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In the Matter of

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Joint Reply Comments of

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Table of Contents

I. Introduction and Summary 2

II. The Commission Ignores and Gives Short Shrift to the Relevant Remedial *Adarand* Studies 3

III. The Commission Inappropriately and Inconsistently Evaluates the Evidence to Minimize Connections between Ownership Identity and Content Diversity 6

IV. The Commission Minimizes Useful Studies Relating to Electoral Participation, which Could Form the Basis of a Compelling Governmental Interest 9

V. As Part of Its Obligation Under *Prometheus II*, the Commission Must Proactively Create Data and Develop a Research Agenda, Starting with Research Standards for Measuring Viewpoint 10

VI. The Commission Should Develop a Robust, Multi-Pronged Legal Analysis 12

- **A. The Commission Should Step Back from Its Conclusions About Potential Remedies** 13
- **B. The Commission Should Retract its Other Premature Conclusions on Compelling Interest and Evaluation of the Required Nexus** 13

Conclusion 14

I. Introduction and Summary

The Commission has, for the first time, at least made an effort to look at the record and the law in the area of race-conscious measures and broadcast diversity. We are pleased the Commission has finally broken through its hesitancy to connect the dots of law, evidence and policy. Unfortunately, while some useful progress has been made in this effort, the Commission's work evidences the need for the Commission to acquire more expertise, to view the record in a holistic and comprehensive manner, to take proactive steps to fill in the data gaps it has identified, and, most important, to affirmatively retract its erroneous conclusions when they are based on a flawed or incomplete reading of the record, the law, or both.

Overall, while the Commission made a significant attempt, its analysis suffers from several repeated flaws. Over and over throughout the NPRM, the Commission selectively reads the evidence and the law, considering each study and each legal theory individually, *seriatum*, dismissing each one in turn because no single approach can suffice. Needless to say, this is a fundamental error because it is extremely unlikely that a single study or single legal theory will be adequate to meet the strict scrutiny burden. As with any legal record, the Commission should use one piece of evidence to stand for one proposition and then use a complementary piece of evidence to fill in where the first one leaves off. Beyond its selective reading, the Commission ignored a significant amount of evidence that has been introduced into the record over the years since the 1995 *Adarand* decision without explaining or acknowledging the omission. The Commission also makes inconsistent conclusions with regard to the studies it relies upon and those it rejects, and ignores the essence of the Third Circuit remand: *the Commission has an obligation to conduct or procure studies to fill the evidentiary gaps it has identified.*

As outlined below, the Commission takes a similarly flawed approach with its legal analysis. The Commission unfortunately often misreads legal precedent, increasing its own legal burden even as it minimizes the positive evidence before it. Admittedly, this area of the law is in flux, and there is very little directly applicable legal precedent governing the Commission's ability to act since most litigation in this area has been confined to the sectors of higher education and government contracting. Nonetheless, this means that the Commission also has an opportunity for creative legal thinking and the unique opportunity to rely on both the precedent identifying the importance of diversity *and* the precedent regarding remedial programs and possibly new justifications unique to the Commission's areas of expertise (such as the relationship between broadcasting and electoral matters). The Commission fails to recognize it is in a stronger position because of the unique attributes of the mass media as contrasted with either government contracting or university admissions.

The Commission has a significant amount of work ahead of it. This work is not optional or on the periphery. The work is the fundamental work of the Commission, a Commission whose statute contains, and that has proclaimed itself, a mandate for strong policy in support of racial and gender equity, to robust diversity, to policies that will produce a vibrant marketplace of ideas, consistent with our most dearly-held First Amendment principles.

II. The Commission Ignores and Gives Short Shrift to the Relevant Remedial *Adarand* Studies

The Commission begins its analysis of the remedial compelling interest with a sweeping incorrect statement, that the Commission "never has asserted a remedial interest in race or gender based broadcast regulation…and most commenters have not focused on establishing a case for remedial measures."[1] The Commission, in 2000, released five studies that it had procured, four of which were geared to developing the data necessary to justify remedial action by the Commission. As a Commission staff report explained with respect to those studies, "the FCC has already found in the Section 257 proceeding that discrimination can be a market entry barrier."[2] To cite only the most recent history, in 2008, the Commission took two steps to stop discrimination, including the requirements that broadcast advertising contracts not discriminate and that stations not discriminate in private transactions,[3] specifically acknowledging, "[f]or over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten 'no urban/no Spanish' dictates."[4]

Moreover, since the main case which establishes the legal and evidentiary standard for remedial action is *Adarand*, and since the Commission has been requested again and again to produce studies that will meet the *Adarand* standard, it is difficult to understand how the Commission can conclude commenters have not sought remedial programs. Even if the Commission had not yet heard clearly the request in the past, let UCC OC Inc. et al make it clear now: the Commission should pursue remedial and diversity-enhancing goals in this docket and in the Quadrennial Review proceedings.[5]

The question of passive participation is a particularly good example of the Commission incorrectly raising the legal bar and thus incorrectly determining current evidence falls short. The Commission notes that it could pursue a remedial interest if it had evidence that it was a "passive participant" in private discrimination and references *Adarand v. Slater* in which the court relies predominantly on private discrimination.[6] But when presented with evidence that the Commission itself procured to determine whether it was a passive participant in private discrimination,[7] the Commission rejects the

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[1] *Further Notice of Proposed Rulemaking, 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371 (rel. Apr. 15, 2014) at ¶ 302 ("NPRM").

[2] See Section 257 Staff Executive Summary (December 12, 2000) (citing Market Entry Barriers Notice of Inquiry, 11 FCC Rcd 6283) ("Adarand Studies Staff Executive Summary").

[3] With regard to broadcast transactions, the Commission concluded its policy would be consistent with its Section 257 statutory mandate, would the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, and the Commission's public-interest mandate to foster viewpoint diversity by promoting the dissemination of licenses to a wide variety of applicants. 2007 Diversity Order at ¶ 40.

[4] 2007 Diversity Order at ¶ 49. *See also, e.g.,* New Financial Qualifications Standard for Broadcast Assignment and Transfer Applicants, 87 F.C.C.2d 200, 201 (1981) (FCC reduction of financial qualification standards to acquire broadcast licenses in part because the prior standard, "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses.")

[5] We endorse AAAJ|AAJC's request and the MMTC suggestion to make preventing discrimination and remedying past discrimination in FCC licensing as one of the explicit goals of the Quadrennial Review. See AAAJ|AAJC at 15-16 and MMTC Comments at 7-8.

[6] NPRM ¶ 306.

[7] "The FCC's potential passive participation in private discrimination is evaluated in the Historical Study." Adarand Studies Staff Executive Summary.

research because it does not prove the Commission *itself* engaged in discrimination.[8] Evidence discrimination by the FCC itself is not the standard, as the Commission's staff executive summary accompanying the release of the 2000 *Adarand* studies explained:

> Under the passive participant theory, a governmental actor must possess evidence that its own practices are "exacerbating a pattern of prior discrimination," and must "identify that discrimination, public or private, with some specificity," to establish the factual predicate necessary for race-conscious relief. *Croson*, 488 U.S. at 504. In this regard, an inference of discriminatory exclusion may arise "when there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged."[9]

The Commission observes that it has no evidence of a disparity between the number of minority and women owned broadcast stations and the number of qualified minority and women owned firms.[10] This observation is flawed for several reasons, the least of which is if the Commission believes that it requires studies that show a statistical disparity among 'willing and able' broadcast licensees and the current distribution of broadcast licensees to people of color and women, then the Commission is clearly required by the *Prometheus* remand to fund such a study as it did in 2000.

Moreover, in 2000 the Commission concluded that it would look at the varying ways the Commission distributed broadcast licenses over time and conduct studies addressing the various time-periods. The Commission funded several statistical analyses that showed disparities in auctions. The studies focused on auctions because, by 2000, competition in an auction was the only way to obtain a commercial broadcast license directly from the Commission.[11] Thus, for the Commission to conclude in 2014 that a study of auctions is irrelevant for broadcasting ignores the modern distribution of broadcast licenses.[12]

In addition, as explained in the Staff Executive Summary released at the time, the studies commissioned in 2000 were specifically requested to follow a conservative approach and limit their analysis to the pool of qualified bidders to those who actually applied for the licenses, this approach "attempt[s] to adapt and apply the judicial standards to the licensing context using a narrow definition of the pool of minorities and women who may be 'willing and able' under *Croson*."[13] Despite their conservative approach, these studies found statistical disparities. These disparities, however, pointed to the fact

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[8] NPRM ¶ 304.

[9] Section 257 Staff Executive Summary (December 12, 2000) (citing *Croson*, 488 U.S. at 509 (plurality opinion); *id.* at 530 (Marshall, J., dissenting)).

[10] NPRM ¶ 303.

[11] Id.

[12] NPRM ¶ 305.

[13] Section 257 Staff Executive Summary. The Staff Summary went on to explain, "utilization ratios are based upon legal doctrine and the body of case law that has been developed in the wake of the Supreme Court's decision in *Croson*. Therefore, FCC staff asked contractors to calculate these utilization ratios to satisfy the applicable legal standards. Although utilization ratios are the only calculations widely recognized by the courts, to comport with prevailing econometric practices, the FCC has also asked contractors to supplement these numbers with substantially more rigorous and methodologically sophisticated econometric analysis. Specifically, FCC staff asked contractors to conduct logistic regression analyses to review the licensing process while controlling for relevant control variables."

that, because of the very conservative starting point of the studies, they found that most of the low participation by people of color and women was a result of potential broadcasters' inability to obtain access to capital, and thus their inability to enter an auction in the first place.[14]

Consistent with this finding, the Commission also sought out research looking at discrimination in access to capital. This access to capital study found "the consistent direction of the results suggest that, without a remedy for capital market discrimination, minority- and women-owned businesses are inappropriately disadvantaged in obtaining FCC broadcast and wireless licenses."[15] The study recommended the Commission solicit further research to confirm his findings, as all researchers do, but considering that a broad swath of research already has identified discrimination in access to capital, it is unclear why the Commission would believe those studies are not relevant and are insufficient for a Commission conclusion that potential broadcasters have the same limitations on access to capital that other people of color face in other industries. Upon what basis does the Commission believe that discriminatory access to financing for broadcast businesses would be different from other businesses? It seems unclear at best, particularly given the breadth of analysis in this area.[16] Most important, the Commission lacks this data because the Commission has not procured this data. The Commission is able to take action to remedy this absence of data if it is in fact inadequate to the task.

The Commission's NPRM also ignores the one study the Commission procured to consider how the Commission might have actively or passively discriminated in the past in comparative hearings. KPMG was hired to do a statistical analysis of 230 comparative hearings that occurred over the periods of 1978-1981 and 1989-1993, two periods during which the FCC gathered financial information on the license application, and during which the FCC's stated policy was to provide credit for minority applicants.[17] This study found some useful indicators that might indicate passive participation. In particular, the study overall pointed to the likelihood that minorities were recruited to participate in ownership only when large transactions were at stake (presumably because these were competitive) but that minorities were not likely to have a significant financial stake in those transactions, consistent with (in the author's words) "non-meaningful" or "sham" participation.[18] This study represents only one way to look at the Commission's relationship to pervasive discrimination during our country's history.

Similarly, the Commission laments the lack of a large number of studies such as the ones found in *Adarand v. Slater* case,[19] but then dismisses the value of studies conducted in the 1980s.[20] The

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[14] Ernst & Young, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority and Women-Owned Companies in FCC Wireless Spectrum Auctions at 4 (2000) ("[M]inority and women applicants tend to qualify at lower rates than other applicants and that these differences are statistically significant. … These findings would suggest that the difference in general utilization ratios may be largely attributable to the differences in qualifying ratios where minority applicants face a lower likelihood of qualifying.")

[15] Prof. Bradford, Capital Markets Study at ix.

[16] We also note that the record is replete with comments describing the problems in access to capital, including comments from parties that do not support ownership limits, such as the National Association of Broadcasters. *See, e.g.,* NAB Comments August 6, 2014 at 91-95.

[17] Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC KPMG LLP. (2000)

[18] *Id.*

[19] NPRM ¶ 306.

[20] *See, e.g.*, note 904.

Commission appears torn between the need for a voluminous decades-long record and a concern that some studies are no longer relevant because they were conducted in the past. The Commission should not disregard older research without an articulated reason as to why the relationships in question would be different from today. [21] In fact, as noted in the comments of AAAJ|AAJC, the Supreme Court has clearly indicated there is evidence of past discrimination in the allocation of licenses and this evidence cannot go stale.[22]

Beyond the statistical analysis, the Commission also procured a historical study documenting the barriers to obtaining licenses by women and people of color.[23] Researchers conducted interviews with 120 individuals representing minority- and woman-owned businesses, as well as 30 key market participants. These interviews revealed the pervasive and continuing obstacles faced by minorities and women in gaining broadcast and wireless licenses. The study asserted that the FCC had often "failed in its role of public trustee of the broadcast and wireless spectrum by not properly taking into account the effect of its programs on small, minority- and women-owned businesses."[24] Beyond the study procured in 2000, the Commission's history is filled with stories of Commission decisions that were clearly in support of discriminatory policies adopted by broadcast licensees. The story of the United Church of Christ's challenge to the WLBT-TV license renewal is one such shameful example of the FCC's willingness to protect blatantly racist behavior by its licensees no matter the evidence.[25] If the Commission believes it requires evidence of active or passive participation in discrimination in order to adopt race-conscious measures, it is the obligation of the Commission under the *Prometheus II* remand to procure that evidence.

III. The Commission Inappropriately and Inconsistently Evaluates the Evidence to Minimize Connections between Ownership Identity and Content Diversity

Perhaps in its effort to proceed cautiously, the Commission takes every opportunity to minimize the relevant evidence in its record, regardless of the evidence's strength or potential use. Such an approach will only paralyze the Commission into inaction, which is not an option given its statutory and judicial mandates. The errors in the record analysis cannot be left standing. We outline some of the most egregious errors and strongly urge the Commission to officially acknowledge the problems with its conclusions so that it can move ahead on a strong legal footing as it makes decisions in this docket.

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[21] In fact, it is very likely that past discrimination will continue to influence today's owners because the Commission has virtually never denied a previously-issued license renewal.

[22] Comments of AAAJ|AAJC at 15.

[23] Ivy Planning Group, *Whose Spectrum is it Anyway?: A Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present* (2000).

[24] *Id.* at 3.

[25] For a detailed description of this history, see KAY MILLS, CHANGING CHANNELS (Univ. of Miss. Press: 2004). *See also*, Robert Horowitz, Broadcast Reform Revisited, Reverend Everett C. Parker and the "Standing" Case (Office of Communication of the United Church of Christ v. Federal Communications Commission), The Communication Review, Vol. 2, No. 3 (1997), pp. 311-348, available at: http://communication.ucsd.edu/_files/BroadReformrev.pdf and David Honig, *How the FCC Helped Exclude Minorities from Ownership of the Airwaves*, Fordham University McGannon Lecture on Communications Practices and Ethics (October 5, 2006), available at: http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf. These two items are included in an appendix to these comments.

One example of the Commission's inappropriately compartmentalized review of the record is its conclusions with regard to whether its current record contains enough evidence to support a "connection between minority ownership and viewpoint diversity [that] is direct and substantial enough to satisfy strict scrutiny,[26] tentatively concluding, "the evidence in the record would not satisfy strict scrutiny."[27]

The Commission proceeds to support this conclusion by considering seven studies in seven paragraphs and determines that each one is not adequate to meet the strict scrutiny standard as the Commission defines it.[28] This method of analysis is as brief as it is infirm: no single study is ever going to establish every component of a record sufficient to meet Supreme Court review in the area of racial preference. For the Commission to build an evidentiary record, it must use multiple studies with differing techniques. Rennhoff and Wilbur's 8A study made an explicit reference to the strength of combining quantitative research like their keyword analysis with qualitative content analysis.[29] Other scholars have strongly recommended such a multi-faceted approach.[30] Moreover, a combined analysis of multiple studies with multiple approaches and strengths is consistent with the Supreme Court's explanation in the government contracting context that statistical analysis must be combined with anecdotal studies.[31]

Beyond concluding that any particular study is inadequate, the Commission's inflates the importance of the Rennhoff and Wilbur study 8A.[32] While the study is one of the most recent studies to consider the connection between ownership and viewpoint diversity, there is no methodological reason weigh this study over the rest of the Commission's record. The study authors used the opportunity to experiment with a new mechanism to measure viewpoint. But, as the study authors themselves indicate, "an absence of evidence is not evidence of absence."[33] The study set out to develop a new measure of viewpoint diversity that has never been tried before. It had the meritorious interest in using actual marketplace behavior as the measure of viewpoint diversity, however, the authors' original idea was to use viewership of national cable networks such as FOX and MSNBC to identify the interests of the audience and work backward to use that to evaluate viewpoint diversity in a local broadcast market, however, they were unable to get the requisite data.[34] In a sector in which the Commission faces a dual

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[26] NPRM ¶ 289.
[27] NPRM ¶ 291.
[28] NPRM ¶¶ 292-298
[29] Rennhoff and Wilbur at 6 ("policymakers and judges should consider both content-and market-based approaches to measuring viewpoint diversity.")
[30] *See* Friedland, *et. al*, at xi, and Kim at 16.
[31] *See, e.g., Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir.1991) ("the combination of convincing anecdotal and statistical evidence is potent").
[32] *See* NPRM ¶ 292 (citing *Local Media Ownership and Viewpoint Diversity in Local Television News*, by Adam D. Rennhoff, and Kenneth C. Wilbur (2011) ("Rennhoff/Wilbur/8A")).
[33] Rennhoff & Wilbur at 23.
[34] *See* Rennhoff/Wilbur/Study 8A (June 2011) t 18 (describing authors' understanding that "the television viewing data would contain local viewing of national cable networks" and despite "the authors' repeated inquiries, the data provider did not provide local audience data for national cable networks.") available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-308596A1.pdf; *see also* Rennhoff/Wilbur, Reply to Peer Review at 3 (June 20, 2011) (describing initial plan for research) available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-308595A1.pdf.

legal obligation to secure appropriate data, the Commission should consider investigating why the study authors were unable to get the data they originally sought to use from its proprietary source.[35]

Much more compelling than a single study using a novel measure of viewpoint diversity was Dam Hee Kim's meta-analysis of 42 studies (a significant portion of all studies ever conducted to consider the connection between viewpoint and identity). While the Commission's analysis implies that Ms. Kim concludes there is little evidence supporting the connection,[36] this is not an accurate reading of Ms. Kim's work. Ms. Kim's meta-analysis of studies considering a connection between ownership and content identifies 18 studies that do find a connection, but only four that do not.[37] She states:

> A review of studies of the nexus among minority ownership, employment and content suggests … *a nexus between minority ownership and content tailored toward minority communities.* It appears that the prevalence of minority owners has been related to the employment of a more diverse group; the employment of minority groups seems to be associated to the provision of diverse content; and *minority-owned stations have tried to air content tailored toward minority communities more than white-owned stations.*[38]

While Ms. Kim does articulate reservations about the data used in the studies, much of that analysis is misplaced and seems to share the erroneous presumption of the Commission that a single study must be found to substantiate the entire factual basis for policy. A number of her concerns do not seem to be on point. For example, she is concerned that many studies either consider radio ownership or TV ownership but not both because the industry compiles data separately for each medium, and recommends future inclusion of cable and Internet content.[39] Since this docket is concerned with broadcasting, it would seem that compelling studies conducted on both of the major broadcasting media ought to suffice. To conclude that the existing proprietary data sets covering radio and television are not adequate to make a case for broadcasting would seem to be a radical conclusion that we doubt the Commission intended to endorse. The same caution applies to Kim's reservations about content-based analysis, which seem to be more of an accurate description that such research is difficult to conduct, rather than a conclusion that we cannot rely on analysis using widely accepted scholarly techniques[40]—in fact she recommends using these techniques later in the paper. Similarly, reviewing the helpful chart in Ms. Kim's paper, the data sources are comprised of the key industry data sets available in communications, such as Arbitron, Nielson, BIA, Duncan's, NTIA and the FCC.[41] She does not

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[35] This is particularly appropriate because the FCC funded the research in question, which means the FCC provided the funding to acquire the data, and presumably funded the original research based on the proposal which included a more relevant data set.

[36] NPRM note 901.

[37] At least one of the four studies that does not identify a connection is the Rennhoff/Wilbur 8A study, which as explained above, is not evidence of anything.

[38] Dam Hee Kim, *The Triangle of Minority Ownership, Employment and Content: A Review of Studies of Minority Ownership and Diversity* at 15 (unpublished manuscript, 2012) (emphasis added).

[39] Kim at 12, 17.

[40] See Kim at 12 ("content analysis is rather dependent on individual coders' interpretation and laborious. Thus, studies adopting content analysis tend to be very narrow in its scope, not only in terms of service covered, but also geographically.")

[41] She also criticizes a study interviewing owners to determine whether owners of color intend to serve their own communities as failing to ascertain whether the owners' intent to serve their communities results in content that

articulate her concerns with the use of this data, but instead recommends additional research that would combine the elements of all the studies, using a variety of techniques linked together and recommends a greater emphasis on audience perception of their own needs.[42] Both of these recommendations are good ones. Her recommendation to augment and repeat previous work demonstrates that Ms. Kim does not condemn the record with a broad brush, but instead describes how a variety of approaches, when combined, can produce compelling results.

If the Commission harbors separate concerns from the ones articulated by Ms. Kim,[43] it should articulate them, particularly since they appear to consist of the commonly-accepted highest quality data the communications sector has produced. If the Commission has a broader or more fundamental critique with regard to the data sets and the use of those data sets, it is up to the Commission, under the Third Circuit remand, to identify the flaws and fix them so that appropriate research can be completed. If the main problem the Commissions has with the data used in studies is that they relied on the incomplete and erroneous nature of the Commission's own data,[44] the Commission must take immediate steps to ensure that the data set is immediately improved to the point that the Commission can no longer point to its own shortcomings as a reason why its own record is insufficient.

Finally, the Commission should include more analysis and reference to other positive studies. For example, another example of an *Adarand* study ignored by the Commission is a comparative study of minority- and majority-owned broadcast stations commissioned by the FCC, but unmentioned in the NPRM, found that despite the fact that minority-owned stations report having fewer resources at their disposal, they report delivering a wider variety of news and public affairs programming and more ethnic and racial diversity in on-air talent.[45] The Commission similarly dismissed without adequate consideration the scholarship by Prof. Cathy Sandoval about radio content and format.

IV. The Commission Minimizes Useful Studies Relating to Electoral Participation, which Could Form the Basis of a Compelling Governmental Interest

The Commission ignores studies that do contain useful findings, particularly the line of research looking into the impact of niche formats for voters of color. The Commission acknowledges but does not

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the targeted audience believes uniquely serves them. Kim at 13. While this is an accurate description of the study, it is not clear why a single study must show every single connection in a complex social science field.

[42] Kim at 16-17. Unfortunately the Commission lost an opportunity to fill in one of the most significant gaps in the research -- the failure to directly study the audience's perception and use of media—when it cancelled the Critical Information Needs studies earlier this year. We also note, ironically, the Commission rejects because of its size one of the few studies on the record which does attempt to survey the audience, the Benton Foundation Byerly study. NPRM ¶ 295. But the Commission does not explain why the limited size alone causes the Commission to set it aside altogether. There is no reason why the results of the study mean it is not useful in making the overall case and in pointing to research that can be expanded to larger populations.

[43] Other than critiquing studies that used its own data.

[44] See Questioning Media Access: Analysis of FCC Women and Minority Ownership Data, Byerly (2006); Ownership Structure and Robustness of Media (Media Ownership Study 2), Duwadi, Roberts and Wise (2007); Minority and Female Ownership in Media Enterprises, Beresteanu and Ellickson (2007), states "The data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis" (p. 2-3).

[45] Bachen and Hammond, DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM at i.

recognize the importance of some of the findings in George/Oberholzer-Gee study 8B.[46] In point of fact, George/Oberholzer-Gee/8B demonstrates that minority-owned stations spend more time covering minority politicians, a critical source of information for a well-informed electorate,[47] and that minority ownership increases diversity in health reporting.[48] Prof. Waldfogel made similar finding in Study 7. Specifically, as the Commission acknowledged, Waldfogel/7 found, "minority audiences have different format tastes than white audiences and that minority-owned stations disproportionately cater to these tastes. In addition, the regression analyses … show that, on a market-wide basis, the presence of minority-owned stations increases the amount of minority-targeted programming and that the availability of minority-targeted formats attracts more minorities to listening."[49] These findings are robust and compelling.[50]

This is not a unique finding, but a line of inquiry that has been demonstrated in multiple studies over many years.[51] The finding with respect to political participation and voting is a strong finding, particularly because so much of the Commission's authorizing legislation with regard to broadcasting evidences a fundamental recognition and concern with the relationship between broadcasting and the electoral process. It is particularly relevant given, as UCC *et al.* explained in its initial comments, that radio plays such an important role politically for voters. Given the importance of voter participation in the Constitution, this is one area where further exploration of novel compelling interest theories could be fruitfully pursued, rather than dismissing two studies out of hand because they do not fit previous models or assumptions.

V. As Part of Its Obligation Under *Prometheus II*, the Commission Must Proactively Create Data and Develop a Research Agenda, Starting with Research Standards for Measuring Viewpoint

The Commission seems blind to the fact that it is a federal agency and thus can create data sets and develop a research agenda to suit its own needs. For example, as UCC *et al.* explained in its initial comments, the Commission could have used its own ownership data to examine the role ownership identity in its analysis of the use of radio construction waivers. The Commission could do this research, it merely chooses not to, showing again by its actions that it does not really intend to meet the strict

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[46] Media Ownership Study 8B, Diversity in Local Television News, by Lisa M. George and Felix Oberholzer-Gee (2011) ("George/Oberholzer-Gee/8B"), NPRM ¶ 293.

[47] George/Oberholzer-Gee/8B at 18

[48] George/Oberholzer-Gee/8B at 15

[49] NPRM ¶ 294, citing Waldfogel Media Ownership Study 7 at 2, 7-10, 17-24.

[50] We address below the erroneous rejection of Waldfogel study 7 based on its use of format.

[51] See Berry, S., J. Waldfogel. Do Mergers Increase Product Variety? Evidence from Radio Broadcasting. Quarterly Journal of Economics, 116, 1009-1025 (2001); Gentzkow, Matthew. "Television and Voter Turnout." Quarterly Journal of Economics 121, no. 3(2006): 931-72; George, Lisa M. and Joel Waldfogel, "National Media and Local Political Participation: The Case of the New York Times" in Roumeen Islam, ed., Information and Public Choice: From Media Markets to Policymaking. Washington, DC: World Bank Publications, pp. 33-48 (2008); Oberholzer-Gee, Felix, and Joel Waldfogel. "Media Markets and Localism: Does Local News *En Español* Boost Hispanic Voter Turnout?" American Economic Review, 99, no. 5 (2009): 2120-28.

scrutiny narrow tailoring standard by demonstrating that it has tried race-neutral policies and they have failed.[52]

One example of a proactive step the Commission should take to augment the research and record is to undertake a detailed review, with scholars, of how to measure viewpoint. Studying viewpoint has proven challenging, and some robust concentration on this point is worthwhile. Many studies use format or other indicators as a proxy for viewpoint, but we agree that a simplistic use of format can often be misleading, and in fact, such simplistic and flawed uses of format likely account for a significant number of the findings where concentration correlates with diversity. At the same time, for the Commission to conclude for the first time with little explanation that *no* scholarship which makes reference to format is probative for establishing viewpoint diversity as a compelling interest[53]--without any distinction between careful and appropriate use of format and less careful uses--is unhelpful at best.

The Commission should review again, in light of its new conclusion, one of the few studies to take a detailed look beneath format names into the content comprising format by the Future of Music Coalition.[54] This study by Peter DiCola carefully analyzed song overlap in a variety of formats to demonstrate that some formats are virtually identical to each other, but some formats are quite distinct.[55] The report goes on to demonstrate that smaller owners are much more likely to produce distinctive formats, and specifically notes the flaws with some research which equates increased concentration with increased variety.[56] For the Commission to completely dismiss Waldfogel Study 7, because it references format, without taking a detailed review of the use of viewpoint measurement and analysis, is error.[57] This is particularly the case because Prof. Waldfogel's use of format shows how format intersects with audience choice for information sources and owner identity. Thus, his findings do not necessarily equate format with viewpoint in a simplistic manner, but show that audience and market behavior demonstrate a detectable difference in content based on the identity of a broadcast owner.

The Commission should take a leadership role in developing a record that will support the outcomes it claims to seek. The Commission should:

- Prepare a detailed internal staff analysis of the ways in which the studies in the record in all the media ownership and media diversity dockets have attempted to measure viewpoint.

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[52] This is similar to the Commission's analysis of its use of the eligible entity program by stations seeking extension of time for construction permits, but not using its own data to determine whether any of these small eligible entities are, in fact, controlled by women or people of color. *See supra*.
[53] NPRM ¶¶ 294, 298.
[54] Peter DiCola, *False Premises, False Promises* (FMC 2006) at 82-113.
[55] See, in particular, figure 3-7 at 100 outlining visually the overlap among some formats and the distinctiveness of other formats.
[56] *Id.* at 102.
[57] NPRM ¶ 294. We also note that such a detailed analysis might save the Commission's own proposed research. The one study the Commission proposes to initiate, the Hispanic TV study, proposes to study "Hispanic-oriented" content that the Commission seems to elsewhere discount as useful to race-conscious analysis. Specifically, the Commission states that the study will analyze the provision of "Hispanic-oriented" programming, without describing whether or how it will consider this analysis in relationship to its conclusions with respect to viewpoint diversity.

- Identify the most probative techniques, catalog the types of data that have been used, have not been used, and identify areas of fruitful analysis which could be conducted in the future, including recommendations for future work from study authors themselves.[58]
- Convene a workshop with scholars and peer reviewers who have conducted the most valuable research in the field to obtain additional input and evaluation about the most effective viewpoint measurement techniques, paying special attention to how multiple types of scholarship, working together, might overcome perceived limitations in prior research.
- Develop a set of benchmarks or guidelines that would identify the spectrum of probative value for research on viewpoint diversity, ensuring that the bar is set within the parameters of current standards for evaluation within the academic and legal communities—in other words, adopting research standards that can be met, rather than merely cataloging deficiencies without pointing to scholarship or techniques that do meet requisite standards.
- Identify which data sets that would be useful, but are not currently available to the scholarly community, either because current data sets are non-existent or proprietary, and develop a plan to collect or to procure it for public or Commission analysis.
- Conduct or fund research that meets those standards.

This model offers a model which the Commission can replicate for each of the important evidentiary issues in this docket that the Commission believes must be overcome in order for the Commission to take proactive steps to improve diversity in broadcasting. A similar sequence ought to be followed using Kim's analysis of the connection between identity and content. The Commission should conduct a detailed review of the strengths and weaknesses of the 22 studies listed in her paper and collaborate with scholars to produce a list of best practices and proposed study models that the Commission feels would be probative of the evidence it needs to move ahead. If the Commission does not take these steps, it becomes clear that the Commission's professed interest in diversity is an empty promise.[59]

VI. The Commission Should Develop a Robust, Multi-Pronged Legal Analysis

In the same way the Commission divides the evidentiary record into smaller incomplete parts, the Commission asks whether either a theory of viewpoint diversity *or* remediation is viable, when in fact the Commission would likely need pursue several legal theories jointly to succeed. Because of the complex relationships and unique role of broadcasting in the U.S., and the nature of scholarship in this area, the Commission should consider the cumulative justifications of viewpoint diversity, remediation, and the additional compelling interests that are also impacted by broadcasting. And because of the

[58] For example, multiple techniques or approaches to viewpoint might be needed. Specifically, Media Ownership Studies 8A by Rennhoff and Wilbur and Study 8B by George and Oberholzer-Gee attempted to define viewpoint diversity differently: Rennhoff using a market approach, George using keyword count. It may be possible that combining both approaches and adding a content-analysis approach in a single study would provide the most in-depth analysis of viewpoint diversity. Such an approach would involve examining texts such as programming schedules, news show transcripts, and other relevant documents, with econometric analysis that take into account market data such as ownership structure, viewership and ratings.

[59] We note that, to the degree that the study of viewpoint is hampered by researcher's inability to obtain content samples of broadcasting, our proposals as part of the Public Interest Public Airwaves Coalition in the in the Enhanced Localism docket would provide the requisite data. See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168.

remand in *Prometheus*, the Commission has written itself a research agenda in each place that it finds that it does not have evidence to meet a strict scrutiny standard.

A. The Commission Should Step Back from Its Conclusions About Potential Remedies

The Commission's analysis of the ODP standard and individualized decision-making is another example of how the Commission incorrectly constructs its analysis with the result of backing itself into a corner. The Commission cabins consideration of the ODP standard within the context of viewpoint diversity goal, ignoring the ODP's similarities to remedies typically applied in pursuit of remedial goals. Moreover, while the Commission takes great pains to explain the obvious--that its regulation of the broadcast industry bears little resemblance to university admissions--it does not analyze how its role is similar to agencies that regulate industries which do pursue proactive diversity policies.

As such, we strongly urge the Commission to step back from its tentative conclusion that it must emulate university admissions in order to pursue viewpoint diversity.[60] It is unclear why the type of mechanisms used in government contracting in pursuit of the remedial compelling interest would not be appropriate for the Commission in its pursuit of diversity. It is not necessary to link a particular mechanism with a goal, particularly since the viewpoint diversity goal has only been considered by the court thus far in limited contexts. Instead, the Commission should further investigate remedial mechanisms and analyze the possibility that those could be used as a means to achieve viewpoint diversity.

As for the ODP standard, we do not disagree with the Commission's conclusion that such a model would likely receive strict scrutiny if an individual's race, gender or ethnicity could be used to presume eligibility for preferences,[61] but we note that the ODP concept is not dissimilar from the 8a style programs used in government contracting. If other federal agencies, such as the Department of Defense and the Department of Transportation, as well as local governments around the country can implement 8a style programs, surely the Commission can find a way to assemble the resources to do so.[62] The Commission's flawed divide-and-conquer approach here is evident as it isolates such a program into the diversity of viewpoints rationale without considering its application to the remedial rationale, and assumes that to pursue viewpoint diversity it must use the same model as institutions of higher learning which also pursue viewpoint diversity. More creative thinking is required.

B. The Commission Should Retract its Other Premature Conclusions on Compelling Interest and Evaluation of the Required Nexus

UCC OC Inc. and Common Cause endorse the conclusions of Asian American Advancing Justice with respect to the Commission's consideration of strict scrutiny jurisprudence as it applies to this case. In

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[60] NPRM ¶ 298.

[61] *See, e.g.,* "[A] presumption that members of certain minority groups are 'socially disadvantaged' for purposes of obtaining SDB status and the benefits that flow from that status… is subject to strict scrutiny. " *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (2008) (*Rothe VII*); *Sherbrooke Turf v. Minnesota Department of Transportation*, 345 F.3d 964, 969 (2003) ("A race-based rebuttable presumption must survive strict scrutiny.").

[62] *See, e.g.,* National Cooperative Highway Research Program, Report 644, *Guidelines for Conducting s Disparity and Availability Study for the Federal DBE Program* (2009), Appendix at 111, list of state Disparity and Availability Studies, attached.

particular, we agree with AAJC that the Commission was incorrect to apply *Lutheran Church* to the present circumstance because that case can be distinguished. The DC Circuit in *Lutheran Church* was concerned about the Commission's interest in diversity within a station, but did not address the Commission's strong obligation to promote diversity among stations.[63]

Similar to the concerns we raise in this comment, AAAJ also notes that the Commission's "relies on dissenting opinions to set an artificial and unofficial standard that the nexus between diversity of viewpoint and minority ownership must be 'nearly complete' and 'tightly bound.'[64] AAAJ correctly explains that, without a specific policy before, it is impossible for the Commission to use the four-prong Gutter test to evaluate: (1) whether race is one of many factors; (2) race-neutral alternatives; (3) harm to individuals who are not members of favored racial and ethnic groups, and (4) sunset provisions.[65] Therefore, the Commission should explicitly retract its conclusions to clear the record of this erroneous and harmful speculation.

Conclusion

The Commission should take all steps outline above to remedy the long-delayed action in this docket to improve ownership rates by women and people of color.

Respectfully Submitted,

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[63] Comments of AAAJ|AAJC at 14.
[64] Id at 14-15 (citing NPRM ¶ 290, ¶ 298 n. 905 (citing dissenting opinions of J. O'Connor and J. Stevens).
[65] See AAAJ comments at 15.