

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

In the Matter of)	
)	
Updating Part I Competitive Bidding Rules)	WT Docket No. 14-170
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Petition of DIRECTTV Group, Inc. and EchoStar)	RM-11395
Echostar LLC for Expedited Rulemaking to)	
Amend Section 1.2105(a)(2)(xi) and 1.2106(a))	
of the Commission’s Rules and/or for Interim)	
Conditional Waiver)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission’s Competitive Bidding Rules and)	
Procedures)	

**Response to the FCC’s Request for Further Notice of the
Multicultural Media, Telecom and Internet Council**

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* This pleading is filed one day out of time owing to internal process issues. MMTC respectfully requests its consideration and acceptance.

SUMMARY

The upcoming DTV incentive auction is projected to be even more successful than the recently completed AWS-3 auction. Yet without the meaningful engagement of DEs, particularly those that are minority- and women-owned, the Commission cannot realistically claim that it has achieved Congress' goal of promoting diversity in ownership. Historically, minority- and women-owned businesses (MWBs) have faced persistent challenges when entering highly competitive markets and industries, and have missed ownership opportunities of wireless services due to regulatory missteps dating back to 2006. Given the economic impact of the wireless industry on domestic growth, the Multicultural Media, Telecom and Internet Council (MMTC) believes that the Commission should do everything within its authority, and in accordance with the congressional mandate of Section 309(j) of the Communications Act, to preserve and enhance the program and to enact reform proposals that foster competition and diversity from all types of enumerated DEs – small businesses, minority- or women-owned, and rural telephone companies (collectively, “DEs”).

The consistent impenetrable roadblocks to accessing capital make it imperative for the Commission to institute rules that make it easier for DE new entrants and incumbents, especially those owned by women and people of color, to enter the highly competitive wireless marketplace. Within this industry, factors that include an increase in competition, the rising costs associated with spectrum acquisition and management, post-acquisition infrastructure investments, and price wars to attract consumers all complicate the entry of non-incumbents who have to make the compelling case for support from potential investors. Moreover, discriminatory institutional practices in accessing capital have made it even more difficult for DEs, especially minority- and women-owned entities, to participate.

In its review of viable processes that accelerate DE program reform, MMTC urges the Commission to eliminate the Attributable Material Relationship (AMR) Rule. By entertaining only those proposals that provide more flexibility in the DE rules so that new entrants and incumbent companies, especially those owned by women and people of color, can effectively compete amid changing market conditions, the FCC will avoid arbitrary and capricious recommendations that are designed to prevent them from creating more flexible and viable business plans to attract investment capital and limit their growth and sustainability. MMTC further encourages the Commission to support those proposals that promote more competition consistent with the mandate of Section 309(j) to disseminate licenses among a wide variety of applicants. Further the Commission should consider alternatives to auction participation that advance telecom ownership diversity in the secondary market.

In MMTC's view, a reformed DE program has the opportunity to break the persistent and longstanding exclusion of MWBEs in highly competitive and capital intensive industries. As wireless becomes the new broadcasting, and people of color and other vulnerable populations leverage mobile as their primary vehicle to the Internet, it is imperative to generate more owners of commercial wireless spectrum that can, in turn, generate economic opportunities for the communities they serve.

I. A REFORMED DESIGNATED ENTITY PROGRAM CAN ADDRESS DISPARITIES IN ACCESS TO CAPITAL FOR PROSPECTIVE MINORITY AND WOMEN OWNERS OF COMMERCIAL WIRELESS SPECTRUM

MMTC respectfully urges the Commission to reform the Designated Entity (“DE”) program to increase competition and foster meaningful diversity in the ownership and control of the public’s spectrum, as intended by Congress when it enacted Section 309(j) of the Communications Act.¹ MMTC exhorts the Commission to avoid repeating regulatory missteps relating to the engagement of small businesses, minority- and women-owned businesses (MWBs), and rural telephone companies (collectively, “DEs”), and engage in the timely reform of the rules as the Commission prepares for the upcoming spectrum incentive auction that will offer the highest valued “beachfront” spectrum the U.S. is likely to auction in the foreseeable future.²

¹ 47 U.S.C. §309(j); *see also* S. Jenell Trigg and Jeneba Jalloh Ghatt, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry* (Feb. 25, 2014) (“White Paper”), 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 May 13, 2015). (“In 1993, Congress amended the Communications Act to grant the FCC authority to conduct competitive bidding (auctions) as a more efficient and expedient means to allocate licenses. Section 309(j) of the amended Communications Act required the FCC to promote economic opportunity and competition and ensure 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.”)

² *See e.g.* Phil Goldstein, *CTIA’s Baker: Getting more spectrum for mobile in years ahead is ‘not going to be easy,’ FierceWireless.com* (Dec. 2, 2014), available at <http://www.fiercewireless.com/story/ctias-baker-getting-more-spectrum-mobile-years-ahead-notgoing-be-easy/2014-12-02> (last visited May 13, 2015).

The completed AWS-3 auction far exceeded national revenue goals³ and included several DEs⁴. However, the disproportionately low participation of new entrant and MWBE DEs in all other auctions since 2006 should be a source of deep concern. Low DE participation has been largely attributed to DEs' inability to raise the necessary capital to compete given the unfavorable regulatory environment post-2006.⁵ As previously stated by the DE Opportunity Coalition ("Coalition"), wireless services have become "the new broadcasting" – powering the world of peer-to-peer communications and broadband technologies, including the Internet of Things, and for more vulnerable populations (*e.g.*, the economically disadvantaged, people of color, the disabled and seniors) the most affordable means for accessing the Internet.⁶ According to CTIA-The Wireless Association, wireless subscriber connections increased from 69.2 million in 1998 to 335.65 million in 2013, contributing to a similar increase in annual wireless revenue from \$33.1 billion to \$189.2 billion during the same period.⁷ The same study reports that nearly

³ See Monica Allevan, *AWS-3 spectrum auction ends with record \$44.9 B in bids*, FierceWirelessTech (Jan. 29, 2015), available at <http://www.fiercewireless.com/tech/story/aws-3-spectrum-auction-ends-record-449b-bids/2015-01-29> (last visited May 13, 2015) ("Total provisional winning bids came in at a record \$44.899 billion – far more than the FCC raised in previous spectrum auctions.")

⁴ The Commission is reviewing petitions to deny the applications of two large DEs that participated in the AWS-3 auction. See also <http://www.multichannel.com/news/policy/fcc-sill-vetting-dish-related-aws-3-bids/390200#sthash.dCQCn1tN.dpuf> (last visited at May 14, 2015). See *e.g.*, ex-parte from Verizon (filed April 24, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001044792>. Inasmuch as that issue is now in litigation and the record is incomplete, we shall refrain from commenting upon it at this time.

⁵ See Comments of the DE Opportunity Coalition, WT Docket No. 14-170 (filed Feb. 20, 2015).

⁶ See generally, National Telecommunications and Information Administration, *Exploring the Digital Nation: Embracing the Mobile Internet* (Oct. 2014), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_embracing_the_mobile_internet_10162014.pdf (last visited May 13, 2015).

⁷ See CTIA-The Wireless Association, *Your Wireless Life: Annual Wireless Industry Survey* (June 2014), available at <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey> (last visited May 13, 2015).

90 percent of U.S. households use wireless services, with 39 percent of these households being wireless only in 2014.⁸ Moreover, wireless investments create jobs: nearly 4 million U.S. jobs are associated with the wireless industry, paying 65 percent higher wages than the national average.⁹ Given the economic impact of the wireless industry on domestic growth, MMTC believes that the Commission should do everything within its authority, and in accordance with the congressional mandate of Section 309(j) of the Communications Act, to preserve and enhance the program and to enact reform proposals that foster competition and diversity from all types of DEs – small businesses, minority- or women-owned, and rural telephone companies. In this filing, MMTC urges the Commission to: a) eliminate the Attributable Material Relationship (AMR) Rule and retain the five-year unjust enrichment period; b) increase DE bidding credits; and c) advance telecom ownership diversity in the secondary market. Each of these areas will be addressed in the Comments.

B. Historic, Systemic Access to Capital Barriers for MWBEs Demand a Robust DE Program.

Historically, minority- and women-owned businesses have faced persistent challenges when entering highly competitive markets and industries. The Small Business Financial Health Initiative (SBFHI) reported that minorities and women continue to face roadblocks in securing financing for their companies.¹⁰ Access to debt capital or poor or below-average financial health

⁸ See *CTIA-The Wireless Association, Your Wireless Life: Quick Facts*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> (last visited May 13, 2015) (“Further research in the CTIA study indicates that 16 percent of U.S. households are what is considered “wireless mostly.”)

⁹ *Id.* See also Larry Summers, *Technological Opportunities, Job Creation and Economic Growth*, Remarks at the New America Foundation, June 28, 2010, available at <http://whitehouse.gov/administration/eop/nec/speeches/technological-opportunities-job-creation-economic-growth> (last visited May 13, 2015).

¹⁰ See Chinwe Onyeagoro, *New Data on Minority and Women Business Capital Access* (Sept. 24,

categories are cited as the primary reasons, along with ongoing disparities in credit experiences that often result in higher borrowing costs, smaller loans, the demand for more collateral and an increased rejection in loan applications for women and minorities.¹¹ Discrimination also continues to be a significant barrier for minorities and women attempting to access capital from traditional financial institutions and venture capital firms. A recent *Washington Post* article referenced academic research that concluded that minority entrepreneurs were treated poorly in comparison to their white counterparts when seeking financing for a small business, even when the other variables, such as credit history and assets, were identical.¹²

The Obama Administration has specifically recognized that the minority business community has not realized its full potential.¹³ The challenges faced by black entrepreneurs and business owners to gain access to capital toward the establishment or expansion of their businesses are well documented in *The President's Agenda and the African American Community*. In this report, it is noted that:

Regardless of firm size, minority-owned firms are less likely to receive loans than nonminority-owned firms. When minority-owned firms do receive financing, it's on

2014), available at <http://www.thefundwell.com/2014/09/new-data-minority-women-business-credit-access-challenges/> (last visited May 13, 2015).

¹¹ *Id.* (“This report affirms disparities in the credit experience for women and minorities documented in much of the existing literature/research on the topic.”)

¹² See *Washington Post*, J.D. Harrison, *Black, Hispanic entrepreneurs discriminated against when seeking small business loans*, (June 3, 2014), available at http://www.washingtonpost.com/business/on-small-business/black-hispanic-entrepreneurs-discriminated-against-when-seeking-small-business-loans/2014/06/03/70059184-ea86-11e3-9f5c-9075d5508f0a_story.html (last visited May 13, 2015). The study found that even when controlling for factors like credit history and business type, minority entrepreneurs were less likely than whites to get approved for a bank loan.

¹³ See *The White House, The President's Agenda and the African American Community* (Nov. 2011), available at https://www.whitehouse.gov/sites/default/files/af_am_report_final.pdf (last visited May 13, 2015)

average for less money and at a higher interest rate than for those firms owned by non-minorities.¹⁴

These impediments to access to capital are not universal among all emerging industries and marketplaces. For example, Silicon Valley start-ups that are also reliant upon financing have not experienced a drought in equity investment. According to one analyst, “[m]any are raising millions in dollars that they do not need because the market is good, “riding a wave of investor enthusiasm.”¹⁵ This is being done despite huge gaps in racial, gender and ethnic diversity among high-tech companies.¹⁶

The consistent impenetrable roadblocks to accessing capital make it imperative for the Commission to institute rules that make it easier for DE new entrants and incumbents to enter the highly competitive wireless marketplace. Within the wireless industry, factors that include an increase in competition, the rising costs associated with spectrum acquisition and management, post-purchase infrastructure investments, and price wars to attract consumers, all complicate the entry of non-incumbents who have to make the compelling case for support from potential investors.

¹⁴ *Id.* at 8.

¹⁵ See William Alden, *Slack is Swept Up In Silicon Valley’s Gold Rush*, BUZZFEED (Apr. 16, 2015) available at <http://www.buzzfeed.com/williamalden/slack-is-swept-up-in-silicon-valleys-gold-rush#.lrG7rnzKm> (last visited May 13, 2015). See also Paresch Dave, *Cash Pours Into Start-Ups, But Investors Are Turning Cautious*, LA Times (Apr. 28, 2015) available at <http://www.latimes.com/business/la-fi-venture-capital-first-quarter-20150428-story.html#page=1> (last visited May 15, 2015.)

¹⁶ See Jon Swartz, *Jesse Jackson Gets Silicon Valley to Talk Diversity*, USA Today, Dec. 11, 2014, available at <http://www.usatoday.com/story/tech/2014/12/10/tech-diversity-jackson-intel/20210063/> (last visited May 13, 2015). (“[A]t a Silicon Valley summit organized by Jackson’s Rainbow PUSH Coalition and hosted by Intel, the conversation was how to change the face of tech companies that for decades have been predominately young white and Asian men.”)

MMTC's White Paper on promoting minority ownership in wireless further details the extent to which regulatory uncertainty has made it nearly impossible for DEs to achieve stability within a rapidly changing wireless marketplace.¹⁷ Unanticipated changes and restrictions in the DE rules, dating back to 2006, have resulted in the nominal participation by non-incumbent DEs, particularly those owned by minorities and women, in past and more recent auctions.¹⁸

In response to the Commission's Request for Further Comment on Issues Related to Competitive Bidding Rules,¹⁹ MMTC requests that the Commission entertain only those proposals that provide more flexibility in the DE rules so that small businesses, especially new entrants and MWBEs, can effectively compete amid changing market conditions, and avoid arbitrary and capricious recommendations that are designed to prevent them from creating flexible and viable business plans to attract investment capital, and limit their growth and sustainability.²⁰ MMTC further encourages the Commission to support those proposals that promote more competition consistent with the mandate of Section 309(j) to disseminate licenses

¹⁷ See Trigg & Ghatt *supra* note 1 at 4.

¹⁸ "Women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses or .64%)." *Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction*, FCC News Release (Mar. 20, 2008).

¹⁹ *Updating Part I Competitive Bidding Rules, Request for Further Comment on Issues Related to Competitive Bidding Proceeding, Updating Part I Competitive Bidding Rules*, 80 FR 22690 (2015). See also *Updating Part I Competitive Bidding Rules, Notice of Proposed Rulemaking*, 29 FCC Rcd 12426 (2014) ("Part I NPRM" or "NPRM").

²⁰ See Trigg & Ghatt *supra* note 1 at 6. ("When wireless industry was still in its infancy, MBEs had a unique opportunity to enter the industry on the ground floor, unlike MBEs engaged in terrestrial broadcasting. In some ways due to the creation of new communications services, the wireless industry avoided the history of discrimination present in the broadcasting industry that hampered the ability for new entrants, especially MBEs. Unfortunately, other forms of discrimination against MBEs regarding access to capital have carried through to the new industry.")

among a wide variety of applicants.²¹ Acting upon our specific recommendations, the Commission can dismantle discriminatory practices and persistent barriers that have prevented small businesses, minority- and women-owned businesses from owning commercial wireless spectrum and returning to underserved, historically disadvantaged communities and consumers the benefits of job creation, business development, contracting, and wealth equity that come from robust, minority-owned business enterprises.

II. THE COMMISSION SHOULD CONSIDER PROPOSALS TO ELIMINATE THE ATTRIBUTABLE MATERIAL RELATIONSHIP (AMR) RULE IN ITS ENTIRETY.

A. The AMR Rule Restricts DEs from Engaging in Flexible and Competitive Business Models.

MMTC and the DE Opportunity Coalition have urged the Commission to repeal the AMR Rule due to the financial limitations and strategic partnership constraints it imposes upon DEs. As detailed in the Coalition's Comments, the AMR Rule does not comply with the language or congressional intent of Section 309(j) and, despite their business distinctions, presumes that all DEs are alike, with identical business and capital needs. The Coalition's Comments also offered case studies of former DEs of various types with different reasons for acquiring spectrum.²² In its current form, the AMR Rule – the last surviving vestige of a series of major DE rule changes improvidently adopted in 2006 – remains a counterproductive regulatory restriction that impedes new entrant and incumbent DE participation. MMTC's

²¹ See 47 U.S.C. § 309(j)(3)(B).

²² See Comments of the DE Opportunity Coalition, WT Docket No. 14-170 (filed Feb. 20, 2015) (MMTC interviewed three former and current DEs between January 2015 and February 2015. The interviews were conducted by both phone and in person by MMTC staff. A survey questionnaire was designed and implemented to gather the relevant data, interviews were transcribed and all respondents provided permission to MMTC and the Coalition to publish relevant findings from the data collected.)

additional concern with the AMR Rule is the way in which it discourages business plans that contemplate the development of scale even before the enterprise undertakes the scale-dependent task of building facilities.

MMTC urges the Commission to reject proposals that advocate for the expansion of the AMR Rule and that propose to levy restrictions on DEs on the false premise that *bona fide* DE's will hoard spectrum assets.²³ While it is appropriate for the Commission to evaluate the merits of any strategic partnerships that have surfaced in any auction, that case-specific evaluation should not overshadow or undermine the statutory requirements of the DE program nor should it penalize other *bona fide* small businesses and rural telcos from exploring business models best suited to their needs.²⁴

MMTC also reaffirms our assertion that the AMR Rule limits DEs as facilities-based competitors.²⁵ Some DEs have an interest in acquiring spectrum to support telemedicine or telehealth applications, or to serve multicultural, multilingual or religious populations, while others may be seeking to create secured networks to accommodate the burgeoning ecology of the Internet of Things. Some DEs may also desire to lease, wholesale or resell spectrum to

²³ See Reply Comments of T-Mobile, WT Docket No. 14-170, (filed March 6, 2015), at 6-11 See, e.g., Comments of Blooston Rural Carriers, WT Docket No. 14-170, (filed March 6, 2015), at 7; Comments of the Taxpayers Protection Alliance, WT Docket No. 14-170, (filed Feb. 20, 2015), at 9-10; Comments of MediaFreedom.org, WT Docket No. 14-170, (filed Feb. 20, 2015), at 1-2.

²⁴ See Reply Comments of NTCA-The Rural Broadband Association, WT Docket No. 14-170 (filed Feb. 20, 2015), at 7 (“NTCA”). (“The NTCA supports the NPRM’s proposal to adopt a more flexible approach that moves away from a restrictive bright-line AMR rule to a process that would evaluate small business eligibility for DE bidding credits using a case-by-case-two-step process.”)

²⁵ See Comments of the Auction Reform Coalition, WT Docket No. 14-170 (filed Feb. 20, 2015), at 15. (The Coalition points to the success of mobile virtual network operators (“MVNOs”) that have been successful in operating services through the four nationwide carriers, thus supporting wholesale models for spectrum provision, See also *id* at 32 to understand the importance of wholesaling as a viable DE business alternative.)

accommodate the fluid, wireless business market and offset its infrastructure costs.²⁶ In all of these cases, the Commission should support rules that allow DEs to explore business models that reflect their existing assets and capabilities, while allowing them the opportunity to grow.

Proposals to retain or even expand the AMR Rule would restrict MWBE DEs toward current wireless models that require immediate spectrum infrastructure build out and use without attaining scale, and without the advantages enjoyed by incumbents, including rural telcos that already have subscribers, existing revenues and infrastructure.²⁷ MMTC believes that contemporary and future opportunities in the ownership of commercial wireless spectrum should not be constrained by rules designed for static environments, unless warranted by specific auction procedures.²⁸

²⁶ See Comments of the DE Opportunity Coalition, *supra* note 5 at 18. (“The AMR Rule has made it very difficult, if not impossible, for a DE to lease, wholesale or resell more than 25% of its spectrum capacity to any individual entity, because the AMR makes the revenues of that customer attributable to the DE. Under these terms, a DE cannot pursue an anchor wholesaling or reselling relationship with a larger company (not even another DE, large or small), without risking loss of its DE eligibility and other benefits, including bidding credits. The AMR impedes the flexibility of DEs to foster innovation and creative solutions for serving markets, particularly underserved and unserved.”)

²⁷ See Reply Comments of T-Mobile, WT Docket No. 14-170, at 6-11 (filed March 6, 2015).

²⁸ See *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, WT Docket No. 12-268, 27 FCC Rcd. 12357 (2012). (“Incentive auctions are a new aspect of the Commission’s efforts to make additional spectrum available for broadband, and are an important part of the spectrum agenda identified in the 2010 National Broadband Plan, which emphasized the indispensable importance of wireless spectrum.”); See also FCC, *Connecting America: The National Broadband Plan* 88-91 (2010). In the Joint Statement on Broadband, the Commission similarly recognized the need for strategic policies for spectrum, in order to meet current and future needs and promote innovation, investment and competition. Joint Statement on Broadband, 25 FCC Rcd at 3421.

B. The Repeal of the AMR Rule Can Be Accompanied by a Five-Year Unjust Enrichment Period and Transparent Reporting Safeguards

The FCC adopted the AMR Rule to require DEs to be facilities-based providers in an effort to curb “participation in the licensing process by those who have no intention of offering services only to the public.”²⁹ In our prior Comments with the DE Coalition, we showed that the Commission incorrectly interpreted the statute as requiring DE’s to solely operate as facilities-based providers, offering services only on a retail basis – the most expensive form of service, especially for new entrants.³⁰ The Commission has now compiled a record showing that leasing agreements are also an efficient use of spectrum and that such relationships can serve the public interest.³¹ Moreover, it has also been documented in the record that wholesaling is distinctly different from leasing.³² Therefore, the AMR Rule needs to be eliminated to allow DEs to exercise both options.

These actions, coupled with the retention of the five-year unjust enrichment period, as adopted in 1997 in the Part I Competitive Bidding Proceeding and as restored in fulfillment of the Third Circuit Court’s 2010 mandate, will be sufficient to encourage diverse participation and

²⁹ *Implementation of the Commercial Spectrum Enhancement Act and the 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, 4754-55 ¶ 3 and n. 9 (2006).

³⁰ See Comments of the DE Opportunity Coalition for a discussion on the legislative history of unjust enrichment and anti-trafficking issues. See also White Paper at 28; Comments of the Auction Reform Coalition, WT Docket No. 14-170 (filed Feb. 20, 2015), at 15-17.

³¹ See *Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003).

³² Wholesaling typically differs from leasing because it involves the construction and ownership of new network facilities by DEs and the sale to third parties of the right to use a DE’s network capacity on those facilities.

competition.³³ In prior Comments, MMTC and the Coalition objected to proposals to extend the unjust enrichment period to ten years, and indeed it should be obvious that especially in a rapidly changing industry, no one will invest in a company from which exit is impossible, or that is faced with a huge potential disgorgement, for a decade. We believe that such rules would further hamper or eliminate the ability of DEs to raise and retain capital and operate their businesses with flexibility comparable to businesses in the rest of the industry.³⁴

Finally, MMTC and the Coalition have urged the Commission to address any concerns about the potential for fraud, waste and abuse on a case-by-case basis by stringently enforcing the agency's existing DE reporting requirements and taking strong enforcement action against any parties that violate the DE rules.³⁵ The Commission can strengthen existing DE reporting requirements to maintain an effective system of checks and balances, while, as part of the repeal of the AMR Rule, also streamlining the reporting requirements to make them less burdensome.³⁶

III. THE COMMISSION SHOULD APPROVE PROPOSALS THAT ENCOURAGE DE PARTICIPATION AT ALL LEVELS

MMTC and the Coalition have already stated that the FCC's classification of all DEs as small businesses was an expedient, gender and race-neutral means to implement Section 309(j)'s

³³ See Comments of the DE Opportunity Coalition (Feb. 20, 2015).

³⁴ See Reply Comments of Council Tree Investors, WT Docket No. 14-170 (filed March 6, 2015).

³⁵ The DE Coalition has been emphatically urged the Commission to reject any proposals that would eviscerate the DE program or gut its effectiveness. See also Reply Comments of the DE Opportunity Coalition, WT Docket 14-170 (filed March 10, 2015).

³⁶ See Comments of the DE Opportunity Coalition at 16-18; see also Comments of the Auction Reform Coalition (Feb. 20, 2015), at 17-19; Comments of the Competitive Carriers Association (Feb. 20, 2015), at 9 ("CCA"); Comments of the NTCA (Feb. 20, 2015), at 5-6; and Comments of the Wireless Internet Service Providers Association (Feb. 20, 2015), at 10-11 ("WISPA"). See also White Paper, p.26.

classification of DEs that includes rural telephone companies, small businesses and businesses owned by minorities and women.³⁷ DEs, especially new entrants, are considered to be small businesses because they have no established revenue under the Commission's longstanding rules. However, one of the more effective mechanisms for encouraging DE participation is through an increase and expansion of the bidding credits to gender and race-neutral categories of firms,³⁸ and a review and evaluation of the revenue thresholds for small business eligibility.³⁹ The Commission has already proposed to move forward in this way to better account for the changing nature of the wireless industry.

MMTC urges the Commission to reject proposals that impose arbitrary caps on bidding credits. Unlike rule revisions surgically targeted at specific abuses, a cap would only serve to impede the ability of DEs to compete in a highly competitive marketplace now and in the future.⁴⁰ True competition in the wireless marketplace occurs when DEs of varying size and structure participate according to the availability of their resources. The DE program is not an affirmative action initiative and should not have proscriptive caps that are designed to keep DEs small when compared to larger companies. Imposing arbitrary size caps such will result in just

³⁷ See generally *Omnipoint Corp v FCC*, 78 F.3d 620 (D.C. Cir. 1996).

³⁸ See Comments of the DE Opportunity Coalition at 33.

³⁹ See White Paper, at 26; see also Comments of CCA, at 10; Comments of Rural Wireless Association (filed Feb. 20, 2015), at 9 ("RWA"); Comments of Auction Reform Coalition (filed Feb. 20, 2015), at 27; WISPA Comments (filed Feb. 20, 2015), at 13.

⁴⁰ See *Ex Parte* Letter to Roger Sherman, AT&T, referencing WT Docket No. 14-170, *Reforming the Designated Entity Program*, (May 11, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001046906> (last visited May 13, 2015) ("All bidding credits would be capped...to protect against abuses of the program. Indeed our support of this framework is directly contingent on proposed caps as we believe that rigorously defined caps provide the greatest assurances to policymakers and auction participants alike that the program will not be exploited for unfair advantage.")

that – small businesses that are consigned forever to remain tiny – which is contrary to what is prescribed in the congressional mandate.⁴¹

While the path towards clearer and less ambiguous rules is the desired goal in the program’s reform, we disagree with those commenters and proposals that suggest that caps are an effective way to address anti-competitive collusive behaviors and close DE “loopholes.”⁴² Caps are a grossly overbroad overreaction to allegations of misbehavior. Caps would punish those who have done nothing wrong, and deprive the public of any possibility of service by medium-scale or large-scale minority- and women-owned wireless competitors.

Minority- and women-owned businesses at this stage do not come close to having the gross revenues of the leading incumbent providers, nor do they have the capital to build out competitive infrastructure and related supports (e.g., call centers, marketing and communications) without substantial equity investment.⁴³ Smaller incumbents, such as DE rural telcos with existing subscribers that have established networks, also do not have the same capital needs as new entrant DEs. Moreover, DE rural incumbents often do not face the same challenge of securing loans because of their access to collateral and other build out incentives. Arbitrary caps on bidding credits would constrain DEs’ general ability to grow, thus limiting their ability to hire, contract and create wealth in under-served, historically disadvantaged communities. To date, the Commission has not imposed a cap on spectrum bidding credits; and in the strongest terms we urge the Commission not to do so now.

⁴¹ See Reply Comments of Council Tree Investors (filed March 6, 2015).

⁴² *Id.*

⁴³ According to CTIA-The Wireless Association, “U.S. carriers invested a one year record high of more than \$33 billion in capital expenditures in 2013, and more than \$260 billion in the last ten years.” See sources cited *supra* note 8 at 6, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> (last visited May 13, 2015).

IV. THE COMMISSION SHOULD CONSIDER ALTERNATE PROPOSALS THAT ENGAGE DEs WHERE THEY CAN BEST SERVE THE UNDERSERVED AND REMAIN ECONOMICALLY VIABLE

The Commission would perform a great public service by considering proposals that would add to a reformed DE program by offering alternatives to auction participation that advance telecom ownership diversity, such as “incentives for secondary market transactions or virtual networks.”⁴⁴

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.⁴⁵ Through this initiative, some MWBEs have been successful in raising capital to acquire licenses, especially when the seller actively seeks DE or MBE participation.⁴⁶

Moreover, the promotion and extension of largely regulation-free secondary market transactions enables MWBEs to attain scale through leasing and wholesaling some of their spectrum – thus providing the MWBEs with a springboard to attain facilities-based status and scale without discriminatory limitations on these practices. Specific proposals to foster more secondary market transactions by the Commission could include:

1. Consideration of secondary market transactions as a factor in whether to give a carrier

⁴⁴ See Reply Comments of AT&T, Competitive Bidding, WT Docket 14-170 *et al.*, (filed March 6, 2015), at p. 11.

⁴⁵ See White Paper at 26 (“Secondary market transactions are those in which an operator gains access to spectrum through private commercial transactions.”)

⁴⁶ For example, in 1999, when seeking merger approval, SBC and Ameritech spun off properties in overlapping wireless phone licensing markets to a group of sellers that included minority investors. See also Seth Schiesel, Ameritech to Sell of Wireless Business to GTE, New York Times (April 6, 1999), available at <http://www.nytimes.com/1999/04/06/business/ameritech-to-sell-half-of-wireless-business-to-gte.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fTelephones%20and%20Telecommunications> (last visited May 13, 2015).

- rule waivers relating to ownership, including in the mergers and acquisitions (“M&As”) context, and possibly attendant to the IP Transition.⁴⁷
2. Consideration of secondary market transactions as a factor in determining whether to report to Congress that the wireless marketplace is competitive.⁴⁸
 3. Restoration and refinement of the Tax Certificate so that it would apply to secondary market transactions, enabling the seller to defer payment of the capital gains taxes on the sale upon reinvestment in comparable property.⁴⁹
 4. Giving carriers that engage in secondary market transactions a bidding credit in wireless auctions, or an opportunity to pay for the spectrum in installments.

The combination of the DE-supporting proposals detailed throughout our Comments, coupled with an increase in secondary market transactions, can enable the Commission to confront access to capital challenges for minority- and women-owned businesses.

⁴⁷ There is a strong line of conceptual precedent for this type of incentive in broadcast regulation. *See, e.g., 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”); *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”); *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”); *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).

⁴⁸ *See* White Paper, *supra*, at 1 (recommending that the Commission consider secondary market transactions as an element of the agency’s annual Wireless Competition Report to Congress).

⁴⁹ In *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 983 (1978), the Commission adopted the Tax Certificate Policy, which quintupled minority broadcast ownership before Congress unwisely repealed it in Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995).

CONCLUSION

As the Commission considers proposals for adoption for a revamped and effective DE program, MMTC believes the Commission should seize this opportunity to end the persistent and longstanding exclusion of MWBEs in emerging, highly competitive and capital intensive industries. As we look forward to the DTV auction, *bona fide* MWBEs should have the opportunity to gain greater access to capital so that they, too, can bid on “beachfront spectrum” rather than being relegated to less desirable spectrum or none at all. More robust participation is at the heart of a successful auction and the public good.

Respectfully submitted,

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