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Hon. Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 05-211 (AWS Auction)
Written *Ex Parte* Presentation

Dear Mr. Chairman:

We were startled by recent reports that the Commission, as part of this proceeding, may be considering rules that more broadly restrict Designated Entity (DE) investment capital than could reasonably be contemplated from the record. Limitations placed on national wireless carriers are well supported by the record. Extending those limitations, however, to more broadly include communications companies, along with smaller, non-national wireless carriers, is wholly unwarranted. That would be the wrong decision for many reasons, most notably the following:

- As a practical matter, such draconian restrictions on DE sources of capital would render the DE program, as mandated by Congress, an effective nullity.

- It is widely at odds with the record in this proceeding, which does not demonstrate problems with communications companies and smaller wireless carriers investing in DEs.

- It closes the door on the last meaningful tool available to the Commission to promote diversity of telecommunications ownership. To this end, we urge the Commission to note the recommendations of its Advisory Committee on Diversity for Communications in the Digital Age, discussed in item (6) below.

1. The Record Does Not Support Expanding the Prohibition. Commenters responding to the *FNPRM* generally supported the Commission's tentative conclusion because it deals with an identified problem. On the other hand, there is little in the record commenting on the suggested expansion. Those few comments are divided and none supported the type of expansion that the Commission is are reportedly contemplating. Even the Department of Justice (DOJ), which supported the Commission's tentative conclusion and was one of few commenters to raise the prospect of expanding the scope of the contemplated prohibition, based its conclusions largely on its national *wireless* carrier merger experience.

2. The Record Does Not Support Meaningful Distinctions Among Large Communications Companies That Have No Significant Wireless Operations. Once the Commission goes beyond fixing the identified problem with national wireless carriers, there is no rational basis in the record of this proceeding to draw lines against large companies that have no significant wireless operations. Companies such as Comcast – Time Warner – Disney – Viacom – Liberty Media – News Corp. – Echostar – DirecTV– Vodafone – Telefonica – American Mobile – and a host of broadcasters, publishers, technology and equipment companies, and Internet companies such as Yahoo and Google have $5 billion or more in revenues, but contribute nothing to the problem that the *FNPRM* was intended to address.

3. The Record And The Commission's Well-Established Policy Supports Ensuring That DEs Have Access To Capital. Expanding the Commission's new prohibition beyond national wireless carriers (*e.g.*, to companies with $125 million in revenue) would put an end to the Commission's well-established policy of ensuring that DEs have access to capital.[1] It has been a central tenet of the DE program since 1994 that DEs are far less likely to succeed unless they have access to sources of capital and industry expertise. A primary reason why this tenet is correct is that lenders and investors seldom will provide funds to a new entrant without some assurance that the entrant has industry-specific contacts and guidance. Indeed, companies that *do not* have a history of DE program manipulation, *do not* have overwhelming wireless market power, *do not* already possess every attribute a small entrepreneur can contribute to a joint enterprise, but *do* already know enough about the wireless industry to invest wisely and rapidly without extensive due diligence – are exactly the kinds of companies the Commission ought to be encouraging to partner with DEs. Traditionally the Commission has promoted such partnerships – two excellent examples being Chairman Sikes' 1991 media incubator proposal and Chairman Fowler's 1982 capitalizing feature of the tax certificate policy.

[1] If the Commission adopts the contemplated changes without thorough consideration of the capital-access impact on the DE program, it would be repeating the error it made in the broadcast multiple ownership proceeding when it repealed the Failing Station Solicitation Rule (FSSR), the only television rule aimed at protecting minority ownership, without considering the impact on minority ownership. *See Prometheus Radio Project v. FCC*, 372 F.3d 373, 420-21 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005); *see also Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977) (overturning Commission's attempt to exempt 2/3 of broadcast licensees from its EEO recruitment rules even though the Commission did not and could not contend that the need for EEO recruitment had diminished).

4. Excluding Non-National Wireless Carriers From The Ranks of Those That May Invest In DEs Would Do Nothing to Solve the Problem Identified In The Record Of This Case. The immediate result would be to undermine the Commission's ability to: (a) promote competition by ensuring the widespread dissemination of licenses, and (b) provide opportunities for small businesses and businesses owned by rural carriers, minority groups and women, in each case contrary to the intent of Congress. This is particularly true now – on the eve of Auction 66 – when DEs have virtually *no* time remaining to raise capital before going to auction. Fundamentally turning the entire structure of the Commission's DE rules on its head at this late date would have the effect of reinforcing the dominant positions of the national wireless service providers. That is the exact opposite of the purpose of this proceeding.

5. The Commission's Existing Rules Will Capture Large Communications Providers Having Attributable Arrangements With Large National Wireless Carriers. In the *FNPRM*, the Commission asked whether it should use the existing controlling interest standard and affiliation rules to attribute wireless revenues to an investor under the new rule. *See FNPRM* at ¶17. The Commission should do so. Among other things, the Commission's existing rules include joint venturers as affiliates. *See* 47 C.F.R. §1.2110(c)(5)(x). If applied in this context, these existing rules will capture large communications providers having attributable arrangements with large national wireless carriers. The Commission should not threaten the timing and certainty of Auction 66 by pursuing an expansion that is unneeded under its existing rules.

6. The Commission's Advisory Committee on Diversity Has Urged The Commission To Maintain, Not Undercut, The DE Program. In October 2004, the Commission's Advisory Committee on Diversity for Communications in the Digital Age, after holding its only emergency session meeting in response to then-pending proposals to critically weaken the DE program, strongly and unanimously "urge[d] the Commission to maintain effective DE rules to increase opportunities for small and minority and women owned businesses." *See* News Release: Advisory Commission on Diversity for Communications in the Digital Age Makes Recommendations, at 1 (Oct. 1, 2004) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-252927A1.pdf). The actions contemplated here would run directly counter to the recommendations of the Commission's own expert advisory committee, which "provides guidance to the Commission on policies and practices that could increase the diversity of ownership . . . in the communications sector . . . ." *Id.*

7. Far Less Regulatory Alternatives Are Available. The Commission's desire to prevent manipulation of its DE program is commendable, but it is not necessary to essentially kill the program to achieve that objective. Several light touch alternatives are available. For example, in our Comments we proposed that the Commission comprehensively review the qualifications of DE applicants, adopt a random audit program (similar in its operation and deterrent effect to the one the Commission uses in broadcast EEO enforcement) and expand the scope of its unjust enrichment rules. *See* MMTC Comments, WT Docket 05-211 (February 24, 2006), pp. 11-14. These and other alternative means of preventing DE program manipulation are far preferable to "killing the patient to cure the disease."

8. The Proposed Changes Would Throw Auction 66 Into Disarray By Introducing Policy Instability, Uncertainty, And Delay. Pursuing the contemplated policy changes would undermine the solid foundation for proceeding with the Auction 66 based on the Commission's tentative conclusion in the *FNPRM*. Moving down the path of the suggested expansion (*i.e.*, beyond national wireless carriers) would create uncertainty and upset settled expectations – the enemies of investment. Even worse, because the contemplated policy changes are unsupported by in the record of this proceeding, adopting them would jeopardize the timing and results of the Auction 66, which is in no one's interest. Indeed, the Commission's willingness to consider undermining the DE program at this late date is likely to weaken investor confidence in the stability of the DE program even if the Commission ultimately does not adopt the contemplated exclusions.

9. The Commission Certainly Should Not Make So Dramatic A Change Without Congressional Approval. Congress plainly proscribed Commission action to eviscerate the DE program. In particular, Congress mandated that the Commission design and conduct spectrum auctions in a manner that "promote[s] economic opportunity and competition, . . . avoid[s] excessive concentration of licenses by disseminating licenses among a wide variety of applicants, including small businesses, . . . and businesses owned by members of minority groups and women" and "ensure[s] that small businesses . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." 47 U.S.C. §309(j)(3)(B) and 309(j)(4)(D). These provisions cannot be reconciled with the proposed changes. When Congress unequivocally instructs an agency to operate a program to promote diversity, the agency is simply not permitted to respond to Congress' instruction by destroying any chance that the program could promote diversity.

MMTC remains firmly committed to expanding opportunities in communications. As DEs today are actively assembling their capital structures in anticipation of Auction 66, the Commission should facilitate, not deter, such activity. Robust DE participation facilitates new competition in a consolidated wireless industry, and it brings new generations of services, technologies and pricing to consumers. MMTC supports the effort to prohibit the award of DE benefits to those partnered with the already-dominant national wireless carriers, but cable and other large communications companies should not be treated like national wireless carriers. Likewise, the Commission should not even consider banning any company with revenues in excess of $125 million from investing in DEs who wish to use a bidding credit. DEs would pay the price for that radically overbroad approach. Auction 66 – most likely one of the last two auctions of significant new wireless spectrum -- is too important to find out later that the Commission was wrong.

Sincerely,

David Honig

David Honig
Executive Director

cc: Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Deborah Taylor Tate

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