

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Implementation of the Commercial Spectrum)
Enhancement Act and Modernization of the) WT Docket No. 05-211
Commission’s Competitive Bidding Rules and)
Procedures)

To the Commission

**REPLY COMMENTS OF THE MINORITY
MEDIA AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these Reply Comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding. 1/

Like MMTC, a large number of commenters in this proceeding support the Commission’s tentative conclusion to restrict companies that qualify as designated entities (“DEs”) from entering into “material relationships,” in-region, with the largest national incumbent wireless operators. 2/ In these Reply Comments, however, MMTC responds to the commenters – including some of the largest national incumbent wireless carriers and their DE partners – that oppose the Commission’s tentative conclusion.

1/ *In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, Further Notice of Proposed Rulemaking, WT Docket No. 05-211* (released February 3, 2006) (“FNPRM”). These Reply Comments reflect the institutional views of MMTC, and are not intended to reflect the views of each individual director, officer or member of MMTC.

2/ *See, e.g.,* Leap Comments; Council Tree Comments; National Hispanic Media Coalition (“NHMC”) Comments; Madison Dearborn Partners Comments; Columbia Capital Comments; RTG/OPASTCO Comments; US Cellular Comments; Doyon Communications Comments; Bristol Bay Natives Corporation Comments; Bethel Native Corporation Comments.

I. THE COMMISSION'S PROPOSAL WOULD REDUCE THE POTENTIAL FOR DESIGNATED ENTITY PROGRAM ABUSE

The histories of civil rights and communications policy are each peppered with examples where rules intended to open opportunity for disadvantaged groups have been circumvented or evaded. ^{3/} In this proceeding, the Commission is taking steps to respond to credible record evidence that *bona fide* small wireless carriers and entrepreneurs are not sufficiently benefiting from the DE program. Since the AWS auction and the 700 MHz auction(s) expected to occur in 2009 are the only two remaining large wireless auctions, the Commission does not have the luxury of waiting for more abuse before it acts. While the largest incumbent national wireline carriers have had ample sufficient opportunity to acquire and control wireless spectrum, small entrants essentially have only the AWS auction and the 700 MHz auction(s) to try to catch up. In drawing lines, the Commission should err on the side of caution to protect legitimate Des.

Some commenters that oppose the Commission's tentative conclusion argue that the Commission's proposal is not reasonably related to the goal of reducing potential abuse of the DE program by larger companies. ^{4/} As discussed below, MMTC disputes the assertion that the Commission's proposal was intended only to reduce the potential for abuse of the DE program. Nevertheless, recognizing that reducing the potential for abuse is indeed one Commission goal, MMTC disagrees with the assertion that the proposal is not reasonably related

^{3/} See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that an unaccredited, basement "law school" for Negroes, created to avoid desegregation of the University of Texas Law School, was inherently inferior). Manipulation of Commission structural rules has been common even where – unlike here – pre-selection discovery is available as a deterrent. See, e.g., *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4088 ¶8 (Rev. Bd., by Member Norman Blumenthal, 1988) ("The Commission's application processes are currently plagued with fraudulent applications where in the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail.")

^{4/} See T-Mobile Comments at 6; Wirefree Comments at 11; Verizon Wireless Comments at 4-6; Cook Inlet Comments at 5-8; CTIA Comments at 7-8.

to the accomplishment of that goal. Under the Administrative Procedures Act, 5/ any Commission decision to change its DE rules must be reasonable. As the Supreme Court has noted, “the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.” 6/

In this instance, substantial evidence has been submitted into the proceeding record demonstrating that a restriction on partnerships between DEs and the largest national wireless incumbents in-region will, indeed, reduce the potential for abuse. First, as MMTC demonstrated in its Comments, the largest national incumbent wireless carriers have been among the most active participants in DEs, especially in auctions where DE-only licenses have been offered. 7/ In fact, in Auction 58 alone, the DE partners of the largest incumbent wireless carriers acquired licenses worth over \$1.0 billion. 8/

Second, by virtue of their current market positions and control over spectrum, roaming, network access, trademarks and other important aspects of the wireless business, the largest incumbent national wireless carriers have the greatest incentives to manipulate the DE program to solidify their market position and presence. As carriers whose collective share of the wireless market is 89-90 percent, the five largest incumbents have the most to lose from the entry of facilities-based competitors into the wireless market, and therefore have the strongest incentives to manipulate the DE program in a manner that forestalls the competition that the DE program was meant to engender.

5/ 5 U.S.C §706(2)(A).

6/ *National Cable & Telecommunications Association v. Brand X Internet Service*, 545 U.S. ___, 125 S.Ct. 2688, 2710 (2005).

7/ See MMTC Comments at 6-7.

8/ *Id.* at 6.

II. THE COMMISSION HAS A LEGITIMATE GOAL OF USING ITS DESIGNATED ENTITY PROGRAM TO COUNTER THE NEGATIVE EFFECTS OF INDUSTRY CONSOLIDATION

Commenters that object to the Commission’s tentative conclusion also argue that if it is the Commission’s intention to use its DE proposal to promote competition policy goals such as minimizing the negative effects of wireless industry consolidation, it would be inappropriate for the Commission to do so through its DE rules. ^{9/} MMTC disagrees. As MMTC noted in its Comments, promoting increased competition by facilitating new market entry was a core goal of the Communications Act provisions that gave rise to the DE program. When Congress enacted Section 309(j) of the Communications Act, one of its most important goals was to ensure that the level of competition and diversity of wireless ownership would increase, not decrease, despite the requirement that spectrum licenses be purchased at auction. ^{10/} It would therefore be inconsistent with Section 309(j) for the Commission to ignore the ways in which its DE rules are currently being used to further industry consolidation. Indeed, Section 309(j) imposes an independent obligation on the Commission to use its auctions program to “promot[e] economic opportunity and competition, . . . [and avoid] excessive concentration of licenses . . . by disseminating licenses among a wide variety of applicants.” ^{11/} Accordingly, rather than being ill-advised, a Commission decision to change its DE rules in order to counter the negative effects of wireless industry consolidation is not only consistent with the aims of the DE program but is arguably compelled by Section 309(j).

^{9/} See T-Mobile Comments at 6 (“Although Council Tree may be correct that recent mergers have allowed certain carriers to amass significant amounts of spectrum, efforts to address spectrum consolidation through adjustments to regulations involving DE benefits are ill-advised for a number of reasons.”); CTIA Comments at 9; Verizon Wireless Comments at 6-14; Cook Inlet Comments at 7 (“The fact that the wireless industry is undergoing a period of consolidation is unrelated to the designated entity program and the policies and objectives it was designed to promote.”)

^{10/} See MMTC Comments at 4.

^{11/} 47 U.S.C. § 309(j)(3)(B).

III. THE COMMISSION'S PROPOSAL PROMOTES COMPETITION AND COUNTERS THE NEGATIVE EFFECTS OF CONSOLIDATION

Some commenters argue that even if the Commission has a legitimate interest in promoting competition and countering the negative effects of wireless industry consolidation, the Commission's proposal to restrict DE partnerships with the largest incumbent national wireless carriers is not reasonably related to the accomplishment of such goals because it does not adequately capture all of the DE relationships that potentially could further the negative effects of industry consolidation. ^{12/} MMTC disagrees with this view. As noted in MMTC's Comments, the wireless industry has experienced significant consolidation in recent years, owing to several mergers and secondary market spectrum license transactions involving its largest national carriers. ^{13/} Indeed, as Council Tree and other commenters have shown, consolidation within the wireless industry has been so pronounced that in terms of population the portion of the wireless market controlled by the country's top five wireless carriers has increased from 50 percent in 1995 to 89-90 percent today. ^{14/} As the market power and spectrum positions of the nation's largest incumbent national wireless providers has increased, so has the ability of this small group of providers to limit market access by new entrants and forestall competition. In its Comments, MMTC noted how the largest national wireless incumbents have used their market

^{12/} See CTIA Comments at 10 ("Even assuming that the Commission has offered sufficient support to identify and justify its ends, it has failed to 'articulate a satisfactory explanation for its action' by showing how the particular means it has chosen – that is banning all DEs from partnering with certain wireless providers – will reduce the concentration of licenses in a meaningful way or prevent companies from evading the purposes of the DE regime."); T-Mobile Comments at 8-9.

^{13/} See MMTC Comments at 7.

^{14/} Ex Parte of Council Tree Communications, Inc. in WT Docket No. 02-353 (June 13, 2005) at 6; Council Tree Comments at 19; Leap Wireless Comments at 3.

positions to engage in anti-competitive roaming and pricing practices. 15/ MMTC also documented the ways in which the largest national wireless incumbents have structured DE arrangements to acquire access to DE spectrum and network capacity. 16/ Finally, MMTC discussed the practice among the largest national wireless incumbents of holding a large amount - often 80 percent or greater - of the equity and debt issued by DEs. 17/ In its Comments, Council Tree explained that when a dominant national wireless provider is allowed to enter into a material relationship with a DE in-region, any benefits that might result from such a partnership are outweighed by the negative consequences associated with allowing the dominant provider to “see its influence extended in terms of geography, spectrum depth, technological reach, and marketing exposure, among other things.” 18/ In view of the negative consequences that flow from DE rules that allow the largest national wireless incumbents to further consolidate their hold on the wireless market, it would be eminently reasonable for the Commission to conclude that the competition policy goals of Section 309(j) would be furthered by restricting DE arrangements with the largest national wireless incumbents. 19/

On this matter, MMTC respectfully disagrees with Verizon Wireless’s assertion that a Commission finding that the DE rules should be modified on competition policy grounds cannot be justified in view of past statements by the Commission regarding the competitive

15/ See MMTC Comments at 7, n. 19 (noting comments filed in the Commission’s Roaming and CMRS Competition dockets).

16/ *Id.* at 6.

17/ *Id.*

18/ Council Tree Comments at 29.

19/ Moreover, the fact that the Commission’s proposed rule change might not eliminate all potential opportunities to use the DE program in a manner that forestalls competition would not make the rule change unlawful under the APA. In order to withstand judicial scrutiny, a Commission rule change need merely be reasonably related to the accomplishment of a permissible goal. In this case, the proposed rule change meets that standard. The perfect is not the enemy of the good.

nature of the wireless industry. 20/ The fact that in merger and other contexts the Commission has concluded that the wireless industry would not or had not become unduly concentrated is insufficient, by itself, to justify having the Commission sit back and tolerate continued use of its DE program to further the negative effects of wireless industry consolidation. In view of the purposes for which the DE program was developed, it makes sense for the Commission to take the opportunity in this proceeding to take account of recent market developments and prevent future DE arrangements that could further exacerbate the negative aspects of wireless industry consolidation.

In its Comments, CTIA contends that because under Commission rules a large incumbent national wireless carrier could directly acquire all of the licenses made available in an open Commission auction, the proposed DE restrictions would be ineffectual at promoting any competition policy goals. 21/ MMTC disagrees with this view. First, any acquisition of all of the licenses in a Commission auction would be subject to antitrust review. Second, when it comes to the DE program, the Commission must seek to promote its competition and diversity goals even when, due to the effect of other policies, the method pursued in the DE program context will not solve the entire problem. Third, the DE program was intended specifically to promote economic opportunity, competition and diversity of ownership, so the Commission should discourage its use to advance industry concentration even if concentration arguably could occur by other means.

IV. THE DESIGNATED ENTITY PROGRAM PROMOTES SEVERAL IMPORTANT SOCIAL POLICY GOALS

Finally, as suggested above, MMTC takes issue with the attempt by commenters that oppose the Commission's tentative conclusion to narrowly define the goals that the

20/ Verizon Wireless Comments at 6-14.

21/ CTIA Comments at 4.

Commission seeks to achieve through its DE rules. While the goal of reducing the potential for abuse of the DE program is certainly a goal of the Commission's DE rules, so too are the goals of promoting economic opportunity, diversity of ownership and competition in the provision of wireless services. 22/ As noted above, the Commission's proposal to restrict DE relationships with the largest national wireless incumbents certainly promotes the goal of reducing the potential for abuse of the DE program. However, it also promotes Congress's economic opportunity, diversity and competition goals by restricting the ability of wireless carriers with significant market power from using the DE program to expand their market dominance, forestall competition and block new entry.

NHMC's Comments demonstrate how Congress's Section 309(j) goals have been thwarted as a result of partnerships between the largest incumbent national wireless carriers and some DEs:

[I]n the ten years in which auctions have been the primary method for distributing licenses for wireless telephony and other wireless services, there is no evidence that allowing incumbent wireless carriers to partner with DEs has generally facilitated deployment of advanced services to minority or underserved communities, has promoted competition and small business growth, or has otherwise served the important social goals of the Communications Act. 23/

In his declaration, which was filed along with NHMC's Comments, Dr. Gregory Rose, an independent consultant working with the Media Access Project, presented findings on a comprehensive study of Commission auctions that support NHMC's views:

The argument that permitting . . . material relationships [between the large wireless incumbents and DEs] is necessary to permit new entrants the broadest access [to] capital and expertise necessary to compete with better financed bidders is belied by the failure to observe any widespread benefit of the credit either in terms of increased competition or service to traditionally underserved communities.

22/ See MMTC Comments at 4-5.

23/ NHMC Comments at 5.

Again, given the incentives and history of incumbents, it appears far more likely that large wireless carriers will use these material relationships to prevent disruptive innovation or ruinous competition, while tacitly colluding to use the bidding credit to further suppress the auction price. 24/

In view of Section 309(j)'s economic opportunity, competition and diversity of ownership goals, the potential of the Commission's proposal to further those goals by reducing the ability of the largest wireless incumbents to use the DE program to extend their market presence and influence, and the record developed in this proceeding showing a strong nexus between the policy goals sought to be achieved through Section 309(j) and the Commission's proposal, the Commission would certainly be justified in enacting its proposed reform of the DE program.

For the reasons discussed above and in its previously-filed Comments, MMTC urges the Commission to adopt its tentative conclusion to restrict DEs from entering into "material relationships", in-region, with the largest national incumbent wireless operators and adopt or seek comment on additional DE program reforms that can advance the goals underlying the Commission's DE program.

24/ NHMC Comments, Declaration of Gregory Rose at 32.

Respectfully submitted,

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I, David Honig, hereby certify that I have this 3rd day of March 2006 caused a copy of the foregoing "Comments" to be delivered by electronic mail to the following:

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