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May 14, 2014

505

The Honorable Thomas E. Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20536

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (GN Docket No. 12-268); Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands (GN Docket No. 13-185); Wireless Competition (WT Docket No. 13-135) & Modernization of Competitive Bidding Rules (WT Docket No. 05-211)

Dear Chairman Wheeler:

On Thursday, the Federal Communications Commission (the Commission) will adopt spectrum incentive auction rules at its open meeting, and hopefully soon thereafter will also adopt so-called "Designated Entity" (DE) rules that are the subject of a separate Commission rulemaking.<sup>i</sup>

Leading up to this meeting, we remind you and your fellow Commissioners of your statutory mandate to "[p]romote economic opportunity and competition...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."<sup>ii</sup>

**The Commission's Competitive Bidding Authority**

Congress has routinely reauthorized the Commission to conduct spectrum auctions since it originally conferred that authority in 1993, as part of the Omnibus Reconciliation Act of 1993 (P.L. 103-66).<sup>iii</sup> Not once in the past 20 years has Congress altered or weakened its public interest directive to the Commission to ensure that it avoid excessive concentration of licenses and that it assign a portion of the licenses sold at auctions to small businesses, and businesses owned by minorities and women.

Congress's express intent and objectives were made perfectly clear in Section 309(j)(3)(B) of the Communications Act.<sup>iv</sup> In 1993, Congress may not have imagined or predicted the myriad ways in which the Internet renaissance and convergence in telecommunications and video would transform and grow the US wireless and mobile broadband industries into the economic workhorses they are today. Yet Congress had enough foresight at the time as to the force and potential of these drivers. Accordingly, Congress passed Commission auctions-legislation which afforded opportunities to small businesses to acquire spectrum



licenses. Congress envisioned that in competing with incumbent providers, these new, small business entrants would introduce new and flexible commercial wireless services that would create scores of new jobs, increase productivity, grow our overall economy and trade balances, and expand access to Internet service providers and commercial wireless voice (and later, texting, messaging, multimedia, and video communications) services for high-cost, remote, and underserved regions and communities.<sup>v</sup>

In using these license assets to tap into emerging and other hyper-growth sectors, Congress wanted for small businesses and for businesses owned by minorities and women to participate in and not be excluded from these vibrant overall economic, market and societal effects.<sup>vi</sup>

#### **Low auction participation levels by DE/MWBEs**

Over the years, the Commission has utilized a variety of Congressionally-endorsed tools, such as bidding preferences and other procedures, to promote minority and women-owned business enterprise (MWBE) participation. While we understand that the Commission adopted race-neutral measures in order to meet Adarand-related standards and limits,<sup>vii</sup> use of these tools resulted in more than 1,400 small businesses, including many MWBEs, winning spectrum licenses during the Commission's first decade of having competitive bidding authority.

The succeeding decade, on the other hand, has produced far worse and alarming results.<sup>viii</sup> Overall DE participation in auctions after the Commission modified its DE rules in 2006, sunk to all-time lows. In Auctions 66 (AWS-I) and 73 (700 MHz) – two of the largest auctions of prime spectrum – DEs won licenses that represented only 4.0% and 2.6% respectively, of the total revenue raised in the auction. And, DEs won zero bids in recent Auction 96 for 176 H-Block licenses, which generated approximately \$1.564 billion in revenue. Of the 23 qualified bidders in Auction 96, it is our understanding that none were MWBEs. Accordingly, very few DEs that are also MWBEs have become new entrants into the wireless communications industry or into growing arrays of mobile broadband sectors.

#### **Further Commission action on DE-inclusionary proposals is needed**

We have been deeply discouraged by perceptions that the Commission is doing very little to eliminate or substantially revise its auction rules and designs in a manner that promotes the discrete statutory goals we previously identified.<sup>ix</sup>

The Commission's incentive auction and DE rules must not deter, rather they must ensure appreciable increases in bidding by MWBEs – bidding either independently or jointly (with other MWBE or with non-MWBE firms) – on one or a series of licenses among the more than 1600 licenses that will be auctioned in the AWS-III band, or for licenses to build networks and to offer wireless communication services in approximately 350 partial economic areas, or PEAs.

First, the AWS-III Report and Order released on March 31, 2014, is of great concern. There were no identifiable enhancements to the DE program in that Order to promote increased

DE participation. We fear that this will be yet another major auction of prime spectrum that will not foster the level of diverse participation that the statute demands.

Second, the Commission's notices and orders must also demonstrate that a complete and comprehensive consideration of the entire record of comments and submissions has been made. Failing to do so is prone to lead to the same undesirable and unacceptable levels of auction activity and outcomes. Any such outcomes are sure to exclude ready, willing and able MWBEs from participating in and reaping the economic benefits and rewards that could be accruing to their businesses, employees, their communities, and to the larger economy.<sup>x</sup>

Potential and proposed changes that we support would call on the Commission to augment auction bidding credits for DEs. DEs should also be allowed the flexibility to design their own business models, including having the choice of using their licenses to operate either as retail or as wholesale providers to other retailers and resellers.<sup>xi</sup>

The Commission should also review its attributable material relationship (AMR) rule,<sup>xii</sup> which in its current form would seem to act as a barrier to small business and DE participation.<sup>xiii</sup> By imposing the AMR rule's 25% limitation on DEs that wish to preserve their DE status, the Commission is essentially looking over the shoulders of DEs and inserting its own business judgments into DE business models. Rather, DEs should be allowed, just like non-DE bidders, to formulate their own risk-reward calculations as to the lines of business they will pursue once they have conducted their own due diligence and arms-length negotiations with prospective suppliers and customers. Provided these calculations and decisions do not compromise a DE's ability to independently control its license and associated business, the Commission should refrain from drawing any conclusions that could foreclose DEs from entering the wireless marketplace and competing for customers and subscribers.

At minimum, the Commission must adopt auction policies and rules that signal to MWBEs that they can win licenses on fair and competitive terms and conditions. Further, to the extent possible the regulatory structure should be cognizant and tolerant of the particular barriers to entry and other business and economic challenges that MWBEs have had to encounter.<sup>xiv</sup>

Affording DEs these opportunities is not only consistent with the statute's dictates, but it would also significantly increase the numbers of MWBEs who enter the auctions as bidders. These corresponding entries will have the desired effects of raising overall bidding activity and the amount of revenues generated at auction.<sup>xv</sup> As importantly, these increases in MWBE bidders and their bidding levels will raise the statistical probabilities that more MWBEs will submit winning bids for licenses at auction.

### **Conclusion**

The Commission's DE rules taken together with Thursday's incentive auction rules will determine largely whether an appreciable number of small businesses and MWBEs will acquire, invest in, lend to, or locate capital for DEs that may want to bid on AWS-III and 600

MHz spectrum licenses. Given the low-band 600 MHz spectrum which is being auctioned has uniquely superior propagation characteristics to other candidate bands for reallocation and eventual auction, it is fair to presume that minority and women entrepreneurs and business owners would be every bit as interested in acquiring licenses to use and profitably operate this spectrum, as any non-minority or male entrepreneur or business owner would be.

The upcoming AWS-III and spectrum incentive auctions mark an historic opportunity for including MWBEs as service providers in the dynamic wireless communications and broadband sectors. Yet, there is a forlorn skepticism shared among MWBEs and many of the lawmakers who empathize with them, as to the Commission's willingness to design an auction framework and accompanying rules that will entice MWBEs to participate in greater numbers, intensity and frequency than has been the case over the last decade.<sup>xvi</sup>

With the ensuing auctions of AWS-III band and low-band 600 MHz spectrum, which is probably the most highly coveted radio spectrum to be auctioned off in the foreseeable future, it is imperative that the Commission adopt rules to ensure that MWBEs participate in the incentive and AWS-III auctions as active qualified bidders for spectrum licenses.

We request that you report back to us within two weeks as to what specific measures you have taken and may be preparing to take that will affect MWBE participation and outcomes in the upcoming incentive and AWS-III spectrum auctions. Through our continuing dialogue, we would like to be made more assured that in executing its competitive bidding authority, the Commission is operating within Section 309(j)(3)(B)'s defined and proper scope. Lastly, we hope that you will make it clear during this week's auction rulemaking, that the DE program is critically essential and that the Commission will have to expend greater efforts to enhance the DE program so that it benefits all intended classes of statutory beneficiaries.

Please contact CBC Executive Director LaDavia Drane, [LaDavia.Drane@mail.house.gov](mailto:LaDavia.Drane@mail.house.gov), at 202-226-9776, if you have any questions or thoughts to offer.

Sincerely,

 _____ Marcia K. Fudge Chairman Congressional Black Caucus	 _____ G.K. Butterfield First Vice Chair Congressional Black Caucus/ House Subcommittee Communications & Technology	 _____ Bobby L. Rush Ranking Member- House Subcommittee Energy & Power/ House Subcommittee Communications &Technology
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Cc: Commissioner Mignon Clyburn  
Commissioner Michael O’Rielly  
Commissioner Ajit Pai  
Commissioner Jessica Rosenworcel

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<sup>i</sup> FCC, Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules, WT Docket No. 05-211

<sup>ii</sup> 47 USC §309 (j)(3)(B)(1993)(emphasis added)

<sup>iii</sup> 47 USC §308 (j)(3). See also The Balanced Budget Act of 1997 (P.L. 105-33)(extending FCC auction authority until 9/30/2007); The Deficit Reduction Act of 2005 (P.L. 109-171)(extending FCC auction authority through 9/30/2011); DTV Delay Act (extending FCC auction authority through 9/30/2012); The Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96)(extending FCC auction authority through 9/30/2021)

<sup>iv</sup> See fn. 2 *supra*.

<sup>v</sup> See fn. 9 *infra*.

<sup>vi</sup> NPD Group, *Mobile Broadband Market Share & Forecast*, April 2013 (Americans are projected to have 34 million mobile broadband devices by the end of 2015, which would be an increase of nearly 50% from 2013), <http://www.connected-intelligence.com/our-research/connect/mobile-broadband-market-share-forecast>; Millward Brown, *Ad Reaction: Marketing in a Multiscreen World*, March 2014 (American consumers on average spend more time daily now viewing their smartphone screens than their televisions.) <http://www.millwardbrown.com/AdReaction/2014/#//>

<sup>vii</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)(race classification by the federal government is subject to strict scrutiny)

<sup>viii</sup> After reviewing available records, we believe that the Commission, for almost a decade, has not fulfilled its discrete legislative mandate relating to minority and women-owned business enterprises. As a whole, those Commissions that presided over the agency and made spectrum allocation and assignment decisions pursuant to their competitive bidding authority, from approximately 2006 until the present, did not perform well in incentivizing or measuring MWBE auction participation, or in facilitating more successful bidding outcomes.

<sup>ix</sup> The Commission should also consider the revision, and if necessary, the repeal of rules in the current DE program that stifle DE engagement in auctions and secondary market spectrum transactions.

<sup>x</sup> According to a Recon Analytics report, *The Wireless Industry: The Essential Engine of US Economic Growth*

- The US wireless industry is responsible for 3.8 million jobs, directly and indirectly, which is an increase of over 200,000 jobs over the past six years accounting for 2.6% of all US employment.
- At \$195.5 billion, the wireless broadband industry would rank as the 46<sup>th</sup> largest economy in the world, as measured by GDP.
  - The wireless industry is now larger than the publishing, agriculture, hotels and lodging, air transportation, motion picture and recording, and motor vehicle manufacturing industry segments.
- The wireless industry and its direct and indirect employees paid \$88.6 billion dollars in taxes, including federal, state and local fees and taxes.

<http://www.ctia.org/resource-library/facts-and-infographics/archive/economic-value-wireless-industry>

<sup>xi</sup> See, e.g. MMTC Notice of Ex Parte Communication, WT Docket No. 05-211 et al., filed 4/25/2014; MMTC Notice of Ex Parte Communication, WT Docket No. 05-211 et al., filed 3/14/2014 (advising FCC officials and staff

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of findings and recommendations from MMTC White Paper on Wireless Ownership); MMTC Notice of Ex Parte Communication, WT Docket No. 05-211 et al., filed 3/7/2014 (letter from 19 signatories, including national civil rights organizations to Chairman Wheeler and FCC commissioners).

<sup>xii</sup> See 47 C.F.R. §1.2110(b)(3)(iv)(A).

<sup>xiii</sup> See, e.g., MMTC Notice of Ex Parte Communication, WT Docket No. 05-211 et al., filed 4/25/2014.

<sup>xiv</sup> In reference to the reform of the DE program, former FCC Commissioner Michael Copps openly stated that:  
"If the upcoming auction ends up being a transfer of public spectrum from big broadcasters to big wireless, it will be a colossal flop...**if we're going to do justice to minorities, women, small business, and competition, we need to be developing DE or similar rules now, not as a last-minute add-on to the auction rules**, as sometimes happened in the past, but as an integral, meaningful part of them." *Communications Daily*. Vol. 34, No. 38 (2/26/2014)(emphasis added).

<sup>xv</sup> In 2005, pursuant to the Commercial Spectrum Enhancement Act, the Government Accountability Office (GAO) undertook a review of the Commission's auctions. GAO examined, among other things, what impact Commission auctions were having on the entry and participation of small businesses. Interestingly, interviewed industry stakeholders who spoke from personal experience (and policy experts) stated that bidding credits were very helpful. They also suggested licensing smaller geographic areas, and providing better lease options for small and rural businesses to promote small business entry and participation. GAO-06-236 (12/20/2005) <http://www.gao.gov/products/GAO-06-236>.

<sup>xvi</sup> The Commission's failure to retool its spectrum auctions to improve MWBE outcomes should not be rooted in a presumption that MWBEs are incapable of raising the large sums of capital needed to acquire highly prized, low-band spectrum; build, manage and lease sizable commercial wireless networks; or lack the acumen and contacts to hire and manage customer service, operations, and technical talent.