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May 31, 2016

Hon. Tom Wheeler
Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Chairman Wheeler:

RE: Remand from the Third Circuit in *Prometheus Radio Project v. FCC*, Case No. 15-3863, 3d Cir. (slip op., May 25, 2016)
2014 Quadrennial Review *et al.*, MB Dockets 14-50, 09-182, and 07-294

I write to recommend a procedure by which the Commission could manage the portion of the above-referenced remand that requires circulation of rulings on 17 MMTC proposals by June 30, 2016.¹ *Prometheus Radio Project v. FCC*, Case No. 15-3863 (3d Cir., slip op., May 25, 2016) (“*Prometheus III*”) at 34-35 n. 11. Therein the Court held:

Multicultural Media, Telecom and Internet Council (“MMTC”), an intervenor, raises an argument that relates in many ways to the eligible entity discussion. Specifically, MMTC contends that the Commission acted arbitrarily and capriciously in declining to address 24 diversity-related proposals that were suggested by a coalition of national organizations. Several of these proposals would benefit from a revised eligible entity definition. The Commission noted that the proposals “are accompanied by detailed and thoughtful analysis” and that “some of them may warrant further consideration.” *2014 FNPRM & Order [2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371 (2014)] at ¶17. However, it tentatively determined that it would not address them during the 2014 review because “they are outside the scope of this proceeding.” *Id.* The FCC based this conclusion on its representation that the proposals “involve cable operators and other non-broadcast services that are outside the scope of our quadrennial review proceedings” and/or “ultimately would require legislative action or action by other federal entities aside from the Commission in order to create changes in rules or policies.” *Id.* In supplemental briefing MMTC identified a substantial number of proposals to which it says neither reason applies.

¹ The Commission rejected 24 proposals; however, the Court obtained from Commission counsel a pledge for circulation of rulings by June 30, 2016 of rulings on the 17 proposals that do not require congressional approval. Thus the references herein and the attachment are to MMTC’s “17” proposals rather than 24 proposals.

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The Commission responds that MMTC's challenge is premature because the decision not to consider the proposals was tentative rather than final. It also represents that it will deal with them in the document that the Chairman has committed to circulating by June 30, 2016. Because MMTC only seeks here to void agency action it considers to be arbitrary and capricious and does not raise a claim of undue delay, we set aside its challenge as premature but note our expectation that the Commission will meet its proffered deadline.

A ruling must be circulated in only four weeks, and some of these proposals have languished at the Commission for over a decade without a ruling. Thus it would be advantageous for the Commission's staff to go through the proposals with MMTC with an eye toward satisfying the Court's expectations and advancing Congress' and the Commission's goal of promoting diversity of broadcast ownership and, particularly, ownership by minorities and women.

In *Prometheus Radio Project v. FCC*, 373 F.2d 372, 465 (3d. Cir. 2004) ("*Prometheus I*"), the same Third Circuit panel as the *Prometheus III* panel remanded 14 MMTC proposals to the Commission under circumstances similar to those in *Prometheus III*. After the *Prometheus I* remand, the Commission declined to engage with us. We had to begin to draft mandamus papers and seek congressional intervention in order to persuade the agency to rule on what, by 2007, had become a package of 25 proposals. Fortunately, when it did rule, the Commission accomplished a great deal: it granted 13 of our proposals, including a landmark ban on racial discrimination in broadcast advertising, and put 12 more proposals out for further comment. See *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922 (2008) ("*2006 Quad Review R&O*").

Still, over three years elapsed between *Prometheus I* and circulation of the *2006 Quad Review R&O*, whereas Chairman Wheeler has only four weeks to circulate an item in response to *Prometheus III*. Additionally, as the *Prometheus III* Court noted, MMTC's package of proposals "relates in many ways to the eligible entity discussion."² *Prometheus III*, slip op. at 34 n. 11. Regarding the eligible entity definition, the Court has placed the Commission into mediation, and the Court expects expedition. *Id.* at 34.

Bearing all of these considerations in mind, we respectfully propose the following timetable (with all dates approximate):

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|--------|--|
| June 3 | Planning call among MMTC, MB, and OGC staffs |
| June 7 | MMTC staff to meet with MB and OGC staff to review the 17 proposals, with an eye to identifying proposals that should either be (1) withdrawn by MMTC, (2) held back by MMTC for revision and resubmission in the 2018 Quadrennial, or |

² Our proposals are connected to the eligible entity discussion in two ways. First, some of our proposals contemplate the use of an eligible entity definition, and would be ineffectual without one. Second, the majority of our proposals are race-neutral and, as such, are the type of initiatives that the Supreme Court expects an agency to consider and exhaust before it can turn as a last resort to race-conscious initiatives to address a compelling governmental interest. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789-90 (2007) (Kennedy, J., concurring in part).

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(3) transferred by Commission staff for consideration in more appropriate live FCC docket.

- June 17 MMTC staff to meet with MB and OGC staff for a thorough, comprehensive review of the proposals that survived the June 7 informal review. Stakeholders would be invited to participate in this meeting,³ and the Chairman's office and commissioners' offices should be invited as well.
- June 22 MMTC would submit revisions, or responses to questions presented at the June 17 meeting. MMTC could also withdraw some of the proposals or hold others back for revision and resubmission in the 2018 Quadrennial.
- June 24 Meeting between Chairman Wheeler and Kim Keenan, President and CEO of MMTC, and members of their senior staffs, to review the proposals that have emerged from the review process.
- June 30 The Chairman would circulate an item that recommends a vote to adopt, reject, or seek further comment on a number of the proposals.

Sincerely,

David Honig

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Attachment: The 17 MMTC Proposals in *Prometheus III*

cc: Hon. Mignon Clyburn
Hon. Ajit Pai
Hon. Jessica Rosenworcel
Hon. Michael O'Rielly
Jonathan Sallet, Esq.
Ruth Milkman, Esq.
Jessica Almond, Esq.
William Lake, Esq.

³ We suggest inviting representatives of the *Prometheus III* petitioners for review to participate in this meeting. MMTC works closely with most of these disparate parties, and believes that their inclusion in our discussions would facilitate the construction of a consensus package of initiatives that would enjoy widespread industry and public interest support. *See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 983 (1978) (favorably citing NAB and other industry parties' endorsements of the proposed tax certificate and distress sale policies).

The 17 MMTC Proposals in *Prometheus III*

The proposals are listed in *Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules, Further Notice of Proposed Rulemaking and Order*, 29 FCC Rcd 4371, 4517 ns. 987, 988 and 989 (2014). They relate to the broadcast industry and do not require congressional approval.

I. The Footnote 987 Proposal

- Proposal 39: Study the Feasibility of a New Radio Agreement With Cuba

II. The Footnote 988 Proposal

- Proposal 34: Must-Carry for Certain Class A Stations

III. The Footnote 989 Proposals

- Proposal 5: Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings
- Proposal 6: Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations
- Proposal 7: Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters)
- Proposal 9: Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees
- Proposal 10: Extend the Cable Procurement Rule to Broadcasting
- Proposal 27: Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process
- Proposal 29: Increase Broadcast Auction Discounts to New Entrants
- Proposal 30: Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments
- Proposal 31: Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid
- Proposal 32: Require Bidders to Specify an Intention to Bid Only on Channels With a Total Minimum Bid of Four Times Their Deposits
- Proposal 33: Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity

- Proposal 35: Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences
- Proposal 36: Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts
- Proposal 37: Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests
- Proposal 40: Create a New Civil Rights Branch of the Enforcement Bureau.