these construction permits are issued, they cannot realistically be recalled. Only a stay can prevent this disaster.

(3) No party would be harmed by a stay. Since April, 2001, when MMTC filed its Petition for Clarification first calling this fraud-inducing loophole to the Commission's attention, not one party has come forward stating that it will suffer any material injury if it does not receive an opportunity to bid on these allotments at once. Nor could any party be so harmed, since a stay would not need to be imposed for any significant period of time. It should not take long for the Commission to examine the pleadings and correct the obvious flaw in its auction procedures. Indeed, by removing the need to later file and defend against petitions to deny, and by ensuring

that the auction is untainted, the slight time devoted now to consideration of this matter will be more than made up in the future.

(4) A stay would serve the public interest. Auction bidding credits are the only significant means remaining to promote minority broadcast ownership, and their evisceration through a fraud loophole is tantamount to abandonment of bidding credits. As the Prometheus court just declared, the Commission cannot lightly abandon its only minority ownership policy affecting a significant industry. Prometheus Radio Project v. FCC, No. 03-3388, 3d Cir. (Slip Op.), p. 96 n. 58 (June 25, 2004) (“[r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make the broadcast spectrum available to all people ‘without discrimination on the basis of race,’” citing 47 U.S.C. §151). Indeed, the Commission has long recognized the importance of providing opportunities for minorities in broadcast station ownership. See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978). Congress expects the Commission to use bidding credits or similar methods to promote competition and diversity. 47 U.S.C. §309(j)(4); see FCC Report to Congress on Spectrum Auctions, 13 FCC Rcd 9601, 9629 (1997). A stay would enable the Commission to correct its demonstrably flawed auction rules and thereby adhere to Congress’ intention that it promote competition and diversity.

Rulemaking decisions, once rendered, are often irreversible. Consequently, the Commission in recent years has frequently exercised caution by granting stays of the effective dates of controversial and contested rulemaking orders.<sup>4/</sup> Such caution is also appropriate here.

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<sup>4/</sup> See, e.g., Numbering Resource Optimization (Order), 15 FCC Rcd 17128, 17128-29 ¶2 (2000) (in which, much like the situation presented here, the Commission stayed the effective date of certain rules until it could have an opportunity to rule ab initio on petitions for waiver). See also Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services (Fourth MO&O), 15 FCC Rcd 7051, 7056 ¶14 (1999); Telecommunications Carriers’ Use of Customer Proprietary Network Information (Order), 13 FCC Rcd 19390, 19392 ¶4 (1998); Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services (Order), 10 FCC Rcd 4146, 4149 ¶8 (1994).

WHEREFORE, MMTC respectfully requests that Auction 37, including all pre-auction deadlines, events and procedures, be stayed until the Commission corrects its auction procedures as described in MMTC's Application for Review.

Respectfully submitted,

*David Honig*

David Honig  
Executive Director  
Minority Media and  
Telecommunications Council  
3636 16th Street N.W.  
Suite B-366  
Washington, D.C. 20010  
(202) 332-7005  
dhonig@crosslink.net

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**EXHIBIT TO MMTC'S JULY 19, 2004 "SECOND MOTION FOR STAY"**

**MMTC Application for Review, Auction of FM Broadcast Construction  
Permits Scheduled for November 3, 2004, PN Rpt. AUC-04-37-K (Auction No.  
37), DA 04-1699 (filed July 12, 2004)**



**TABLE OF CONTENTS**

Summary	1
Pleadings in the Record	2
Background	3
Discussion	9
Conclusion and Relief Sought	12

The Minority Media and Telecommunications Council (“MMTC”), pursuant to 47 C.F.R. §1.115, respectfully submits this Application for Review of Auction of FM Broadcast Construction, PN Rpt. AUC-04-37-K (“Auction 37 Second PN”).<sup>1/</sup> Review is sought for each of the reasons specified in 47 C.F.R. §1.115(2)(i), (ii), (iii), (iv) and (v). Since Form 175’s for this auction will begin to be accepted on July 22, 2004, expedited action is respectfully requested.

### **Summary**

This is MMTC’s sixth attempt in four years to bring to the agency’s attention what should have been regarded as a matter of the highest importance: a clear loophole in the broadcast auction rules which (1) opens the door for widespread bidding credit fraud, (2) renders that fraud inactionable because it violates no rules, and (3) will emasculate or nullify the new entrant bidding credits policy, which is presently Commission’s only means of promoting minority ownership in the auction process.

Fortunately, there is a complete and virtually cost-free remedy: requiring applicants to provide full, transparent, and timely disclosure of an applicant’s entitlements to bidding credits. This straightforward approach is far superior to the Bureaus’ preferred option of petitions to

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<sup>1/</sup> This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors. Addressed herein is the Auction 37 Second PN’s ruling denying MMTC’s request that the Commission require same-day bidding credit eligibility disclosure to avoid fraud. Id., p. 18. The Auction 37 Second PN also denied MMTC’s request for restoration of the minority bidding credits, e.g., one tailored for socially and economically disadvantaged businesses (SDBs). See id. MMTC does not seek review of that holding, since a court of appeals has just declared that “[w]e anticipate...that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission’s diversity objectives.” Prometheus Radio Project v. FCC, No. 03-3388, 3d Cir. (Slip Op.), p. 110 n. 70 (June 25, 2004) (“Prometheus”). The Commission has recently began an inquiry that could lead to the development of such a definition, as well as incentive policies based on that definition. Media Bureau Seeks Comments on Ways to Further Section 257 Mandate and to Build on Earlier Studies, DA 04-1690 (released June 15, 2004).

deny. No petition to deny would ever be granted, since grant of a petition to deny presupposes a rule violation. This type of fraud is made possible by a rule loophole, not by rule violations or misrepresentations.

### **Pleadings In The Record**

Each of the pleadings MMTTC has filed was unopposed. They are:

1. MMTTC Petition for Clarification, Amendment of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234 (filed April 19, 2001) ("Petition for Clarification"). The Commission never ruled on or mentioned this pleading.
2. MMTTC Comments, Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31 (filed May 15, 2002). The Commission listed this pleading in the Appendix of its decision in the docket, but did not otherwise rule on or mention it. See Reexamination of the Comparative Standard for Noncommercial Educational Applicants, Second Report and Order, 18 FCC Rcd 6691 (2003) at Appx. A.
3. MMTTC Petition for Reconsideration, Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31 (filed June 16, 2003). The Commission never ruled on or mentioned this pleading.
4. MMTTC Motion for Stay, Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31 (filed June 16, 2003). The Commission never ruled on or mentioned this pleading, even though the Commission's failure to mention or rule on an MMTTC request for stay in another case was among the reasons a court of appeals invoked the rarely-used futility doctrine to impose a stay of its own. See Prometheus Radio Project v. FCC, No. 03-3388, Order #E-59 (per curiam, September 3, 2003) ("under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.")
5. Comments of MMTTC, Revised Inventory and Auction Start Date for FM Broadcast Construction Permits, PN Rpt. AUC-04-37-1, DA 04-1020 (May 6, 2004) ("Auction 37 Comments"). Although considered in a fleeting way in the Auction 37 Second PN, it was denied without discussion of the impact on minority ownership, and without an acknowledgement of the impossibility of addressing, through petitions to deny aimed at "fraudulent misrepresentation," a type of fraud that works precisely because it requires no misrepresentations. Id., p.18; see pp. 9-12 infra.

## **Background**

The New Entrant Bidding Credits Program was born in 1993 when Congress adopted Section 309(j) of the Communications Act, in which it authorized the Commission to employ systems of competitive bidding to award spectrum licenses with the objectives of

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the public 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[.]

Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312 (1993), codified at 47 C.F.R. §309(j)(3).

The New Entrant Bidding Credits Program helps fulfill three congressional commands: first, under 47 U.S.C. §257, to undertake to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services;”<sup>2/</sup> second, under 47 U.S.C. §151, to ensure nondiscrimination in its administration of the spectrum;<sup>3/</sup> and third, under 47 U.S.C. §309(j), to promote minority ownership in spectrum-based services.<sup>4/</sup>

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<sup>2/</sup> 47 U.S.C. §257(a). Section 257 also establishes a "National Policy" under which the Commission shall promote “diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity.” 47 U.S.C. §257(b). Congress expects the Commission to report, every three years, on “any regulations prescribed to eliminate barriers within its jurisdiction....” 47 U.S.C. §257(c).

<sup>3/</sup> 47 U.S.C. §151, provides that the agency is created, inter alia, “so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service” (language added in the 1996 Telecommunications Act emphasized).

<sup>4/</sup> 47 U.S.C. 309(j)(4)(D) provides that the Commission shall “consider the use of tax certificates, bidding preferences, and other procedures” to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”

When it created the New Entrant Bidding Credits Program, the Commission declared that the Program would “promote opportunities by minorities and women consistent with congressional intent without implicating prematurely the constitutional issues” that figured in Adarand v. Peña, 515 U.S. 200 (1995).<sup>5/</sup> Today, the program is the Commission’s only means of fostering minority ownership in the broadcast auctions process.<sup>6/</sup>

Auction 37 is the best chance in a generation – since Docket 80-90 -- for minorities to acquire a significant number of new FM facilities. It is a national scandal that minorities control only 4.2% of the nation’s radio stations. Because these stations tend to be AM, lower powered or exurban facilities, they constitute only 1.3% of industry asset value. For two generations, the Commission did virtually nothing to eliminate the gross disparity in media ownership. However, by correcting the Auction 37 Second PN in order to prevent bidding credit fraud, the Commission can avoid repeating this mistake.

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<sup>5/</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (First Report and Order), 13 FCC Rcd 15920, 15995 ¶189 (1998), recon. granted in part, denied in part on other grounds, 14 FCC Rcd 8724 (1999), modified in other respects, 14 FCC Rcd 12541 (1999), affirmed sub nom. Orion Communications Limited v. FCC, D.C. Cir. No. 98-1424 (per curiam), 20 C.R. 784 (released June 13, 2000). See also Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996) (holding that the Commission acted reasonably in adopting small business-based eligibility rules and abandoning former race conscious rules in order to avoid an Adarand challenge.)

<sup>6/</sup> When an agency operates only one program aimed at fostering a vital objective, the repeal of that program could trigger heightened judicial scrutiny. Recently, the Commission attempted to repeal its only program aimed specifically at fostering minority television ownership, the “Failing Station Solicitation Rule,” 47 C.F.R. §73.3555 n. 7, which required a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell its failed, failing, or unbuilt television station to an in-market buyer. In Prometheus, supra, pp. 94-95, the Court held that the Commission “entirely failed to consider an important aspect of the problem,” citing Motor Vehicle Mfgs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1982). The Court added that “[r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make the broadcast spectrum available to all people ‘without discrimination on the basis of race,’” citing 47 U.S.C. §151. Prometheus, p. 96 n. 58.

Even the whiff of fraud would likely doom even the very modest New Entrant Bidding Credits Program. For example, it is widely appreciated that grossly exaggerated allegations of non-genuineness concerning a single proposed transaction led to Congress' 1995 repeal of the tax certificate policy, which since 1978 had been responsible for 2/3 of minority owned broadcast stations.

The bidding credits program offers two benefits: (1) a new entrant will receive a payment discount after it wins a permit; and (2) a new entrant can discourage competing bids by holding itself out, during the auction, as an entity that ultimately will be entitled to the discount. A loophole in the auction rules eviscerates the second of these benefits of the bidding credits program. The loophole allows an applicant, after changing its structure so as to disentitle itself to bidding credits, to conceal that critical fact from its opponents while the auction is underway.

In particular, as the auction rules are written now, an applicant can claim new entrant bidding credits, deploy the credits in the auction against other applicants, and then, during or after the auction, quietly and non-transparently abandon the attributes that gave rise to those credits.<sup>7/</sup> Sometimes this will happen when inexperienced applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. However, all too many applicants will realize that the rules allow them to scheme in advance to retain their diversification attributes only long enough to claim bidding credits. An applicant that does not plan ultimately to be structured as a new entrant can simply create a shell new-entrant structure, claim the bidding credits, and then, during the auction, revert to its long-planned

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<sup>7/</sup> Section 47 CFR §1.2105(b)(2), governing wireless and certain other nonbroadcast auctions, contemplates that “[m]ajor amendments cannot be made to a short-form application after the initial filing deadline.” Such amendments expressly include “changes in an applicant’s size which would affect eligibility for designated entity provisions[.]” This rule was necessary because the Designated Entity rules are a set-aside, such that one’s disentanglement as a designated entity should be disqualifying. That is not and should not be the case for the comparative, non-set-aside broadcast New Entrant Bidding Credits. However, one salutary effect of Section 1.2105(b)(2) on wireless auctions is that it entirely forecloses the auction gamesmanship discussed herein. The entirely appropriate absence of a comparable broadcast rule unintentionally leaves broadcast auctions open to this gamesmanship.

permanent structure. It could then quietly disclose that fact 30 days later, after the auction is over, when the competing bidders can do nothing about it. See Petition for Clarification, pp. 3-8.

To be sure, a bidder cannot use these undeserved bidding credits to claim a payment discount after the auction. See Auction 37 Second PN, p. 15 (Eligibility). However, due to the non-transparency of the bidding process, fraud artists can create the false impression that they continue to possess the enhanced financial capability that derives from an entitlement to bidding credits. In this way, a fraud artist can bluff an honest bidder into folding its bidding early or pursuing a different and sub-optimal allotment.

Not only can fraud artists game the system in this way, they will. If FM comparative hearings taught us anything at all, it is that a very substantial minority of applicants for new construction permits will use every questionable means to game the system -- even when faced with the likelihood of document production and depositions.<sup>8/</sup> That is why the Commission's "comparative downgrading" policy was so vital to the integrity of the hearing process. That policy required comparative downgrading in the wake of an applicant's relinquishment of a comparative plus factor.<sup>9/</sup> The Section 1.65 30-day reporting period disabled most of the potential for fraud attendant to comparative downgrading in the slow-moving comparative hearing process. However, the 30-day reporting period has the unintended effect of allowing gamesmanship to infect the auction process, since a bidder can simply delay taking a §1.65 reportable action until less than 30 days before the auction is over.

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<sup>8/</sup> See Carta Corporation, 5 FCC Rcd 3696, 3701-72 ¶15 (Rev. Bd. 1990) (collecting cases to make the point that "the Commission has been confronted with a large volume of applications that disingenuously depict a two-tier ownership structure so as to exploit artificially the Commission's comparative structure[.]")

<sup>9/</sup> Daytona Broadcasting Company, Inc., 97 FCC2d 212, 218 (1984), review granted in part, denied in part, 59 RR2d 1302 (1985) (holding that when applicants for the same permit merge after the cutoff date, the surviving applicant will inherit the least comparatively advantageous attributes of each of the merging applicants. See discussion in Richard P. Bott II, 4 FCC Rcd 4924, 4927 ¶18 (Rev. Bd. 1989), review denied, FCC 90-109 (released April 12, 1990).

The operation of this fraud, and its consequences for honest bidders, are detailed by MMTC's expert witness, Kofi Ofori, Esq. See Declaration of Kofi Ofori, Auction 37 Comments. Mr. Ofori, who the Commission had engaged to perform one of its 2000 Section 257 studies, was a co-author of The MMTC FM Auctions Guide (2001). Mr. Ofori explained:

Access to accurate information about one's opponents is an objective for all competitors participating in the auction process. Bidders are more likely to prevail against their opponents based on how much they know about their opponents' capabilities, needs and strategies. While needs and strategies are generally unknowable to opposing bidders, capital capabilities are determinable through customary research methods such as credit reports, corporate records, newspaper articles, court records and the like. Using these methods, it is generally possible to ascertain whether one's opponent has great or slight access to capital.

A bidder's entitlement to bidding credits has profound consequences for the strategy of the competing bidders. It signals to opposing bidders that a competitor is capable of bidding at higher amounts than would otherwise be assumed based upon the competitor's capital resources. Thus, when a bidder changes its ownership and capital structure after filing its Form 175, and is permitted by the auction rules not to inform others that it is no longer qualified for bidding credits, the fairness of the bidding process is severely undermined. Consider this example, which roughly mirrors the typical scenario in a multiple allotment, multiple round auction less than 30 days in length.

In this scenario, there are five bidders: A, B, C, D, and E, and two allotments: Huntsville and Florence, Alabama. Each bidder has performed research on the others, generally knows the assets available to the others, and bases its knowledge about the availability of bidding credits on what its opponents have stated in their Form 175's.

In the first three rounds of bidding, Bidders A and B compete for Huntsville, and Bidders C and D compete for Florence. Bidders A and B claim bidding credits, while Bidders C and D do not. Bidder E does not choose which allotment to pursue until the start of round 4 of the bidding.

Bidder E prefers Huntsville -- but upon observing that competitors A and B are using bidding credits, she recognizes that the bidding could go higher on a per pop basis in Huntsville than in Florence. The reason, of course, is that bidding credits reduce the financial contribution required of the winning bidder, enabling it to bid more.

Faced with the choice of bidding for Huntsville against two entities with bidding credits, or bidding for Florence against two entities without bidding credits, Bidder E chooses to bid for Florence. Perhaps she will win -- but the Florence market offers less profit potential and was not her preferred allotment.

Bidder E reasonably relied upon the information contained in the Form 175's filed by Bidders A and B. However, if Bidders A and B (or even one of them) serendipitously changed their ownership structures the day before the auction such that they would be disentitled to bidding credits, and did not disclose this information until after the auction concluded, Bidder E would have foregone her opportunity to bid on Huntsville due to bidding manipulations on the part of her opponents.

Bidder E would be livid, and with good reason. If she had known that Bidder A or Bidder B really was not entitled to bidding credits, Bidder E could have won her prize -- Huntsville -- knowing that Bidders A and B could not outbid her.

Suppose Bidder A wins Huntsville. To be sure, Bidder A will pay a premium after the auction is over, because Bidder A will not have bidding credits. But Bidder A will have her prize -- Huntsville. Further, Bidder A will have secured this prize in competition with only one opponent, Bidder B, rather than in competition with Bidder E as well. In this way, Bidder A may win Huntsville at a lower price as a result of the reduced number of bidders -- offsetting the premium that would be paid post-auction as a result of not having bidding credits. If Bidder B dropped out before the last round, Bidder A would be rewarded with Huntsville at a substantial discount from its fair market value.

Alternatively, Bidder E could have bid for Huntsville, paying far more for it than she would have paid if she had known that Bidders A and B were actually not entitled to bidding credits. Worse still, Bidder E could bid for Huntsville and lose, only to discover later that she was tricked into bidding for the wrong allotment.

In these ways, the lack of transparency in bidding credit reporting undercuts the value of bidding credits, rewards gamesmanship, and ultimately undermines public confidence in the integrity of the auction process.

The cure is very simple, fortunately. The Commission already contemplates having daily updates of bids during the auction. Therefore, it can also require daily updates of entitlements to bidding credits. Disgorgement, and penalties for 11th hour ownership changes, could also provide a disincentive to auction gamesmanship.

In sum, by relying detrimentally on false information, the genuine applicants will be harmed in three ways. First, they will waste resources bidding on allotments they cannot win. Second, they will overbid to win their desired allotments. Third, in a multiple allotment, multiple round auction, they will abandon their optimal allotments and pursue inferior allotments that they would not have pursued had they enjoyed timely and accurate information on their opponents' entitlements to bidding credits.

The remedy could not be more straightforward:

Acceptance of an auction password and submission of a bid should constitute affirmative reaffirmation of a bidder's ownership structure and entitlement to bidding credits. If a bidder downgrades comparatively after the filing of Form 175 but before the end of the auction, it should be required to post that fact on the auction website fact at the start of each round of bidding, and thereafter should enjoy only those bidding credits that correspond with its actual structure. Requiring such reports and adjustments to bidding credits would ensure that no bidding credit continues to be deployed after its diversification predicate becomes inoperative. It is a complete and virtually cost-free remedy.

Petition for Clarification, p. iii.

In the Auction 37 Second PN, the Bureaus did not dispute MMTC's prediction that the auctions could be polluted by fraud. However, the Bureaus entirely rejected MMTC's simple and complete remedy. The Bureaus failed to mention the impact on minority ownership, to address Mr. Ofori's expert witness statement, or even to accurately characterize the point MMTC has tried in vain to make in six pleadings since April, 2001. Here is their ruling in its entirety:

We disagree with the assumption underlying MMTC's comments that applicants that lose or change their new entrant bidding credits status have necessarily engaged in fraudulent misrepresentation. To the extent that an applicant makes a misrepresentation or lacks candor in the course of its claim for a bidding credit, the Commission has sufficient mechanisms to address such conduct, including the petition to deny process. We therefore find no reason to adopt special measures to address MMTC's concerns.

Id., p. 18. As shown below, this ruling is fundamentally flawed.

### **Discussion**

The Bureaus erroneously state that MMTC assumed that applicants that lose their entitlements to bidding credits "have necessarily engaged in fraudulent misrepresentation." Id. It was plain error to conflate fraud with misrepresentation. MMTC has never suggested that misrepresentations were an element of this type of fraud. Instead, the danger of this type of fraud is that it derives from a loophole in the rules. It requires no misrepresentation at all. Consequently, petitions to deny can never cure this kind of auction fraud, because a hearing will only be held on a petition to deny if the applicant intended to violate a Commission rule. See, e.g., Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700-1701 ¶¶15-18 (1992) (holding that a

showing of “deceptive or abusive intent” is necessary to sustain the conclusion that an applicant committed disqualifying misconduct). Here, the species of fraud in question is permitted by the rules. Thus, a rational losing bidder, having no possibility of supplanting the winning bidder, will never invest the effort and expense of filing a petition to deny.

Even if the Commission were to adopt a bright-line rule to the effect that comparative downgrades after the filing of Form 175 would be disqualifying,<sup>10/</sup> petitions to deny would still not be a meaningful remedy. In discovery and at trial, comparative hearing applicants had to defend the genuineness of their ownership structures under the watchful eyes of their opponents and a judge. That safeguard is unavailable in auctions, which rely entirely on paper self-reporting. The reliability of self-reporting has only the degree of integrity possessed by the competitor most willing to push the regulatory envelope. A petitioner to deny will almost never have access to the internal files or incriminating statements of its opponents. Thus, no losing bidder would ever possess sufficient evidence to support a petition to deny, and any petition to deny would be denied summarily.

Under 47 C.F.R. §73.5006, petitions to deny must be filed just ten days after the auction. Compare 47 C.F.R. §73.3584 (allowing three months to file petitions to deny renewal applications). Further, there is no guarantee that a petitioner to deny, after spending hundreds of thousands of dollars trying a hearing to displace an auction winner, would ever receive the liberated construction permit. Thus, petitions to deny would be extremely rare even if evidence of fraud were always available.

Yet even if petitions to deny were always filed, and even if they were always granted, they would still be a miserably inefficient remedy for fraud. A petition to deny is an after-the-fact remedy. The grant of a petition requires the displacement of the winner and her replacement

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<sup>10/</sup> Such a rule would be somewhat analogous to Section 47 CFR §1.2105(b)(2) in the designated entity set-aside context; see p. 5 n. 7 supra. Such a rule is appropriate under the set-aside Designated Entity paradigm, but it would be far too onerous under the comparative-based New Entrant Bidding Credits paradigm.

with someone else. A hearing before an administrative law judge entails great expense for all concerned, including the Commission itself. Appeals can consume years. Meantime, the public would continue to endure the deprivation of new broadcast service.

Since petitions to deny can never be a meaningful remedy, the Commission should take a hard look at MMTC's proposed remedy: requiring same-day reporting of comparative downgrades. This approach is virtually cost-free, since bidding is to be handled over the Internet, with bids considered round-by-round. See Auction 37 Second PN, p. 25 (Remote Electronic Bidding); id., p. 26 (Simultaneous Multiple Round Auction). The cost of full transparency is nearly zero, since the web-based auction process already is designed to report the previous day's bidding at the start of each day. Even if the Commission did not want to build into its bidding paradigm the functionality to allow for online reports of bidding credit eligibility downgrades, the Commission could use the more rudimentary – and also virtually cost-free – approach of simply requiring same-day bidding credit eligibility reports to be exchanged among bidders by e-mails to groups or lists.

MMTC's proposal is far preferable to reliance on petitions to deny. While agencies have some leeway to eschew unviable, unclear, or insubstantial proposals, they cannot brush aside substantial proposals from rulemaking commenters. For example, in City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C. Cir. 1987) (“Brookings”), the Court remanded the Commission's decision to modify the methods for reimbursing local telephone companies for interstate service costs where the Commission failed to consider alternatives that were outlined in rulemaking comments. These proposals included “a full-scale cost study of a scientifically selected group of average schedule companies,” using surrogate companies as cost models for average schedule companies, and reimbursing costs on an “access line” basis. Id. at 1169. These proposals represented different mathematical approaches, sufficiently obvious to warrant attention, and not unfamiliar to the Commission. Id. Consequently, the proposals were “sufficiently detailed and of ample significance to merit the Commission's consideration.” Id. In Brookings, the Court found that that the Commission had

“breached [its] duty in failing to consider the proposed alternatives, particularly in light of the fact that the choice it embraced suffered from “noteworthy flaws.” Id.

Here, too, the Bureaus’ reliance on petitions to deny is fundamentally flawed. MMTC has proposed a solution that obviates any need for line drawing, eliminates the need for parties to file or for the Commission to consider petitions to deny, and completely closes the fraud-inducing loophole in the rules.

**Conclusion and Relief Sought**

Yet another auction scandal could deeply undermine public confidence in the integrity of the auction process -- and endanger even the continuation of such modest pro-diversity initiatives as new entrant bidding credits. Conversely, a tangible reduction of the potential for auction fraud and gamesmanship would profoundly benefit genuine small businesses, including established minority broadcasters and others whose credentials are genuine. Further, the Commission’s reputation for going the extra mile to ensure clean auctions would increase the likelihood that minority bidding credits, or a restoration of part of the Tax Certificate Policy, could survive in the crucible of congressional and judicial, and public scrutiny.

FM Auction #37 is the long-awaited proceeding under which 290 new commercial FM allotments will be made available all at once – the largest single opportunity to acquire new FM construction permits since Docket 80-90 a generation ago. What a tragedy it would be if this extraordinary opportunity to promote diversity were squandered. The Commission should provide immediately for same-day bidding credit entitlement reporting in FM Auction #37.

Respectfully submitted,

*David Honig*

David Honig  
Executive Director  
Minority Media and Telecommunications Council  
3636 16th Street N.W., Suite B-366  
Washington, D.C. 20010  
(202) 332-7005  
dhonig@crosslink.net

July 12, 2004

**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that I have this 12th day of July, 2004 caused a copy of the foregoing "Application for Review" to be delivered by electronic mail to the following:

Hon. Michael Powell  
Chairman  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Kathleen Abernathy  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Michael Copps  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Kevin Martin  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Jonathan Adelstein  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Lisa Scanlan, Esq.  
Media Bureau  
Federal Communications Commission  
445 12th St. S.W.  
Washington, DC 20554

Kenneth Burnley, Esq.  
Wireless Bureau  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

*David Honig*

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David Honig

**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that I have this 19th day of July, 2004 caused a copy of the foregoing "Second Motion for Stay" to be delivered by electronic mail and by U.S. First Class Mail, Postage Prepaid, to the following:

Hon. Michael Powell  
Chairman  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Kathleen Abernathy  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Michael Copps  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Kevin Martin  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Hon. Jonathan Adelstein  
Commissioner  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

Lisa Scanlan, Esq.  
Media Bureau  
Federal Communications Commission  
445 12th St. S.W.  
Washington, DC 20554

Kenneth Burnley, Esq.  
Wireless Bureau  
Federal Communications Commission  
445 12th St. S.W.  
Washington, D.C. 20554

*David Honig*

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