Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

TO THE COMMISSION

INITIAL COMMENTS OF DIVERSITY AND COMPETITION SUPPORTERS

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DEDICATION: HON. WILLIAM E. KENNARD

These Comments, the subject of which is so close to the heart of those who love diversity and competition, provide us the privilege of expressing gratitude to a great Americans on whose shoulders we stand. Bill Kennard's shoulders are very broad indeed, and although he is still years away from turning 50 he has already dedicated more than a lifetime to extraordinary public service.

Bill Kennard started his broadcast career as a radio announcer, later becoming First Amendment counsel for the NAB and then joining private practice representing broadcasters. Today he serves as the Managing Director for Telecommunications at the Carlyle Group, where he handles billion-dollar telecom projects and placements. His career in between these goalposts in time will never be forgotten.

As a co-founder of MMTC, Bill Kennard hosted its meetings for the first eight years of the young organization's life. The drudgery of a fledging organization was never below him, whether that meant editing pleadings, formulating positions on issues, or twisting the arms of colleagues. Upon becoming General Counsel of the FCC, his job was to win cases for the agency in court, and during his tenure the agency won all eight cases in which the undersigned represented the civil rights appellant. He handled these cases with grace and style, never once succumbing to the urge to appeal to low ideological instincts and, always, without

overreaching by seeking to dilute the underlying civil rights policies or the rights of citizens to participate in Commission proceedings.

Upon taking the reins of the Commission in 1997, Chairman Kennard never shied away from controversy nor strayed from principle. He championed the highly progressive e-rate and LPFM programs, and laid the foundation for the restoration of the broadcast and cable EEO programs. We did not agree with everything he did. But on balance, and viewed with the maturity and wisdom that the passage of time allows, it is clear that the Commission had never had a more committed, passionate or effective civil rights champion in the Chairman's seat. Few if any agencies ever have.

So it is with deep appreciation and love that the Diversity and Competition Supporters dedicate these Comments to the Hon. William E. Kennard -- an FCC Chair who did his best for the public interest.

* * * * *

The seventeen organizations listed in the Annex (collectively, the "Diversity and Competition Supporters") respectfully submit these Initial Comments in response to the Omnibus NPRM.[1/] The organizations included in the Diversity and Competition Supporters collectively represent the interests of the nation's minority media consumers.

As explained in Section I infra, these Initial Comments are unavoidably incomplete, and they will be supplemented promptly.

SUMMARY

The abysmal level of minority broadcast ownership throughout the past eighty years is a national disgrace, and the loss of nearly half of the nation's minority owned television stations in the past three years is an emergency. Redressing these wrongs should be the Commission's first objective in this proceeding.

For thirty years, the courts, the Congress and the Commission have been of one voice that minority ownership must be addressed as a central element of structural regulation. The Omnibus NPRM acknowledges this.[1/] However, the Omnibus NPRM failed to seek comment on key Commission studies about minority ownership, and failed to include the attribution rules within the scope of this proceeding. The Omnibus NPRM even ponders "whether" minority ownership is still an important issue in a rulemaking whose outcome will determine who shall own the electronic mass media.[2/]

1/ Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NPRM), 17 FCC Rcd 18503 (2002) ("Omnibus NPRM").

2/ Id. at 18521 ¶50.

The Diversity and Competition Supporters earnestly want the Commission to have the benefit of a full record on the most critical subject of minority ownership. As luck would have it, the 25th Anniversary of the Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978) ("1978 Minority Ownership Policy Statement") is May 25, 2003. The most appropriate commemoration of the years of perseverance which led to the 1978 Minority Ownership Policy Statement would be the adoption of a new generation of minority ownership policies. To develop these policies, the Commission should convene a 25th Anniversary Public Hearing, this spring, devoted entirely to minority participation in the media.

Our Comments make these principal substantive points.

1. Minority ownership is a necessary goal of structural ownership regulation, as it has been since 1973. Yet minority ownership in radio is at risk, and minority ownership in television in free-fall. 3/

2. Minority ownership is endangered because of the present effects of past discrimination, much of which was practiced with the participation of the Commission itself. Discrimination among advertisers and lack of access to capital also remain systemic impediments to diversity. Unless implemented with caution and wisdom, further consolidation is likely to imperil the prospects for a fully integrated radiofrequency spectrum. 4/

3. The courts, Congress, and the Commission have been of one voice: structural rulemakings must focus upon and address minority ownership. This massive structural rulemaking must do so as a matter of the highest priority. 5/

3/ See pp. 17-19 infra.

4/ See pp. 19-50 infra.

5/ See pp. 50-60 infra.

4. Minority ownership promotes competition by ensuring that all sources of intellectual and creative capital are put to their highest use, and because an integrated industry serves the public better and thus competes more effectively than a segregated industry. 6/

5. Minority ownership promotes diversity because minority owners serve interests and address needs not served or often recognized by most majority media. 7/

6. Minority ownership policies provide the only meaningful remedy for decades of deliberate, well-documented discrimination in which the Commission itself was a participant. 8/

7. The Commission should design its structural rules to preserve, protect and promote minority ownership. All of the old ones are dead or dormant. Passively "monitoring" the problem will be futile after deregulation is allowed. Thus, the Commission should acknowledge the need to end minority exclusion now, and devise new policies that are adequate to meet that need. While it can consider and encourage voluntary efforts, such efforts are inadequate to address the magnitude of the problem. Finally, while it can initially try race-neutral efforts, it should be prepared to invoke race-conscious efforts as a last resort. 9/

8. There are six steps the Commission can take to design its structural rules to promote and protect minority ownership. 10/

   a. Phasing new regulations into operation cautiously through a Staged Implementation Plan. The regulations would take effect in a series of logical Stages (i.e., large markets, then medium, then small; or a few percentage points of permissible market power added at each Stage). Before each Stage, the Commission would measure diversity, competition, localism and minority ownership levels, and each deregulatory Stage would take effect only if each of these measurements

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6/ See pp. 61-65 infra.

7/ See pp. 66-72 infra.

8/ See pp. 72-73 infra.

9/ See pp. 73-81 infra.

10/ See pp. 82-141 infra.

shows that the factor being measured is healthy. This procedure will ensure that those lacking quick access to capital (particularly minorities) will have sufficient time to reconfigure themselves in order to compete effectively in the new regulatory environment. Further, the Commission can avoid, as best it can, the damage that would result if deregulation is taken too rapidly, only to prove to have been an irreversible mistake. A Staged Implementation Plan would avoid the market dislocations that often attend sudden deregulation, and it would have the highly desirable effect of allowing the Commission to terminate its current practice of evaluating requests for waivers of its ownership rules.

b. Encouraging voluntary industry efforts to assist minority entrepreneurs, and taking account of these efforts, both in crafting new regulations and in evaluating their impact as they are phased into operation.

c. Building incentives into the rules to reward licensees for trading with, selling to, or incubating socially and economically disadvantaged businesses ("SDBs"), including but not limited to minorities. We suggest several incentive plans. Illustrative examples include:

   i. Implementation of Senator McCain's Telecommunications Ownership Diversification Act. A bold step the Commission can take would be to establish the day the Telecommunications Ownership Diversification Act becomes law as the effective date for any new rules adopted in this proceeding.

   ii. Granting applications that are otherwise premature under the proposed Staged Implementation Plan if the applicant sells stations to minorities or adopts an incubator program.

   iii. Allowing holders of expiring construction permits to sell the permits to socially and economically disadvantaged businesses, as an alternative to forfeiting the permits entirely.

d. Requiring "Equal Transactional Opportunity" -- analogous to Equal Employment Opportunity. A nondiscrimination and modest outreach program can be designed in a manner that does not disrupt the expectations of station sellers that potential buyers be qualified and observe confidentiality.

e. Adopting a Zero Tolerance Policy for ownership structure abuse, thereby assuring that if new rules are adopted, unscrupulous sham artists will not push the limits even farther, on a de facto basis, than the Commission wishes to go.

f. Modernizing the antiquated FM allotments process so as to manage the spectrum more efficiently and create opportunities for new entrants to build and operate their own facilities. Perhaps the best antidote to more concentration is more new facilities. There are three ways the Commission could achieve this result:

i. The Commission should create two new FM classes: Class A1 (1,500 watts at 100 meters) And Class A2 (1,000 watts at 50 meters).

ii. The Commission should perform a comprehensive engineering search of the FM spectrum to identify the most-needed new allotment opportunities.

iii. The Commission should replace FM station classes with pure interference-based criteria.

9. Building on its goal of universal telephone service for all Americans, the Commission should adopt a goal of universal multichannel media and broadband service to all Americans. Until that goal is achieved, the Commission's structural rules should not be based upon a "voice" test that includes voices unavailable to low income and rural families. 11/

The issues in this proceeding are complex and contentious, but all stakeholders want to see them resolved, and no one wants the delay attendant to another court remand. We are confident that if they are asked to do so, all stakeholders will come

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11/ See pp. 142-45 infra.

together and debate these issues collegially. Furthermore, many of the technical issues attendant to a Staged Implementation Plan will require industrywide consensus -- for example, when the Stages would begin, how long they would last, how the Commission would declare that the industry is healthy enough to progress to the next Stage, and how to configure the Staged Implementation Plan to incentivize minority ownership. In that spirit, we propose that after the Commission issues a First Report and Order, the Commission convene a negotiated rulemaking in which the best minds in communications policy could develop the strongest possible consensus implementation proposals for the agency's consideration.[12/]

12/ See pp. 145-47 infra.

* * * * *

I. The Commission Should Hold A Public Hearing Devoted Entirely To The Subject Of Minority Ownership

The Omnibus NPRM is a document of breathtaking scope, dwarfing many times every previous media ownership notice of proposed rulemaking. It seeks comment on six core sets of ownership rules, and it also poses the critical question of how these rules can be harmonized with one another. Review of any one of these sets of ownership rules, by itself, would be a major proceeding. Extensive research is expected of all parties.[13/]

Given the limited resources of public interest and minority organizations[14/] and the relatively short time allowed for public

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13/ Omnibus NPRM, 17 FCC Rcd at 18516 ¶32 ("[w]e welcome the submission of any relevant empirical studies for quantifying benefits and harms, as well as comments based on well-established economic theory and empirical evidence. In that regard, we are especially interested in receiving comments that provide not only the theoretical justifications for adopting a particular regulatory framework, but also empirical data on the effect that competition and consolidation in the media industry have on our policy goals.")

14/ In the wake of Fox Television Stations, Inc., 280 F.3d 1027 (D.C. Cir. 2002) ("Fox Television"), rehearing granted, 293 F.3d 537 (D.C. Cir. 2002) ("Fox Television - Rehearing"), the Commission could be compelled to review all of its regulations and justify their retention. The burden on small and minority owned companies and consumers to provide meaningful input in these rulemakings would be mind-boggling. A multitude of lawyers are available to help large companies participate in rulemaking proceedings, but only three senior FCC practitioners and four other lawyers work fulltime to file rulemaking comments on behalf of consumers and minorities. No balanced record can emerge from unbalanced advocacy.

comment relative to the magnitude of the task,[15] an issue such as minority ownership, that was addressed in just one paragraph of the Omnibus NPRM,[16] can easily get trampled upon or overlooked.

Fortunately, time still remains for the Commission and the parties to address the monumental issues in this proceeding with deliberation and reflection, and to work together to attempt to narrow the issues and generate creative solutions to seemingly intractable problems.[17]

The minority ownership docket, MM Docket No. 94-149, has been dormant for eight years, and, as we explain herein, no significant tools to promote minority ownership are currently in use.[18] Yet the outcome of this proceeding could literally eviscerate minority

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15/ The parties were afforded only 101 days to answer 179 questions and to conduct empirical research on those questions. The Commission required over a year just to ask these questions and conduct its own preliminary research. Time was even refused to accommodate expert witnesses who are unavailable at the end of the academic semester. Order, DA 02-3575 (released December 23, 2002). Some deregulation opponents have suggested that the Commission is rushing to judgment. See, e.g., Bill McConnell, "Critics: FCC stacks dereg deck," Broadcasting & Cable, October 7, 2002.

16/ Omnibus NPRM, 17 FCC Rcd at 18521 ¶50.

17/ MMTC has tried to initiate those discussions. On November 6, 2002, MMTC convened a meeting of 53 representatives of all major stakeholders to discuss the Commission's research studies as well as minority ownership issues, and to determine whether any common ground could be found on the major issues. The major trade associations, the networks, television stations, radio stations, newspapers, cable companies, unions, writers, artists, public interest and consumer groups, minority groups and women's groups were all represented. Members of the Commission's staff, and two commissioners, participated in this meeting. Their participation was uncommonly helpful and constructive.

18/ See pp. 53-54 n. 96 infra.

broadcast entrepreneurship, especially in television. We trust that the Commission would find such an outcome completely unacceptable.

Since the Commission's December 12, 2000 Market Entry Barriers Seminar, which was devoted to five studies examining how and why minorities have been excluded from broadcast ownership (the "Section 257 Studies")19/ (and one other study focusing on wireless) there has been no discussion of how the Commission can arrive at a workable plan to preserve, protect and promote minority ownership. Regrettably, the Commission has not yet decided whether to place the Section 257 Studies in the record of this proceeding.20/ Thus, most parties will not think that the Commission regards it as important that they address the Section 257 Studies in their comments.

In 2001, in the course of rejecting various MMTC proposals to save minority television ownership, the Commission promised to

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19/ The Section 257 Studies are described and discussed at pp. 29-32 infra.

20/ Still pending before the Commission is a motion by MMTC and NABOB to put the Section 257 Studies into the record. The studies were conducted under a mandate from Congress under Section 257 of the Telecommunications Act, codified at 47 U.S.C. §257 (1996). Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity." 47 U.S.C. §257(b). Section 257 was drafted with the promotion of minority ownership in mind. Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

[n. 20 continued on p. 10]

review these studies.[21/] We trust that the Commission intends to keep this promise. Nonetheless, with the comment date now upon us, no effort has yet been made solicit public comment on the Section 257 Studies. Further, the Omnibus NPRM really failed to

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20/ [continued from p. 9]

> [W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (Statement of Rep. Collins).

21/ In Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12909-10 ¶¶13-14 (1999) (emphasis supplied) ("Television Broadcasting") (fns. omitted), the Commission announced the purpose of these studies and established their relationship to ownership structure regulation:

> We note that a number of parties have expressed concern about the fact that greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting. We share these concerns. The Commission has recognized the importance of promoting new entry into the broadcast industry as a means of promoting competition and diversity. Indeed, we have adopted a "new entrant" bidding credit as part of our broadcast auction procedures for these reasons and also to comply with our statutory mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." We will monitor the effects of the relaxation of our local TV ownership rules on new entry.

[n. 21 continued on p. 11]

do justice to the subject of minority ownership.[22/] Nor did the Omnibus NPRM do justice to one of the most useful tools available to the Commission in promoting minority ownership: the

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21/ [continued from p. 10]

> We are now guided in considering initiatives to encourage greater minority and women-owned mass media businesses by a 1995 Supreme Court decision that held that any federal program that uses racial or ethnic criteria as a basis for decision-making is subject to strict judicial scrutiny....
>
> We are presently conducting studies that we believe will allow us to address this issue in the context of our broadcast licensing and ownership policies. Upon the completion of these studies, we will examine the steps we can take to expand opportunities for minorities and women to enter the broadcast industry. In the interim, we encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to participation of women and minorities in the mass media (emphasis supplied).

After the Section 257 Studies were released, the Commission again affirmed that "[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission." Review of the Commission's Rules Governing Television Broadcasting (Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (fn. omitted) ("Television Broadcasting - Reconsideration") (reversed in part on other grounds sub nom. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), rehearing denied, ___ F.3d ___ (August 12, 2002) ("Sinclair"). That ruling came in response to MMTC's petition for reconsideration of Television Broadcasting. MMTC predicted that that these rules would cut the number of minority owned television stations in half in three years. MMTC, Petition for Partial Reconsideration and Clarification, MM Docket No. 91-1221 (filed October 18, 1999) ("MMTC Television Ownership Reconsideration Petition"), p. ii. Approximately as MMTC predicted, the number of minority owned television stations has declined from 33 in 1999 to 20 today.

22/ In particular, the Omnibus NPRM asks a most unsettling question about minority ownership: "whether" the Commission "should consider such diverse ownership as a goal in this proceeding."

[n. 22 continued on p. 12]

22/ [continued from p. 11]

Omnibus NPRM, 17 FCC Rcd at 18521 ¶50. This was a surprise, because for 30 years the Commission had focused on "how," not "whether," to promote minority ownership. Just five years ago, the Commission recognized that it "has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry." 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998) (seeking comment "on the relationship between these ownership limits and the opportunity for minority broadcast station ownership" (fn. omitted); id. at 11299 (Separate Statement of Commissioner Susan Ness) (asking about the impact of the ownership rules "on the number of minority and female-owned outlets"); id. at 11304 (Separate Statement of Commissioner Michael Powell) (asking whether diversity of ownership encompasses "[a]dequate representation among others of minorities and women" and whether diversity of programming encompasses "[p]rogramming that is targeted to particular minority or gender groups within a community"); id. at 11306 (Separate Statement of Commissioner Gloria Tristani) (soliciting comment on whether "all segments of society [including] rich and poor, urban and rural, minority and non-minority...have legal and practical access to such diversity and are actually making use of it.")

Since the Commission has acknowledged that it "has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses," Omnibus NPRM at 18521 ¶50 and n. 122 (citing authorities), the fact that the Commission is asking "whether" minority ownership remains important suggests that the Commission may be contemplating a change of course on this most critical of subjects. While we hope this is not the case, we are not sure. Just ten months ago, the Commission opened a structural ownership proceeding with a notice of proposed rulemaking that did not even contain the words "minority ownership," much less any mention of the subject. See Multiple Ownership of Radio Broadcast Stations in Local Markets (NPRM), 16 FCC Rcd 19861 (2001) ("Radio Ownership NPRM"). Likewise, neither the words "minority ownership" nor any discussion of the subject can be found in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Ninth Annual Report), FCC 02-338 (released December 31, 2002) ("Ninth Video Competition Report").

attribution rules, which it normally reviews and often recalibrates attendant to any major overhaul of the structural ownership rules.23/

23/ In a proceeding aimed at ensuring that one industry does not dominate another, and that one company does not dominate others, nothing could be more germane than the attribution rules. Surprisingly, the Omnibus NPRM did not seek comment on the interrelationships between additional media and cross-media interests and the standards used to determine when one company influences another one. Specifically, the Omnibus NPRM states that the attribution rules "do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under those ownership rules...[the attribution level] is not related to any changes in competitive forces." Id. at 18506 n. 13.

This surprising pronouncement -- buried in a footnote -- is an unexplained about-face on one of the most fundamental principles of modern structural ownership regulation. The Commission has long regarded the attribution rules as inextricably intertwined with the substantive ownership rules. See, e.g., Attribution of Broadcast and Cable/MDS Interests (R&O), 14 FCC Rcd 12559, 12560 ¶1 (1999) ("Attribution Rules") (attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions....The new attribution rules we adopt today are integrally related to the rules adopted in our companion local television ownership and national television ownership proceedings. A reasonable and precise definition of what interests should be counted in applying the multiple ownership rules is a critical element in assuring that those rules operate to promote the goals they were designed to achieve.")

Beginning in 1995, the Commission reviewed its broadcast ownership and attribution rules -- and its minority ownership policies -- in tandem. See Review of the Commission's Regulations Governing Television Broadcasting (Further NPRM), 10 FCC Rcd 3524 (1995) ("1995 Television NPRM"), Review of the Commission's Regulations Governing Attribution of Broadcast Interests (NPRM), 10 FCC Rcd 3606 (1995) ("1995 Attribution NPRM"), and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788 (1995) ("1995 Minority Ownership NPRM"). Comments in each of these simultaneously-issued and crossreferenced proceedings were due on the same day, April 17, 1995.

[n. 23 continued on p. 14]

Consequently, the Commission will need to use other means to develop a record on this subject. The only means available (short of another comment period) would be to hold a public hearing devoted to minority ownership.

As luck would have it, the 25th Anniversary of the 1978 Minority Ownership Policy Statement is May 25, 2003. The most appropriate commemoration of the years of perseverance which led to the 1978 Minority Ownership Policy Statement would be the adoption of a new generation of minority ownership policies. To develop these policies, the Commission should convene a 25th

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23/ [continued from p. 13]

Attribution rules are written by taking account of the degree of influence one company can exercise over another company in which it holds a noncontrolling interest. A company permitted by new ownership rules to occupy the dominant position in a market may have the ability and incentive to exercise undue influence over other companies; and smaller companies in the market may have the need and incentive to allow themselves to be influenced by the larger company in order to survive. It follows that the continued efficacy of the test used to measure and constrain attributable interests must be reviewed at the same time that the ownership limits are reconsidered -- just as a highway department must reconsider its speed limits, stopping distances, and the placement of traffic signals as automobiles and trucks become larger and faster. Thus, the time at which the Commission is simultaneously examining nearly all of the ownership rules presents, as never before, an urgent need to recalibrate the ownership rules with the attribution rules.

Even assuming for the sake of argument that the Commission could arbitrarily hold attribution standards fixed while it examines ownership standards, such a course of action would be unwise. In this proceeding, many of the parties' positions on the substantive ownership rules are likely to be polar opposites. Consequently, the Commission needs every measure of flexibility, every adjustable input, every tool, device and variable available to craft a set of rules that proves equitable and sustainable. By including attribution standards in the mix, the Commission would enhance its own ability to harmonize the parties' sharply divergent positions.

Anniversary Public Hearing, this spring, devoted entirely to minority participation in the media.

The most important purpose of such a public hearing would be to hear from minority and nonminority industry leaders on how minority ownership can be advanced. While we have done our best to suggest some paradigms for promoting minority ownership,[24/] the Commission should hear from others besides ourselves on the question of which minority ownership initiatives would be best. History teaches that minority ownership policies are unlikely to succeed without the full support of the regulated industries. Every one of the successful minority ownership policies was fashioned as a win-win by providing incentives for nonminority broadcasters to invest in or sell stations to minorities.[25/] To design new initiatives, the

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24/ See pp. 82-141 infra.

25/ The tax certificate policy, adopted in the 1978 Minority Ownership Policy Statement, 68 FCC2d at 983, offered sellers a deferral of capital gains taxes if they sold stations to minorities. The distress sale policy, still on the books and also adopted in the 1978 Minority Ownership Policy Statement, 68 FCC2d at 983, offers a licensee in hearing an opportunity to escape the hearing if it sells its stations to minorities for no more than 75% of fair market value. The comparative hearing policy (resulting from TV-9, Inc. v. FCC, 495 F.2d 929, 935-38 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974) ("TV-9")) gave minority applicants a slight advantage in a competition for construction permits issued pursuant to the Policy Statement on Comparative Hearings, 1 FCC2d 393 (1965) ("1965 Policy Statement"). Nonminority passive investors in these applicants could ride the minority principals' coattails to financial success. The Clear Channel eligibility criteria, flowing from Clear Channel Broadcasting in the AM Broadcast Band (R&O), 78 FCC2d 1345, 1368-69 (1980) ("Clear Channels"), recon. denied, 83 FCC2d 216 (1980), aff'd sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982) also followed this paradigm. The "Mickey Leland

[n. 25 continued on p. 16]

Commission will need to draw upon -- and ask for -- the enormous creativity and goodwill of the affected industries. At such a public hearing, the Commission can hear, at one time and in one place, the full range of historical perspective, legal and economic analysis, research findings and creative proposals on this most critical of subjects.26/

25/ [continued from p. 15]

Rule," flowing from Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O) [on reconsideration], 100 FCC2d 74, 94 (1985) (previous and subsequent histories omitted) ("1985 Multiple Ownership - Reconsideration"), which provided that an interest of up to 49% in minority-controlled stations would not be subject to attribution with respect to two stations beyond the otherwise applicable national ownership caps. Finally, Chairman Sikes' and NABOB's plan for incubators (the "Incubator Plan", proposed in Revision of Radio Rules and Policies (Reconsideration), 7 FCC Rcd 6387 (1992) ("1992 Radio Rules - Reconsideration") (otherwise denying reconsideration in Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992) ("1992 Radio Rules")) would have followed the Mickey Leland Rule paradigm by allowing those who helped minorities build broadcast companies to acquire additional stations beyond the otherwise-applicable ownership caps.

26/ A useful model for such a hearing was the Commission's June 24, 2002 public hearing on equal employment opportunity. We note, also, how timely it would be to hear the life testimony of minority broadcast pioneers, including many who helped craft the original minority ownership policies, while we are still blessed with their presence and wisdom.

II. Minority Ownership Should Be A Necessary Goal Of Structural Ownership Regulation

A. The Status Of Minority Broadcast Ownership

Today over one-quarter of the nation's people own only approximately 1.2% of the equity in the industry most important to democracy. That statistic is a stain on the regulatory agency that stood by and watched it happen, and that sometimes egged it on.27/ How abysmal is the state of minority broadcast ownership today?

Radio. MMTC recently found that the number of minority owned radio stations is increasing, although it still remains extremely low -- just north of 4% of all stations.28/ Moreover, the number of minority radio owners is decreasing.29/ Specifically:

- Between August, 1997 through December, 2001, the number of stations owned by privately held minority owned companies increased from 367 to 399. 30/
- The number of privately held minority owners decreased from August, 1997 to December, 2001 from 169 to 149 -- from a high point of 173 in 1991. 31/

27/ See discussion at pp. 19-31 infra.

28/ Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (MMTC, March, 2002) ("Consolidation and Minority Ownership"), which may be found in the Comments of MMTC in MM Docket No. 01-317 (Radio Ownership) (filed May 8, 2002) ("MMTC Radio Ownership Comments"), Exhibit 1, pp. 10-12. If this rate of growth (from 3.2% to 4.1% in five years) is maintained, and the minority percentage of the population does not rise above its current level (26.3%), it will take 123 years (until 2106 A.D.) for minorities to reach ownership parity. Even that is optimistic, since minority percentage of the population will exceed 50% by about 2050.

29/ Id.

30/ Consolidation and Minority Ownership, p. 10.

31/ Id.

- As the number of privately held minority owners declined, the average number of stations owned by each owner increased from 1.48 in 1991 to 2.68 in 2001. 32/

- In local markets, the number of minority owners declined from 1.42 owners per market in 1997 to 1.19 owners per market in 2001. Thirty-six minority owners, accounting for 65 stations in August 1997, left the industry before December, 2001, and many of them attributed their departure to consolidation. 33/

- In August, 1997, there were no publicly held broadcast licensees controlled by minorities. By December, 2001, there were four such firms owning a total of 156 stations. These firms are Entravision (52 stations), Radio One (63 stations), Radio Unica (16 stations) and Spanish Broadcasting System (26 stations). 34/

- Much of the increase in minority ownership can be attributed to spinoffs from a single transaction, the 1999 Clear Channel acquisition of AM-FM. As of December, 2001, 30 stations sold to minorities in that transaction are still owned or controlled by minorities. 35/ Monitoring of these stations by MMTC discloses that in December, 2002, 29 of them are still owned or controlled by minorities.

Television. The number of minority owned full power television stations has dropped from 33 to 20 in the three years since the Commission deregulated local television station ownership.36/

These statistics may appear surprising to those who recognize that minorities have always had the same qualifications to succeed in the broadcast business that other Americans have had. Further, by the 1990s, a generation of minorities had graduated from

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32/ Id.

33/ Id.

34/ Id., p. 12.

35/ MMTC's media brokerage has kept track of this statistic.

36/ See p. 11 n. 21 supra.

broadcast and business training programs in large numbers, and they took full advantage of the employment opportunities offered in broadcasting during the first twenty years of FCC EEO regulations. Four years ago, the NAB commenced its Leadership Training Program, which trains minority and female broadcast managers to become owners -- yet to the best of our knowledge not one graduate of this superb program has actually acquired a station. What, then, makes up the ceiling that is preventing a generation of talented minority broadcast managers from moving up into ownership?

B. Why Minority Media Ownership Remains So Slight

The ceiling stopping the advancement of minorities into ownership is fabricated of two ingredients: (1) discrimination and its present effects, and (2) consolidation that occurs without the intervention of regulatory checks and balances and without the initiative of public spirited industry statespeople.

1. Discrimination And Other Market Entry Barriers Impede Minority Ownership

As this is written in December, 2002, the resignation of a powerful Senator from a position of great authority has just sparked a healthy national conversation about race discrimination. Whether this is a fifteen minute conversation remains to be seen, but we are blessed to know that the national tolerance for the signals and code of a two-class society was thinner than many people imagined.

We have written often in Commission proceedings about the history and persistence of discrimination. As painful as it is to relate this history, it may be even more discomforting to digest.

What is the source of this discomfort? It is that most Americans have elders, friends, mentors and predecessors in office who participated in, refused to prevent, or endured acts of racial oppression that were just as wrong then as they are now. Visit the great wall opposite the Commission Meeting Room, and gaze at the portraits of the chairmen (there have been no chairwomen) who served from 1934 to the present. These gentlemen -- some great, some not so great -- mostly participated in or refused to prevent discrimination from infecting the ownership structure of the industries they regulated. None of them, until Chairman Wiley, did anything to put an end to it.

Uncomfortable it may be, but it is a fact that the paucity of minority ownership today, and minorities' disproportionate ownership of stations with weak technical facilities, were caused in large measure by officially sanctioned discrimination.37/

The history of Commission ratification and validation of discriminatory practices of its licensees is described at length

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37/ It is often pointed out that only about 6% of the original owners of broadcast stations still own these stations. The point of this statistic is that minorities somehow are not disadvantaged by having to buy what others got for free. The premise of the argument is that a "little" discrimination can be forgiven and forgotten. This intellectually dishonest argument embeds at least four fallacies.

First, the nonminority headstart is actually far more than 6% of the asset value of the industry. The stations originally bought by Whites, who faced no minority competition for them, are among today's most valuable properties. Included among them are most big-market VHF network affiliates and all of the 25 unduplicated AM clear channel stations -- prime beachfront property.

[n. 37 continued on p. 21]

37/ [continued from p. 20]

Second, the first owners of broadcast stations typically chose the second owners, who chose the third owners, and so on seriatim, thereby replicating themselves in power and excluding minorities across generations. Until MMTC founded its media brokerage in 1997, there were no minority owned brokerages, or even any minorities employed by nonminority brokers. The Commission rejected a 1978 proposal by Commissioner Hooks to create a transparent bidding process for broadcast sales -- at a time when minorities owned only 60 stations. Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1, 3 n. 3 (1978) ("Hooks Broadcast Sales Proposal") Thus, when today's nonminority owners bought into broadcasting a generation ago, their bids were insulated from minority competition, and nonminorities enjoyed an opportunity to purchase stations at prices that did not reflect the oligopoly rents buyers pay today.

Third, nonminorities' headstart in broadcast ownership affords them a huge competitive advantage in depth of experience, job tenure, and crossgenerational entitlements. Many young White college graduates entering broadcasting today can call for help from parents, uncles, aunts and grandparents who entered broadcasting early without facing competition from minorities. These fortunate few, with the advantage of family ties to the beneficiaries of discrimination, today stand first in line for internships, plum jobs, and investments in their broadcast companies.

Fourth, the money earned and put into family treasuries in the first 50 years of broadcasting has been converted into the working capital that supports today's generation of broadcast entrepreneurs. Some of that money went into other industries, just as money from other industries went into broadcasting. But the profits earned during the years when minorities were prevented from owning stations formed a mountain of capital controlled by families attuned to broadcast investing and ownership. Minorities trying to buy their way into the industry are today starting from nothing.

Consequently, even if only 6% of the original owners still own the same stations, the legacy of segregation is that the original owners have created a stratified system of broadcasting that persists today. The racial privileges of the industry's founders continue to reproduce themselves intergenerationally, with little resistance or even conscious recognition by the industry, its regulators or the public.

in the MMTC Radio Ownership Comments, pp. 71-104, and in the Comments of the Civil Rights Organizations in MM Docket No. 99-25 (Low Power FM Radio), filed August 2, 1999, at 34-63 ("Civil Rights Organizations' LPFM Comments"). Summaries of the early history in commercial licensing policy,[38/] noncommercial licensing

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38/ See, among others, Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that the owner of segregated movie theaters had the character necessary to be issued a television construction permit because state segregation laws were not inconsistent with the Communications Act); Broward County Broadcasting, 1 RR2d 294 (1963) (terminating trumped-up revocation proceeding when the licensee agreed to abandon its Black format, which was opposed by the government of the segregated Fort Lauderdale suburb to which the station was licensed); The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (issuing only an admonishment in response to the FBI's well-documented allegation that a radio licensee helped incite the 1962 riot in which Whites tried to prevent James Meredith from integrating the University of Mississippi (two people were killed)); Lamar Life Broadcasting Co., 38 FCC 1143 (1965), reversed and remanded, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I"), accepting remand, 3 FCC2d 784 (1966); renewing license again, 14 FCC2d 495 (ALJ 1967); aff'd, 14 FCC2d 431 (1968); reversed and vacated sub nom. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II") (in which the Commission ultimately had to be instructed by the D.C. Circuit to deny the license renewal application of a notorious discriminator); Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision") (adopting a grossly restrictive one-year-without-revenue financial qualification standard for construction permit applicants), repealed in Revision of Application for Construction Permit for Commercial Broadcast Station, 87 FCC2d 200, 201 (1981) ("Financial Qualifications Standards") because the Ultravision standard "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses"); Chapman Television and Radio Co., 24 FCC2d 282 (1970); on remand, 21 RR2d 887 (Examiner 1971) (holding that the co-owner of a segregated cemetery, who helped preserve the segregation policy and then covered it up, had the character to be a broadcast licensee); Evening Star Broadcasting Co., 24 FCC2d 735 (1970) and 27 FCC2d 316 (1971), aff'd sub nom. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) (holding that a television station's EEO record would be evaluated based on the demographics of its market, not its city of

[n. 38 continued on p. 23]

policy,[39] and structural regulation,[40] are given in the margin.

38/ [continued from p. 22]

license (which happened to be the majority-Black District of Columbia)); NBMC, 61 FCC2d 1112 (1976) and Citizens Communications Center, 61 FCC2d 1095 (1976) (refusing, after an unexplained 3 1/2 year delay, to adopt any of 61 proposals to advance minority participation in the electronic mass media); NBC, Inc., 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting) (refusing to examine allegations of employment discrimination until a final order is issued in a civil lawsuit -- which broadcasters never allow to happen); Hooks Broadcast Sales Proposal, 43 RR2d at 3 n. 3 (rejecting Commissioner Hooks' proposal for a 45 days public notice period as a remedy for discrimination in station brokering because publicizing station sales might inconvenience some incumbent broadcasters); PTL of Heritage Village Church, Report No. 18597 (1982), recon. denied, 53 RR2d 824 (1983), appeal dismissed sub nom. NBMC v. FCC, 760 F.2d 1297 (D.C. Cir. 1985) (allowing wrongdoer to escape hearing and distress sale liability, thereby undermining the distress sale policy). Cases from 1972 through 2000 involving failure to enforce the EEO Rule are far too numerous to mention.

39/ The Commission routinely approved the licensing applications of segregated state universities. Minorities were barred by many state laws or customs from attending universities operating the only FCC-licensed educational stations. Examples include KASU-FM, Arkansas State University, licensed in 1957; WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1958. There were many others. The average signon year for stations owned by 28 Historically Black Colleges and Universities ("HBCUs") was 1980, while the average signon year for stations licensed to the 29 predominantly White state colleges in the same states was 1970. The White schools' stations mean power level was 40.57 kw, 20% more than the HBCUs' stations' mean power level of 33.8 kw. The White schools' mean HAAT was 671.4 feet, almost 2 1/2 times the HBCUs' stations' mean HAAT of 273 feet. Thus, the HBCUs were given a late start, after which they received second class broadcast facilities. See Civil Rights Organizations' LPFM Comments, p. 38 n. 76.

40/ See, among others, 1360 Broadcasting Company, 36 FCC 1478, 2 RR2d 824 (Rev. Bd. 1964) ("1360 Broadcasting") (refusing to waive AM nighttime coverage rules to allow a first nighttime service to become available to 98.0% of Baltimore's Black community; Member Joseph Nelson dissented, citing three examples where the Commission had granted similar waivers for nearly all-White communities); Mel-Lin, Inc., 22 FCC2d 165 (1970) ("Mel-Lin") and Champaign National Bank, 22 FCC2d 790 (1970) ("Champaign") (same rule and same outcome as in 1360 Broadcasting).

Until the courts intervened in 1973 and 1975,[41] and until the Commission turned a major corner by adopting minority ownership policies in 1978 and expanding them in 1982,[42] there was no institutional effort to remedy the palpable exclusion of minorities from broadcast ownership. Even after 1973, minorities were often only able to acquire low-power, technically inferior AM stations with urban or Spanish formats that became available when the original owners retired.[43]

Moreover, the agency almost always refused to consider the impact on minority ownership of its spectrum management and

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41/ TV-9, 495 F.2d 929 (requiring consideration of minority ownership in comparative hearings); Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) ("Garrett") (requiring consideration of minority ownership in the administration of ownership regulations).

42/ The first Commission decision applying minority ownership as a factor in structural regulation was Atlass Communications, Inc., 61 FCC2d 995 (1976) ("Atlass") (granting AM nighttime coverage waiver to promote minority ownership, and thereby reversing the policy followed in 1360 Broadcasting, Mel-Lin and Champaign). See also Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration). Thanks to Chairman Wiley's and Chairman Ferris' initiative, in 1978 the Commission adopted the distress sale policy and the former tax certificate policy. 1978 Minority Ownership Policy Statement; see also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) ("1982 Minority Ownership Policy Statement"). This pro-active initiative proved that the Commission is capable of summoning the will to turn away from discrimination and implement effective minority ownership policies.

43/ Eastern and Southern European Jewish immigrants often built these stations to serve ethnic groups speaking Russian, Yiddish, Italian or Polish. In the years preceding World War II, the Commission frequently refused to grant their uncontested construction permit applications on the thin pretext that it

[n. 43 continued on p. 25]

structural multiple ownership policies. In Docket 80-90,44/ in

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43/ [continued from p. 24]

didn't serve the public interest to broadcast in certain foreign languages. See Voice of Brooklyn, 8 FCC 230, 248 (1940), Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), and Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936). These abhorrent rulings violated Section 326 of the Communications Act and the First Amendment. They were really aimed at a particular language, Yiddish. Having experienced thinly-disguised religious discrimination at the hands of their government even as the Holocaust was beginning, it is not surprising that these broadcasters often became the first to broadcast programming that served others who suffered discrimination -- particularly African Americans. Later, many sold their stations to African Americans, making it possible for African Americans to secure ownership opportunities available nowhere else in the industry. Examples of stations with such a history include Washington's WOL, New York's WWRL and WLIB, Philadelphia's WHAT, Baltimore's WWIN, Pittsburgh's WAMO, Boston's WILD, Buffalo's WUFO, Chicago's WBEE and Miami's WMBM.

Minority broadcasters' preponderant ownership of stations with weak technical facilities was caused by the unavailability of stronger facilities. The legacy and present status of minority ownership of stations with inferior technical facilities is described in Kofi Ofori's 2002 study, Consolidation and Minority Ownership, pp. 16-18.

44/ The Commission considered minority needs when it created 689 new FM authorizations in Docket 80-90. Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Allotments (R&O), 94 FCC2d 152, 159 n. 10 (1983) ("Docket 80-90 R&O"). However, the Commission refused to dedicate spectrum for minority ownership, preferring instead to rely on the comparative process. Id. at 179. Soon afterward, when it established comparative criteria for the Docket 80-90 stations, the Commission diluted the previously available enhancement for minority ownership by authorizing a "daytimer preference" -- on the startling assumption that operating during daylight hours renders an applicant inherently as likely to promote diversity as minorities. Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second R&O), 101 FCC2d 638, 647-49 (1985), recon. denied, 59 RR2d 1221, 1226-28 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987). Commissioner Rivera accurately characterized the weight of the daytimer preference -- which incorporated a "substantial" local ownership credit -- as so heavy that "it will be almost impossible for any newcomer - minority or non-minority - to prevail against a

[n. 44 continued on p. 26]

the AM 9 kHz spacing proceeding,[45/] in the domestic clear channel proceeding,[46/] in the foreign clear channel proceeding,[47/] in the

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44/ [continued from p. 25]

qualifying daytimer." Id., 101 FCC2d at 653 (Dissenting Statement of Commissioner Henry M. Rivera).

45/ 9 kHz Channel Spacing for AM Broadcasting (R&O), 88 FCC2d 290 (1981) (Commissioners Jones and Fogarty dissenting) (preferring minor cost savings to owners of digital receivers in luxury automobiles to the creation of approximately 400 new AM stations.) Minority groups had sought 9 kHz spacing (and the 1979 U.S. WARC delegation had successfully provided for its adoption in ITU Region II) as a means of promoting minority ownership. Those digital receivers are long since outdated (now that we have the AM Expanded Band); thus, the nation lost an easy opportunity to have 10% more AM stations.

46/ In Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission's Rules (R&O), 102 FCC2d 548, 558 (1985) ("Clear Channels Repeal"), recon. denied, 4 FCC Rcd 5218 (1989), the Commission repealed the minority and noncommercial eligibility criteria in Clear Channels, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority owned stations had been created under this two-year old policy. Id. at 555. The tax certificate and distress sale policies did not conflict with the Clear Channels policy; rather, the three policies each promoted minority ownership in different ways, and none of them had generated any controversy. Thus, it was disingenuous to justify repealing one of the policies because the others were "sounder." The repeal of Clear Channels was a straight-out reduction of minority ownership efforts, with no countervailing benefits whatsoever.

47/ Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (R&O), 101 FCC2d 1, 6 (1985) ("Foreign Clear Channels"), recon. granted in part, 103 FCC2d 532 (1986), reversed in part sub nom. NBMC v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986), on remand, Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further NPRM), 2 FCC Rcd 4884 (1987), Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second R&O), 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988), recon. denied, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum.) Dissenting in Foreign Clear Channels, 101 FCC2d at 30-31, Commissioner Rivera asserted that the Commission was:

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AM Expanded Band proceeding,[48/] in the 1992 Cable Act

47/ [continued from p. 26]

> backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so....The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved (emphasis in original, fn. omitted).

48/ In deciding to give all of the AM Expanded Band to incumbents and none to minority new entrants, the Commission was quite brazen in articulating its regulatory priorities: "reserving even one channel for [minority, female and educational broadcasters'] exclusive use would assure a 10% decrease in expanded band resources dedicated to interference and congestion reduction." Technical Assignment Criteria for the AM Broadcast Service (R&O), 6 FCC Rcd 6273, 6307 ¶111 (1991) ("Expanded Band Report"), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) ("Expanded Band Reconsideration Order") (subsequent history omitted) (permitting only incumbents to colonize the 1605-1705 kHz band and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band's expansion in the Commission's planning for (and the U.S. delegation's advocacy in) the 1979 WARC. The Expanded Band Report failed to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and NBMC on this issue; the organizations weren't even listed in the Appendix as commenters. Id. at 6344-47. When the organizations sought reconsideration, advancing a more modest proposal, the Commission held that the new proposal "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments the Commission had disregarded! Adding insult, the Commission went on to justify its refusal to adopt minority incentives by claiming that it had "address[ed] the need to increase opportunities for minority ownership" when it adopted the 1992 Radio Rules. Expanded Band Reconsideration Order, 8 FCC Rcd at 3261 ¶37. Actually, those rules did nothing to promote minority ownership, and instead authorized more consolidation despite minority groups' (accurate) prediction that more consolidation would severely inhibit minority ownership.

implementation proceeding,[49] in the satellite digital audio radio proceeding,[50] in the digital audio broadcasting proceeding,[51] in

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49/ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (First R&O), 8 FCC Rcd 3359 (1993) (failing even to acknowledge the existence of extensive comments by the Caribbean Satellite Network ("CSN"), much less CSN's arguments for (or any other discussion of) policies to foster minority ownership of cable networks. CSN, which had 1,500,000 subscribers, was only the second minority owned cable channel, (after BET) to launch U.S. operations.)

50/ Responding to Rules and Policies for the Digital Audio Radio Satellite Service, IB Docket No. 95-91 and GEN Docket No. 90-357 (NPRM), 11 FCC Rcd 1 (1995), MMTC urged the Commission to set aside channels to provide access to minority entrepreneurs. Comments of MMTC in IB Docket No. 95-91 and GEN Docket No. 90-357 (Digital Audio Radio Satellite Service) (filed September 15, 1995). The Commission refused, holding that it had "relied on the representations of [the four] satellite DARS applicants that they will provide audio programming to audiences that may be unserved or underserved by currently available audio programming." Rules and Policies for the Digital Audio Radio Satellite Service, IB Docket No. 95-91 and GEN Docket No. 90-357 (R&O, MO&O and Further NPRM), 12 FCC Rcd 5754, 5791 ¶90 (1997). Thus, nonminority entrepreneurs' promise to offer minority formats trumped minority entrepreneurs' own proven record of diverse programming. This paternalistic holding was a radical departure from the Commission's historic commitment to minority ownership as a means of advancing program diversity.

51/ Minority ownership was nowhere mentioned in Establishment and Regulation of New Digital Audio Radio Services, GEN Docket No. 90-357 (NOI), 5 FCC Rcd 5237 (1990) ("DARS NOI"), even though the Notice focused on providing spectrum for incumbents and for public broadcasters and inquired into the need for structural ownership restrictions. Id. at 5238 ¶11 and 5239 ¶14. Responding to the DARS NOI, four civil rights organizations filed extensive comments and reply comments, along with an extensive study detailing the level of minority demand for DAB facilities by market ("DAB Demand Study"). Comments of the NAACP, LULAC, National Hispanic Media Coalition and NBMC in GEN Docket No. 90-357 (Digital Audio Broadcasting) (filed October 12, 1990); Reply Comments of the NAACP, LULAC, National Hispanic Media Coalition and NBMC in GEN Docket No. 90-357 (Digital Audio Broadcasting) (filed January 7, 1991). The Commission neglected to mention, much less rule on the civil rights organizations' proposals or DAB Demand Study, or put the minority ownership issue out for comment in subsequent DAB

[n. 51 continued on p. 29]

the 1992 radio ownership proceeding,[52] and in the concurrently-decided television duopoly and attribution rule proceedings,[53] the Commission refused every time to take even modest steps to shield minority ownership from the adverse consequences of its decisions, much less do anything pro-active to cure the exclusion of minorities from broadcast ownership. In doing so, the Commission has repeatedly flouted Congress' repeated commands that the Commission should take systematic steps to promote minority ownership.[54]

The Commission's own research -- which it has not yet decided to put into the record of this docket[55] -- documents the Commission's misadministration of the issue of minority ownership over the past generation. Specifically, the KPMG Study shows how the agency presided over a comparative hearing process designed (after court intervention)[56] to help minorities win licenses,

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51/ [continued from p. 28]

proceedings. Establishment and Regulation of New Digital Audio Radio Services, GEN Docket No. 90-357 (NPRM and Further NOI), 7 FCC Rcd 7776 (1992) ("DAB NPRM"). The DAB NPRM also said nothing about minority ownership.

52/ See 1992 Radio Rules, 7 FCC Rcd at 2769-2770 ¶¶26-29 (pointing to the existence of the tax certificate and distress sale programs in order to justify relaxation of the local radio ownership rules).

53/ See discussion at pp. 50-52 infra.

54/ See discussion at pp. 57-59 infra.

55/ See p. 9 supra.

56/ TV-9, 495 F.2d 929.

while actually failing miserably to achieve that goal.[57/] Antoinette Cook Bush and Marc Martin have amplified on this point in a leading law review article.[58/]

57/ KPMG Economic Consulting Services, "Study Of The Broadcast Licensing Process" (2000) ("KPMG Study"). The study includes three parts: (1) History of the Broadcast Licensing Process; (2) Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and (3) Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC.

The study examines minority broadcast ownership during a period when the Commission sometimes awarded credit for minority ownership. It concludes that a dollar of assets in an application with minority presence was treated more favorably than a dollar of assets generally, but a dollar of liabilities had a more adverse impact on the probability of a win for an application with minority presence than for an application with lesser minority involvement.

KPMG also found that minority participation in comparative hearings was very low relative to minority representation in the U.S. population. The comparative hearing process seemed to have awarded credit for minority participation, as the Commission had intended. Nonetheless, there was actually a lower overall probability for an application with minority ownership winning a license than a nonminority application after controlling for a variety of important variables. This occurred because minority applicants were less likely to be "singletons", i.e., applications unopposed by mutually exclusive applicants.

58/ As Bush and Martin explain:

> the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses exclusively to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of

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The Ivy Group Study documents the widespread appreciation among regulatees that minority and female ownership was imperiled by, inter alia, structural ownership deregulation and by weak FCC enforcement of its policies against fronts and sham structures.59/

58/ [continued from p. 30]

> nonminorities until reforms were finally adopted in 1978 (fns. omitted; emphasis supplied).

A. Bush and M. Martin, "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Fed. Comm. Law J. 423, 439 (1996).

59/ Ivy Planning Group, "Whose Spectrum Is It Anyway? Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing - 1950 To Present" (2000) ("Ivy Group Study"). The Ivy Planning Group interviewed 120 representatives of small, minority and women owned businesses that had attempted (successfully or not) to acquire, sell or transfer a license during the years 1950 - 2000. The researchers also interviewed 30 key market participants, including media brokers, lenders, attorneys, industry leaders, and FCC officials. The consensus of the interviewees was that for minority and women licensees, market entry barriers were exacerbated by a number of actions and inactions by the Commission and Congress, such as weak enforcement of EEO regulations, underutilized FCC minority incentive policies, use by nonminority men of minority and female fronts during the comparative hearing process, and the lifting of the broadcast ownership caps. Congress' repeal of the tax certificate program, which from 1978 until its repeal in 1995 provided tax incentives to encourage firms to sell broadcast licenses to minority owned firms, was regarded by interviewees as a particularly severe blow to minorities' ability to acquire broadcast and cable properties. (The tax certificate policy was repealed in Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. §1071 (1995)) ("Tax Certificate Repeal").

Among the conclusions of the Ivy Group Study were that (1) bidding credits designed to increase the opportunities for participation in wireless auctions by small, minority and women owned businesses were ineffective and unsuccessful; (2) the relaxation of ownership caps has significantly decreased the number of small, women and minority owned businesses in the broadcasting industry; and (3) the Commission 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.

Not all discrimination and other market entry barriers visited on minorities has involved the Commission itself. The Bradford Study documents how minorities' lack of access to capital has inhibited minorities' ability to secure broadcast licenses, thereby making it difficult for them to buy their way into an industry others entered for free.60/ The Commission itself has rendered similar findings over the past generation,61/ as has NTIA.62/ The Ivy Group Study corroborates these findings, and

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60/ William Bradford, "Study Of Access To Capital Markets And Logistic Regressions For License Awards By Auctions," University of Washington (2000) ("Bradford Study"). Using regression analysis, Dr. Bradford examines the capital market experiences of current broadcast license holders with respect to race, gender, the year of application or acquisition, business cash flow, equity, and size of firm (full time employees). His study found that minority broadcast license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision. Minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables. Dr. Bradford also concludes that minority status resulted in a lower probability of winning in spectrum auctions.

61/ See, e.g., 1982 Minority Ownership Policy Statement, 92 FCC2d at 852-53 (authorizing the use of limited partnerships as capital formation tools in conjunction with the then-extant minority ownership policies). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 5th R&O, 9 FCC Rcd 5532, 5573 ¶98 (1994) (discussing a 1992 study by the Federal Reserve Bank of Boston which concluded that a Black or Hispanic applicant in the Boston area is roughly 60% more likely to be denied a mortgage loan than a similarly situated White applicant.)

62/ See National Telecommunications and Information Administration, U.S. Department of Commerce, "Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States" (December, 2000) at 45-46 (describing the impact of minorities' lack of access to capital); Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Department of Commerce, "Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries" (1995) (documenting artificial barriers faced by minorities in obtaining credit or financing for communications ventures).

also finds anecdotal evidence of discrimination in the transactional marketplace -- further exacerbating the effects of a lack of access to capital.[63/] Lack of access to capital explains why large vertically and horizontally integrated companies usually outbid most minority owned companies for desirable properties.

Another entry barrier is advertiser discrimination, which often takes the form of outright refusals by advertisers and their representatives to use outlets serving African American or Spanish speaking populations. The Ofori Study documents this discrimination by advertisers against minority broadcasters and others serving minority communities.[64/] The Ivy Group study

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63/ See Ivy Group Study, discussed on p. 31 n. 59 supra.

64/ Kofi Ofori, "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999). This study examines discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters. Its central finding is that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn. Anecdotal data collected by the study suggested that, in some instances, the media buying process is influenced by stereotypical perceptions of minorities, presumptions about minority disposable income, a desire to control product image and unfounded fears of pilferage.

The study identifies two particularly egregious practices: "no urban/Hispanic dictates" (an advertiser's instructions to its agency to refuse to buy airtime on stations with Black or Spanish formats) and "minority discounts" (an advertiser's refusal to pay as much to reach minority audiences as it would pay to reach White audiences, other factors being equal). A followup regression analysis (not sponsored by the Commission), "Minority Targeted Programming: An Examination Of Its Effect On Radio Station Advertising Performance" (January, 2001) found that advertisers paid less for time on stations owned by minorities (especially standalone stations), stations having minority formats, and stations targeted to young audiences. These factors appeared to be a proxy for "no urban/Hispanic dictates" and "minority discounts."

corroborated these findings.[65]

In conclusion, the Commission's history, and its own research, document overwhelmingly that, in great measure, because of the Commission's own actions and omissions, minorities were two generations late in getting a foothold in broadcast ownership.[66] Minorities are making slow headway in catching up in radio, while minority television ownership is in a state of collapse. Today only the seldom-used distress sale policy promotes minority ownership.

The Commission has done nothing to follow up on the Section 257 Studies since their December, 2000 release.[67] Two years is a

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65/ See Ivy Group Study, discussed on p. 31 n. 59 supra.

66/ Since 1990, the distress sale policy has only been used in two very small radio transactions, which is not surprising since almost no stations go to hearing anymore.

67/ By December, 2000, the Commission had released all of the Section 257 Studies. The following month, the Commission declined to consider MMTC's minority ownership proposals in the TV local ownership proceeding because the Commission had not yet evaluated the Section 257 Studies. Television Broadcasting - Reconsideration, 16 FCC Rcd at 1078 ¶33 and 1078-79 n. 69. Two years later, no analysis of these studies, no further studies, and no rulemaking proposals have emerged. To be sure, evaluation of the Section 257 Studies may have been delayed in light of the pendency of Adarand Constructors, Inc. v. Mineta, No. 00-730 (2000 Term) ("Adarand VIII"), which raised the issue of whether, as a practical matter, a federal contracting program could ever be even moderately race-conscious. The Solicitor General defended the Department of Transportation's moderately race-conscious program, as did a number of the Diversity and Competition Supporters. On November 27, 2001, the Supreme Court decided Adarand VIII, issuing a per curiam opinion holding that certiorari had been improvidently granted. Thus, a federal race-conscious business contracting program has survived judicial review under strict scrutiny. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), certiorari dismissed as improvidently granted sub nom. in Adarand VIII. Thus, there is no impediment, practical or theoretical, to Commission review of the Section 257 Studies.

very long time to sit on time-sensitive social science data, especially after promising to review and act on the data.[68/] And as noted earlier, the Bureau has twice postponed a decision on whether to put the Section 257 Studies into the record of this proceeding.[69/] Its failure to render this decision by the due date for comments has guaranteed that the general public will comment only sparsely on these profoundly informative materials.

In light of the Commission's history, and in light of the Commission's present hesitation even to place its own research on the roots of this history into the record, is it a mystery why we are alarmed that the agency has suddenly disinterred the long-since closed question of "whether" minority ownership is important in its administration of the radiofrequency spectrum?

The penultimate lesson of this history is this: the time is long past for the Commission consistently to be "a part of the solution."

2. Consolidation Impedes Minority Ownership, Unless Countervailing Measures Are Adopted

The likely impact of consolidation on minority broadcast ownership is not difficult to predict, although as shown infra, adverse impacts of some forms of consolidation can be ameliorated by implementing countervailing measures.

68/ See p. 9 supra.

69/ See Order, DA 02-2989 (released November 5, 2002) at 2 n. 6; Order, DA 02-3575 (released December 23, 2002) at 3 n. 12.

a. Consolidation Generally

Consolidation can magnify the influence of past discrimination on radio ownership. Past discrimination has left minorities with insufficient broadcast assets to form an equity base from which they can acquire more properties.70/ The assets minorities would have owned, but for discrimination, are now owned by others who can deploy those assets against minorities in bidding contests for new properties. As a result, past discriminatory ownership patterns are perpetuated, such that an exclusionary industry replicates itself across generations.

Further, minorities still face societal discrimition from advertisers and their representatives, and lack of access to capital -- the fruit of historic discrimination even though it may not all still be intentional.71/

Finally, minorities tend not to own enough stations available to be offered to sellers in tax-free exchanges -- by far the most desirable transaction model for sellers with large tax bases. As Senator McCain has pointed out:

> the tax code makes cash sales less attractive to sellers than stock-swaps. So new entrants and smaller incumbents, which typically must finance telecom acquisitions with cash rather than stock, are less-preferred purchasers than large incumbents. As a result, telecom business sellers have little incentive to sell their businesses to new entrants and small incumbents. 72/

70/ See pp. 19-31 infra.

71/ See pp. 32-35 supra.

72/ Hon. John McCain, Statements on Introduced Bills and Joint Resolutions (Senate - October 15, 2002) (introducing S.3112, the Telecommunications Ownership Diversification Act of 2002) ("McCain Statement on S.3112").

Consequently, it is still more difficult for most minority owned companies, compared to other companies, to raise and deploy capital for broadcast acquisitions.[73/] Thus, most minority owners will be unable to compete successfully against much larger companies to buy the properties that would become available as a result of deregulation.

Exacerbating the ability of minorities to bid successfully for stations is the fact that minorities still do not learn about stations for sale as early or as often as others do. Formerly part of this problem, media brokers are usually part of the solution now.[74/] We are less familiar with the marketing outreach practices of the large investment houses, and would welcome more

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73/ MMTC has often called attention to this phenomenon. For example, after the Commission doubled the local ownership limits in the 1992 Radio Rules, MMTC observed:

> Minority broadcasters suffered dearly from the 1992 radio rules. Since most minority owned stations are AM standalones or Class A FMs, minorities seldom find themselves able to take advantage of LMAs and duopolies. Instead, they are faced with ever-larger and more economically powerful nonminority competitors.

Reply Comments of MMTC, MM Docket No. 91-221 (Regulations Governing Television Broadcasting) (filed June 10, 1995).

74/ The majority of media brokers, especially in recent years, have undertaken to try to reach out to minority buyers. The brokers' professional organization, the National Association of Media Brokers (NAMB) has committed itself genuinely to integration and inclusion. Investment houses, when brought in to sell stations, seldom reach out to minorities (other than public companies). We do not know of a single instance in which an investment house went out of its way to practice equal opportunity marketing for a broadcast transaction, although we do know of instances in which companies engaged investment houses and also undertook equal opportunity marketing on the companies' own initiative.

information on this subject.[75]

If deregulation occurs, minorities' ability to compete to purchase stations would be even further impaired, for three reasons.

First, many companies with stations to sell are waiting to see if deregulation is announced so they can sell to companies that are now ineligible as buyers. Upon the announcement of deregulation, a wave of properties will be made available by these sellers. In the ensuing "private auctions," few new entrants will be in a position to bid as much as in-market operators. In MMTC's experience through its media brokerage, it is rare for a station to be sold to a new entrant in competition with a company that can consolidate the station vertically or horizontally. The investment community will regard the station as worth more if it is sold to the consolidator. Consequently, an in-market competitor will almost always prevail against an out-of-market company or a new entrant in a bidding contest to purchase an in-market station.

75/ An apparently typical incident occurring within the past two years involves a nonminority broadcast company that had over a dozen stations to be sold. The stations' availability for purchase was rumored for two weeks before it was announced, but minority broadcasters did not hear these rumors. When the company formally announced the stations' availability for purchase, it also announced that it had engaged a Wall Street investment house to handle the bids. The deadline for bids was the following day. Evidently, those in the old-boy network already knew about the deal and had begun preparing their bids. Interestingly, the nonminority broadcast company figuring in this incident happens to be one of the nation's most progressive-minded broadcasters, with one of the most outstanding EEO records in the industry.

Second, after the station sales that take place in the wake of consolidation are completed, there will be fewer stations left for minorities to buy -- especially in the case of television. Once consolidated, a station seldom comes on the market as a singleton. As consolidation proceeds, eventually there simply are no more assets left in play for which small and minority entrepreneurs can bid competitively against larger companies.

Finally, after deregulation, many minority owned incumbent broadcasters will come under intense pressure from their investors to sell to consolidators. The minority owned stations may be viable and profitable under their current ownership, but they will be perceived by investors as more lucrative if they are owned by consolidators. For many minority broadcasters, the only alternative to selling to a consolidator will be buying out their investors -- which is not a realistic option because most minorities lack sufficient reserves of family wealth for such emergencies. This phenomenon will sharply undercut the original objective of minority operators to keep their businesses in the hands of family members or other minorities.

For these reasons, the Commission should take close account of the impact of its proposals on minority business opportunity.

b. Specific Forms Of Consolidation

i. Television Duopoly

Duopoly has profoundly diminished minority ownership. Since local television deregulation in 1999, minority television

ownership has gone from 33 stations to 20.[76] Today there is actually only one Hispanic owned television station left. This is an emergency, and unless the Commission is prepared to accept the collapse of minority owned television ownership, it should not permit additional local television duopolies.

One reason why duopolies are adverse to minority ownership is that minorities have not been in television ownership as long as they have been in radio. When the 1978 Minority Ownership Policy Statement was adopted, there were 59 minority owned radio stations -- and only one television station -- on the air. Consequently, minorities are only now acquiring the skill sets needed to succeed in television ownership -- just at the very moment that the Commission may rob them of the opportunity to use these skills.

Further, the investment community is unlikely to finance a weak standalone when it can finance a dominant competitor's bid for a duopoly.[77] A duopoly can sell itself as a one-stop advertising buy, since it reaches virtually every television viewer. Even most local radio clusters (also known as "platforms") cannot match this feat, because many radio listeners fall into niches that cannot all be reached even by an eight-station radio platform.

76/ See p. 18 supra.

77/ Investment banker Steve Pruett has predicted that a duopoly will be worth more than the combined value of the first station and the price paid for the second. E. Rathbun, "Ready, set...duopoly," Broadcasting & Cable, August 9, 1999, at 4, 5.

In addition to harming minority broadcasters, local television duopolies hurt minority consumers. In the wake of radio deregulation in the 1980s, independent local radio news and public affairs have nearly collapsed. Consequently, local television news and public affairs is frequently the only way that information pertinent to and about local minority communities is made known to the community at large. A television news or public affairs department that is uninterested in covering the minority community often leaves members of that community with only one or two other broadcast outlets that might get their story told. Thus, any further reduction in the number of independent local news and public affairs voices, particularly in medium and small markets, would profoundly disserve minority media consumers.

To be sure, the occasional "failing" or "failed" station may really need the option of being duopolized in order to avoid going dark. But it is difficult to conceive of any benefit to the public from the duopolization of a non-failing station. Duopoly means one less independent local news department, one less independent public affairs department, one less independent editorial voice, and one less independent person choosing which PSAs to air. Duopoly also means fewer opportunities for newcomers to obtain employment and learn the business.

Contrary to our earlier skepticism, the failing station rule has proven adequate to protect the public. Beyond that, further duopolization should be prohibited.

ii. Television/Radio Crossownership and Newspaper/Broadcast Crossownership

Television/radio crossownership, and newspaper/broadcast crossownership have less potential for reducing local voices than does television duopoly. Crossownership also holds greater potential for public-interest synergies, including the export of television news and newspaper content into local radio, where independently produced, in-depth news and public affairs have become scarce or absent entirely. Diversity is hardly promoted when a widget-maker buys a radio station and uses it as a mere music box, where the alternative would have been the local newspaper buying the radio station and putting newspaper reporters on the air. Concerns that this would mean one less voice in the community evaporate when the alternative is a voice that never speaks.[78/]

Radio, television and newspapers are only modestly close substitutes for news and information,[79/] so television/radio crossownership and newspaper/broadcast crossownership are not as dangerous from a diversity standpoint as is television duopoly.

Nonetheless, crossownership should not be allowed to proceed unless there is very close and continuing supervision of its impact on diversity, competition and minority ownership. If a newspaper or television station is allowed to buy one of the only remaining independent television or radio outlets in its

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78/ See MMTC Radio Ownership Comments, pp. 13-19.

79/ See Joel Waldfogel, "Consumer Substitution Among Media," The Wharton School, University of Pennsylvania (2002).

community, a new entrant will almost never be able to match the newspaper or television station's offering price, since investors pay a premium for vertical and horizontal integration.80/ Thus, laissez-faire deregulation of crossownership should be rejected, since that would significantly diminish minority ownership opportunities. Additional crossownership should be permitted only if the Commission proceeds in stages that take effect upon affirmative verification that the market is healthy, and if the Commission adopts public interest and minority ownership protections such as those we outline in these Comments.81/

iii. National Television Ownership Rule

We favor retention of the 35% cap. The availability of network affiliates for sale to new entrants is a precondition to the growth of minority owned television companies. In today's environment, a viable television company must be composed of network affiliates. In a bidding contest over stations for sale, the network with which the seller's station is affiliated enjoys a considerable advantage.82/ Moreover, presently no minority owned television licensee has significant bargaining power with syndicators. Any syndicator would prefer a company with national dominance over a small entrepreneur.

80/ See pp. 38, 40 supra.

81/ See pp. 82-141 infra.

82/ We do not believe a network would veto the purchase by others of a station it seeks to buy. Nonetheless, investors would regard a network's ownership of its own affiliate as more attractive than another company's bid to own the station and then pay compensation to the network for the affiliation.

iv. Dual Network Rule

The Commission greatly values diversity at the national network level,[83] so it would be a monumental achievement for a minority owned company to buy or start a television network. A blanket authorization for mergers among the networks would preclude this.

Moreover, independent ownership of the few over-the-air networks is an enormous benefit to consumers, including rural residents and low income families who cannot afford or cannot receive the networks on cable.[84]

Competition in news and information among the networks is the ultimate contest in the marketplace of ideas. Any merger between two of the largest networks should be unthinkable under any circumstances.[85] A merger involving one of the smaller networks should be permitted only if the smaller network is in such extreme

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83/ See, e.g., Fox Television Stations, Inc., 11 FCC Rcd 5714, 5731 (1995) (Separate Statement of Commissioner James H. Quello) and id. at 5733 (Separate Statement of Commissioner Andrew C. Barrett) (each relying on News Corp.'s creation of the much-desired fourth network as a principal reason to waive the 25% alien ownership restriction in Section 310(b) of the Communications Act).

84/ See pp. 142-45 infra.

85/ The presence of three independently owned national over-the-air nightly newscasts, prime-time newsmagazines and Sunday morning talk programs is inextricably engrained in the nation's democratic framework and culture. If program diversity on a national scale means anything at all, it means that the nation's television viewers can choose among three of the crown jewels of democracy -- ABC, NBC and CBS News.

distress that a larger network truly is the only viable buyer.[86/]

v. Local Radio Ownership

The 1992 Radio Rules essentially halted the growth of minority owned radio in its tracks for four years. However, in the wake of radio ownership deregulation following the 1996 Telecommunications Act, the number of minority owned stations and the percentage of industry asset value held by minorities did not decline, although the number of minority owned companies declined substantially.[87/] Based on his analysis of the operational success of minority owned and controlled stations relative to majority owned stations, Kofi Ofori concludes:

> Based upon several performance measures, minority stations have not realized the same economic potential realized by majority stations. This pattern holds true for the present as well as the time frame immediately following passage of the 1996 Telecommunications Act. Stations owned by minority firms that are publicly traded also perform at levels below their majority counterparts. While these trends continued throughout the period of increased ownership consolidation, the data does not necessary link station underperformance with ownership consolidation. Further research should be undertaken to compare present data on station performance with data prior to the relaxation of the numerical limits.
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> Secondly, other variables, in addition to ownership consolidation, may have adversely affected station performance (e.g. discriminatory advertising practices and lack of capital). However, the data does suggest that ownership consolidation has resulted in the decline in the number of minority owners - a development that commenced with the relaxation of the numerical limits. The fact that the number of minority owners remained level from 1990 until the

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86/ See Comments of MMTC in MM Docket No. 00-108 (Dual Network Rule) (filed September 1, 2000), p. ii ("having attempted without success to find a minority buyer for UPN, MMTC realizes that UPN can only be preserved by an established network with O&Os and efficiencies from duopoly and vertical integration. A Duopolized UPN is better than a Dead UPN.")

87/ See Consolidation and Minority Ownership, p. 12.

> passage of the 1996 Act and then sharply declined is of particular significance and should be of concern to the Commission. 88/

The fact that minority radio ownership did not collapse after 1996 can be attributed to three factors.

First, minority owners tend to have extraordinary skills. An old saw holds that minorities in business must be twice as skillful to get half as far, and that's really true. The few minority entrepreneurs who have survived over the years overcame far greater obstacles than similarly situated nonminority counterparts had to face. There was no room for average minority businesspeople in radio. Those still standing are extraordinary.

Second, four minority owned companies were able to go public. As Ofori notes, by December, 2001 these four companies collectively owned 156 stations.89/

Third, there were major spinoffs associated with mergers involving Viacom and Clear Channel. The CEOs of both companies, exercising industry statesmanship in the best sense of the term, undertook diligently, with MMTC's assistance, to provide minorities with an equal opportunity to buy stations. These companies ensured that minority potential purchasers were sought out and encouraged to bid, and that they received the same consideration at every stage of the bidding that nonminority bidders received. As a result of these transactions (particularly the 1999 acquisition of AMFM by Clear Channel) minorities acquired

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88/ Consolidation and Minority Ownership, pp. 26-27.

89/ Id., p. 12.

53 stations. These transactions had an unexpected but most welcome "coattails" effect on minority companies' access to capital. Even those companies that bid unsuccessfully for the spinoff stations found doors opened for them on Wall Street, because the minority owned companies were being seriously sought out, by the nation's two largest radio broadcasters, as potential purchasers of beachfront property. Minority owners who hadn't thought they'd have a chance to grow devoted themselves to writing business plans and bidding for other properties that normally wouldn't have gone to minorities. Further, through the networking of the National Association of Black Owned Broadcasters (NABOB) and the American Hispanic Owned Radio Association (AHORA), minorities who decided to (or were forced to) leave the business were often able to sell to other minorities.

These conditions are not certain to be replicated in a new wave of consolidation. The outstanding civil rights motivations and actions of industry leaders won't have an impact if companies with less sensitivity to the need to integrate broadcast ownership wind up doing the huge deals. Further, all of the other impediments facing minority entrepreneurs today remain without a cure -- particularly the inability of most minority owners to offer non-core assets for tax-free exchanges.

Although the number of minority owned radio stations increased since 1996, the loss of so many minority owned radio companies is a cause for concern. Many of the companies leaving the industry were well run, had much to offer, and under normal conditions would have prospered. Further, there have been few

minority new entrants since 1996, since a company starting from nothing in a period of consolidation seldom draws the attraction of investors. Consequently, radio consolidation has diminished the intellectual and cultural diversity of the ownership pool and has discouraged new entrants.

There is nothing inherent in the nature of consolidation that will bring about more minority ownership. In the long run, unregulated consolidation would most likely force out most minority entrepreneurs and create new barriers to entry in ownership. The fact that minority radio owners have not suffered a rout in the past six years is a testament to their skill and endurance and a tribute to the goodwill of other industry leaders.

The bottom line is that the 1996-2001 increase in minority owners' share of industry asset value from about 0.8% to 1.2% is no reason to declare victory and withdraw the regulatory troops. By 1863, the Union Army had brought about a comparable increase in the percentage of former slaves who could read. Fortunately, President Lincoln did not stop there.

c. Factors That Can Offset The Adverse Consequences Of Consolidation

Some forms of consolidation would diminish minority ownership no matter how they are implemented. However, it is not accurate to assert that consolidation can never be implemented in a manner that advances minority ownership.[90/]

First, consolidation is ameliorated when it is implemented in stages rather than suddenly. Businesses unable to turn on a dime

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90/ See pp. 82-141 infra (discussion of remedies).

can adjust, make plans, and raise sufficient capital to compete and survive.

Second, the adverse impact of consolidation is counterbalanced when industry statespeople make voluntary efforts to assist minority entrepreneurs. The industry-founded Quetzal/J.P. Morgan Fund is an example of such an effort, as were the initiatives of Clear Channel and Viacom to market spinoff properties to minorities. These efforts were not undertaken in exchange for deregulation, so it would be reasonable for the Commission to take them into account in evaluating the need and prospects for deregulation.

Third, when the marketplace contains incentives that reward licensees for trading with, selling to, or incubating socially and economically disadvantaged businesses, minorities have used these incentives, and have enjoyed some success even in the face of growing consolidation. The former tax certificate program is an outstanding example.

Fourth, direct relief targeted to minority entrepreneurs certainly helps them compete effectively. The most critical need, of course, is for equity on reasonable terms.

Fifth, when minorities have a fair opportunity to know of potential transactions, they can often bid successfully; conversely, their unawareness of transactions ensures that they will never bid at all.

Sixth, one of the best antidotes to consolidation of existing facilities is the creation of new ones. Thus, the Commission should manage the spectrum so that new facilities are made

available for construction permit applications in markets that need more service to meet the needs of growing and more diverse populations.

C. A Failure To Design Rules To Promote Minority Ownership Would Be Inconsistent With The Communications Act, With Court Rulings, And With Commission Precedent

We have described how the Commission has refused repeatedly over the past two generations to fully come to grips with the crisis of minority exclusion from broadcast ownership. We felt the need to set out this history because the Omnibus NPRM asked the surprising question of "whether" minority ownership is an important part of structural regulation.

Eighteen years ago, the Commission recognized that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership."[91/] Prompted by the courts,[92/] the Commission has at times taken action, but more frequently has done nothing.[93/] Most unfortunately, in 1995 the Commission decoupled its minority ownership rulemaking proceeding from its television ownership and attribution proceedings, leaving the minority ownership docket in a state of neglect for the past eight years.[94/] Although the Commission in 1998 voted to collect

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91/ 1985 Multiple Ownership - Reconsideration, 100 FCC2d at 94; see also Revision of Radio Rules and Policies (Second MO&O), 9 FCC Rcd 7183, 7191 ¶46 (1994) (to the same effect).

92/ TV-9, 495 F.2d 929; Garrett, 515 F.2d 1056.

93/ See pp. 24-29 supra.

94/ In 1995, the Commission recognized that multiple ownership, attribution, and minority ownership are closely interrelated.

[n. 94 continued on p. 51]

94/ [continued from p. 50]

Thus, it called for concurrently filed and crossreferencedcomments in proceedings addressing each of these issues. See 1995 Television NPRM, 1995 Attribution NPRM and 1995 Minority Ownership NPRM. However, after Adarand, the Commission decoupled the minority ownership proceeding from the television ownership and attribution proceedings. See Review of the Commission's Regulations Governing Television Broadcasting (Second Further NPRM), 11 FCC Rcd 21655 (1996); Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Further NPRM), 11 FCC Rcd 19895 (1996); Broadcast Television National Ownership Rules (NPRM), 11 FCC Rcd 19949 (1996) (subsequent histories omitted).

In 1997, MMTC asked the Commission to reverse this uncoupling. Letter to William Caton, Acting Secretary, FCC, from David Honig (March 25, 1997). Therein MMTC noted that Chairman Sikes' and NABOB's Incubator Plan, which contemplated granting incubating companies more liberal multiple ownership waivers and more liberal treatment of attribution, had drawn "widespread industry support and unanimous public interest and minority community support." MMTC noted further that concluding the multiple ownership and attribution dockets while leaving the minority ownership docket unresolved might "render it impossible later to develop incentives useful as inducements to incubate minority owners or to effectuate the financing or sales of stations to minorities." Consequently, MMTC urged the Commission to recouple the minority ownership, TV local ownership, and attribution proceedings, or to issue a further NPRM in the minority ownership proceeding "concurrently with the Commission's decisions in the multiple ownership and attribution dockets. The Further Notice should express the Commission's tentative views concerning appropriate incentives, permissible under the 1996 Act, which could be matched with incubation, financing and sale initiatives."

The Commission responded two years later in Television Broadcasting with this explanation for omitting to review the effects of its new television duopoly rules on minority, female and small business ownership:

> We note that a number of parties have expressed concern about the fact that greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting. [fn. 23] We share these concerns. The Commission has recognized the importance of promoting new entry into the broadcast industry as a means of promoting

[n. 94 continued on p. 52]

94/ [continued from p. 51]

competition and diversity. Indeed, we have adopted a "new entrant" bidding credit as part of our broadcast auction procedures for these reasons and also to comply with our statutory mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." [fn. 24] We will monitor the effects of the relaxation of our local TV ownership rules on new entry.

We are now guided in considering initiatives to encourage greater minority and women-owned mass media businesses by a 1995 Supreme Court decision that held that any federal program that uses racial or ethnic criteria as a basis for decision-making is subject to strict judicial scrutiny.... [fn. 25]

We are presently conducting studies that we believe will allow us to address this issue in the context of our broadcast licensing and ownership policies. Upon the completion of these studies, we will examine the steps we can take to expand opportunities for minorities and women to enter the broadcast industry. In the interim, we encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to participation of women and minorities in the mass media.

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fn. 23: See, e.g., Letter from David Honig, Executive Director, Minority Media and Telecommunications [Council], to William Caton, Acting Secretary, FCC, dated March 25, 1997; AWRT Comments.

fn. 24: 47 U.S.C. §309(j)(4)(D). See First R&O, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, 13 FCC Rcd 15920, 15993-15996, ¶¶186-190 (1998) ("Competitive Bidding First R&O").

fn. 25: Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995).

Television Broadcasting, 14 FCC Rcd at 12909-10 ¶¶13-14.

data on minority and female ownership,[95] no aggregate data has been released.

The tax certificate, distress sale and comparative hearing policies were among the Commission's crowning achievements.[96]

95/ [continued from p. 53]

On reconsideration, MMTC advanced several minority ownership proposals. In the course of rejecting these proposals, the Commission stated further (referring to the Section 257 Studies):

> [w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.

Television Broadcasting (Reconsideration), 16 FCC Rcd at 1078 ¶33 (fn. omitted).

As noted earlier, the Adarand litigation is over now, having been resolved favorably to the government. See p. 34 n. 67 supra. The Section 257 Studies were released in December, 2000. The Commission has not issued an analysis of them, and it has twice delayed a response to MMTC's and NABOB's requests that these studies be included in the record of this proceeding. See p. 9 and n. 20 supra.

95/ See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (R&O), 13 FCC Rcd 23056, 23095-98 ¶¶96 (1998) ("1998 Biennial R&O") (deciding to collect data on broadcast owners' gender and race in order to "determine accurately the current state of minority and female ownership of broadcast facilities, determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257...."), recon. denied on this issue (and granted in part on other issues), 14 FCC Rcd 17525, 17530 ¶17 (1999) (emphasis supplied).

96/ The history of the minority ownership policies from 1973 through 1996 is well known, so the most essential facts are recited here in summary form for the uninitiated. A court decision in 1973 required the Commission to take minority ownership into account in comparative hearings. TV-9, 495 F.2d 929. Another decision in 1975 required the Commission to take

[n. 96 continued on p. 54]

Unfortunately, the Commission too often cited these programs as though they were cure-alls. In many of the past rulings in which it refused to develop new minority ownership initiatives, the

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96/ [continued from p. 53]

minority ownership into account in spectrum management. Garrett, 515 F.2d 1056. In 1976, the Commission first included minority ownership as a factor in a spectrum administration case. Atlass, 61 FCC2d 995. The following year, Chairman Wiley ordered an examination of how the Commission's rules could be amended to promote minority ownership; this review led to the adoption of the distress sale and tax certificate policies under Chairman Ferris. See 1978 Minority Ownership Policy Statement, 68 FCC2d at 983. A financing feature was added in 1982 to allow companies controlled by minorities, but with other passive investors, to qualify under the minority ownership policies. 1982 Minority Ownership Policy Statement, 92 FCC2d 849. These policies lifted minority broadcast ownership from 60 stations in 1978 to over 300 stations by 1995.

Along the way, the Commission in 1980 adopted Clear Channels, which added minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A Clear Channels. 78 FCC2d at 1368-69. In 1985, after Clear Channels had produced only thirteen minority owned stations, the Commission repealed the rule. Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules (R&O), 102 FCC2d 548, 558 (1985) ("Clear Channels Repeal"), recon denied, 4 FCC Rcd 5218 (1989). In 1985 the Commission also adopted the Mickey Leland Rule, which allowed a company at the national 12-station limit for AM, FM or TV to hold up to a 49% interest in two more stations if those stations were controlled by minorities (1985 Ownership Recon. Order, 100 FCC2d at 94. The Mickey Leland Rule was slightly modified in 1994. Revision of Radio Rules and Policies (Second MO&O), 9 FCC Rcd 7183, 7191 ¶48 (1994).

In 1995, Congress repealed the tax certificate policy. See Tax Certificate Repeal (discussed on p. 31 n. 59 supra). Comparative hearings were suspended after Bechtel II (Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1992)), which invalidated the "integration of ownership into management" comparative criterion that had been central to the 1965 Policy Statement. The 1996 Telecommunications Act eliminated the Mickey Leland Rule (by eliminating numerical national ownership caps), and it also replaced comparative hearings with auctions. Since the Commission had not performed any Adarand studies by 1995, neither Congress nor the Commission could build race-conscious criteria into the auction rules.

Of the original minority ownership policies, only the distress sale policy is still on the books. It has been used only in two small transactions since 1990.

Commission pointed to its 1978 minority ownership policies and said, in effect, "we don't have to promote minority ownership in the proceeding at hand because we're doing it in these other ways."[97/] These rulings were all wrong. Minority exclusion has always been so extreme that the Commission should have turned over every stone to correct it.

In any event, no such feeble excuse for inaction can be invoked anymore, because circumstances have changed.[98/] The tax certificate policy is dead,[99/] and if it is revived (no sure thing) it will assume a considerably more modest form. In its absence, those with stations to swap in a tax-free exchange enjoy an overwhelming advantage in a contest with new entrants to

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97/ See, e.g., Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (MO&O), 4 FCC Rcd 5102, 5104 ¶19 (1989) (minorities "would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station"); Clear Channels Repeal, 102 FCC2d at 558 (a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership.)

98/ See Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (noting that "[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears," citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

99/ See Tax Certificate Repeal, supra.

purchase a station.[100] Comparative hearings are dead.[101] Auctions, as currently proposed, eviscerate the value of all of these bidding credits, as MMTC has pointed out in an April, 2002 petition to clarify the auction rules which is still awaiting a ruling.[102] Auctions, moreover, require startup equity (the hardest kind to raise), and minorities seldom have ready access to substantial start-up equity. Further, auctions cannot address minority exclusion in most radio markets and virtually all television markets, since the spectrum devoted to radio and television is fully saturated in most of the densely populated areas of the country. And while EEO certainly addresses one of the desirable predicates for ownership (experience in the business), it is hardly a comprehensive, broad-spectrum antibiotic that will remedy the effects of discrimination and fully nurture the growth and survival of minority owned companies.[103]

100/ See McCain Statement on S.3112 ("the tax code makes cash sales less attractive to sellers than stock-swaps. So new entrants and smaller incumbents, which typically must finance telecom acquisitions with cash rather than stock, are less-preferred purchasers than large incumbents. As a result, telecom business sellers have little incentive to sell their businesses to new entrants and small incumbents.")

101/ See 47 U.S.C. §309(j) (authorizing broadcast auctions).

102/ See MMTC, Petition for Clarification in MM Docket No. 97-234 (Competitive Bidding for Commercial Broadcasting and ITFS Licenses) (filed April 19, 2001), re-filed and amplified upon in Comments of MMTC in MM Docket No. 95-31 (Comparative Standards for Noncommercial Educational Applicants) (filed May 15, 2002).

103/ See, e.g., Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (NOI), 11 FCC Rcd 6280, 6306 ¶38 (1996) ("Market Entry Barriers") ("[r]ace or gender discrimination in employment may impede participation and

[n. 103 continued on p. 57]

Consequently, the only tools left to promote minority ownership are the rules governing how much spectrum is devoted to broadcasting and who may occupy that spectrum. In light of the momentousness of the market dislocations contemplated in this whale of a proceeding, the Commission certainly ought to use these tools to the fullest extent possible.

There is one other compelling reason why the Commission must not fail once again to squarely address the minority ownership question: Congress has commanded the agency to do so, repeatedly and in no uncertain terms. In the 1982 Cable Act Amendments, Congress declared:

> an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public" (emphasis supplied). 104/

Congress reiterated this command in the 1992 Cable Act.105/ In the 1996 Telecommunications Act, Congress went further,

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103/ [continued from p. 56]

advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions.") Employment opportunities can serve as a bridge to ownership, but EEO rules are not a substitute for ownership rules, since "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news." TV-9, 495 F.2d at 938.

104/ Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765 (1982) at 26.

105/ Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102nd Cong. 2d Sess. 1992, at 60.

reaffirming that competitive bidding must result in a dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women.106/ In the same statute, Congress included Section 257, one of whose purposes is to promote minority ownership.107/ And if any doubt about Congress' intentions remained, the 1996 Telecommunications Act also amended the very first section of the

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106/ In 1993, Congress adopted 47 U.S.C. §309(i)(A)(3), which provided that "for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including...businesses owned by members of minority groups, and women." In 1996, when Congress repealed 47 U.S.C. §309(i)(A)(3) in favor of auctions, Congress again reiterated that minority ownership was an important objective in fostering minority telecom ownership. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services).

107/ In Section 257 of the 1996 Telecommunications Act, Congress directed the Commission to complete a proceeding "for the purpose of identifying and eliminating...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...." 47 U.S.C. §257(a). Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity." 47 U.S.C. §257(b). Congress also expects the Commission to report, every three years, on "any regulations prescribed to eliminate barriers within its jurisdiction...." 47 U.S.C. §257(c). Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

[n. 107 continued on p. 59]

Communications Act to prohibit race and gender discrimination.108/

This history is unsettling to write or read about, but it cannot be sugarcoated. Like the Black farmers who were honest with the Agriculture Department on the subject of crop subsidies, or the Native Americans who were honest with the Department of the Interior regarding their Trust Fund, we must be honest with the Commission about its historic failure to do as Congress has willed it to do, and as it was morally obliged to do, in its administration of public property.

107/ [continued from p. 58]

> [W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely under represented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

108/ 47 U.S.C. §151 (1996). The 1996 Telecommunications Act added the words underscored below to this provision, which created the Commission:

> [f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, <u>without discrimination on the basis of race, color, religion, national origin, or sex</u>, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service....

Chairman Quello recently reminded us that the task of promoting ownership diversity is incomplete. In a commentary identifying what he considered to be the ten most critical priorities facing today's Commission, Chairman Quello listed as his top three:

(1) "[c]ongratulate [two merging companies] on [inter alia] their intention to give minority companies first option on buying stations";

(2) "[c]ongratulate broadcast leaders...for initiating an investment fund for minority purchase of stations [and]...encourage other broadcasters to also contribute to funding"; and

(3) "expedite establishment of the tax-certificate" policy, which was "an effective, noncoercive way to promote minority ownership." 109/

Fortunately, there is a great deal the Commission can do right now. As public interest groups have counseled with great moral authority, the Commission can abstain from deregulating further. Alternatively, it can eschew deregulation in those areas where any deregulation at all would eviscerate minority ownership, and deregulate in other areas only with great care and thoughtfulness, in carefully managed stages, and with aggressive and creative steps designed to preserve, protect and promote minority ownership.

109/ James Quello, "If I were chairman (again)," Broadcasting & Cable, October 4, 1999, p. 18.

D. Minority Ownership Serves The Public Interest

Depending upon whether the Commission's minority ownership-promoting initiatives are regarded as race-neutral or race-conscious, they would be justified under the rational basis standard or the strict scrutiny standard, respectively.110/ Narrowly tailored policies can be designed to meet either standard. Each of at least three government interests in advancing minority ownership are compelling: promoting competition, promoting diversity, and remedying the present effects of past discrimination in which the government was a passive participant. Although not discussed below, some of the proposals we advocate would also serve the compelling interest of preventing discrimination.111/

1. Minority Ownership Promotes Competition

Commission Martin recently pointed out that:

> A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition. 112/

110/ None of the proposals we advance in these Comments is race-conscious. However, if initiatives based on these proposals fail to cure the problem of minority exclusion from broadcast ownership, the Commission would need to resort to race-consicous means. See pp. 79-81 infra.

111/ See pp. 115-120 infra (proposing an "Equal Transactional Opportunity" program which would import EEO principles into the broadcast transactional marketplace). Like EEO, Equal Transactional Opportunity would help prevent discrimination.

112/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), FCC 02-303 (released November 20, 2002) ("2002 EEO Second R&O") at 112 (Separate Statement of Commissioner Kevin J. Martin).

He is right. And conversely, when talented persons are prevented from contributing competitive acumen to the marketplace, based on their membership in a racial group, consumers are denied the full range of products and services that the marketplace otherwise would provide.

In broadcasting, as in other industries ailing from the absence of minority competition, nonminorities have had a cushier ride to business success because they did not have to face competition from minorities. Lacking the maximum possible competitive spur, these nonminorities inevitably produce an inferior product. For example, the product called "major league baseball", as it was played before Jackie Robinson, was laughably inferior to today's major league baseball. Not only were minorities unable to add their competitive skills to the game, the nonminority players lacked the impetus to play their best either. If Babe Ruth and Walter Johnson had had to bat against Satchel Paige and throw to Josh Gibson, imagine how much better Ruth and Johnson would have played the game.

The impact of integration on competitiveness has been well established by the Defense Department's pioneering and highly successful work in promoting racial inclusiveness.[113/] In the banking field, federal regulators understand the uniqueness of minority owned banks and have undertaken aggressive efforts to

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113/ The Army's aggressive efforts to stay competitive by ending segregation and ensuring full integration at all levels is described in Charles C. Moskos and John Sibley Butler, All That We Can Be (1996).

foster their success.114/ Senator McCain has taken this approach for the media and telecom industries, having introduced the pro-competitive Telecommunications Ownership Diversification Act of 2002 (S.3112):

> [w]hile large companies continue to merge into even larger companies, small businesses have faced substantial barriers in trying to become long-term players in the telecommunications market. These barriers can be even more formidable for members of minority groups and for women, for whom it has historically been more difficult to obtain necessary capital. Since new entry and the ability to grow existing businesses are key components of competition, and since competition is usually the most successful way to achieve the goals of better service and lower prices, restricting small business' ownership opportunities does not serve consumers' interests. 115/

In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices and leaves consumer demand unsatisfied. In the electronic media, a key input into production is the quality and diversity of the ownership pool, consisting of the companies whose management teams, business plans, talent and

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114/ See Policy Statement Regarding Minority-Owned Depository Institutions, Federal Deposit Insurance Corporation (FDIC), 67 F.R. 77-80 (released January 2, 2002), which calls for comments on how the FDIC can implement provisions of Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 that require the Secretary of the Treasury to consult with the Director of the Office of Thrift Supervision and the Chairperson of the Board of Directors of the FDIC to determine the best methods for preserving and encouraging minority ownership of depository institutions. The FDIC noted that it "has long recognized the unique role and importance of minority-owned depository institutions and has historically taken steps to preserve and encourage minority ownership of financial institutions." Id. at 77.

115/ McCain Statement on S.3112, supra.

creativity are the basis for organizing and deploying all other inputs to production. The diversity of the ownership pool is an especially critical input in broadcasting, for which business creativity so often translates into ability to attract creative people to the line staff and manage them effectively. In a business whose product is the distribution of the fruits of talent, it is unsound economic policy to allow market imperfections to exclude anyone on a basis other than merit.

As we have shown, minorities control only a miniscule proportion of broadcast stations, and minorities own an even smaller portion of industry asset value. Minority participation has been depressed by government action and inaction, as well as by societal discrimination. But whatever its causes, the resulting nonparticipation of minorities in ownership is inefficient as a means of organizing production in a business uniquely based on talent. Since talent is equally distributed throughout society, the nonparticipation of large sectors of society in the generation of production of the fruits of talent is inherently inefficient. Whether or not it is anticompetitive, it is macroscopically noncompetitive.116/

116/ This principle applies with special force in industries like radio and television, journalism, movies, music, sports, medicine, education and law, each of which depend heavily on human talent -- even if it may not necessarily apply industries whose primary inputs in production are natural resources such as electricity. For example, in NAACP v. FPC, 425 U.S. 662 (1976), the NAACP had asked the court to find that EEO rules in the power industry would make that industry more competitive. The court found the argument intriguing, but it concluded that the facts did not demonstrate a

[n. 115 continued on p. 65]

Greater minority inclusion in ownership would strengthen the competitiveness of the broadcasting industry in three ways. First, by enabling the minority owned segment of the industry to compete effectively, the Commission would bring about an increase in the number of stations which are operating successfully, staying on the air, and serving the public. Second, minority owned facilities would create jobs which would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace. Third, new facilities owned by minorities and reaching heretofore underserved minority audiences have a net positive effect on the ability of advertisers to reach the entire public.117/

116/ [continued from p. 64]

nexus between minority employment and electric power generation sufficient to require the Federal Power Commission to adopt an EEO rule similar to that in effect at the FCC. In dictum, the court declared that the FCC's mandate to promote diversity justified its EEO regulations. Id. at 670 n. 7. The court left open the question of whether the FCC's EEO rule could have been justified as a means of promoting the competitiveness of the broadcasting industry.

117/ The language in the Omnibus NPRM that refers to minority ownership happens to be located at the end of the section on "Diversity." See Omnibus NPRM, 17 FCC Rcd at 18521 ¶50 and ns. 122-23. The government's interest in promoting competition is at least as important or compelling as the government's interest in promoting diversity. The physical location of the minority ownership issue in the Omnibus NPRM should not control the analysis used to develop the issue on the merits.

2. Minority Ownership Promotes Diversity

Regulation to promote diverse viewpoints seems ineffectual to some, because many broadcasters seldom bother to air viewpoints on local issues anymore.[118/] Yet the paucity of broadcast speech and debate only underscores the heightened importance of structural regulation to promote diversity. After all, broadcasters have

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118/ This phenomenon can be traced to Deregulation of Radio (R&O), 84 FCC2d 968 ("Deregulation of Radio"), recon. granted in part, 87 FCC2d 797 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). MMTC has maintained that "[t]he entirely predictable result of Deregulation of Radio was that broadcasters canceled public affairs programs and substituted higher-profit music or celebrity-talk shows. Today, competing, original local radio news broadcasts are rare -- a particularly unfortunate development in light of the instantaneousness and inexpensiveness of radio newsgathering and the attendant versatility of radio in covering local stories." MMTC Radio Ownership Comments, pp. 18-19 (fns. omitted); see also Graeme Browning, "Shouting to be Heard: Public Service Advertising in a New Media Age," Kaiser Family Foundation (2002) (finding that while 25% of TV and cable network airtime is devoted to paid advertising and promotions, only 15 seconds per hour (0.4% of all airtime) is devoted to PSAs, and 43% of this is located between midnight and 6 AM, with only 9% during prime time.) Today, MMTC has observed, "the radio industry is neither a library nor a supermarket checkout counter; it is more like a library full of empty shelves because someone stole most of the books. The signature fact describing today's deregulated radio industry is that most radio listeners don't hear many 'viewpoints' at all. The least well kept secret in radio is that the majority of radio stations don't articulate very many viewpoints -- even their own." MMTC Radio Ownership Comments, pp. 15-16 (fn. omitted). To be sure, "news or news/talk formats are growing in influence" but "all of the stations in these formats are often held by just one or two owners in a market, and many of these stations air mostly syndicated programming with little or no original programming addressing local community needs. The fact that a few stations may choose to offer these formats hardly excuses the dozens of other stations from their obligation to say something of value to the public within the environment created by their primarily entertainment-based formats." Id., pp. 16-17.

been relieved of their obligations to preserve unique formats,[119] to ascertain community needs,[120] to program to meet those needs,[121] to restrict commercials,[122] to broadcast modest amounts of nonentertainment programming,[123] to broadcast local programming,[124] to observe the Fairness Doctrine,[125] and even to program most of the airtime on stations they own.[126] Thus, the only way the Commission can promote diversity anymore is through the structural rules.[127] The best structural rules would ensure that there is such a multiplicity of voices on the air that a few

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119/ FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

120/ Deregulation of Radio, 84 FCC2d at 993-99.

121/ Id.

122/ Id. at 1008.

123/ Id. at 977.

124/ Id. at 993-99.

125/ Fairness Report, 2 FCC Rcd 5272, 5295 (1987).

126/ 1992 Radio Rules, 7 FCC Rcd at 2787 ¶63.

127/ In a 1970 structural rulemaking, the Commission delivered perhaps the best defense of diversity ever put on paper:

> A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital....It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated.

Multiple Ownership of Standard, FM and Television Broadcast Stations (First R&O), 22 FCC2d 306, 311 (1970).

of them might actually have something to say, and perhaps even have antagonistic things to say.

The Commission has long recognized that minority ownership provides all consumers with viewpoints that they are unlikely to receive elsewhere.128/ Congress agrees.129/

The goal of using racial integration to promote diversity of viewpoints has also become unfashionable to some. After 30 years as the primary justification for the EEO rules, diversity was not cited as a justification for the new EEO rules the Commission adopted two months ago.130/ Yet there is nothing shocking or illogical about the concept that an integrated workplace, an integrated control group in a company, or an integrated industry yields a different and better product for the consuming public. Consider how different and better WLBT-TV was in 1970 -- under

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128/ See Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). The Waters decision followed the D.C. Circuit's directive that the Commission consider minority ownership as a factor in comparative hearings. TV-9, 495 F.2d at 935-38.

129/ In 1982, Congress determined that "an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765 (1982) at 26. See also discussion of subsequent congressional ratification of minority ownership as a means of fostering diversity, provided at pp. 57-59 supra.

130/ See 2002 EEO Second R&O, supra.

integrated ownership, minority management and an integrated workforce -- than it had been earlier under all-White ownership, management and staffing. Imagine that, in the 1950s, the publishers of the Black newspapers of the day had also owned television stations. Think of how much shorter the civil rights struggles would have been, and how many fewer people would have suffered and died. After a few years under the microscope of integrated television stations' news and public affairs programs, segregation would have crumbled under its own weight.131/

Not only is the nexus between integration and viewpoint diversity logical, it has stood up to the light of scholarship. Extensive research documents that minority owned broadcasters

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131/ The impact of minority participation in media on the way Americans see the world and themselves may also be appreciated from the headlines of today. Most of the nation feels proud of itself after Senator Lott's resignation as Senate Majority Leader, but the truth is that after the Senator made his infamous December 5, 2002 remarks on C-SPAN, the story languished for days in the nonminority media. Just one national reporter -- Gwen Ifill of PBS's "Washington Week in Review," played the clip the evening of December 5. On the other hand, scores of nonminority reporters (including twelve who actually covered the Thurmond birthday party where Lott spoke) thought the matter unimportant at the time. Ultimately, a racially integrated reporting team at Time magazine wrote the authoritative treatment of Lott's segregationist record, and Senator Lott's inability to get the better of BET's Ed Gordon brought his Senate leadership career to an end. In a typical post-mortem reaction, Washington Post reporter Mark Leibovich, who initially failed to appreciate the importance of the story, told his newspaper that "I feel badly about it in retrospect. I kick myself." See Howard Kurtz, "A Hundred-Candle Story And How To Blow It," Washington Post, December 16, 2002, p. C-1. Lott's comments hit minorities' radar screen immediately (and also hit many nonminority conservatives' radar screens immediately) but they failed to raise the eyebrows of almost all nonminority journalists. Id.

offer viewpoints not provided elsewhere.[132/] Metro Broadcasting cited several studies finding that minority owners offer different programming than nonminority owners.[133/] One of the Section 257 Studies, the Santa Clara Study, also reaches this conclusion,[134/]

132/ These studies are collected in Comments of Consumers Union et al. in MM Docket No. 01-235 (Cross-Ownership of Broadcast Station and Newspapers) (filed December 3, 2001), pp. 53-54 ns. 87-89 (incorporated by reference). Additional studies are collected in the Comments of EEO Supporters (MMTC et al.) in MM Docket No. 98-204 (Broadcast and Cable Equal Employment Opportunity Rules and Policies) (filed March 5, 1999), pp. 166-71 (incorporated by reference).

133/ Summarizing this evidence, Justice Brennan's majority opinion concluded:

> [e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990) ("Metro Broadcasting").

134/ Christine Bachen, Allen Hammond, Laurie Mason and Stephanie Craft, "Diversity Of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity And News And Public Affairs Programming?" Santa Clara University School of Law (2000) ("Santa Clara Study"). This study found that minority owned radio stations aired more racially diverse programming than did majority owned stations. Minority owned radio stations were significantly more likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings. They were also more likely to have a minority format for their music programming. Minority owned television stations were significantly more likely than their majority owned counterparts to have current events related programming and issues relevant to senior citizens. Furthermore, radio stations and television stations with more minorities on their staffs had more racially diverse programming than comparable stations with few minority employees. Owner involvement, ownership structure, and station revenue were not predictors of programming diversity.

as does the Ivy Group Study.[135] Furthermore, minority owners tend to predominate in niche formats on standalone stations, thereby further promoting content diversity.[136]

The viewpoints of minorities -- including the diversity of viewpoints held within minority communities[137] -- can enrich public discourse, reduce stereotyping and unify the nation. Promoting diversity of viewpoints has always been and should continue to be a primary reason for Commission action to preserve, protect and promote minority ownership.

135/ The Ivy Group Study concluded that the declining participation of small, women and minority owned businesses in broadcasting has resulted in diminished community service and diversity of viewpoints. See discussion of the Ivy Group Study, p. 31 n. 59 supra.

136/ In radio, program diversity has been advanced primarily by standalone stations, not clusters. MMTC's comprehensive study, "The Relationships Between Platform Size and Program Formats in Commercial Radio" (March, 2002) (appended as Appendix 2 to the MMTC Radio Ownership Comments), found that while large local station clusters ("platforms") have contributed to the variety of rock-based popular music formats heard on the radio, it is the standalone stations that have sustained such major format types as Spanish language and religious programming, and such niche formats as bluegrass, the blues, Chinese programming and radio for children. Often, stations adopt these specialized formats to protect themselves from platform owners, who seldom duplicate this programming and cannot sell around it. Minority owners have been disproportionately represented in these niche formats.

137/ The fact that "not all minorities think alike" is often used as an argument against diversity-promoting regulation -- but actually the argument cuts the other way. "Not all minorities think alike" does not mean that "all minorities think like White people," such that a media industry controlled entirely by White people would yield the same range of viewpoints that would be produced by a media industry whose ownership ranks are integrated. The fact that "not all minorities think alike" is one reason why the nation needs more than just token minority ownership. Listeners and viewers need to hear hear the views of a broad spectrum of minorities who do not agree with one another on every issue.

3. Minority Ownership Helps Remedy The Present Effects Of Past Discrimination

In the 1996 Section 257 Inquiry, the Commission acknowledged that discrimination can be a market entry barrier.138/ Further, the Supreme Court has found that the governmental interest in remedying past discrimination can meet even the compelling interest standard.139/ Such an interest permits an agency to remedy the consequences of its own participation in discrimination, even, in some cases, if race-conscious measures are required.

We have documented the scope and the nature of the Commission's own involvement in the discrimination against minority broadcasters, including its assistance to segregated

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138/ See Section 257 Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (NOI), 11 FCC Rcd 6280, 6282-83 ¶3 (1996).

139/ See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) ("Croson"), finding that in order to establish a compelling interest, the government must show "a strong basis in evidence for its conclusion that remedial action (i)s necessary" (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) ("Wygant"). The Croson court also held that a government actor may not rely on general societal discrimination in order to justify a race conscious program. Id. at 499. Instead, the government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a "passive participant," id. at 492 (plurality opinion), as is the case here. The governmental actor must possess evidence that its own practices were "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. Id. at 504. Justice O'Connor's majority opinion in Adarand recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 515 U.S. at 237.

state universities, its licensing of segregationists and discriminators, its use of irrationally stringent financial and other attributes as licensing criteria, and its failure to enforce its equal employment regulations.140/ Whether characterized as ratification, validation, permissiveness, benign neglect, or passive participation, the agency's acts and omissions were a very significant reason why minority ownership is so palpably inadequate. To be sure, there were other causes of minority media exclusion, but the fact that an injury has many causes neither nullifies any of these causes nor exempts any causing party from its responsibility to help cure the injury.

The Commission has the authority, the Congressional mandate, the research findings and the administrative tools to cure minority media exclusion. Now it must exercise moral authority, and do whatever it takes.

E. The Commission Should Design Its Structural Rules To Preserve, Protect And Promote Minority Ownership

We offer these useful axioms derived from history and experience.

1. It Is No Longer Reasonable To Invoke Existing Programs Or Hope For New Ones In Order To Rationalize Inaction

In the past, the Commission has far too often explained its refusal to take new steps to promote minority ownership by pointing to initiatives already on the books.141/ Circumstances

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140/ See pp. 19-31 supra.

141/ In Television Broadcasting, the Commission declined to consider minority ownership proposals, pointing instead to the

[n. 141 continued on p. 74]

have changed, however. There are no programs on the books, save the almost never-used distress sale policy. The one program under consideration in Congress, Senator McCain's Telecommunications Ownership Diversification Act, is most deserving of adoption. However, it is unavoidably modest, and it is targeted to only one of several basic needs -- overcoming sellers' preference for tax-free exchanges if their properties have low tax bases. Bidding credits -- if the Commission ever readopts broadcast auction rules -- are usually only valuable for small market FM properties. Thus, the Commission should treat this proceeding as a blank slate for minority ownership initiatives.

2. "Studying" Or "Monitoring" The Problem Is Too Late After Deregulation Is Allowed

Most physicians agree: it is ill-advised to perform x-rays after the patient is in the grave. Likewise, "monitoring" the effects of the media consolidation process after it is finished is meaningless. In the civil rights field, promises to conduct post-mortem "monitoring" are often forgotten, because a government that

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141/ [continued from p. 73]

"new entrant bidding credit" and to the Section 257 Studies, while also promising to monitor minority ownership and to encourage incubators. 14 FCC Rcd at 12909-10 ¶¶13-14 (full text set out on pp. 51-52 n. 94 supra). None of this was realistic, to put it gently. The "new entrant bidding credit" is useless for television, since there are essentially no new television allotments to be had in the top 200 markets. The Section 257 Studies have been gathering dust for two years. There has been no monitoring of minority ownership (although the Commission gathered data for that purpose in the 1998 Biennial R&O, 13 FCC Rcd at 23095-98 ¶¶96), and no incubators have been created. Is it any wonder that civil rights organizations appraise the agency's civil rights jurisprudence with skepticism?

would make a meaningless civil rights promise too often also lacks the will to honor it. That explains, among so many other things, the Agriculture Department's 1980 unimplemented plan to "monitor" the Department's own mistreatment of Black farmers, or the Interior Department's 1890 unimplemented plan to "monitor" the abysmal conditions of Native Americans after the federal government tore them from their ancestral lands.

The federal government knows it really means to conduct monitoring. When the DEA "monitors" entry points, its monitoring leads to arrests of drug smugglers. Because Deputy Attorney General Katzenbach went to Oxford in 1962 to "monitor" the integration of the University of Mississippi, James Meredith was enrolled. Because the Justice Department "monitors" local election laws under Sections II and V of the Voting Rights Act, citizens are able to cast ballots and have their votes recorded. And when the Commission recommences its monitoring of broadcast EEO compliance (through random audits this time), its monitoring will prevent discrimination and produce equal employment opportunity.

In the wake of the instant proceeding, research that drives the pace of deregulation would be the right way to bring about a healthy, racially integrated media ownership environment while, at the same time, permitting some deregulation to occur.142/

142/ See pp. 82-101 infra. Nonetheless, the Commission should continue gathering data that is not used directly for regulatory implementation. The Commission's long-term databases on EEO and universal service are essential for pure research and long-term policymaking.

3. The Commission Should Tailor Its Initiatives To The Need To End Minority Exclusion From Media Ownership

Token or throwaway programs might make the agency institutionally feel that it has achieved something, but snails-pace progress is unacceptable in the wake of two generations of discrimination. The Top 50 policy, the Clear Channels policy, the Mickey Leland Rule are all examples of programs that were easy grist for repeal because they came to be regarded as mere underbrush.143/ A real program such as tax certificates, with results and a constituency, is much more likely to remain in effect for many years and achieve something of lasting value.144/

As we have documented at length, the issue of minority exclusion from broadcast ownership is the most critical need to be addressed in this proceeding. No stone should be left unturned, no proposal tabled, and no dialogue cut short until the issue is fully and finally resolved.

143/ See p. 26 n. 46, p. 54 n. 96, and pp. 96-97 and n. 165 supra.

144/ In 1986, the Commission suddenly suspended the distress sale and comparative hearing policies on the theory that these longstanding programs were race-conscious. The tax certificate policy was race-conscious too, but that program was not suspended (on the transparent pretext that no application involving the program was before the Commission; yet the Commission also held that subsequent tax certificate applications were to be granted routinely.) Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications (NOI), 1 FCC Rcd 1315, 1319 ¶26 (1986). While not stated in the decision, the reason the tax certificate program was allowed to remain in effect was that it was a real program with a real constituency.

4. The Commission Should Give Some Weight In This Proceeding To Voluntary Industry Efforts, Which Are Not A Panacea But Should Be Encouraged

It is reasonable for federal officials to entreat groups of regulatees voluntarily to undertake lawful actions, under two conditions: (1) the action of any individual regulatee in response to the government's general entreaty cannot result in a government benefit to her, nor can the inaction of any individual regulatee result in a government action adverse to her; and (2) the collective action of many regulatees is significant and genuine, and is unlikely to disappear if favorable regulations are adopted.

Under these conditions, the government may officially notice and regard collective industry initiatives as a favorable part of the market environment when deciding how much deregulation can be justified. Voluntary industry efforts are like any other market condition: the fact that they are often nonpecuniary does not make them irrelevant to agency decisionmaking, any more than the existence of noncommercial broadcasting is irrelevant to the regulation of commercial broadcasting.

Indeed, from the day President Kennedy encouraged Americans 42 years ago to "ask not what your country can do for you, ask what you can do for your country," jawboning has been regarded as part of the moral and visionary leadership expected of federal officials. FCC commissioners are no exception. Contrary to the stereotype, they are not bean-counters hunched over their desks all day, rubber-stamping applications. They are leaders who exercise judgment, have opinions, and articulate those opinions

with moral authority. They can and should jawbone. No subject before the FCC or any other agency is more suitable for jawboning than the protection of a minority from the excesses and indifference of the majority.

Nonetheless, jawboning is a supplement to regulation, not a substitute for it, because the results of jawboning are often ephemeral. It would be a serious mistake for an agency to hope that the unpredictable charitable impulses of industry to resolve a massive civil rights problem.

To be sure, sometimes jawboning has subtle positive impacts not noticeable in the short run. For example, in civil rights, jawboning may cause company CEOs to start thinking about a problem that seldom commands their attention in their daily travels -- an exercise that may bear fruit in the years to come. But much of the time, jawboning yields very little.

Applying these principles here, what has the industry done voluntarily, as an industry, of which the Commission can take official notice? Those who, like us, are skeptical about deregulation might feel tempted to say "the industry has done nothing," but that wouldn't be fair because three initiatives are truly noteworthy, genuine and long-lasting:

First, the NAB Foundation's efforts since 1999 to provide ownership training to minorities and women through the NAB Leadership Training Program program are first-rate and could not be more genuine or useful.

Second, the efforts of the two largest radio companies to practice equal opportunity marketing of station spinoffs attendant to mergers are worthy of notice. Although these are just two companies, and their efforts are still far ahead of the rest of the industry, the fruits of their efforts (51 stations placed in minority hands thus far) are profoundly significant.

Third, the 15-company (and NAB) initiative known as the Quetzal/J.P. Morgan Fund is worthy of credit, although its fairly modest size ($175 million, not all of which is devoted to broadcasting) and unavoidably tight investment criteria have circumscribed its impact across the industry as a whole.

Since each of these initiatives is significant, genuine and long-lasting, they are entitled to credit as the Commission evaluates how much deregulation is appropriate and how fast it should proceed. Further, the Commission should encourage the industry to do even more.

5. The Commission Should Be Prepared To Develop Race-Conscious Efforts As A Last Resort In Case More Modest Initiatives Fail

Generally, race-neutral programs should be attempted before race-conscious ones are considered.145/ Consequently, we have proposed only race-neutral programs at this time.146/

145/ See Croson, 488 U.S. at 507-510.

146/ Our proposals would assist socially and economically disadvantaged small business concerns ("SDBs"). The term is defined precisely in the SBA's governing statute. See 15 U.S.C. §631(a)(4)(A). However, the Commission might need to define "small" in a manner that more realistically reflects the size of a

[n. 146 continued on p. 80]

Time may reveal that the race-neutral measures advocated in these Comments are inadequate. Fortunately, the Section 257 Studies establish that race-conscious measures would be eminently justifiable in order to meet the compelling governmental interest in remedying the consequences of Commission's own involvement in

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146/ [continued from p. 79]

broadcaster. See, e.g., Television Broadcasting, Appx. A (Final Regulatory Flexibility Analysis), 14 FCC2d at 12971 n. 250 (expressing the Commission's tentative belief that "the SBA's definition of 'small business' greatly overstates the number of radio and television broadcast stations that are small businesses" and reserving "the right to adopt a more suitable definition of 'small business'" as applied to mass media.)

The steps we propose herein are vital to securing the full inclusion of all disadvantaged persons, including many people of color, in the mass media. They are justified to fulfill Congress' instruction to all agencies to assist SDBs' efforts to secure growth opportunities and obtain access to capital. See Small Business Economic Policy Act of 1990, 15 U.S.C. §631(a) and (b), in which Congress declared that

> it is the continuing policy and responsibility of the Federal Government to...foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses. Congress further declares that the Federal Government is committed to a policy of utilizing all reasonable means...to establish private sector incentives that will help assure that adequate capital at competitive prices is available to small businesses. To fulfill this policy, departments, agencies, and instrumentalities of the Federal Government shall use all reasonable means to coordinate, create, and sustain policies and programs which promote investment in small businesses.... (emphasis supplied).

past discrimination.[147/] Thus, the Commission should expressly leave open the option of turning to a race-conscious plan, as a last resort, if that is necessary to bring about the integration of the ownership ranks of democracy's most important industries.

147/ Race-conscious remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct. Adarand, 515 U.S. at 269 (Souter, J., dissenting) ("[t]he Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.") A prior judicial, administrative, or legislative determination of discrimination by the government is not required before the government may voluntarily choose to use remedial efforts. Croson, 488 U.S. at 500. However, an agency must have a "strong basis in evidence," for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others, and that a race-conscious remedial effort is appropriate. Id. at 500, quoting Wygant, 476 U.S. at 277. This does not mean that an agency must admit that it discriminated, either intentionally or inadvertently, before adopting remedial measures. See Johnson v. Transportation Agency, 480 U.S. 616, 652-53 (1987) (O'Connor, J, concurring); Wygant, 476 U.S. at 290 (O'Connor, J. concurring).

F. Six Ways The Commission Can Preserve, Protect And Promote Minority Ownership

We present here six general paradigms for remedying minority exclusion from media ownership.

1. New Regulations Should Be Phased In Through A "Staged Implementation Plan," With Each New Stage Beginning After The Commission Certifies That Levels Of Diversity, Competition, Localism And Minority Ownership Remain Healthy

We have expressed strong opposition to many forms of deregulation and grave skepticism about others. Some of the forms of deregulation under consideration in this proceeding (especially more television duopoly) should be rejected outright because they would devastate minority ownership no matter how they are implemented. However, we also acknowledge that the public could benefit if some forms of deregulation are implemented the right way.148/ Further, we recognize that the Commission might ultimately adopt some deregulatory steps; otherwise, it would

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148/ For example, in its comments in the radio ownership docket, and based on research studies it performed on minority ownership and on radio formats, MMTC expressed a desire to preserve a balance between platforms and independents, thereby capturing the variety and efficiency benefits of one business form and the diversity and competitive benefits of the other. To preserve this balance, MMTC urged the Commission to ensure that the platforms do not control so much advertising revenue that independents cannot survive or offer meaningful local service. MMTC offered a formula defining when a market "tips" in this manner. Its formula was more objective and practical than the arbitrary 50/70 screen. It was based on the operation of radio markets, it was applicable to any market, and it can be understood by anyone who has mastered 9th grade algebra. The formula would ensure that after market's two largest platforms took their share of market revenues, enough revenue would be left over to cover the operating costs, programming costs, and a reasonable profit for independently-owned stations in the market. See Reply Comments of MMTC in MM Docket No. 01-317 (Radio Ownership) (filed May 8, 2002) ("MMTC Radio Ownership Reply Comments"), pp. 22-27.

hardly have bothered putting the public and its staff through this prodigious exercise.

Consequently, we recommend that <u>if</u> the Commission adopts a plan of deregulation, it should phase its regulations into operation in steps, through a "Staged Implementation Plan."

No motorist would blindly accelerate down a crowded highway with blinders on and no brakes, not knowing what lies ahead. Prudent motorists have a plan to arrive at their destination, and usually can predict their time of arrival with close accuracy -- but they drive with their eyes open, and if unexpected road conditions await them, brakes are at their disposal.

Likewise, the Commission faces uncertain future marketplace conditions as it plans a journey that could include deregulation. The prudent course would be choose an ultimate destination, predict the time of arrival with what should be reasonable accuracy, but drive toward that destination with open eyes and the ability to apply the brakes if an unexpected surprise awaits along the journey.

We set out below an operational framework for a Staged Implementation Plan. We are not wedded to all of the details, and we welcome all suggestions that could improve the idea.

a. <u>Sample Calendars For Staged Deregulation</u>

Under this plan, and only way of illustration, if local market deregulation (<u>e.g.</u> newspaper/broadcast crossownership) were undertaken, it might take place in five Stages, with a new Stage every two years to correspond to the biennial review process in 47 U.S.C. §202(h).

Figure 1: Sample Market Size-Based Deregulation Plan

Stage 1: DMAs 1-10 in 2003

Stage 2: DMAs 11-25 in 2005

Stage 3: DMAs 26-50 in 2006

Stage 4: DMAs 51-75 in 2009

Stage 5: DMAs 76-100 in 2011

If it is undertaken, national deregulation (e.g. the television ownership caps) might be liberalized at the rate of one additional percentage point of coverage (or of audience, or advertising share) in five Stages, one Stage every two years, from 2003 through 2011, as follows:

Figure 2: Sample National Coverage-Based Deregulation Plan

Stage 1: 36% coverage in 2003

Stage 2: 37% coverage in 2005

Stage 3: 38% coverage in 2006

Stage 4: 39% coverage in 2009

Stage 5: 40% coverage in 2011

These numbers are illustrative and arbitrary, of course. Every such set of numbers will unavoidably be somewhat arbitrary, including any numbers contained in the final rules.

b. How Deregulation Would Be Triggered By The "Healthy Markets Algorithm" -- A Scientific Measurement That Can Be Used To Certify That The Market Is Healthy

For each form of deregulation (e.g. newspaper/broadcast crossownership; we refer henceforth to each type of business combination under review as a "Form of Deregulation"), the Commission would measure the health of the market, with each Stage of deregulation commencing when the Commission certifies that the

market is healthy. Here is how this process might work in practice.

i. Establishing The Healthy Markets Algorithm

In its First Report and Order in this docket ("2003 Omnibus First R&O") (anticipated this spring), the Commission would identify which forms of deregulation (if any) it wants to undertake, and how far it wants deregulation to proceed. It would then convene, this summer, a negotiated rulemaking in which all stakeholders would work together, with economists and social scientists backing them up, to arrive at an objective, independently verifiable and quantifiable formula that defines a healthy market (the "Healthy Markets Algorithm").

The Healthy Markets Algorithm would allow the Commission to take the market's temperature before each Stage of deregulation is anticipated to occur.

The Healthy Markets Algorithm would be applied separately to each Form of Deregulation but, in keeping with the Sinclair decision, the Healthy Markets Algorithm applicable to each Form of Deregulation would have the same voice test.149/

The Healthy Markets Algorithm would include both statistical and anecdotal components:

149/ As essentially required by Sinclair, 284 F.3d at 162.

Statistics. The Commission would examine statistical benchmarks for the market's health, using measurement tools that focus upon each of four factors:

a. Diversity

b. Competition

c. Localism (for rules designed to promote localism)

d. Minority ownership.150/

Anecdotal Evidence. Supplementing the statistical measurements would be anecdotal evidence that can help the Commission understand the meaning of the statistics, and shed light on whether any of the statistical readings are anomolous.151/ For example, a head-count of the number of independent voices in a market may not disclose the fact that these voices are either extraordinarily successful (i.e., they are the market leaders) or extraordinarily unsuccessful (i.e., unusual

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150/ Measuring minority ownership in the aggregate and linking the Stages to this measurement would not cause this plan to be race-conscious, since the measurements and any possible freeze would apply across the board -- affecting minorities and nonminorities equally. No one would either receive or be deprived of a government benefit because of her race. Nor could anything an applicant does or omits to do, because of race, affect her entitlement to a government benefit. Race would "matter" only insofar as, in the aggregate, minority ownership levels are an indication of the health of the market.

151/ For example, as MMTC recommended in the television duopoly proceeding,

> [t]he Commission's monitoring program should also determine the extent to which losses of stations owned by minorities or SDBs were attributable to the new rules. Whenever minorities or SDBs decide to sell or shut down a station, the Commission should ask them how these new rules played a part in their decision.

MMTC Television Ownership Reconsideration Petition, p. 11 n. 35.

economic conditions have forced them to lay off all of their programming staffs).

ii. Applying The Healthy Markets Algorithm By Issuing Healthy Markets Certifications

To apply a Healthy Markets Algorithm, the Commission would examine the statistical and anecdotal evidence it has gathered with respect to a particular Form of Deregulation. Based on this evidence, if the market is healthy the Commission would issue a "Healthy Markets Certification" based on its application of the Healthy Markets Algorithm.

The process of rendering a Healthy Markets Certification could be susceptible to some degree of subjectivity if the statistical evidence conflicts with the anecdotal evidence. That is unavoidable in evaluating any social science or economic data, however. Like any other agency dealing with social science research, the Commission must be expected (and, within reason, trusted) to act based on its judgment rather than on ideology.

Indeed, the Commission will need to exercise its judgment irrespective of whether it deregulates all at once or through a Staged Implementation Plan. To minimize the possibility of subjective or inconsistent results, the Commission should state, in advance, the weight it will give to anecdotal evidence, and it should provide illustrations of the kind of anecdotal facts which would cause it to override statistical findings.152/

152/ These illustrations could be written into the rules as "Notes" interpreting the rules themselves. Presently, there are ten "Notes" to 47 C.F.R. §73.3555.

iii. Authorizing Each Stage In A Staged Implementation Plan To Take Effect Based On Healthy Markets Certifications

The key to linking deregulation to measurements of market health is in measuring the market with the Healthy Markets Algorithm in the even-numbered years, and implementing the Stages of a Staged Implementation Plan occur in the odd-numbered years.

For example, suppose it is 2004, and the First Stage of a Staged Implementation Plan for newspaper/broadcast crossownership had gone into effect in 2003.153/ In 2004, the Commission gathers the statistical and anecdotal evidence it needs in order to apply its Healthy Markets Algorithm. If, for example, as applied to newspaper/broadcast crossownership, the Healthy Markets Algorithm reveals that the market is healthy, the Commission in 2004 would issue a Healthy Markets Certification for newspaper/broadcast crossownership. The Second Stage of the Staged Implementation Plan for newspaper/broadcast crossownership would then go into effect in 2005 as planned, as contemplated in the 2003 Omnibus First R&O.

Suppose, however, that the 2004 reading of the Healthy Markets Algorithm for newspaper/broadcast crossownership shows that the market is unhealthy. A year would remain before the Second Stage of the Staged Implementation Plan would normally take effect, and the Commission would use that year wisely. First, it

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153/ The record in this proceeding would establish the initial health of the market, enabling the First Stage of any Staged Implementation Plans to take effect in 2003. Section 202(h) can be read to require some immediate, initial deregulatory action if justified by the record. See discussion at pp. 99-101 infra.

would ask the public to provide additional anecdotal information that could shed light on why the market is unhealthy, whether a freeze would produce undesirable cross-media competitive effects,[154] and what the Commission could do to restore the market to health and thereby avoid stopping the clock on its Staged Implementation Plan. For example, if the market is unhealthy because of an absence of competitors, the Commission could accelerate the process of making new allotments possible,[155] and it could seek further tax relief or an appropriation from Congress to strengthen independent media outlets. Upon taking such corrective steps, the Commission could allow the next Second Stage to begin in 2005.

Suppose that notwithstanding the corrective steps taken in 2004-2005, the Healthy Markets Algorithm in 2006 reveals that the market is still unhealthy. During 2006, the Commission would ask the public whether the data is wrong. If the data is accurate, and no further corrective steps can be undertaken, the Staged Implementation Plan would be frozen in 2007. Meantime, the Commission would redouble its efforts to take corrective steps to

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154/ For example, suppose that the Staged Implementation Plan for one Form of Deregulation goes into effect without a freeze, but another Form of Deregulation remains frozen because, as to that Form of Deregulation, the market is unhealthy. One argument the Commission certainly could consider is that the growing competitive strength of those benefitting from the Form of Deregulation that was allowed to go forward is impairing the competitive ability of companies that could not expand their market positions as quickly because of the freeze.

155/ See pp. 128-41 infra.

restore the market to health. Thus, if the 2008 reading of the Healthy Markets Algorithm reveals that the market has been restored to health, the Third Stage of the Staged Implementation Plan would commence at that time.

c. Why A Staged Implementation Plan Is Better Than One-Shot "Over-The-Cliff Deregulation"

We began this discussion with the metaphor of a motorist, pointed in the direction of her destination, but driving with blinders over her eyes and no brakes. In this proceeding, this spring, the Commission will decide upon its destination and it will fix a time for arrival. A Staged Implementation Plan would provide both eyesight and brakes. These tools would come in handy if a bridge is out. Thus, we refer to sudden, one-step massive deregulation as "Over-the-Cliff Deregulation."

As described below, a Staged Implementation Plan would be superior to Over-The-Cliff Deregulation in at least six ways.

i. Irreversible Errors Can Be Prevented Based On Sound Science

A Staged Implementation Plan would ensure that the Commission can avoid causing irreversible damage if a deregulatory step proves to be a mistake.

Any of four scenarios would characterize the implementation process:

First Scenario -- Consistently Healthy Markets. If the market remains healthy while deregulation is implemented, the Staged Implementation Plan would proceed at the pace initially contemplated.

Second Scenario -- Signs Of Ill Health. If the market shows signs of ill health while deregulation is being implemented, the Commission can design mid-course corrections that maintain the market's health and still allow the Staged Implementation Plan to proceed at the pace initially contemplated.

Third Scenario -- Serious Illness. If the market becomes seriously unhealthy, the Commission can freeze deregulation until the market's health is restored, thereupon allowing the Staged Implementation Plan to proceed to its conclusion at a slower rate than was originally contemplated but with only minimal harm borne by the public during the journey.

Fourth Scenario -- Incurable Illness. If further deregulation would cause diversity, competition, localism or minority ownership to collapse, deregulation would stop. That would save the Commission from ever having to "put the genie back in the bottle," as Commissioner Copps has pointed out.156/

The Commission's ability to proceed along these four scenarios is far preferable to passive, meaningless "monitoring" whose outcome would never affect an actual regulatory event.157/ Structural deregulation of the industries most critical to democracy is far too important to do the wrong way. A Staged Implementation Plan would allow deregulation that does not impair

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156/ See Omnibus NPRM, 17 FCC Rcd at 18567 (Concurring Statement of Commissioner Michael J. Copps) ("[s]uppose for a moment that the Commission decides to remove or significantly change current limits on media ownership -- and suppose our decision turns out to be a mistake. How do we put the genie back in the bottle then? No way.")

157/ See pp. 74-75 infra.

the market's health to occur unimpeded; to allow deregulation that can impair the market's health to occur while the Commission takes steps to maintain the market's health; and deregulation that seriously endangers the market's health to stop.

ii. Phased-In Deregulation Avoids Costly Market Dislocations Based On Speculation

A Staged Implementation Plan would avoid market disruptions that are often caused by very dramatic and sudden deregulation. Investment decisions have been based on projections that assume the existence and continuation of a given regulatory structure. Thus, when that regulatory structure changes very suddenly, investment decisions may come to be based on guesswork. Too-sudden deregulation has often led to speculation and a sudden run-up in prices that doesn't reflect properties' real values.158/ Business plans, particularly those of small businesses, will suddenly prove outdated, causing investments in small businesses to dry up. These unfortunate but predictable consequences of Over-The-Cliff Deregulation could undermine the Commission's objective of expanding economic opportunity in broadcasting.

158/ Deregulation in the airline industry in 1978 provides a textbook example of this phenomenon.

iii. Businesses Lacking Easy Access To Capital, Particularly Minorities, Would Have A Chance To Adjust And Survive

A Staged Implementation Plan would enable those lacking quick access to capital -- particularly minorities -- to have sufficient time to reconfigure themselves, revise their business plans, raise new capital, and find stations to purchase, thereby remaining competitive in the new regulatory environment. In this way, the Commission could avoid the post-1999 experience with television duopoly, whose sudden impact caused a rush of applications (all filed November 16, 1999) and led to a dramatic and disturbing reduction (from 33 to 20 in three years) in the number of minority owned television properties.159/

iv. Staged Implementation Would Be A Ready-Made Template For SDB Incentive Programs That Foster Minority Ownership

A Staged Implementation Plan would provide a logical template for the implementation of incentive programs whose impact would benefit minority ownership. Eight such potential initiatives are described in the next Section of these Comments.160/

A very significant initiative, by a licensee, that assists SDBs would be defined in the rules as a "Qualifying Activity." Suppose that a certain Form of Deregulation is to occur in five Stages, one Stage every two years depending on a measurement of the market's health at each Stage, as described above. Suppose, further, that it is early in 2004, and the First Stage occurred in

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159/ See discussion at p. 18 supra.

160/ See pp. 102-15 infra.

2003. A company wishes to undertake a merger. One of the acquisitions to be included in the merger would not otherwise be rule-compliant until after the Fifth Stage occurs in 2011. If the company pledges to perform four Qualifying Activities -- one for each upcoming Stage -- the Commission could find that this pledge is so beneficial to the public interest that it more than counterbalances any potential adverse impact of a station acquisition that occurs four Stages earlier than otherwise contemplated by the Staged Implementation Plan. A few combinations happening earlier than otherwise contemplated under the Staged Implementation Plan would not materially disserve the public interest, and they would be justifiable based on the greater good flowing from the Qualifying Activities of the applicants seeking relief.161/

On the other hand, an application that would not become rule-compliant even after the final Stage of the Staged Implementation Plan would be dismissed as inconsistent with the rule.162/

Thus, applicants would know, in advance, whether their applications would qualify, what range of flexible options they have at their disposal to enable them to qualify, and what applications will not qualify. Regulatees would be able to make

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161/ The closest analogue to this approach is the Mickey Leland Rule, which allowed a company at the national 12-station limit for AM, FM or TV to hold up to a 49% interest in two more stations if those stations were controlled by minorities. See 1985 Ownership Recon. Order, 100 FCC2d at 94. NABOB's 1992 proposal for an incubator program (which the Commission put out for comment, but has yet to act upon) also resembles this approach. See 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6391-92 at ¶¶20-26.

162/ See U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

firm and achievable plans, and they would possess the flexibility to implement those plans by choosing Qualifying Activities that best suit their capabilities.

Furthermore, nothing could be more equitable than placing the responsibility for undertaking Qualifying Activities that tend to promote minority ownership on those who seek special privileges, the unrestricted award of which otherwise would have tended to inhibit minority ownership. An applicant not wishing to perform a Qualifying Activity would be deprived of nothing to which it would otherwise have been entitled.

In order to meld the Staged Implementation Plan paradigm with the Qualifying Activities paradigm, a number of technical issues would need to be answered, including:

1. Should the magnitude of the otherwise-nonqualifying transaction bear some quantifiable relationship to the magnitude of the Qualifying Activity? For example, could a company's sale of a station in Yuma to an SDB merit approval of the company's acquisition of a station in Phoenix?

2. When must the Qualifying Activities be performed?

3. How would the Commission verify completion of the Qualifying Activities?

4. How would the Commission ensure that a Qualifying Activity is really something that adds value to the public and not something that the company would have done anyway (e.g., selling a station to an SDB that would have gotten the deal anyway because it was willing to pay a premium price for entry)?

5. What should the Commission do if a Qualifying Activity is not performed due to the deceitfulness of the applicant, the bad judgment of the applicant, a bankruptcy, the actions of third parties, or Acts of God?

6. What procedures would be needed to ensure that the Qualifying Activity has lasting value? For example, if a Qualifying Activity is selling a station to an SDB, should the buyer be subject to an antitrafficking provision?

These issues are not beyond the problem-solving capacities of human minds working collaboratively. All of these questions can be answered in a negotiated rulemaking, such as the one we propose herein.[163]

v. After Writing Staged Implementation And SDB Incentives Into The Rules, The Commission Would No Longer Need Its Archaic Ownership Waiver Jurisprudence

A Staged Implementation Plan would enable the Commission to cast off its controversial, byzantine ownership waiver jurisprudence in favor of a new procedure that ensures objectivity and avoids, to the extent humanly possible, the appearance of inconsistent results.

It has always been difficult to arrive at a waiver paradigm that is consistent over time. Inevitably (and without the benefit of formal rulemaking) the most liberal waiver becomes the new de facto rule. Such a waiver triggers a multitude of similar waiver requests, each of which must be granted under Melody Music based on the precedent set by the original waiver.[164] Overly liberal waiver requests can even swallow a rule entirely, as happened to

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163/ See pp. 145-47 infra.

164/ Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965) stands for the proposition that an agency must accord comparable treatment to similarly-situated parties.

the Top 50 Policy after the Commission approved 23 consecutive waiver requests.165/

A Staged Implementation Plan would avoid this unpleasantness. All parameters, including the timing of the Stages, the Healthy Markets Algorithm, and the Qualifying Activities, would be agreed upon in advance through rulemaking and would be incorporated into the rules themselves. Thus, there would never be a need for a waiver. Waivers are required when the Commission is asked to approve a transaction that is otherwise prohibited by the rules. Under the Staged Implementation Plan, the Commission would only have to consider and pass upon applications that are "otherwise premature." Such a transaction would be allowed to close an earlier Stage than would a transaction that lacks any Qualifying Activities. The Commission would apply -- rather than waive -- the rules, since the Staged Implementation Plan would be part of the rules. If an application would not conform to the rules even after the completion of the final Stage of a Staged Implementation Plan, the Commission would simply dismiss the application.

Consequently, adoption of a Staged Implementation Plan would enable the Commission to achieve a much-desired regulatory goal that has eluded it for decades: doing away with broadcast ownership waivers entirely.

165/ See Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations) (R&O), 75 FCC2d 585, 590 (1979) ("Top 50 Policy Repeal"), recon. denied, 82 FCC2d 329 (1980), aff'd. sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982).

vi. A Staged Implementation Plan Would Help The Commission Resolve The Global Issues In This Docket This Spring, While Deferring Technical Implementation Questions To A Negotiated Rulemaking This Summer

A Staged Implementation Plan would be consistent with the extremely tight timetable which the Commission has imposed upon itself. It is probably impossible, by spring, for the Commission to arrive at rational and legally sustainable answers to all of the 179 questions in the Omnibus NPRM. The best the agency might do by spring is arrive at global answers -- e.g., what, if anything, will be deregulated, to what extent, over what time period, and with what approach to resolving the minority ownership question. These global decisions can be set out in the 2003 Omnibus First R&O in the spring, coincident with which the Commission can issue a "Notice of Proposed Negotiated Rulemaking."166/ In the negotiated rulemaking, the Commission can address such technical matters as the statistical and anecdotal measuring tools for the Healthy Markets Algorithm,167/ and the quantum and nature of Qualifying Activities to be used when an applicant seeks approval of a transaction that would not be routinely approved until after a subsequent Stage of the Staged Implementation Plan.168/

166/ As urged at pp. 145-47 infra.

167/ See pp. 85-87 supra.

168/ See pp. 93-95 supra (describing how a Staged Implementation Plan would serve as a template for Qualifying Activities); pp. 103-105 infra (describing two types of potential Qualifying Activities).

d. Staged Implementation Can Be Designed To Comply With, And Advance, The Goals Of Section 202(h)

We are confident that a Staged Implementation Plan can be designed in a manner consistent with Section 202(h) of the 1996 Telecommunications Act. As codified at 47 U.S.C. §161, this provision requires the Commission to review, biennially, regulations such as those being considered in this proceeding. It directs that the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and it instructs the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest." In reviewing this provision, the D.C. Circuit recently decided to leave

> unresolved precisely what Section 202(h) means when it instructs the Commission first to determine whether a rule is "necessary in the public interest" but then to "repeal or modify" the rule if it is simply "no longer in the public interest." 169/

The parties will debate with vigor over what "necessary in the public interest" and "no longer in the public interest" mean.170/ Fortunately, the answers to these questions need not be known in order for the Commission to conclude that a Staged Implementation Plan would be harmonious with Section 202(h).

169/ Fox Television - Rehearing, 293 F.3d at 540.

170/ On this question, we generally associate ourselves with the views expressed in the Comments of UCC, filed this date.

First, as we have presented it, the Staged Implementation Plan paradigm would enable the Commission, upon the issuance on its 2003 Omnibus First R&O, to effectuate the First Stage immediately.171/ Thus, if the words "repeal or modify" are read to imply action that begins immediately, the Staged Implementation Plan would satisfy that requirement.

Second, if a rule is found not "necessary in the public" or "no longer in the public interest," and the Commission reads that language to mean it must "repeal or modify" the rule, nothing in the words "repeal or modify" (particularly the more moderate term "modify") suggests that the Commission's deregulatory action must occur all at once. The statute is silent on this question, thereby implicitly leaving it to the Commission's routine discretion on how to craft the remedy. On that subject, the Commission's discretion is very broad.

At most, then, Congress has said that if the agency finds it no longer "necessary" for the rules to remain in one place, the Commission must choose a better destination, point its public interest vehicle in that direction, and drive it there. Section 202(h) does not disallow the Commission from observing the road and being ready to apply the brakes promptly if danger is observed. Specifically, the Commission is permitted -- indeed, it is expected -- to conduct further biennial reviews to determine

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171/ See p. 88 n. 153 supra.

whether further "modifications" are needed. Such biennial reviews are designed in to our model of a Staged Implementation Plan.

Consequently, a Staged Implementation Plan could be fully consistent with Section 202(h), irrespective of how the Commission defines the terms "necessary in the public interest" and "no longer in the public interest."

* * * * *

We are among those who generally oppose deregulation, and we most vigorously oppose certain of deregulation's most dangerous forms. Nonetheless, if the Commission decides to undertake some forms of deregulation, this moderate approach should be considered as a starting point for a compromise. A well designed, conscientiously administered Staged Implemented Plan would satisfy most of the objectives of all parties, avoid market disruptions, promote minority ownership, and ultimately provide the public with both the efficiency and variety that flow from consolidated operations <u>and</u> the diversity and competition that flow from independent operations.

2. The Commission Should Build Into The Rules Incentives For Trading With, Selling To Or Incubating Socially And Economically Disadvantaged Businesses

Experience has shown that market-based incentive programs that promote minority ownership are likely to be successful. They are generally embraced by all stakeholders, and because short-term adverse consequences (if any) are distributed very thinly throughout the entire population, they do not deprive anyone of a a material actual or presumed entitlement. The prototypical example of such programs was the former tax certificate program.

We offer eight examples of incentive-based steps the Commission can consider. Two of these could serve as Qualifying Activities under a Staged Implementation Plan: (b) Sales of Stations to SDBs and (c) Incubator Programs.172/

a. The McCain Bill

The Telecommunications Ownership Diversification Act, whose champion is Senator McCain, would provide a capital gains tax deferral to those selling stations to socially and economically disadvantaged businesses ("SDBs"). Like our proposals in this proceeding, Senator McCain's bill is race-neutral, being targeted to SDBs. The strongest point of this legislation is that it would provide an alternate to tax-free exchanges as a driving point for transactions where the seller has a low tax basis. The Commission has consistently urged Congress to implement this legislation, and

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172/ See pp. 103-105 infra (discussing these activities). See also pp. 93-96 supra (discussing role of Qualifying Activities in a Staged Implementation Plan).

hopefully 2003 will be the magic year for it.[173/] In the optimistic hope that Congress will be cooperative, a bold step the Commission can take would be to establish the day the Telecommunications Ownership Diversification Act becomes law as the effective date for any new rules adopted in this proceeding.

b. Sales Of Stations To SDBs

With the possible exception of lack of access to capital, the unavailability of quality stations to buy is the single greatest barrier to the growth of minority owned broadcast companies. Therefore, the single most important incentive the Commission could create is one that would allow a company to conclude an otherwise-premature transaction if it sells stations to socially and economically disadvantaged businesses.

c. Incubator Programs

The Commission should revive Chairman Sikes' and NABOB's Incubator Plan, proposed in 1992 Radio Rules - Reconsideration.[174/] Under this proposal, a company could acquire more than the otherwise-allowable number of stations if it establishes a program that substantially promotes minority ownership. The proposal is still pending. Owing to its

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173/ See, e.g., Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15445 ¶184 (2000) (recommending that Congress create a program that would "permit[] deferral of taxes on any gain from the sales of telecommunications businesses to small telecommunications firms, including disadvantaged firms and firms owned by minorities or women, as long as that gain is reinvested in one or more qualifying replacement telecommunications businesses.")

174/ 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6391-92 ¶¶22, 24-25.

timeliness and quality, we set it out at length:

> [Our proposal] would permit a group owner to own or have a controlling interest in some number of stations beyond the otherwise applicable national limits if it establishes and successfully implements a broadcast ownership "incubator" program designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio field. Such a program would work as follows. A group owner would be permitted to acquire an attributable interest (including a controlling interest) in stations above the otherwise applicable ownership limit upon a prior demonstration that it has in place a small business investment incentives program involving a meaningful and ongoing commitment to increasing pluralism in radio station ownership and stimulating investment in the radio industry. Such programs would be designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited broadcast business experience, and that have expressed an interest in station ownership....
>
> Without attempting to limit additional creative mechanisms that may be developed, some general guidelines and examples of qualifying programs can be provided. For example, a group owner might create an SBA-like program which offers to eligible participants:
>
> 1. Management or technical assistance
> 2. Loan guarantees
> 3. Direct financial assistance through loans or equity investment
> 4. Training
> 5. Business planning assistance.
>
> Alternatively, a group owner could enter into a joint venture with an established Small Business or Minority Enterprise Small Business Investment Company (SBIC or MESBIC) to accomplish the intended objective....We also might consider an administrative relationship between the stations' owners. Properly structured, such an arrangement might provide a greater incentive for investment in the operations of hitherto untested owners as well as allow these owners to enjoy some of the administrative efficiencies associated with group ownership. 175/

175/ Id.

Other steps could be added to the list of qualifying activities. Here are a few of them:176/

1. A pressing need is the creation of a business planning center, affiliated with an HBCU, that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing and pursue acquisitions.

2. Additional training programs, modeled after as the NAB Foundation's Leadership Training Program, could help minorities and women, already experienced in broadcast management, learn the skills required for ownership.

3. Another pressing need is the development of a large, liberal line of credit upon which SDBs could draw in financing broadcast ventures. Such a line of credit could be assembled with the cooperation of a syndicate of minority banks.

4. Financial investments in SDBs, or funds that support them, can be structured to include mentoring by senior executives and professionals wishing to convey their knowledge and experience to subsequent generations.

It would be necessary for these steps to be of sufficient magnitude and permanence as to justify transactions that otherwise would not comply with a Staged Implementation Plan.

Having stations to buy is by far the most important need. It would be most unfortunate if hundreds of minorities were trained in broadcast ownership, but there were no stations available for them to buy. At the same time, it is essential that companies be afforded some measure of flexibility in choosing what steps they are best suited to perform effectively. Harmonizing these objectives would be a useful assignment for those participating in a negotiated rulemaking that we are proposing.177/

176/ We are exploring these approaches.

177/ See pp. 145-47 infra.

d. Free Speech Radio

The Commission could adopt MMTC's proposal for a new class of "Free Speech Stations" having at least 20 non-nighttime hours per week of airtime, independently owned by small disadvantaged businesses, and primarily devoted to nonentertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station." A platform owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could then buy another fulltime station under the provision of the Communications Act that allows for an exception to the eight station rule when a new station is created.178/ That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a platform could grow steadily up to the limits allowed by antitrust analysis. Moreover, the number of voices and viewpoints heard by the public would grow exponentially, and

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178/ Section 202(b)(2) of the 1996 Telecommunications Act authorizes the Commission to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a)(2) "if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation." Channel bifurcation does indeed give rise to an increase in the number of stations, since each station in a share-time is a "radio station" under 47 C.F.R. §73.1715 (authorizing commercial share-time operations). See discussion in MMTC Radio Ownership Comments, pp. 158-161.

minority ownership would get a much-needed boost. No new legislation would be required to accomplish this.179/

e. Sales To SDBs As Alternatives To Divestitures

Under the current local television ownership rules, there are two scenarios in which a combination of same-market properties, although lawfully acquired, cannot be sold intact, and therefore must either be retained or broken up on resale. These are:

a. Two television stations which, when duopolized, were not each among the top-four rated stations in the market, but which since have attained that status (e.g., because the ratings of one of the stations has improved); 180/ and

b. A television/radio combination which, when created, was within the crossownership size limitation corresponding to the number of voices then in the market, but which since has come to exceed that limitation because consolidation, or stations going dark, has reduced the number of voices in the market. 181/

MMTC recognized that these divestiture rules would "have an unintended consequence: they would discourage some companies from selling these combinations even where the sale would promote diversity."182/ Consequently, in October, 1999, MMTC proposed that the Commission allow the owner of such combinations to sell

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179/ The proposal is outlined at length in the MMTC Radio Ownership Comments, pp. 111-173. In theory, the proposal could also be configured for television, such that a company that does nothing but produce and broadcast television news and public affairs would become the Free Speech Station on the same channel as an Entertainment Station that carries only network or syndicated entertainment fare. We have not developed this concept, but are open to any thoughts on whether it would be viable and whether it would serve the public interest.

180/ See Television Broadcasting, 14 FCC Rcd at 12933 ¶64.

181/ Id. at ¶100.

182/ MMTC Television Ownership Reconsideration Petition, p. 17.

the combination intact to an SDB, irrespective of the stations' ratings or the number of operating television voices in the market. This would result in no greater concentration of ownership than had existed previously, and it would contribute to diversity by placing valuable properties in the hands of small businesses, particularly minorities.[183]

MMTC did not propose that an SDB be allowed to assemble an otherwise prohibited duopoly or television/radio combination by acquiring the stations from different owners, since such an acquisition would concentrate local ownership. Instead, MMTC only proposed that the owner of a duopoly or television/radio combination that would otherwise have to be retained or split up be permitted to sell the duopoly or television/radio combination intact to an SDB.

The Commission rejected this proposal because it had not reviewed the Section 257 Studies.[184] The Section 257 Studies contain extensive evidence documenting barriers to entry faced by SDBs, including the availability of high-quality properties for sale.[185] Thus, the proposal is ripe for adoption.[186]

183/ Id., pp. 15-17.

184/ Television Broadcasting - Reconsideration, 16 FCC Rcd at 1078 ¶33.

185/ See, e.g., Ivy Group Study (discussed on p. 31 n. 59 supra).

186/ This concept could also be crafted to apply to newspaper/broadcast crossownerships, if the Commission authorizes these. For example, a newspaper/broadcast combination, allowable based on a given number of voices being in the market, might have to be retained or be broken up if the number of voices declines due to consolidation or the failure of other properties in the market.

f. Abstention From Attribution Of EDP Interests, And Vesting Of Multiple Ownership Rights, For An EDP Provider Who Finances An SDB's Construction Of An Unbuilt Station

In the 1999 television duopoly proceeding, MMTC proposed that:

> when a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest (the "EDP Provider") should be reserved a place in line to subsequently duopolize or crossown another same-market station.
>
> SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.
>
> SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.
>
> To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.
>
> When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB's unbuilt permit will be rewarded with a guaranteed

opportunity to acquire a full complement of local properties. 187/

This EDP Interest's nonattribution, coupled with this vested right to grow in the market, would powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity.188/

g. Grandfathering The Nonattributable Nature of EDP Interests in SDBs

In the 1999 ownership attribution proceeding, MMTC proposed the grandfathering of the nonattributable nature of EDP Interests in SDBs, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider. MMTC contended that while the EDP concept was "a well-intentioned effort to discourage fraud while also encouraging broadcasters to invest in or lend to small concerns" the new EDP rules "have an unintended consequence: they may discourage broadcasters from providing an EDP interest to any SDB anywhere in the country, irrespective of whether the potential EDP Provider is presently a same-market media entity or a major program supplier to the SDB."189/ MMTC explained:

187/ MMTC Television Ownership Reconsideration Petition, pp. 17-18.

188/ Like MMTC's other proposals in the 1999 television ownership and attribution proceedings, the Commission rejected this proposal because it had not yet reviewed the Section 257 Studies. This proposal is ripe for review now. See p. 108 supra.

189/ Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket No. 94-150 (Ownership Attribution) (filed October 18, 1999), p. 2.

This unfortunate outcome is caused by the fact that the potential EDP Providers are also among the nation's largest broadcasters. They are jockeying for position and dominance in a rapidly consolidating national market for broadcast properties. In this consolidating marketplace, broadcasters of national scope are structuring their station portfolios so they can acquire other companies, or be acquired themselves, with a minimum of spinoffs and divestitures. Other factors being equal, companies select merger partners that "fit" well -- i.e., the combination of their properties will require few spinoffs. Spinoffs dislocate employees; they entail transaction costs and executive time; they often cannot be effected at optimal value; and they sometimes provide opportunities for competitors to delay the regulatory approval process through legal challenges.

Consequently, broadcasters usually find it disadvantageous to hold small, potentially attributable interests in markets not critical to their growth strategies. These nonstrategic interests could become attribution time bombs that would explode upon a sizable merger or acquisition. In positioning itself for future acquisitions, a broadcaster will not want to laden its portfolio with these time bombs that would make its bid for an acquisition target noncompetitive with the bids of other companies.

An EDP Interest in an SDB would be an exceptionally volatile attribution time bomb. This EDP Interest could become attributable if the acquisition target owns another station in the SDB's market (a "Potentially Overlapping Station"). Thus, if an EDP Provider wishes to bid for this acquisition target, the EDP Provider would be compelled to structure its bid either to exclude or spin off the Potentially Overlapping Station, or to reduce or extinguish its EDP Interest in the SDB. These requirements would increase the cost, risk and time for such an acquisition, making the EDP Provider's bid for the acquisition target relatively less attractive to both the EDP Provider and the target. The opportunity costs of a foregone merger, or the merger's higher transactional costs if undertaken, would likely far exceed the profit potential of any EDP Interest in any SDB. Realizing this, most large broadcasters would probably not go to the trouble of providing EDP Interests to SDBs.

The nonstrategic nature of EDP Interests in SDBs helps explain why these interests are relatively rare even now. Converting them into attribution time bombs could wipe them out entirely, rendering a potentially valuable source of debt and equity unavailable to SDBs. This is the opposite of the small business investment climate the Commission wants to foster.

The Commission can cure this problem by grandfathering otherwise nonattributable EDP interests in SDBs in situations where these four conditions are met:

1. the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction");

2. the Unrelated Transaction occurs at least a year after the EDP relationship was formed;

3. the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and

4. the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB. 190/

This procedure would promote diversity by avoiding any inadvertent disincentivizing of EDP Interests in SDBs.191/

h. Allowing Holders Of Expiring Construction Permits to Sell The Permits To SDBs

In 1998, Entravision Holdings LLC ("Entravision") submitted a petition for rulemaking (RM-9567) which sought to revise the construction permit expiration standard established pursuant to §§319(a)-(b) of the Communications Act and implemented in 47 C.F.R. §73.3598. This proposal, which is still pending, is deserving of a new and favorable look.

Entravision proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign

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190/ Id., pp. 1-3 (fn. omitted).

191/ This proposal, too, was rejected because the Commission had not yet reviewed the Section 257 Studies, but it is ripe for review now. See p. 110 n. 188 supra.

language groups for at least 80% of their operating time. Entravision's proposal is derived from the 1998 modification of 47 C.F.R. §73.3598, in which the Commission created a single three year term for construction permits and provided for their automatic forfeiture upon the expiration of their term unless the cause of the delay is an Act of God or the nonfinality of the grant due to administrative or judicial review.192/

The Entravision proposal would need modest fine-tuning so that it applies to all SDBs, rather than only minorities or those planning to serve minorities' or foreign language groups' programming needs. Thus modified, the Entravision proposal would be a far superior market mechanism for disposing of expiring permits than the current plan for automatic expiration. The proposal allows the Commission to quickly and efficiently place an expiring permit in the hands of those who the Commission has found are likely to promote diversity right now. Allowing SDBs to build out these permits is far preferable to allowing the permits to expire, for four reasons:

First, affording SDBs a chance to build out the permits would promote diversity. For SDBs, the process of applying for a new construction permit is even more risky and time consuming than taking on a partially completed project with an outstanding permit. Moreover, even unsuccessful construction permit applicants must encumber their capital for significant periods of time in order to preserve their financial qualifications to hold

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192/ See 1998 Biennial R&O, 13 FCC Rcd at 23056, 23090-91 ¶¶83-85.

the permit. Completing construction on an existing permit would significantly reduce some of the start-up costs and risks that present the most significant barriers to minority entry.

Second, allowing permittees to sell expiring permits to SDBs would give the permittees a well-deserved rescue. A permittee who honestly tried but failed to build out her permit is hardly a profiteer or a trafficker. It is often inequitable to leave such a permittee with nothing after she has invested heavily, in good faith, in obtaining the permit and beginning construction.

Third, the acquisition of an expiring permit by SDBs would enhance the likelihood that the public will receive service on an expedited basis. When a permit is unbuilt, the public in the proposed station's service area receives only silence on the frequency. Furthermore, the FM and TV separation criteria include an obligation to protect unbuilt facilities as though they were on the air, thereby preventing the expansion of service on the same or adjacent channels in other communities. If the permit were turned in and reissued, additional time would be wasted without any new service to the public. Moreover, a new permittee would face barriers to success even greater than those faced by the original unsuccessful permittee, because the new permittee would have to pay an auction price for the spectrum space and then defend herself against petitions to deny from unsuccessful bidders in the auction.

Fourth, allowing SDBs to buy expiring permits would relieve the Commission of the time and expense of putting the allotment out for bids again.

These considerations make the Entravision proposal particularly attractive. The proposal represents the most cost-effective option for all parties involved -- the permittee, the Commission, the public, and socially and economically disadvantaged entrepreneurs.

3. The Commission Should Adopt An "Equal Transactional Opportunity" Policy, Modeled After Its Equal Employment Opportunity Policy

If it is worthwhile for broadcasters to provide equal employment opportunity, it is even more worthwhile for them to provide equal transactional opportunity. The Commission can fulfill this objective by exporting the core of its broadcast EEO program into the transactional context.[193]

For many broadcast employees, the chance ultimately to achieve ownership is the reason for having a career in the business. To find that door blocked by the old boy network is unacceptable in a highly professional business like broadcasting.

In the employment context, it is black letter law that the exclusive use of word-of-mouth recruitment performed by members of

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193/ Much of this section is based on MMTC's knowledge of the brokerage business. In addition to its advocacy work, since 1997 MMTC has operated the only minority owned (and only nonprofit) media brokerage. In 2000, MMTC was voted into membership in the National Association of Media Brokers ("NAMB"). We are confident that all or nearly all NAMB members would find a nondiscrimination and outreach rule unobjectionable -- and indeed welcome, since it would help bring more qualified buyers into the transactional process.

a racially homogeneous staff is inherently discriminatory.[194/] If broadcast employment is close-knit, broadcast ownership is waterproof fabric. While broadcast employers deal directly with job seekers, broadcast owners usually interpose a level of insulation from those seeking to purchase stations. The fact that a station is for sale is often not known except to those with whom licensee or the broker have familiarity.

Sellers' interest in confidentiality led the Commission in 1978 to reject Commissioner Hooks' proposal to have broadcast station sales conducted transparently.[195/] There are valid reasons for confidentiality, among them the need to avoid frightening the staff into departing the station (and thus impairing its value at sale) and the need to prevent competitors from acquiring the seller's privileged financial information and its intellectual property. Another valid reason for

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194/ See, e.g., Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) ("[c]ourts generally agree that, whatever the benefits of nepotism and word-of-mouth hiring, those benefits are outweighed by the goal of providing everyone with equal opportunities for employment"); Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997) (Commission was "troubled that a significant number of the stations' hires, for which recruitment efforts were made, resulted from staff or client referrals" (fn. omitted)); Walton Broadcasting, Inc., 78 FCC2d 857, 875, recon. denied, 83 FCC2d 440 (1980) (condemning "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referrals from a predominately white work force, which, while unintended, effectively discriminated against minority group employment.") In the 2002 EEO Second R&O, the Commission affirmed that ("[o]ur purpose is to ensure that word-of-mouth recruitment practices are not the sole method of recruitment and that all members of the public have an opportunity to compete for available jobs." Id. at 34 ¶101.

195/ See Hooks Broadcast Sales Proposal, 43 RR2d at 3 n. 3.

confidentiality is the need to ensure that unqualified entities and tire-kickers do not waste the seller's time.

Virtually all brokers consciously avoid race discrimination, but brokers are human and thus they operate based on the information available to them.196/ Many capable, qualified minority entrepreneurs are unknown to many brokers and to most sellers. Thus, it is still commonplace for transactions to be announced that minorities could have competed for, but never learned about.

When minorities are solicited and afforded bidding opportunities equal to those of nonminority companies, minorities routinely succeed in securing and closing transactions. A prime example of this was Clear Channel's 1999 dispositions of 110 stations attendant to the AMFM merger. Minorities were invited into the process as soon as it began, and their bids were considered on the same basis as the bids of large, incumbent nonminority companies. At the end of the process, 40 of these stations were bought by minorities. It is hardly the case, however, that minorities would secure 40 of 110 randomly-occurring station sales for which outreach, broad enough to reach all

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196/ Broadcast transactional work has its share of unfortunate incidents and experiences. One still encounters a presumption among some in the industry that Hispanic entrepreneurs are interested only in Spanish language facilities, or that African American entrepreneurs are interested only in urban or gospel facilities. Yet another unfortunate practice is soliciting minority bidders for failing properties after an initial bidding process in which the nonminority bidders have all passed; a fairer approach would have been to approach minorities when the properties were first offered for sale (and perhaps, back then, had more value and could have been rescued.)

qualified bidders, including minorities, was not performed. More typically, minorities will secure only a handful (and perhaps none) of those properties, because they usually would not have learned about their availability for purchase.

This is not the fault of the NAMB, which has made sincere efforts to bring about the integration of the business.197/ Instead, as in any business, there are those whose self-assessment of their awareness of potential minority buyers is unrealistic.

Rather than change human nature, the Commission can act in a straightforward way to ensure that broadcasters with stations for sale conduct broad outreach within the businesslike parameters of their need for confidentiality and their need to screen out unqualified potential bidders. For example, if the search parameters call for public companies only, the four minority owned public companies in broadcasting can easily be notified. If the search parameters call for successful operators in the southeast, there are at least ten minority owned companies who should almost automatically be solicited. If the search parameters allow for qualified new entrants, many of those who have graduated from the NAB Foundation's Leadership Training Program (among others) could be contacted. All of those contacted, of course, would be held to the same professional standards of qualifications and confidentiality as any other potential buyer.

The Commission has ample authority to adopt this moderate approach. While Section 310(d) of the Communications Act

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197/ NAMB is a voluntary membership association, not a licensing or standard-setting bureau. Not all media brokers belong to NAMB.

prohibits the Commission from intervening in the ultimate selection of a buyer, the Commission has broad authority under Section 151 to ensure that the industry operates in a nondiscriminatory manner. Further, the caselaw on this subject makes it clear that the Commission has subject matter jurisdiction over allegations of transactional discrimination.198/

An antidiscrimination and outreach rule can be crafted along the lines of Section 73.2080(a), and an outreach rule can be crafted along the lines of Section 73.2080(c)(1) and 73.2080(c)(1)(ii) (the "First Prong") of the new EEO regulations.199/

198/ See Univision Holdings, Inc., 7 FCC Rcd 6672, 6683-6684 (1992), petition for recon. dismissed, 8 FCC Rcd 3931 (1993), aff'd. by Memorandum sub nom. National Hispanic Media Coalition v. FCC, No. 92-1549 (D.C. Cir., filed October 30, 1992) (finding no discrimination in the sale of TV stations and a TV network, but reaching the merits); Federal Broadcasting System, Inc., 62 FCC2d 861, 872-873 (Rev. Bd. 1977) (a radio station case, to the same effect); cf. NLT Corp., 52 RR2d 817, 819 (1982) (rejecting, but reaching the merits of an allegation that a competing TV station intended to commence a racially motivated advertiser boycott against an African American owned TV station potential purchaser) and Evening Star Broadcasting Company, 68 FCC2d 136-140, and 149-155 (Dissenting Statement of Commissioner Joseph R. Fogarty), recon. denied, 68 FCC2d 158, 159-163 (1978) (discussing alleged breach of a provision of a citizens agreement that provided that the seller would consider minority buyers for its newspaper). Owing to the confidentiality of the station sale process, intentional discrimination is always unprovable.

199/ Entrepreneurs are by definition sophisticated and aware of the basics of broadcast transactions, so we do not believe it necessary for the Commission to adopt procedures comparable to the Second Prong of the EEO regulations (notifications to those requesting them; see 47 C.F.R. §73.2080(c)(1)(ii)) or the Third Prong (outreach activities aimed at informing minorities about opportunities in the business; see 47 C.F.R. §73.2080(c)(2)). Nonetheless, the Commission certainly should not discourage companies from undertaking such initiatives. Finally, although

[n. 199 continued on p. 110]

An Equal Transactional Opportunity rule would benefit sellers by expanding competition among qualified contenders to buy broadcast properties. The rule would carry no "burdens," paperwork or otherwise. Sellers would simply certify on Form 314 or Form 315 that they complied with the rule. Moreover, the rule would be constitutionally unobjectionable since it would only require nondiscrimination and broad outreach to qualified buyers.

4. The Commission Should Adopt A Standard Divestiture Period, Such As One Year

We have urged the Commission to adopt a Staged Implementation Plan which would eliminate altogether the need for waivers.200/ However, if the Commission continues instead to offer rule waivers, it should take the opportunity presented by this proceeding to bring some sense of regularity and logic to its divestiture cases.

The Commission should avoid imposing on a seller an unreasonably short period within which it must spinoff a broadcast property. As noted earlier, many minorities require ample time to secure access to capital.201/ As the Commission has recognized,

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199/ [continued from p. 119]

reporting requirements obviously are essential to the meaningful EEO regulation of 14,000 broadcast stations, we do not believe that reporting requirements are necessary to ensure Equal Transactional Opportunity. Media brokers are a very small group of men and women who are very senior in the industry. Like communications lawyers, media brokers survive on their integrity. In MMTC's experience as a media broker, all media brokers always insist, in the strongest terms, that their clients observe FCC regulations.

200/ See pp. 96-97 supra.

201/ See pp. 32-33 supra.

very short divestiture periods not only force sales at below market value, they may also preclude bids from minorities.202/

The cases on divestiture time periods attendant to waivers are all over the map.203/ It is impossible to derive from these cases any logical principle governing the length of time required for a divestiture. What can really justify giving one licensee six months to effect a spinoff and giving another one two years? Even if the cases involved different rules, a difference in

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202/ See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as part of CBS' showing in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity "has already filed an application to assign one of the stations it will divest to a minority-controlled entity"); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver"); Combined Communications Corp., 72 FCC2d 637, 656 ¶45 (1979) (declaring that the opportunity to approve the spinoff from the Gannett/Combined Communications Corp. merger of WHEC-TV, Rochester, New York to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties"); cf. Midwest Communications, Inc., 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities).

203/ See, e.g., Shareholders of CBS Corporation, 15 FCC Rcd 8230 (2000) (six month temporary waiver of television/radio crossownership rule) and Shareholders of the Ackerley Group, Inc., 17 FCC Rcd 10828 (2002) (twelve month temporary waiver of the same rule). Other cases on this subject run the gamut from six months to two years.

divestiture periods can no longer easily be rationalized on that basis.204/

Thus, the Commission should establish a standard period within which all divestitures should be performed. Commission decisions awarding long waiver periods have sometimes been read as code for "you will never have to divest because we are going to liberalize the rule anyway." Thus, a standard waiver period should be short enough to avoid the impression that a decision to liberalize the rule is all but certain. A standard waiver period should also be long enough to avoid sales at distress prices, and to ensure that minorities have a fair opportunity to raise the capital necessary to bid competitively.

There is sound precedent for such an approach. In 1965, the Commission adopted the Ultravision rule, which imposed the almost absurdly excessive requirement that an construction permit applicant have reasonable assurance of funds sufficient to operate the station for a year without revenue.205/ Repealing Ultravision in 1982, the Commission adopted a far more realistic three month reasonable assurance period. In so doing, the Commission held that the one-year period in Ultravision "conflict[ed] with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from

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204/ This follows from Sinclair, 284 F.3d at 162 (holding that Commission must explain inconsistency between having one voice test for the television duopoly rule and a different voice test for the television/radio crossownership rule).

205/ Ultravision, 1 FCC2d at 547.

seeking broadcast licenses."[206] Along these lines, the Commission can adopt a standard waiver period long enough not to "conflict[] with Commission policies favoring minority ownership and diversity because [of] its stringency[.]"[207]

Our initial sense is that the appropriate standard waiver time period is always or almost always one year, but we are not wedded to this number. Other parties may suggest a more appropriate time period that would supplant the scattershot caselaw in this area and ensure that when divestitures occur, minorities and other small businesses have a reasonable opportunity to raise capital and submit bids.

5. The Commission Should Adopt A Zero Tolerance Policy For Ownership Rule Abuse

If the Commission intends to deregulate, it should assure the public that any new bright-lines it draws will not be exceeded, evaded, or circumvented by the ruses and shams which have filled the pages of the FCC Reports and FCC Record for two generations. A bright-line rule is only as respected as the Commission's enforcement of the rule.

Particularly at a time when public interest groups quite properly express fears of the adverse consequences of unabated ownership consolidation, the Commission must come to terms with ownership fraud. When a company can conceal its de facto control of another company, and thereby operate the way a company would operate if it owned more stations than are permissible, honest

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206/ Financial Qualifications Standards, 87 FCC2d at 201.

207/ Id.

companies inevitably will pressure the Commission to raise the ownership rules even further so they can legally own the same combinations of properties that their dishonest competitor surreptitiously "owns."

The Commission certainly has the tools to end ownership abuse. Its rules empower it to require production of documents, to conduct depositions, to hold hearings, to call in renewals early, to deny applications and to revoke licenses. Moreover, although ownership abusers are often clever, the Commission's first-rate Enforcement Bureau staff, when allowed to do its job, can outsmart and outmaneuver the fraud artists almost all of the time.

No one doubts that we lost the tax certificate policy in 1995 because Congress did not highly regard the Commission's ability to police ownership structural abuse. What a terribly high price that was! The particular transaction that provoked the Hill's interest was <u>not</u> a sham -- it was just "big." Nonetheless, Congress' unwillingness at the time to save the tax certificate policy by imposing limits on the size of transactions reflected Congress' low regard for the Commission's willingness to police ownership structural abuse. Nothing that has happened since has done much to overcome the appearance that the constable on the broadcast ownership fraud beat is asleep. It would be a shame if the lingering perception of FCC somnolescence on the ownership integrity front impedes Senator McCain's valiant effort to see a tax deferral bill into law.

The courts, too, look with skepticism on the manner in which the Commission's administration of its anti-fraud polices.208/ When the Commission maintained an independent body empowered to designate fraud allegations for hearing, that body -- the Review Board -- seldom lacked the willpower to express its revulsion when faced with those who disrespected the ownership regulations.209/

Who is responsible for curbing ownership abuse?

Honest broadcasters can't do it. A licensee seldom can muster the time, effort, resources, or long-term motivation to take on a fellow broadcaster over this issue.

208/ See, e.g., Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992) ("Bechtel I") (referring to "strange and unnatural" ownership structures"); Astroline Communications Co. v. FCC, 857 F.2d 1556, 1567 (D.C. Cir. 1988) (subsequent history omitted) (requiring a hearing where the evidence suggested that a radio and television station in the same market were de facto controlled by the same party).

209/ One of the best explications of the prevalence of ownership abuse came from the pen of the late Norman Blumenthal:

> the Commission's application processes are currently plagued with fraudulent applications wherein the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail....Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the very lowest echelon.

Religious Broadcasting Network, 3 FCC Rcd 4085, 4088 ¶8 (Rev. Bd. 1988). See also Carta Corporation, 5 FCC Rcd 3696, 3701-72 ¶15 (Rev. Bd. 1990) (collecting cases to make the point that "the Commission has been confronted with a large volume of applications that disingenuously depict a two-tier ownership structure so as to exploit artificially the Commission's comparative structure[.]")

Whistleblowers can't do it. On rare occasions, company insiders forward with stories to tell, but whistleblowers are rare because they risk losing their careers if they say what they know. Furthermore, in any sophisticated industry today, companies bent on concealing fraud require their employees to sign "gag" agreements which survive the employment relationship and are are tied to post-employment bonuses, stock options, consulting contracts and other parachute accouterments. A whistleblower can lose her children's college educations if she is too brave.

Citizen groups can't do it. Citizen groups sometimes carry the burden of exposing fraud, but they typically lack personal knowledge of the intimate facts. Few citizen groups have the resources to carry on a prolonged fight at the Commission.

Consequently, only the Commission can root out ownership fraud, and it must do so on its own motion. Thus, as part of its resolution of this proceeding, the Commission should adopt a "zero tolerance" policy on ownership structure abuse. Here is what a zero tolerance policy should commit the agency to do:

First, conduct random audits of applicants aimed at uncovering possible ownership fraud.210/

Second, widely and regularly publicize a blanket invitation to whistleblowers to tell their story in confidence to Enforcement Bureau staff, and offer whistleblowers protection and assistance in securing alternate employment. The home page of the Commission's website can be used for this purpose.

210/ In the 2002 EEO R&O, the Commission chose to rely on random audits for compliance purposes. Id. at 49 ¶155.

Third, implement an unwaivable policy of conducting thorough investigations of serious allegations of structural abuse -- using depositions rather than the ineffectual approach of writing the licensee a letter to which it can respond at its leisure. When the facts warrant, cases should be designated for hearing promptly.

Fourth, underscore, as the RKO General court required, that the representations of applicants must be complete in every respect, and must not have even the appearance of evasiveness.211/

Fifth, put ownership fraud cases on a fast track, such that the Commission typically will move from allegation to hearing or non-hearing resolution within 90 days.

211/ In RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) ("RKO General"), the court held that RKO General's incomplete representations to the Commission violated Section 1.65 of the rules, and further held that

> [u]nlike a private party haled into court...RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," [citing the FCC's brief in the case] and license applicants may not indulge in common-law pleading strategies of their own devise....In spite of an SEC investigation that was rapidly gathering steam, and in spite of the fact that its qualifications as a licensee were at issue before the FCC, RKO failed to come forward with a candid statement of relevant facts.

Id. at 229.

212/ Omnibus NPRM, 17 FCC Rcd at 18505 ¶4.

6. The Commission Should Conduct A Thorough Engineering Review Of The FM Spectrum And Approve New Allotments To Address Population Diversity And Growth

When it commenced this proceeding, the Commission noted that "the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation."212/ It was a fair point that the ownership rules needed review relative to technological advancement, and that the ownership rules had never been evaluated to ensure that each rule was consistent with the other rules.213/

These legitimate criticisms of the ownership rules -- governing who can occupy the spectrum -- apply with even greater force to the allotment rules, which govern how much of the spectrum there is for anyone to occupy.

Consolidation might crowd the resource, but wise spectrum management can expand the resource. One of the best antidotes to consolidation of existing facilities is the creation of new ones. Indeed, if there were limitless opportunities to build new stations, there would be little need for this proceeding. It follows that if there were far greater opportunities to start new stations, it would be much easier to justify greater consolidation of existing ones. Incumbent owners have no cause to complain

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213/ See Sinclair, 284 F.3d at 162 (holding that Commission must explain inconsistency between having one voice test for the television duopoly rule and a different voice test for the television/radio crossownership rule).

about a Commission decision that optimizes spectrum utilization so as to bring in new competitors.214/

Thus, we propose that the Commission announce, in this proceeding, that it is opening new rulemaking dockets aimed at modernizing the ground rules for its management of the FM portion of the radiofrequency spectrum.215/ In particular, we urge the Commission to manage the spectrum so that new facilities are made

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214/ See, e.g., Docket 80-90 R&O, 94 FCC2d at 158 (noting that a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests"); Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) ("VHF Drop-ins") at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). A fine exposition of this approach is found in the separate statement of Chairman Fowler and Commissioner Dawson in the Low Power Television (R&O), 51 RR2d 476, 525 (1982):

> Low power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.

This outlook is consistent with the Commission's ruling in Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (R&O), 3 FCC Rcd 638, 640 (1988), in which the Commission decided to rely on market forces to promote competition and therefore abandoned the notion of "ruinous competition" that dated to the "Carroll Doctrine" (per Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958)).

215/ We are not proposing that the Commission undertake similar reforms for AM and television at this time. The AM band is basically full, and the television transition to digital has either preempted or postponed meaningful effort at television allotment reform.

available for construction permit applications in markets that need them due to population growth and population diversity.216/

If the ownership rules are outdated, then the procedures for channel drop-ins are truly antediluvian. Consider this:

1. An FM channel must have a predetermined operating power and tower height associated with a particular class. 217/ The lowest class is Class A (typically 6,000 watts at 100 meters HAAT). 218/ Each class has its own set of interference protections -- basically a set of standard minimum separation distances corresponding to stations in other classes. 219/ These standard distances are intended to ensure that a quantifiable amount of interference ("harmful interference") is not generated. Thus, if a potential allotment could serve a community and generate no harmful interference, but would have to operate at a lower power or tower height than a Class A facility, the allotment will not be dropped in. 220/ Further, if a community could be served quite well with a station whose power/HAAT levels are between two classes, and no

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216/ Without Commission intervention, including reform of the allotments process, broadcast spectrum utilization is unlikely to keep pace with the rapid growth of the nation's population and the rapid diversification of the nation's population. Between 1990 and 2000, the number of people in America rose by almost 33,000,000 -- a 13.2% increase. The 1990 population was 248,709,873; the 2000 population was 281,421,906. U.S. Census Bureau, 1990 Summary Tape File 3 (Social Characteristics), "Census 2000 Redistricting Data" (2000). In 1990, the last year for which data is available, there 13,983,502 persons who speak English "less than 'very well.'" U.S. Census Bureau, "Detailed Language Spoken at Home and Ability to Speak English for Persons 5 Years and Over - 50 Languages with Greatest Number of Speakers" (1990). The Census Bureau projects that the population in 2010 will be 13.3% African American, 5.1% Asian American and 14.6% Hispanic. U.S. Census Bureau, Population Estimates Program, Population Division: "Annual Projects ot the Total Resident Population, 1999 to 2100" (1999).

217/ 47 C.F.R. §73.210.

218/ 47 C.F.R. §73.211.

219/ 47 C.F.R. §73.207(b).

220/ 47 C.F.R. §73.207(a).

higher class is available because higher power/HAAT would cause harmful interference, the Commission will only consider dropping the channel in at the lower class rather than at a power/HAAT that falls between the two classes. 221/ The fact that the station might be competitively disadvantaged if it signs on at the lower class would not matter.

2. To drop in an FM allotment, someone must file a petition for rulemaking, which goes through an extensive comment period. 222/ At the end of this sometimes lengthy process, an allotment is added to the Table of FM Allotments 223/ -- whereupon, eventually, it will be put out for auction. The process is expensive and tedious, to say the least.

3. The allotment is likely to be for service to a tiny community that lacks its own channel, since the allotment criteria prefer allotments to a community lacking one. This has become a legal fiction. Ultimately the station will seldom have its offices in that town, which may be little more than a crossroads on a map. Instead, the station will operate (often from an engineering closet, with no specific staff dedicated to it at all) from a central office in the commercial center of the market. The station will not be required to serve or even ascertain the needs of the community of license. Indeed, it will be quite all right if the station goes through an entire eight-year license term and does not once put an actual resident of the community of license on the air. Residents of the town may not even be aware that their community has its own radio station.

4. An allotment dropped into Community A will often preclude an allotment in Community B, hundreds of miles away, even though Community B may have a much greater need for a new allotment. If Community B, at that point in history, did not happen to attract the interest of a person who was willing to volunteer to go through the rulemaking process, Community B will be out of luck.

221/ Id.

222/ 47 C.F.R. §1.401 et seq.; see particularly 47 C.F.R. §1.420.

223/ 47 C.F.R. §1.425.

Thus, although the Table of FM Allotments should reflect the optimum service to the people of the nation as a whole, the Table actually reflects only the fruits of the volunteerism of the occasional randomly-located gadfly who is willing to file a rulemaking petition even though she will have no advantage over competitors in an auction. A community with great need for a new station will not receive one -- simply because an engineering gadfly does not happen to reside there. 224/

5. The person who filed the rulemaking petition may not even apply for the allotment when it is auctioned, since after the passage of many years she may have lost interest, moved or died. Further, in the auction, she would receive no reward for having secured the allotment's inclusion in the Table of FM Allotments. 225/

6. The auction itself is then conducted with bidding credits for new entrants and small businesses. However, under the rules presently in effect but under review for an unrelated reason, any applicant can structure itself to appear eligible for bidding credits, and deploy those bidding credits in the auction so as to discourage others who might more highly value the allotment. An applicant can do this even though it changed its structure before or during the auction to remove the attribute which entitled it to the bidding credits! Thanks to this massive loophole in the rules, the bidding credits of a legitimate new entrant or small business are actually valueless, notwithstanding the Commission's expectation that these bidding credits would be a reasonable substitute for credits that

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224/ To be sure, many proponents of amendments to the Table of FM Allotments are professionals who conduct systematic studies of the community's needs and the economic potential of the proposed facility. However, even in the best of circumstances, these rulemaking petitions are filed based on the perceived need for a station in a specific community -- and not on whether there is a greater need for new service in other communities, whose chances of securing new allotments of their own would be precluded by a grant of the rulemaking proposal.

225/ This restriction certainly disincentivizes the filing of rulemaking petitions. Nonetheless, such a credit would be unwise from a public interest standpoint, since it would significantly dilute the new entrant and small business bidding credits that help promote minority ownership. It is difficult to rationalize awarding a credit for engineering skill or deep pockets. A better approach would be to abandon or reduce reliance on drop-in petitions altogether.

otherwise would have promoted minority ownership directly. 226/

7. After the channel is won, the winning company is usually allowed in short order to sell it at a huge profit to someone else, such as the owner of a multiple station platform in the market. The fact that the station would no longer be independently owned will not stop any such transaction.

8. This system does not measure -- or even consider -- demographic shifts in the population, and in the population per station in a market. It does not take into account whether certain markets are growing dramatically, whether substantial communities with no local radio service (especially in the South and the West) will soon have sufficient population to support a station, or whether foreign or domestic immigration has dramatically changed the communications needs of particular markets.

9. Minority ownership is at no time, and in no way, considered throughout this process.

10. The Commission relies entirely on this process, and thus it undertakes no holistic review of the needs of the population as a whole to determine which communities most need radio service.

This system is broken. It ensures that the pool of drop-ins bears only the most inexact, almost random relationship to the changing communications needs of the nation's communities. Americans would never use this method to allocate our national, state and local parks, our post offices, our public schools, our roads, our airports, our public health facilities, our weather stations, our farm service agencies and our police and fire stations. Private enterprise doesn't operate that way either: McDonald's, Wal-Mart and Radio Shack use economists and social scientists -- not gadflies -- to decide where to put new stores.

226/ See Competitive Bidding First R&O, 13 FCC Rcd at 15993-96 ¶¶186-190 (discussed in Television Broadcasting, 14 FCC Rcd at 12909-10 ¶¶13-14. See p. 52 supra).

Furthermore, this system does little to address Congress' command that

> [i]n considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same (emphasis supplied). 227/

Can anyone seriously defend this system as the most efficient, logical, or equitable way to administer a portion of the radiofrequency spectrum that is so valuable to democracy?

To be sure, this system was entirely reasonable when it was created. In the early 1950s, when this system was designed, the Commission lacked the computing power to survey the entire nation periodically and determine the communications needs of each community. It has performed such a survey only once in the past generation -- in connection with Docket 80-90 in 1980.228/ That surveys was expensive and difficult. A comparable national FM survey could now be designed in a few days. Once the algorithm is written, the actual computations would require a few milliseconds, if that much.

Thus, we present three proposals to modernize the FM frequency allotment process.

227/ 47 U.S.C. §307(b).

228/ See Docket 80-90 R&O, 94 FCC2d at 159 n. 10.

a. The Commission Should Create Two New FM Classes: Class A1 (1,500 watts at 100 meters) And Class A2 (1,000 watts at 50 meters)

A relatively easy first step toward efficient spectrum utilization would be the creation of new classes of FM stations. These stations would be far more powerful than an LPFM station, but considerably less powerful than a Class A facility. These channels would principally be designed for communities where even a Class A facility is not necessary to serve the entire public, or for niche service to neighborhoods in large markets.229/

We do not propose that the Commission change the underlying interference criteria.230/

For the sake of starting a discussion, we are proposing two new classes of stations: Class A1 (1,500 watts at 100 meters) and Class A2 (1,000 watts at 50 meters). Class A1 stations would have the same tower height but half the minimum power as Class A stations; Class A2 stations would have 1/3 the minimum power and half the minimum HAAT as Class A stations. These coefficients are unavoidably arbitrary, but they are no less arbitrary than the

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229/ For example, such a station covering only Washington's northern Virginia suburbs would be noncompetitive in a rock format, but if it broadcast in Hmong, Mandarin or Krio (the *lingua franca* of Sierra Leone) it could find its market and be a rousing success.

230/ However, a fair argument can be made (and has been made in the LPFM proceeding) that improved receiver selectivity will render the third-adjacent criterion obsolete in a few years -- if that hasn't happened already.

current station class specifications. We are not wedded to these parameters and would be pleased if someone came up with better ones.231/

These stations would be subject to the same interference criteria as full power stations, and they would be regulated like full power stations. Their 60 mV/m contours might, for example, extend about 8-12 miles from the tower; thus, they would be suitable for full coverage of a small town or county, or of a neighborhood or borough of a large city.

The process of licensing these stations could be tailored so as to provide points of entry for small entrepreneurs. The Commission should consider using eligibility criteria, conceptually similar to those in Clear Channels,232/ to directly promote ownership by socially and economically disadvantaged businesses. The Commission should also consider a no-trafficking period (e.g. five years) to ensure that the public receives the benefits of independent ownership of these stations a significant length of time.

231/ It is not a fair objection that LPFM was the Commission's way of opening the spectrum to localized service. LPFM was and is a good idea, and some LPFM stations will find their audience and provide very useful service. Nonetheless, LPFM facilities are sparse, and power levels are extremely low. LPFM was preferable to pirates, but it was never intended to be a cure-all for concentration.

232/ 78 FCC2d at 1368-69. See discussion at p. 54 n. 96 supra.

b. The Commission Should Perform A Comprehensive Engineering Search Of The FM Spectrum To Identify The Most-Needed New Drop-In Opportunities

The Commission should examine the FM spectrum to determine how its use can be maximized for the benefit of the public. The Commission can do this by conducting a national search for potential channel allotments. In consultation with the Bureau of the Census, and with the broadcasting authorities in Canada, Mexico and the Bahamas, the Commission can propose a plan based on demographic trends, including population size, as well as ethnic and language diversity. The search parameters should include, as necessary conditions, the current interference criteria. As desirable conditions, the search parameters should include the projected number of people per station in a market in 2010, the projected language and racial diversity of the market in 2010, and the presence or absence of minority owned stations in the market.[233/] This plan would then be put out for public comment, whereupon it could be adjusted based on showings of special needs documented by commenting parties. Then the new drop-ins could be set for auction.

If the Commission performs this kind of comprehensive review frequently, it could almost entirely abandon its dependence on the unreliable system of individual rulemaking petitions as a substitute for systematic spectrum administration. The Commission

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233/ Cf. Docket 80-90 R&O, 94 FCC2d at 159 n. 10 (considering, as a factor in deciding which communities would receive allotments, the presence of large minority populations lacking minority owned broadcast stations).

could still leave open the option of receiving an occasional individual rulemaking petition that might be based on a community or demographic need not reflected in its national spectrum review algorithm.

Although the subsequent administration of the Docket 80-90 allotments left much to be desired, the concept of making more allotments available to the public has always been sound.234/ The goal of maximizing spectrum utilization has never been more timely than it is right now, when the Commission is contemplating steps that could deprive the public of independent voices.

c. The Commission Should Replace FM Station Classes With Pure Interference-Based Criteria

If there is a rule no longer "necessary in the public interest,"235/ or whose elimination would promote "diversity of media voices, vigorous economic competition, [and] technological advancement,"236/ that rule is 47 C.F.R. §73.202 -- the Table of FM Allotments and the rules in Subpart B of Part 73 of the Rules that implements or is dependent upon the Table of FM Allotments.

The use of a handful of classes of FM stations, each with its own set of fixed-distance minimum protected contours, is a demonstrably inexact proxy for interference-based criteria. There is no need for such a proxy when today's computing power enables the Commission to use the real thing. Indeed, when grandfathering

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234/ See p. 129 n. 214 supra and authorities cited therein.

235/ 47 U.S.C. §161 (codifying Section 202(h) of the Telecommunications Act).

236/ 47 U.S.C. §257(b).

or other short-spacing renders the Table of FM Allotments inapplicable, the Commission already uses interference-based criteria.237/

Although it would result in quite a number of new allotments, the use of pure interference-based allotment criteria would not require a radical change in engineering principles. Interference-based criteria would strictly observe the current definitions of harmful interference, thereby avoiding the difficulties faced by AM broadcasters under that band's less than stellar interference-based system. New allotments and construction permits would be fully protected, as they are now.238/

Fixed-distance contours do provide interference protection, but they do so at the expense of maximum utilization of the spectrum within the parameters established by the underlying pure interference criteria. Think of it this way: how much more space on a map can be covered with concentric circles of <u>any</u> size than with concentric circles of a few predetermined sizes?

As a result of converting to pure interference-based criteria, the spectrum can be used far more efficiently. More stations could sign on. Further, more marginally-viable Class A stations, ineligible now to upgrade to Class C3, could instead upgrade to a power and HAAT between those now assigned to Class A and Class C3, and thus better serve their communities. Minority

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237/ 47 C.F.R. §73.215.

238/ A transition period, possibly based on a random selection system, might be needed to ensure that the Commission is not inundated with upgrade applications filed on the same day.

broadcasters would find this especially attractive.239/

The minimum distance separations rule, upon which the Table of FM Allotments is based, permits many stations to reach areas far beyond their protected contours, since not every station's protected contours bump up against a distant station's protected contours. This extra coverage, usually reaching far beyond the confines of local markets, is what may be characterized as "gift coverage" because no station is entitled under the rules to expect it. The use of pure interference-based criteria inevitably would result in more allotments at the expense of some of this "gift coverage." Certainly some owners of stations receiving "gift coverage" might express misgivings about interference-based criteria. Nonetheless, their loss of perhaps one or two percent of their audiences (almost always out-of-market, which can't be sold to advertisers anyway) would be far outweighed by the public interest benefits attendant to new allotments of quite a number of viable new stations to serve the public.240/

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239/ See Consolidation and Minority Ownership, p. 18 (documenting that in 2001, 57% of minorities' stations were Class A facilities, but 44% of nonminorities' stations were Class A facilities).

240/ One caveat must be noted. An unfortunate result of the complete replacement of the Table of FM Allotments with pure interference-based criteria might be the reduced ability of some Class A stations in very large markets to serve their entire markets with the fortuitous aid of "gift" coverage." Many such Class A stations in large markets are owned by small businesses that are trying to compete against more powerful local stations. To help preserve these small businesses, the Commission should build heightened interference-based (or old-fashioned contour) protections into its new allotments system to protect large-market Class A facilities.

All of these steps would dramatically benefit minorities, since they were the last ones in the door for ownership. Consequently, minorities tend to be saddled with a disproportionate number of technically inferior facilities. Consolidation would only worsen minorities' second-class status on the radiofrequency spectrum. New facilities are perhaps the ultimate race-neutral initiative whose impact would substantially promote minority ownership.241/

There are many other things the Commission can do to promote more efficient spectrum utilization. Among them are the wider use of directional antennas, shielding, and interference agreements between or among licensees, or even reduced channel spacing through the ITU's WARC process. These and other techniques should all be on the table if the Commission issues an "Omnibus Broadcast Spectrum Notice of Proposed Rulemaking." Parallel to such a proceeding, the Commission should initiate consultations with other ITU member nations, particularly Canada, Mexico and the Bahamas, and encourage them to adopt modernized allotment paradigms recommended here.

241/ In 1995, MMTC examined 100 Docket 80-90 rulemakings conducted in the 1980s, and found that minorities prevailed in 27 of them and (by that time) still owned 9% of the original 100 facilities. At the time, minorities only owned 3% of all of the nation's radio stations. Thus, compared to purchasing stations, construction permits are a far more attractive route into ownership for new entrants.

III. Media Service To Low Income And Rural Families Should Be A Necessary Goal Of Structural Ownership Regulation

The Omnibus NPRM seeks comment on:

> whether the level of diversity that the public enjoys varies among different demographic or income groups. Although access to broadcasting services is available to all individuals in a community with the appropriate receiving equipment, access to other forms of media typically requires the user to incur a recurring charge, generally in the form of a subscription fee. Does this or any other differences between broadcasting and other media reduce the level of diversity that certain demographic or income groups enjoy? Does the fact that 86% of American households pay for television impact this analysis? What is the extent of any disparity in access to diversity, and how should we factor in that disparity in our diversity analysis? 242/

It would be a mistake to write rules based on the media voices that are received by those fortunate enough to have multichannel service. The electronic media is essential to one's ability to participate in our democracy. The 15% -- and growing -- percentage of television households lacking full access to our electronic media include low income and rural families, who are most in need of the electronic media to understand, interact with, survive in and succeed in the world.243/

242/ Id. at 18520 ¶48. But see n. 243 infra (updating the 86% figure given in Paragraph 48 of the Omnibus NPRM).

243/ In June, 2001, the percentage of TV households which are MVPD households was 86.42%, a number which had steadily increased since June, 1998. However, the comparable figure for June, 2002 -- just released December 31, 2002 -- is 85.25%. Ninth Video Competition Report, FCC 02-338, at 75 (Appx. B, Table B-1, Assessment of Competing Technologies). The decline in the percentage of MVPD households reflects the fact that between June, 2001 and June, 2002, there was a 1.79% increase in MVPD households but a 3.19% increase in the total number of TV households. Id. What this means, apparently, is that the rate of growth in TV households without MVPD service is outstripping the rate of growth in MVPD

[n. 243 continued on p. 143]

It follows that government can no more impose an affordability requirement on one's access to media for participation in democracy than it could impose a poll tax on one's electoral participation in democracy.244/ Even if all media were substitutable (which they are not)245/ and even if national media could address specifically local needs (which they cannot), it would be a mistake to count, as "voices," media that a very substantial segment of the population cannot receive.

How substantial is 15%? That number is the same as the percentage of Hispanic Americans. It is two percent more than the percentage of African Americans. It is seven percentage points more than the percentage of low income residents who still do not have a telephone in their home; yet the Commission would never assume that we have universal POTS service while so many of the

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243/ [continued from p. 142]

households. This most likely reflects immigration into the United States by families who cannot afford MVPD service, as well as migration of low and middle income families to rural areas where cable is unavailable and satellite service is prohibitively expensive. In any case, this statistical trend shows that the Commission can no longer assume that universal MVPD service will inevitably come into being and moot out the need for structural regulations that protect low income and rural families.

244/ See Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (outlawing the poll tax).

245/ We generally concur with the Comments of UCC on this subject. See also MMTC Radio Ownership Comments, pp. 47-48.

urban and rural poor lack this indispensable communications tool in their dwelling places.245/

Media such as DBS, DARS, cable and the Internet are not nearly as ubiquitous as over-the-air television. These media all require subscription fees, which are often quite substantial. Only a small fraction use DBS or DARS, and only about 2/3 of TV households have cable.246/ Cable is not and may never be available to many rural families. Almost 46% of Americans do not regularly use the Internet.247/ Thus, it would be discriminatory against low income and rural families to count these media as "voices."

We urge the Commission to adopt a goal of universal media service to all Americans, paralleling its goal of universal telephone service to all Americans. Until that goal is achieved,

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246/ See FCC, "New Telephone Subscribership" (released February 7, 2002) (as of July, 2001, telephone penetration for the nation was 95.1%. For households with annual incomes over $60,000 it was 98.9%, but for households with annual incomes below $5,000 it was only 81.7%. Telephone penetration was 95.8% for White households, 91.3% for Hispanic households and 90.3% for African American households.

247/ See Ninth Video Competition Report, FCC 02-338, at 75, Appx. B, Table B-1, Assessment of Competing Technologies (disclosing that as of June, 2002, 65.25% of TV households have cable, 17.30% of TV households have DBS, and 2.71% of TV households have MMDS, SMATV, HSD or OVS).

248/ U.S. Department of Commerce (Economics and Statistics Administration and National Telecommunications and Information Administration), "A Nation Online: How Americans are Expanding Their Use of the Internet" (February 6, 2002), p. 73. Even when the Internet is available, its accessibility to the public is still severely truncated. As UCC has pointed out, there is a 50% gap in Internet access between those earning less than $25,000 per year and those earning more than $75,000. See UCC Comments in MM Docket No. 01-317 (Radio Ownership) (filed March 19, 2002), p. 9 n. 28.

the Commission should not include in its structural rules a "voice" test that encompasses voices not available to low income and rural families.

It would be highly desirable if low income and rural Americans could soon enjoy the same level of multichannel media and broadband service that other Americans enjoy. Congress and the Commission should do what they can to hasten that day. Building upon its goal of universal telephone service, the Commission should adopt a goal of universal multichannel media and broadband services to all Americans. Until that goal is achieved, the Commission's structural rules should not be based upon a "voice" test that includes voices unavailable to low income and rural families.

IV. The Commission Should Convene A Negotiated Rulemaking To Help It Determine How To Implement The Results Of This Proceeding

The Commission has broad authority to convene negotiated rulemakings.[249/] A proceeding such as this one, which is without precedent in its scope and potential impact, is an excellent candidate for such a procedure.

The comments in this proceeding are certain to illuminate the parties' sharp differences of opinion. With only a short time period within which to answer 179 questions, most parties inevitably will revert to and preserve their traditional views.

On November 6, 2002, in an effort to help the parties move toward common ground, MMTC convened a meeting for stakeholders in

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249/ Procedures for negotiated rulemakings are set out in 5 U.S.C. §561 et seq.

this proceeding. Fifty-three representatives of all major stakeholders attended -- the major trade associations, the networks, television stations, radio stations, newspapers, cable companies, unions, writers, artists, public interest and consumer groups, minority groups and women's groups. The fact that "everyone showed up" for such a meeting shows that a negotiated rulemaking would have every likelihood of success.

A Staged Implementation Plan lends itself perfectly to a negotiated rulemaking proceeding.250/ Among the technical issues attendant to a Staged Implementation Plan that would need to be resolved are the statistical and anecdotal measuring tools determining when a market is healthy enough to handle more deregulation, and the quantum and nature of Qualifying Activities to be used when an applicant seeks approval of a transaction that would not be routinely approved until a subsequent Stage.251/

To maximize its chances of success, this negotiated rulemaking might have three co-convenors: one from industry, one from the public interest groups, and one from the Commission. Every resource should be made available to the negotiating parties, including sufficient time to allow for contemplation and compromise, as well as engineers, economists and social scientists to provide expert advice.

250/ See pp. 93-96 supra.

251/ See pp. 85, 95-96, 98, and 107 supra.

It will take the collaborative and thoughtful efforts of all stakeholders to ensure that the end result of this omnibus proceeding is a fair balance among large and small ownership combinations, a protected and growing number of minority owners, and industries that offer more diversity, competition, efficiency and variety. A negotiated rulemaking seems tailor-made to achieve this outcome.

Respectfully submitted,*/

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ANNEX

DIVERSITY AND COMPETITION SUPPORTERS

American Hispanic Owned Radio Association
Civil Rights Forum on Communications Policy
League of United Latin American Citizens
Minority Business Enterprise Legal Defense and Education Fund
Minority Media and Telecommunications Council
National Asian American Telecommunications Association
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Council of Churches
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Urban League
Native American Public Telecommunications, Inc.
PRLDEF-Institute for Puerto Rican Policy
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press