May 15, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Dortch:

RE: SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC, Applications for New Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands, File Nos. 0006670667 and 0006670613

The Multicultural Media, Telecom and Internet Council ("MMTC") and the National Association of Black Owned Broadcasters ("NABOB"), as *amici curiae*,[1] respectfully comment on the question of whether the Commission should be expected to provide auction applicants, such as SNR Wireless LicenseCo, LLC ("SNR") and Northstar Wireless, LLC ("Northstar"), with its views on whether proposed changes to their agreements with DISH Network Corporation ("DISH") would allow them to qualify for bidding credits under the Commission's Designated Entity ("DE") Program.

In 1993, Congress required the Commission to create the DE Program to close the indisputably wide gap in opportunity that historically has prevented minorities and women, and other new entrants, from acquiring commercial spectrum licenses.[2] With two recent exceptions (the SNR and Northstar cases now on remand), the FCC, for the entire history of DE Program, has allowed DE bidding credit applicants to confer with the Commission whenever the Commission has concerns that particular aspects of their relationships with larger companies could raise *de facto* control concerns. This consultation, along with sensible rule enforcement, is vital to ensuring the long-term success of the DE Program.

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[1] MMTC is a non-partisan, national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecom and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications. NABOB is the only trade organization representing the interests of African-American owners of radio and television stations across the country. NABOB has two principal objectives: First, to increase the number of African-American owners of telecommunications facilities, and second, to improve the business climate in which we operate. The overall objective is to maximize the potential for financial success through providing advocacy resources and information in critical business areas including, advertising sales, station acquisition, financing, and federal broadcast regulation. As *amici*, MMTC and NABOB seek to advance the public interest and, in particular, the advancement of diversity and inclusion in telecommunications, through the Designated Entity Program. *See* 47 U.S.C. §§257 and 309(j). The views expressed herein reflect the institutional views of MMTC and NABOB and are not intended to represent the views of each individual MMTC and NABOB officer, director or member.

[2] *See* 47 U.S.C. §§309(j)(3)(B), (4)(C) and (4)(D).

In this case, the D.C. Circuit told the FCC that in light of this history, the FCC erred in not allowing SNR and Northstar an opportunity to cure any concerns the FCC had regarding their relationship with DISH prior to rejecting their bidding credit applications, and remanded the cases back to the Commission to allow those applicants to negotiate a cure of the Commission's *de facto* control concerns.[3]

Consistent with the D.C. Circuit's holding and remand, fundamental concepts of fair notice and due process and Congress' command in Section 309(j), the Commission should at a minimum agree to meet with SNR and Northstar and provide its views as to whether proposed changes to their relationships with DISH would entitle SNR and Northstar to bidding credits. A decision not to provide such input would discourage the participation of the under-represented groups Congress required the agency to assist in the DE Program, and discourage passive investment in businesses controlled by members of such groups. It is not asking too much for the agency's staff to respond to routine, business-related questions, the answers to which are vital to any entrepreneur that is attempting, in good faith, to comply with standards that are not bright-line and potentially subject to varying interpretations, depending on the circumstances.[4]

Two substantive issues on which guidance is sought by SNR are:

> (1) what is an acceptable "market" interest rate "if charged in the DISH loan to SNR," and (2) "whether the twelve contractual passive investor protection rights afforded the passive private equity investors in the SNR Wireless Management, LLC agreement… would be acceptable to the Commission if also applied to DISH."[5]

These questions are paradigmatic of the kinds of questions that arise every day in the normal business planning of companies that are attempting in good faith to comply with the Commission's rules and policies.

Such guidance inherently requires a back-and forth dialogue between the applicants and the Commission, especially in situations, such as these, where the Commission assesses *de facto* control under the very fact-based "totality of the circumstances" standard, and various provisions of applicants' agreements with DISH relate to other provisions and could be affected by changes in other provisions. Although the FCC issued a detailed order in 2015 explaining why SNR's and Northstar's relationship with DISH resulted in a transfer of *de facto* control of the companies to DISH, the FCC's 2015 order did not indicate what specific changes would need to be made to their contractual arrangements with DISH to satisfy the FCC that DISH no longer wields *de facto* control.[6] It is precisely this type of guidance that SNR and Northstar (and all DE applicants, for that matter) deserve.

Instead, by failing to provide the necessary guidance, and opportunity to cure, the agency is saying, in effect, "figure it out for yourself, and if you guess wrong, we will throw out your applications." If this

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[3] *See SNR Wireless LicenseeCo, LLC v. FCC,* 868 F.3d 1021 (D.C. Cir. 2017) ("*SNR Wireless v. FCC*") (subsequent history omitted).

[4] *See id. at* 1036.

[5] *Ex Parte* Letter of SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC, May 4, 2018, p. 3.

[6] *See Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015).

absence of fair and informed feedback ever prevails, the Designated Entity Program will die a slow death. Applicants simply can't afford to sink costs into a program that is implemented in a manner designed to select winners and losers based on who guesses the right answers to technical questions, nor will private investors commit to DEs because of such uncertainty. Such a process is unfair and illogical, and it flies in the face of congressional intent under Section 309(j) of the Communications Act of 1934, as amended to foster diversity amongst a wide variety of applicants and to avoid an excessive concentration of licenses. Moreover, such a process places yet another unreasonable market entry barrier on any new entrant or small business, contrary to Section 257,[7] and would undermine other FCC efforts to foster inclusion in the telecommunications industry.

Consequently, the Commission should adopt a policy of providing applicants with a reasonable opportunity to cure any deficiencies identified by the Commission in their bidding credit applications. In the post-remand scenario of the current litigation, the agency's staff should provide SNR and Northstar with the guidance they have requested. The Commission would be violating both the letter and spirit of the D.C. Circuit's remand order in *SNR Wireless v. FCC* (and Sections 309(j) and 257 of the Communications Act) if it did not provide such guidance.

Respectfully submitted,

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[7] 47 U.S.C. §257(c).

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that on May 15, 2018, a true and correct copy of the foregoing letter was sent by United States mail, first-class postage prepaid, to the following:

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* This entity did not provide an address for service of pleadings. Accordingly, the address specified is based solely on information and belief after conducting a reasonable search.