Minority Media and Telecommunications Council

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May 10, 2013

Ruth Milkman, Esq.
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Milkman:

RE: MWBE Participation Data
WT Docket No. 11-186 and Subsequent Dockets

The Minority Media and Telecommunications Council ("MMTC") respectfully submits this letter to urge the Wireless Telecommunications Bureau ("WTB") to include data on minority and women owned business enterprises ("MWBEs") in its next report to Congress on competition in the mobile wireless marketplace. These changes would allow the Commission to evaluate the impact that its policies have on diverse participation as well as determine how MWBE participation influences marketplace competition.

The Commission has prioritized the participation of MWBEs in the wireless marketplace to promote competition. It is under a statutory obligation to "avoid" "excessive concentration" of spectrum licenses and must promote the inclusion of small businesses, like MWBEs, in the competitive bidding systems it designs to grant licenses to wireless carriers.[1] To further this objective, the Commission has implemented initiatives like the designated entity ("DE") rules,

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[1] See, e.g., 47 U.S.C. §309(j)(3)(B) (stating that in designing systems of competitive bidding for spectrum licenses "the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives … promoting economic opportunity and competition and ensuring 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.")

with the goals of increasing diverse ownership of spectrum licenses and fostering the success of MWBEs in spectrum auctions.[2]

However, in two recent public notices[3] released by the WTB requesting information for its Sixteenth Report on mobile wireless competition,[4] requests for data concerning MWBE participation were not included. MMTC believes that the WTB should request information on all wireless competitors' size and race/ethnicity,[5] as well as MWBE contracting and procurement opportunities and participation data and trends, in all notices issued for the upcoming mobile wireless competition report. The inclusion of this data is consistent with the Commission's objective to encourage marketplace diversity, as it will help the Commission evaluate the extent to which MWBEs participate in the mobile wireless industry. It could also inform any future initiatives to facilitate greater MWBE presence in the industry. Furthermore, as the Sixteenth

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[2] See, e.g. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, 21 FCC Rcd 4753, 4756 ¶9 (2006) (describing the DE program by stating that "the Commission's primary method of promoting the participation of designated entities in competitive bidding has been to award bidding credits -- percentage discounts on winning bid amounts -- to small business applicants.") Former Commissioner Michael Copps stated that "in this age when telecommunications companies seem only to grow larger and larger, it is important to have programs that encourage competition from smaller entrepreneurs. This is exactly what the Designated Entity (DE) program is all about and it is why we must do everything we can to make this program perform as intended." Id. at p. 4808. See also Council Tree Communications Inc. v. FCC, 619 F.3d 235, 248-258 (3d Cir. 2010) (vacating two DE rule modifications – the 50% impermissible material relationship rule and the 10-year unjust enrichment rule -- because of "serious" deficiencies in the Commission's notice and comment process. While these rule modifications were in effect, the aggregate dollar value of licenses won by DEs in two highly significant Auctions, #66 and #73, dropped from an average of 70% in previous auctions to 4% and 2.6%, respectively).

[3] See Wireless Telecommunications Bureaus Seeks Updated, Year-End 2011 Data For Its 16th Annual Report on Mobile Wireless Competition, Public Notice, 27 FCC Rcd 2570 (2012) (rel. March 14, 2012); Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, Public Notice, 26 FCC Rcd 15595 (2011) (rel. Nov. 3, 2011).

[4] See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 2013 FCC LEXIS 1137 ("Sixteenth Report").

[5] There is no legal impediment to the collection of racial data. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788-790 (2007) (supporting the proposition that the government can collect data on race when considering the impact of its policies without triggering the strict scrutiny standard of judicial review. In his concurrence Justice Kennedy states that "it is permissible to consider the racial makeup of schools," and school boards may draw "attendance zones with general recognition of the demographics of neighborhoods" and may engage in "tracking enrollments, performance, and other statistics by race"); see also United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976) (holding that "purely hypothetical misuse of data" concerning race and ethnicity "does not require the banning of reasonable procedures to acquire such data.")

Report does not make any "formal finding as to whether there is, or is not, effective competition in the industry,"[6] the inclusion of MWBE data could be used as a factor to aid the Commission in making a formal finding to Congress about mobile wireless marketplace competition.

MMTC remains committed to working with the WTB and the Commission to promote the greater inclusion of minorities and women in our spectrum-based industries. As always, we welcome the opportunity to meet with you to further explore how we can work on these issues together in a meaningful and effective way.

Sincerely,

David Honig
President

[6] See Sixteenth Report at p. 3, ¶2.