

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

In the Matter of	)	
	)	
2006 Quadriennial 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. 06-121
	)	
	)	
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 Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
To the Commission		

**MOTION FOR WITHDRAWAL OF THE FURTHER NOTICE OF PROPOSED  
RULEMAKING AND FOR THE ISSUANCE OF A REVISED FURTHER NOTICE**

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## Introduction

In this motion, the Diversity and Competition Supporters (collectively, “MMTC”)<sup>1</sup> are requesting the Commission to withdraw the FNPRM and promptly publish a revised further notice of proposed rulemaking that corrects three serious and interrelated errors in the FNPRM: (1) its failure to identify and describe the minority ownership proposals remanded by the court in Prometheus Radio Project v. FCC<sup>2</sup>, (2) its failure to refer to or seek comment on a definition of a socially and economically disadvantaged business (“SDB”),<sup>3</sup> the linchpin of most minority ownership proposals, and (3) its failure to recite a central legal basis for minority ownership relief, Section 257 of the Telecommunications Act, 47 U.S.C. §257.

These are very serious errors, but it would be unfair to characterize the FNPRM as entirely hostile to minority ownership. In some respects it is an improvement on previous efforts.<sup>4</sup> Recognizing that minority ownership is interrelated to the other ownership rules, the FNPRM seeks comment on how proposals directed to other issues would affect minority

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<sup>1</sup> The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277. Its membership as of this date is essentially unchanged from 2002. A list of its members is found in Appendix A. Additional organizations have agreed to join the Diversity and Competition Supporters for the filing of comments in response to the Further NPRM in this proceeding, 2006 Quadriennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 06-121 (Further Notice of Proposed Rulemaking), FCC 06-93 (released July 24, 2006) (“FNPRM”). This Motion and all subsequently filed pleadings in response to FNPRM reflect the institutional views of each of the Diversity and Competition Supporters, and are not intended to represent the individual views of each of the Diversity and Competition Supporters’ officers, directors and members.

<sup>2</sup> Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (“Prometheus”), stay modified on rehearing, No. 03-3388 (3d Cir., September 3, 2004) (“Prometheus Rehearing Order”), cert. denied, 125 S. Ct. 2902 (2005).

<sup>3</sup> The term “socially and economically disadvantaged business” is defined in the SBA’s governing statute. See 15 U.S.C. §637(a)(4)(A).

<sup>4</sup> See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317 (NPRM), 16 FCC Rcd 19861 (2001) (containing no mention of minority ownership at all); 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, MM Docket No. 02-277 (NPRM), 17 FCC Rcd 18503, 18521 ¶50 (2002) (asking “whether” (!) the Commission “should consider such diverse ownership as a goal in this proceeding.” Compare 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 stations ownership” (fn. omitted)).

ownership.<sup>5</sup> Further, the Commission contemplates examination of minority ownership in a public forum.<sup>6</sup> Nonetheless, unless the errors in the FNPRM are corrected, it will be impossible for the Commission to adopt -- and sustain -- any meaningful minority ownership relief.

Curing the errors in the FNPRM would require a restart of the proceeding, but as a matter of law that appears unavoidable. Still, this should be regarded as one step backward and two steps forward, as it would remove the cloud of reversible error that overlays the proceeding. Because minority ownership is an “integral part” of media ownership policy, uncorrected serious procedural errors in addressing minority ownership would require a remand of the entire set of rules.<sup>7</sup> No one wants a second remand.

Most of the current ownership rules are solid and valuable, and they deserve to be reaffirmed and perhaps strengthened on occasion. On the other hand, rules that impose market entry barriers on small businesses,<sup>8</sup> or that are otherwise no longer “necessary in the public interest” do need to be “repealed or modified.”<sup>9</sup> Although the record evidence supports the conclusion that most consolidation adversely affects minority ownership, our minds are always open to new evidence suggesting that relaxing a rule would have more benefits than detriments.

Minority media ownership, like all other issues of civil rights, can only be understood through the prism of historical context. This is the history of the FCC as an institution, going

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<sup>5</sup> See FNPRM at 4 ¶6 (“we urge commenters to explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses.”) We respectfully encourage the Commission to give much more weight to comments that respond to this guidance than it gives to comments that disregard it.

<sup>6</sup> See FNPRM at 27 (Statement of Chairman Kevin J. Martin) (“Over the next several months, the Commission will hold half a dozen public hearings around the country on the topic of media ownership to more fully involve the American people.”)

<sup>7</sup> See, e.g., Maryland/Delaware/D.C. Broadcasters Association v. FCC, 253 F.3d 732, 736 (D.C. Cir. 2001) (*en banc*) (preceding and subsequent histories omitted) (“Maryland Broadcasters”) (holding that an entire set of rules must be stricken if a flawed portion “played an integral part in the Commission’s evaluation of the rule as a whole” (emphasis added)). See discussion at 18-23 *infra*.

<sup>8</sup> See 47 U.S.C. §257.

<sup>9</sup> See Telecommunications Act of 1996, Section 202, codified at 47 U.S.C. §161.

back to its earliest days.<sup>10</sup> No one person or one set of commissioners wrote it. Although there have been a few shining moments, most of the history is ugly. As a result, minority ownership is in a steep tailspin. Minority broadcasters, with sparse assets, are devoting their lives to building value and providing service. They can't wait for the 2010 quadrennial review. They need and deserve relief now.

### **Summary**

The Diversity and Competition Supporters respectfully request the Commission to withdraw the FNPRM and promptly issue a new one that corrects three potentially fatal errors.

First and most critically, the Commission should follow the mandate of the Court of Appeals in Prometheus, which calls attention to MMTC's "proposals for advancing minority and disadvantaged business and for promoting diversity in broadcasting" and requires the "rulemaking process in response to our remand order" to "address these proposals at the same time."<sup>11</sup> Fundamentally, to "address these proposals" in any meaningful way, the Commission must identify and describe them.<sup>12</sup> The Commission failed to do that, an omission all the more unfortunate because the reason the Court remanded the proposals in the first place was that in its

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<sup>10</sup> See Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936), discussed at n. 36 infra.

<sup>11</sup> Prometheus, 373 F.3d at 421 n. 59. See also id. at 435 n. 82.

<sup>12</sup> MMTC appends hereto Appendix B, which describes each of MMTC's 14 proposals (items 1-14). Appendix B also describes 12 informal and generally non-regulatory informal suggestions made by the Minority Media and Telecommunications Council at a November 6, 2002 meeting it organized at the Department of Commerce. Although these twelve items were not proposals, the Commission misidentified them as such in the 2002 Biennial Review Order while failing to address the 14 proposals MMTC actually did make in its comments. See ns. 29 and 34 infra. The 12 informal suggestions are set out in Appendix B (items 15-26) for the Commission's convenience. Finally, Appendix B identifies 17 recommendations of the Commission's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee"), nine of which parallel MMTC's proposals and suggestions (items 1, 3, 4, 5, 6, 8, 12, 14 and 24) and eight of which originated with the Diversity Committee itself (items 27-34). The Diversity Committee is a 29-member expert body, chartered in 2003. Its Charter provides that the Diversity Committee will focus on "Financial issues, such as access to capital; Transactional transparency and related outreach; Career Advancement; [and] The impact of new and emerging technologies...on diversity issues." See Charter, Advisory Committee on Diversity for Communications in the Digital Age, §B.

2002 Biennial Review Order,<sup>13</sup> the Commission also failed to identify and describe 12 of MMTC's 14 proposals.<sup>14</sup>

Second, to meaningfully seek comment on MMTC's proposals, consider the recommendations of the Diversity Committee, and fully consider other minority ownership initiatives the parties might offer,<sup>15</sup> the agency must specifically seek comment on the central predicate of most minority ownership initiatives – the definition of a socially and economically disadvantaged business (SDB). Of MMTC's 14 rulemaking proposals,<sup>16</sup> ten rely on an SDB definition.<sup>17</sup> The Prometheus Court certainly appreciated the importance of an SDB definition. While approving, for the time being, the Commission's proposal to restrict to "small businesses" the transfer or sale of grandfathered combinations that would violate the local ownership limits (the "Transfer Restriction"),<sup>18</sup> the Court stated:

We anticipate, however, that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission's diversity objectives.<sup>19</sup>

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<sup>13</sup> 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, MM Docket No. 02-277 (Report and Order), 18 FCC Rcd 13620 (2003) ("2002 Biennial Review Order").

<sup>14</sup> The twelve proposals that were neither identified nor described in the 2002 Biennial Review Order are set out in Appendix B, items 3-14. These twelve proposals are apparently referenced only in an eleven-word phrase buried at the end of paragraph 49 of the 2002 Biennial Review Order. See id., 18 FCC Rcd at 13636 ¶49, discussed at ns. 29 and 34 infra. The 2002 Biennial Review Order identified and described, but did not rule on, MMTC's transactional nondiscrimination proposal (Appendix B, item 1). See 2002 Biennial Review Order, 18 FCC Rcd at 13636-37 ¶52. Finally, the 2002 Biennial Review Order identified, described, and ruled on MMTC's proposed transfer restriction to SDBs (Appendix B, item 2), approving a transfer restriction but limiting it to small businesses while not reaching the question of whether to further limit it to SDBs. See 2002 Biennial Review Order, 18 FCC Rcd at 13810-11 ¶¶488-490 and n. 1042.

<sup>15</sup> See FNPRM at 4 ¶6 ("we urge commenters to explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses.")

<sup>16</sup> See Appendix B, items 1-14.

<sup>17</sup> See Appendix B, items 2, 3, 4, 5, 6, 7, 8, 9, 13 and 14.

<sup>18</sup> Prometheus, 373 F.3d at 426-27. In the Prometheus Rehearing Order, p. 2, the Court permitted the Transfer Restriction to small businesses to take effect. Thus, the only remaining question concerning the Transfer Restriction is the suitability of the SDB classification as a potential improvement on the small business classification. See Appendix B, item 2.

<sup>19</sup> Prometheus, 373 F.3d at 428 n. 70.

Nonetheless, in the FNPRM, no such reevaluation is contemplated, and SDBs are nowhere mentioned.

Third, in a revised further notice, the Commission should include the market entry barriers provision of the Telecommunications Act (codified at 47 U.S.C. §257; hereinafter “Section 257”) as a primary legal basis for (1) MMTC’s proposals, (2) the recommendations of the Diversity Committee, (3) other minority ownership initiatives the parties might propose in response to the FNPRM, and (4) the Failing Station Solicitation Rule (“FSSR”), whose reexamination the Court required in this remand proceeding.<sup>20</sup> Under the Administrative Procedure Act (“APA”), the Regulatory Flexibility Act (“RFA”) and the Commission’s own rules, a rulemaking notice must set out each legal basis for its proposed rules.<sup>21</sup> Since Section 257 is a central element of the legal justification for minority ownership initiatives, its omission from the FNPRM must be corrected.

These errors in the FNPRM are far from technical. Rather, they have caused serious injury to the Diversity and Competition Supporters and their respective members,<sup>22</sup> and to the public interest. These errors have left the Commission unable to attract the breadth of comments it needs in order to adopt minority ownership policies that promote competition,<sup>23</sup> and that are

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<sup>20</sup> See Prometheus, 373 F.3d at 421 (remanding for consideration of the FSSR).

<sup>21</sup> 5 U.S.C §553(b)(2), 5 U.S.C. §603(b)(2), and 47 C.F.R. §1.413 respectively.

<sup>22</sup> Each of the Diversity and Competition Supporters has members involved in the media industry – variously, as broadcast owners, investors, potential owners, programmers, program suppliers, managers, employees, listeners or viewers. Thus, the injured persons are competitors and potential competitors, as well as members of the audience who are being deprived of the diversity of information and viewpoints that flow from racially diverse ownership. See FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) (establishing broadcast competitors’ Article III standing); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (“UCC I”) (establishing listeners’ and viewers’ Article III standing).

<sup>23</sup> Cf. Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24129 (2002) (reconsideration pending on other grounds) (Separate Statement of Commissioner Kevin J. Martin) (“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” (emphasis supplied)).

comprehensive, effective and sustainable. Minority ownership, already dangerously low, is in a steep tailspin,<sup>24</sup> depriving the nation of the entrepreneurial, managerial, professional and creative resources of a third of its people in the stewardship of its most influential industries. For 21 years, minority ownership has been an integral element of media ownership policy,<sup>25</sup> yet today the Commission lacks a single initiative that significantly advances minority media ownership. If the remand means anything, it means that the Commission cannot continue putting minority ownership in the corner of its media ownership rulemaking closet, to be addressed one day in the future – a day that never seems to arrive.<sup>26</sup>

**I. The Further Notice Contains Three Profoundly Serious Omissions**

**A. The Further Notice Fails To Identify And Describe MMTC’s Proposals**

In Prometheus, the Court noted that the Commission had repealed the FSSR “without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR).”<sup>27</sup> In remanding for “correction of this omission,” the Court noted “that the Commission deferred consideration of the MMTC’s other proposals for advancing minority and disadvantaged businesses and for promoting diversity in programming” and had specifically deferred “consideration of the MMTC’s ‘Transaction Nondiscrimination’ proposal pending

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<sup>24</sup> Based on the Minority Media and Telecommunications Council’s initial review of the 2001 and 2005 FCC databases of minority ownership (which undertook to correct for the over-inclusion or under-inclusion of certain categories of stations and owners in 2005), it appears that minority full power commercial broadcast ownership (including public companies controlled by minorities) declined during this period from 4.2% to approximately 3.9%.

<sup>25</sup> See Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 FCC2d 74, 94 (1985) (“1985 Multiple Ownership Reconsideration Order”) (acknowledging that “our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.”)

<sup>26</sup> See Prometheus, 373 F.3d at 435 n. 82 (“On remand the Commission should also consider MMTC’s proposals for enhancing ownership opportunities for women and minorities, which the Commission had deferred for future consideration”); see also id., 373 F.3d at 421 n. 59.

<sup>27</sup> Prometheus, 373 F.3d at 421.

recommendations from its Advisory Committee for Diversity.”<sup>28</sup> The Court directed that “[t]he Commission’s rulemaking process in response to our remand order should address these proposals at the same time.”<sup>29</sup> In a final instruction, the Court directed the Commission to “consider MMTC’s proposals for enhancing ownership opportunities for women and minorities, which the Commission had deferred for future consideration.”<sup>30</sup>

Thus, the Court was not remanding the general subject of minority ownership for consideration. Instead, it was remanding for consideration of each of MMTC’s specific proposals.

Notwithstanding the Third Circuit’s clear command in its remand order, the notice published in the Federal Register contains not one word identifying or describing MMTC’s proposals.<sup>31</sup> Almost as surprising, the only information given in the FNPRM that describes MMTC’s proposals are these 27 words, contained in a footnote:

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<sup>28</sup> Id. at 421 n. 59.

<sup>29</sup> Id. Here is a scorecard of the proposals ignored in the 2002 Biennial Review Order and the non-proposals misidentified there. In the 2002 Biennial Review Order, 18 FCC Rcd at 13636 ¶49, the Commission listed what it characterized as thirteen proposals by MMTC. The first twelve of these were not proposals to the Commission at all; rather, for the most part they were suggestions for private business initiatives, set out in a one-page exhibit to an informational Minority Media and Telecommunications Council document (Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002, Tab 10, “Twelve Minority Ownership Solutions”). Most of the “Twelve Minority Ownership Solutions” were not regulatory in nature (e.g. “Equity for specific and contemplated future acquisitions” (Appendix B, item 15); “Executive loans, and engineers on loans to minority owned companies and applicants” (Appendix B, item 20)). The thirteenth item listed in paragraph 49 of the 2002 Biennial Review Order consisted of these eleven words: “Sales to certain minority or small businesses as alternatives to divestitures.” Those eleven words were apparently the Commission’s crabbed shorthand for the 14 actual proposals that MMTC had set out in hundreds of pages of Comments and Reply Comments and other filings in the 2002 Biennial Review and in the 2001 Radio Ownership docket (MM Docket No. 01-317). The Commission’s intent can be divined from the fact that among MMTC’s 14 proposals (Appendix B, items 1-14), eight proposals contemplated sales or other assistance to SDBs as alternatives to divestitures. See Appendix B, items 2, 3, 4, 5, 6, 7, 8 and 14. Thus, in the FNPRM (at 4 ¶5 and n. 14), the Commission appears to (correctly) acknowledge that the Court was requiring that it seek comment on all of MMTC’s proposals.

<sup>30</sup> Prometheus, 373 F.3d at 435 ¶82.

<sup>31</sup> See 2006 Quadrennial Regulatory Review: 2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules (MB Docket No. 06-121, MB Docket No. 06-277; FCC 06-93), 71 Fed. Reg. 45511-45515 (August 9, 2006).

*2002 Biennial Review Order*, 18 FCC Rcd at 13634, 13636 paras. 46, 50. *See also, e.g.*, MMTC Jan. 2, 2003 Comments, MMTC Feb. 3, 2003 Reply Comments.<sup>32</sup>

That is all there is. Not the names of the proposals. Not their respective subject matters. Not page citations to them in the record.<sup>33</sup> Not a hint that 12 of the 13 items referred to in the relevant paragraph of the 2002 Biennial Review Order (§50) that are cited in the first sentence of this footnote are not MMTC's proposals, while MMTC's 14 actual proposals are contained in the second sentence beginning – incongruously – with the afterthought signal “*see also, e.g.*”<sup>34</sup>

What is the commenting public to infer from this stunning lack of clarity?<sup>35</sup>

Clarity is especially vital to an agency's consideration of civil rights issues. Only a handful of potential commenters are familiar with the nuances of minority media ownership, or with how minority ownership is interdependent with the other issues in the proceeding.

Therefore, to win the public's cooperation in compiling a complete record on minority

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<sup>32</sup> FNPRM at 4 n. 14.

<sup>33</sup> On top of that, rather than proudly setting out the Diversity Committee's recommendations in the FNPRM, the Commission relegated a fifteen-month body of work (September 23, 2003 to December 10, 2004) by the Commission's 29 experts to a two-sentence footnote. *See FNPRM* at 4 n. 15.

<sup>34</sup> The FNPRM refers to “MMTC's filings...including those that were listed in the *2002 Biennial Review Order* and referenced by the Court.” FNPRM at 4 ¶5. This phrase is apparently an attempt to justify the citation, in n. 14 of the FNPRM, to a paragraph of the 2002 Biennial Review Order that contained the twelve informal suggestions that were not MMTC's proposals (Appendix B hereto, items 15-26) as well as the eleven words purporting to describe the proposals MMTC did make (Appendix B hereto, items 1-14, as explained in n. 29 *supra*). *See Prometheus*, 373 F.3d at 421 n. 59 (citing the 2002 Biennial Review Order, 18 FCC Rcd at 13636 ¶50 (which refers to ¶49, listing proposals MMTC did not make). Following this citation in n. 14 of the FNPRM to proposals MMTC did not make, there appears a “*see, e.g.*” reference to the proposals MMTC did make. The FNPRM thus used the Court's reference to the Commission's own incorrect citation in the 2002 Biennial Review Order as a vehicle to mislead the parties by directing them first to proposals MMTC did not make. *Prometheus* hardly contemplated that bizarre result. While the Court did cite the 2002 Biennial Report and Order with its incorrect references to MMTC's proposals, the Court also unequivocally directed the Commission – without citing to the Commission's erroneous citation – to “consider MMTC's proposals for enhancing ownership opportunities for women and minorities, which the Commission had deferred for future consideration.” *Prometheus*, 373 F.3d at 435 n. 82. Further, the Commission certainly knew what MMTC's proposals were and were not. *See* MMTC Brief in *Prometheus Radio Project v. FCC*, 3d Cir., No. 03-3388 (filed October 21, 2003), p. 18 n. 36; MMTC Reply Brief in *Prometheus Radio Project v. FCC*, 3d Cir., No. 03-3388 (filed December 22, 2003), p. 17 and n. 12. Thus it was improper for the Commission to direct the public to non-proposals and then tell the public to “*see, e.g.*” documents that somewhere contained MMTC's actual proposals. It is bad enough to misidentify a party's proposals once, as happened the 2002 Biennial Review Order. To do the exact same thing again, on remand yet, is astonishing.

<sup>35</sup> The FNPRM's footnote 14 is so cryptic and abstruse that even the Commission's own expert small business office didn't understand it. *See* pp. 16-17 *infra*.

ownership, the Commission must set out the issues accurately and clearly, erring on the side of too much rather than too little information. Only in this way does the Commission have any chance of overcoming the greatest threshold impediment to clarity on civil rights issues: their decontextualization from history.

In communications policy, the fog of civil rights history is especially thick. Most of the commenting public is unaware that the Commission for decades routinely and deliberately granted broadcast licenses to segregationist companies and colleges, thereby facilitating the exclusion of minorities from broadcast employment and ownership.<sup>36</sup> The public generally isn't aware that Chairman Wiley, Chairman Ferris, and Commissioners Hooks and Rivera and many others tried valiantly to jump-start minority ownership,<sup>37</sup> as Congress intended.<sup>38</sup> The public

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<sup>36</sup> See, e.g., Southland Television, 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that because Louisiana's movie theater segregation law was not inconsistent with the Communications Act, a segregationist movie theater owner could hold a television license). Many other examples of how the Commission promoted segregation in broadcasting are provided in the Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 3, 2003) ("MMTC 2003 Comments") at 22-23 ns. 38-40. This series of cases originated in 1936, when the Commission issued the first in a series of decisions in which it refused to issue construction permits to otherwise qualified applicants because the applicants wanted to provide programming for European Jewish immigrants in their native languages, particularly Yiddish. See Chicago Broadcasting Ass'n., supra, 3 FCC at 280 (discussed in the MMTC 2003 Comments at 24-25 n. 43).

<sup>37</sup> Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978) (adopting tax certificate and distress sale policies); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) (creating attribution relief to permit minority entrepreneurs to qualify as beneficiaries of minority ownership policies based on the entrepreneurs' control of their companies).

<sup>38</sup> Congress has repeatedly directed the Commission to take steps to advance minority ownership. See, e.g., Communications Amendments Act of 1982 – National Telecommunications and Information Administration, Pub. L. No. 97-279, H.R. Conf. Rep. 97-765 (1982) at 26 ("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"); 47 U.S.C. §309(i)(A)(3) (1993) providing that in designing its system of competitive bidding "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"; 47 U.S.C. §309(j)(4)(c)(ii) (1997) (to the same effect). Three members of the Senate have asked the Commission not to allow more media consolidation until it seriously addresses the issues of minority, female and small business ownership. See Letter to Hon. Kevin J. Martin from Hon. Bill Nelson, Member, United States Senate, June 14, 2006 ("I strongly believe that the FCC should address the issues of minority, women, and small business ownership before taking up the wider media ownership issue"); Letter to Hon. Kevin J. Martin from Hon. John F. Kerry and Hon. Barack Obama, Members, United States Senate, July 19, 2006, urging Commission to complete the Market Entry Barriers proceeding "before consideration of broader media consolidation issues begins in earnest." The Market Entry Barriers proceeding, MB Docket No. 04-228, is discussed at n. 42 infra.

generally doesn't know that the Commission's initiatives yielded modest but promising initial results<sup>39</sup> until the initiatives came to a stop in 1995<sup>40</sup> and were not replaced with new ones. The public generally doesn't know that by 2000 the Commission had produced five studies on this issue,<sup>41</sup> yet six years later it still has failed to act on these studies, and it has disregarded every minority ownership proposal germane to the studies.<sup>42</sup> The public generally doesn't know that by December 10, 2004 – the date of its most recent in-person meeting – the Diversity Committee had unanimously approved 17 recommendations that addressed minority and female media ownership,<sup>43</sup> but all 17 of these recommendations have been ignored.<sup>44</sup> The public generally doesn't know that minority ownership is in a steep tailspin.<sup>45</sup> The one thing about minority ownership that the public does know from reading Prometheus and the FNPRM is that the

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<sup>39</sup> Between 1978 and 1995, minority ownership of broadcast stations grew from 60 to over 300 stations. See MMTC 2003 Comments at 54 n. 96. However, at no time have minority owned or controlled full power broadcast stations' asset values cumulatively reached even 2% of the industry total.

<sup>40</sup> The tax certificate policy was repealed in 1995. Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995). New potential minority ownership initiatives were put on hold in the wake of Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ("Adarand III"), which applied strict scrutiny to racial classifications in federal programs.

<sup>41</sup> See Staff Executive Summary, Market Entry Barriers Studies (December 12, 2000), describing the five studies performed in response to 47 U.S.C. §257 (the "Section 257 Studies").

<sup>42</sup> In 2001, the Commission declined to consider the Minority Media and Telecommunications Council's proposals in the television local ownership proceeding because the Commission had not evaluated the Section 257 Studies. See Review of the Commission's Rules Governing Television Broadcasting (MO&O on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) ("While we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.") Five years have elapsed, yet the Commission has yielded up neither the evaluation nor the initiatives. Although the Section 257 Studies were the only significant step taken to implement Section 257, the Commission's 2003 Triennial Report to Congress on Section 257 (required by 47 U.S.C. §257(c)) contained not a word about the Section 257 Studies. See Section 257 Third Report to Congress, 19 FCC Rcd 3034 (2004). In 2004, in MB Docket No. 04-228, the Commission sought comments on the Section 257 Studies (see n. 55 infra), but that docket, too, has been dormant.

<sup>43</sup> See "Achievements of the FCC's Advisory Committee on Diversity for Communications in the Digital Age, September 29, 2003 – February 16, 2005" (Diversity Committee Memorandum, revised February 17, 2005). The Diversity Committee's 17 recommendations regarding minority media ownership are identified in Appendix B, items 1, 3, 4, 5, 6, 8, 12, 14, 24, 27, 28, 29, 30, 31, 32, 33 and 34.

<sup>44</sup> Id. While it was ignoring the Diversity Committee's recommendations, the Commission was also violating the Committee's own Charter by failing, for 14 months, to permit the Committee to meet. See Charter, Advisory Committee on Diversity for Communications in the Digital Age, §H ("The Committee shall meet a minimum of two (2) times per year.")

<sup>45</sup> See n. 24 supra.

Commission in 2003 tried to repeal its only policy designed to foster minority television ownership – the FSSR – without so much as mentioning that minority ownership was one of the FSSR’s key objectives.<sup>46</sup>

Notwithstanding all of this, the FNPRM offers the public little to suggest what this remand-triggering controversy is all about. Not only does the FNPRM fail to identify and describe even one of MMTC’s proposals, it fails to mention that eight of MMTC’s 14 media ownership proposals have been endorsed unanimously by the Commission’s own expert advisory committee with subject matter expertise.<sup>47</sup> It fails to inform the unsuspecting public of the inconvenient but essential fact that six of MMTC’s 14 proposals have been awaiting action for between seven and 14 years.<sup>48</sup> It fails to advise the public that six of MMTC’s proposals – including proposals for staged implementation of deregulatory initiatives and for tradable diversity credits<sup>49</sup> – relate closely to the other issues in the proceeding and to how all of the Commission’s decisions might be implemented.<sup>50</sup>

The public’s lack of knowledge of this history heightens the importance of ensuring that the public is clearly informed of what proposals have been offered that could move the agency

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<sup>46</sup> See Prometheus, 373 F.3d at 421; FNPRM at 8-9 ¶17. This is hardly the first time the Commission had ignored its obligation to fully consider minority ownership proposals in the manner contemplated by the APA and the Commission’s rules. Among the more recent examples of these procedural irregularities are Technical Assignment Criteria for the AM Broadcast Service (R&O), 6 FCC Rcd 6273 (1991) (refusing to adopt minority ownership incentives for the AM expanded band and failing to acknowledge the existence of (or even include in the appended commenting parties list) extensive comments by the NAACP, LULAC and NBMC; on reconsideration (8 FCC Rcd 3250, 3254 ¶¶36-37 (1993)), the Commission rejected a revised proposal by the three organizations, ruling without irony that the organizations’ revised proposal “should have been submitted earlier as a comment in response to the NPRM”); Establishment and Regulation of New Digital Audio Radio Services (NPRM and Further NOI), 7 FCC Rcd 7776 (1992) (failing to mention the NAACP, LULAC, NHMC and NBMC’s extensive minority ownership proposals and DAB demand study, or to put the minority ownership issue out for comment in subsequent DAB proceeding); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (First R&O), 8 FCC Rcd 3359 (1993) (failing to address minority ownership and failing to respond to, or even include in the appended commenting parties’ list, the minority ownership proposals of the Caribbean Satellite Network, one of only two minority owned cable channels at the time).

<sup>47</sup> See Appendix B, items 1, 3, 4, 5, 6, 8, 12 and 23.

<sup>48</sup> See Appendix B, items 1, 3, 4, 5, 7 and 8.

<sup>49</sup> See Appendix B, items 24 and 25 respectively.

past its history. The FNPRM must be corrected if it is to ensure that the general public will know about, respond to, and create new proposals to address minority ownership.

**B. The FNPRM Fails To Consider The Definition Of A Socially And Economically Disadvantaged Business**

In the 2002 Biennial Review Order, the Commission adopted the Transfer Restriction, limiting the eligible purchasers to small businesses,<sup>51</sup> and the Court approved this provision.<sup>52</sup> While it declined MMTC's proposal to immediately designate SDBs, rather than small businesses, as the category of eligible purchasers,<sup>53</sup> the Court stated:

We anticipate, however, that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission's diversity objectives.<sup>54</sup>

In the FNPRM, no such reevaluation is contemplated; indeed, SDBs are nowhere mentioned and the FNPRM nowhere alludes to the SDB issue. This omission is easy to rectify, because the SDB definition issue was briefed in 2004 in the Market Entry Barriers proceeding, MB Docket 04-228.<sup>55</sup> Thus, the Commission need only determine whether and how this definition should be modified for broadcasting and used to foster minority ownership.

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<sup>50</sup> See Appendix B, items 19, 20, 21, 22, 23, 24 and 25.

<sup>51</sup> 2002 Biennial Review Report, 18 FCC Rcd at 13809-12 ¶¶487-90.

<sup>52</sup> Prometheus, 373 F.3d at 426-27; Prometheus Rehearing Order, p. 2. Unfortunately, in the two years that the Transfer Restriction has been in effect, there does not appear to have been a single transaction involving the intact sale to a small business of a grandfathered combination.

<sup>53</sup> This proposal is contained in Appendix B, item 2. Thus, its noninclusion in the FNPRM is also addressed in the preceding subsection of this motion. However, a definition of an SDB is essential to nine other MMTC proposals (Appendix B, items 3, 4, 5, 6, 7, 8, 9, 13 and 14) and to any meaningful consideration of most potential minority ownership initiatives. Further, the Court specifically referenced SDBs as an issue addressable on remand. Prometheus, 373 F.3d at 428 n. 70. Therefore, SDBs should have been addressed in the FNPRM even if MMTC had made no proposal on SDBs in the 2002 Biennial Review. Consequently, the SDB issue is being set out in this separate section of the instant motion.

<sup>54</sup> Prometheus, 373 F.3d at 428 n. 70.

<sup>55</sup> See Mass Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies, MB Docket No. 04-228 (PN and NOI), 19 FCC Rcd 10491 (2004).

An SDB definition is hardly a minor wrinkle in this rulemaking. Not only is it critical to the evolution of the Transfer Restriction, it is the linchpin of any serious effort to address minority ownership. It specifies the potential beneficiaries of ten of MMTC's 14 proposals that were remanded by the Court.<sup>56</sup> Without an SDB definition, initiatives based on these MMTC proposals would be so dilute as to have little or no impact on minority ownership.<sup>57</sup> Thus, without seeking comment on an SDB definition, the Commission cannot fully respond to the Court's instruction that the Commission address MMTC's proposals.<sup>58</sup>

**C. The Further Notice Fails To Include All Legal Justifications For Minority Ownership Policies**

In the FNPRM, the Commission failed to identify a central legal basis for the adoption of minority ownership policies – Section 257. The APA provides that a notice of proposed rulemaking must contain “reference to the legal authority under which the rule is proposed,”<sup>59</sup> and the RFA states that an initial regulatory flexibility analysis shall contain “a succinct statement of the objectives of, and legal basis for, the proposed rule.”<sup>60</sup> Although the FNPRM specifies eight statutory provisions providing legal bases for the rules that might emerge from this proceeding,<sup>61</sup> the Commission omitted the most significant provision that would provide a legal basis for MMTC's and other minority ownership proposals, and for the FSSR – Section 257, the Market Entry Barriers provision. Enacted as part of the Telecommunications Act of 1996, Section 257 provides that the Commission must periodically report to Congress on

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<sup>56</sup> See Appendix B, items 2, 3, 4, 5, 6, 7, 8, 9, 13 and 14.

<sup>57</sup> SDBs are a subset of small businesses. Like other small businesses, they are economically disadvantaged; but unlike other small businesses, they are also socially disadvantaged. Their social disadvantage stems from individualized factors or from their membership in a class (such as a racial group in a particular industry) for which discrimination has inhibited entry and financing. See MMTC 2003 Comments, pp. 79-81.

<sup>58</sup> Prometheus, 373 F.3d at 429.

<sup>59</sup> 5 U.S.C. §553(b)(2). See also 47 C.F.R. §1.413 (to the same effect).

<sup>60</sup> 5 U.S.C. §603(b)(2).

<sup>61</sup> FNPRM at 18 ¶¶42, 43; id. at Appendix B (Supplemental Initial Regulatory Flexibility Analysis) at 23 ¶49.

“market entry barriers for entrepreneurship of telecommunications services and information services” and on “any regulations prescribed to eliminate” these barriers to entry.<sup>62</sup>

Section 257 is hardly superfluous or redundant. Rather, it is the most important provision the Commission will need to rely upon to craft minority ownership policies that satisfy Congress’ objectives. Even if the Commission could rely on other statutory provisions to sustain new minority ownership policies and the FSSR, it would make no sense for the Commission to deprive itself of the availability of the central provision Congress adopted to foster minority ownership.

## **II. The Flaws In The Further Notice Have Caused Serious Injury**

By issuing its deeply flawed FNPRM, the Commission has caused serious injury. The injured parties include the Diversity and Competition Supporters, as well as their members who are competing or hoping to compete in the broadcasting industry or who are listeners and viewers seeking the diversity of information and viewpoints that flow from racially diverse ownership. Through the FNPRM, the Commission has put members of the public to work writing comments that are unlikely to address all of the matters remanded by the Court, or all of the interconnected issues the Commission regards as fundamental to media ownership policy.<sup>63</sup> Members of the public have been deprived of the required notice of what they are commenting on,<sup>64</sup> what legal justifications they might address,<sup>65</sup> and whether they should help define the linchpin of most potential minority ownership initiatives.<sup>66</sup>

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<sup>62</sup> 47 U.S.C. §§257(a), (c)(1) and (c)(2). Congress expressly identified “diversity of media voices” as a purpose the Commission must advance under Section 257. 47 U.S.C. §257(b).

<sup>63</sup> See p. 22 infra (discussing the interconnectedness of minority ownership with the Commission’s other media ownership policy objectives). Six of MMTC’s proposals address issues vital to the proceeding that are not specific to minority ownership. See Appendix B, items 18-25 (including, e.g., proposals for staged implementation of rules (item 13) and for tradable diversity credits (item 14)).

<sup>64</sup> See pp. 6-12 supra (discussing MMTC’s 14 proposals).

<sup>65</sup> See pp. 13-14 supra (discussing Section 257).

<sup>66</sup> See pp 12-23 supra (discussing SDBs).

With only limited time and resources for the preparation of comments, the parties understandably will assign a low priority to proposals the Commission did not see fit to identify and describe.<sup>67</sup> If the public comes to suspect that the Commission no longer regards minority ownership as a high priority, few comments will be filed on that subject. Should that happen, the Commission might ultimately have to conclude that the record only justifies the adoption of inadequate, inefficient or unsustainable policies, or is too sparse to justify the adoption of any minority ownership policies at all. That would mean that until the 2010 quadrennial proceeding, the nation would continue to waste the entrepreneurial, managerial, professional and creative resources of a third of its people in the stewardship of its most influential industries.

### **III. Failure To Correct The FNPRM's Omissions Would Be Reversible Error**

Just as there was no ambiguity about the Commission's obligation in the 2002 Biennial Review Order to describe MMTC's proposals and rule on them,<sup>68</sup> there is no ambiguity about the Commission's obligation on remand to describe the specific proposals on which it has been instructed to seek comment. The Prometheus Court held that "the adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency."<sup>69</sup> In that holding, the Court applied Section 553(b)(3) of the APA, which provides that a notice of proposed rulemaking must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>70</sup>

Satisfying Section 553(b)(3) is easy. To provide notice of a specific proposal an agency is considering, a simple descriptive phrase will do. Even a single word can sometimes be

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<sup>67</sup> The Commission organized the FNPRM as a series of questions, and did not offer specific proposals. Regardless of whether it was wise or lawful for the Commission to organize the FNPRM that way, it is indisputable that the Court of Appeals required the Commission to seek comment on MMTC's specific proposals.

<sup>68</sup> See 5 U.S.C. §553(c) and 555(e). The Commission has never contended that any of MMTC's proposals is unworthy of recitation and consideration.

<sup>69</sup> Prometheus, 373 F.3d at 411 (citing Am. Iron & Steel Inst. v. EPA, 568 F.2d 284, 293 (3d Cir. 1977)).

<sup>70</sup> 5 U.S.C. §553(b)(3). See also 47 C.F.R. §1.413(c) (containing identical language).

sufficient if the word fully describes what the agency has in mind. For example, in Prometheus, a description of television multiple ownership economics that included the word “triopolies” provided sufficient notice that the Commission might ultimately decide to allow common ownership of three full power television stations in certain markets.<sup>71</sup>

Yet the FNPRM lacks even that much. It contains not one word that describes even one of MMTC’s 14 proposals. Thus, the FNPRM cannot possibly be said to contain their “terms or substance” or “a description of the subjects and issues involved” in the remanded proposals.<sup>72</sup>

The “see also, e.g.” citation to MMTC’s comments and reply comments in footnote 14 of the FNPRM is a grossly inadequate vehicle to provide notice of MMTC’s proposals.<sup>73</sup> If that were sufficient to satisfy the notice requirement of Section 553(b)(3) of the APA, the Commission would hardly have needed to produce a 45-paragraph FNPRM. Instead, it could have issued a one-sentence order saying “Comments are sought in response to the issues remanded by the Court,” inserted a footnote citing Prometheus (lacking even internal page citations), and let the parties try to figure out what the agency wants.

Discerning the adequacy of the notice contained in the FNPRM is not a hypothetical exercise. The Commission already knows, as a fact, that the FNPRM is insufficient to “fairly

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<sup>71</sup> See, e.g., Prometheus, 373 F.3d at 416 (holding that the 2002 Biennial Review Order’s description of “‘different economic incentives’ relating to diverse viewpoints in newscasting that might exist ‘among stand-alone stations, duopolies, or triopolies’” left “‘little doubt that the Notice provided a sufficient ‘description of the subjects and issues involved’ in the Commission’s decision to allow triopolies.”)

<sup>72</sup> In MMTC’s proposals, here are some examples of critical terms whose absence from the FNPRM could give rise to a subsequent claim that a rule relying them was not a logical outgrowth of the proceeding: “equal transactional opportunity” (Appendix B, item 1); “buildout deadlines for selling expiring construction permits” (Appendix B, item 4); “incubator programs” (Appendix B, item 5); “share-times” (Appendix B, item 6); “attribution of EDP interests” (Appendix B, item 8); “ownership rule abuse” (Appendix B, item 10); “joint operating agreements” (Appendix B, item 11); “tradable Diversity Credits” (Appendix B, item 14).

<sup>73</sup> The signal “see also, e.g.” is normally used to identify material that is illustrative, supplemental, or optional to review. Agencies never use this signal to notify commenters that the material being cited is essential. Putting such a signal in a footnote only compounds its damage. See, e.g., McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (admonishing the Commission not to hide its intentions with confusing language and bury important points in footnotes because “[s]uch obscurity and imprecision collide[s] with the Commission’s responsibility, shared by all federal agencies, of issuing intelligible orders.”)

apprise interested persons” of the subjects and issues in the proceeding. It knows this because the FNPRM was insufficient even to “fairly apprise” the Commission’s own expert small business office of these subjects and issues. On July 26, 2006, the Office of Communications Business Opportunities (“OCBO”) distributed a package of materials containing the FNPRM “as well as the relevant portions of MMTC’s comments which are incorporated by reference into the FNPRM.”<sup>74</sup> OCBO’s effort was highly commendable. Unfortunately, all of the materials enclosed with OCBO’s mailing were the wrong documents. They included MMTC’s twelve informal suggestions to private industry stakeholders,<sup>75</sup> as well as the Supplemental Comments of Diversity and Competition Supporters in MB Docket 02-277 (filed January 27, 2003), which contains expert testimony and scholarly abstracts but no proposals. Thus, OCBO’s mailing included nothing about the fourteen proposals that MMTC filed in the 2002 Biennial Review.<sup>76</sup> Since even OCBO was sincerely confused, the Commission can hardly expect the general public to read the FNPRM and discern what, exactly, the Commission wanted members of the public to address in their comments.

In the context of the agency’s institutional history,<sup>77</sup> the agency’s failure to fully, unequivocally and promptly correct the FNPRM would not be favorably regarded by a reviewing court. Judges frown on public officials’ failure to obey federal court orders.<sup>78</sup> If it fails to

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<sup>74</sup> OCBO Letter on Media Ownership, July 26, 2006.

<sup>75</sup> See Appendix B, items 15-26, discussed in ns. 29 and 34 supra.

<sup>76</sup> See Appendix B, items 1-14.

<sup>77</sup> See pp. 9-12 supra.

<sup>78</sup> The leading modern case on disobedience to federal court orders (as well as on an issue not present here, federalism) is Cooper v. Aaron, 358 U.S. 1 (1958). All nine justices co-authored the decision, which held that defiance of a federal court’s mandate must not be “nullified openly and directly” by state officials “nor nullified indirectly by them through evasive schemes for segregation whether attempted ‘ingeniously or ingenuously.’” Id. at 17 (citing Smith v. Texas, 311 U.S. 128, 132 (1940)). As with many cases the Supreme Court uses to open lines of precedent, Cooper v. Aaron contains strong facts. MMTC does not wish to imply that the Commission’s mishandling of minority ownership, egregious as it is, rivals Governor Faubus’ human rights abuses of the Little Rock Nine that persisted even after President Eisenhower deployed the 101<sup>st</sup> Airborne Division.

implement the Third Circuit’s mandate, the Commission would risk yet another remand of all of its multiple ownership decisions,<sup>79</sup> loss of control of the docket,<sup>80</sup> or worse.<sup>81</sup>

Thus, to avoid committing reversible error, the Commission must identify and describe MMTC’s proposals<sup>82</sup> as well as the recommendations of the Diversity Committee,<sup>83</sup> seek comment on an SDB definition, and specify Section 257 as a legal basis for rules the Commission might develop. That is the only way the Commission can satisfy the Court’s mandate. Only in this way can members of the public understand the minority ownership issue and regard it as worthy of attention, comment knowledgeably on MMTC’s proposals, the Diversity Committee’s proposals, and the FSSR, consider MMTC’s proposals’ interrelatedness

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<sup>79</sup> See, e.g., Maryland Broadcasters, 253 F.3d at 736 (holding that an entire set of rules must be stricken if a flawed portion “played an integral part in the Commission’s evaluation of the rule as a whole[.]”) See discussion at 22 *infra*.

<sup>80</sup> See, e.g., Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (“UCC II”) (reviewing a television license renewal proceeding held on remand from an earlier decision of the same name (UCC I, 359 F.2d 994), the Court found the record manifested a “curious neutrality in favor of the [segregationist] licensee” and was “beyond repair.” UCC II, 425 F.2d at 547, 550. Therefore, the Court vacated the grant of the renewal application. *Id.* at 550.) See also Tex Tin Corp. v. EPA, 992 F.2d 353, 355 (D.C. Cir. 1993) (finding that the EPA, on remand from a case of the same name (935 F.2d 1321 (D.C. Cir. 1991)) had produced studies and reports that were “not responsive” to its remand order, and ordering the appellant’s tin slag facility deleted from the National Priorities List (NPL) for potential corrective action under the Comprehensive Response, Compensation and Liability Act).

<sup>81</sup> In Public Citizen Health Research Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987) (“Brock”), petitioners alleged that OSHA had failed to comply with the remand order in Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986), which had required OSHA to adopt a short-term exposure limit for the toxin ethylene oxide or provide evidence showing that no such limit was necessary. Two years then elapsed without action, whereupon the Court rendered a finding of “unreasonable delay” but declined to hold OSHA in contempt only because it determined that bureaucratic inefficiency, rather than bad faith, was the cause of OSHA’s “laggard pace.” Brock, 823 F.2d at 629. Courts also take note of whether an agency’s failure to comply with a court order was an isolated incident or was part of a long pattern of unlawful or improper behavior. See, e.g., Cooper v. Aaron, 358 U.S. at 15 (recounting several actions and omissions by Arkansas state officials that, taken together, constituted a pattern of wrongdoing).

<sup>82</sup> To accomplish this, the Commission could simply attach this motion’s Appendix B to a revised further notice. See House Committee Report Accompanying the Administrative Procedure Act, Doc. No. 248, 79<sup>th</sup> Cong., 2d Sess. 258 (1946) (“Summaries and reports may also be issued as aids in securing public comment or suggestions.”) While OCBO could also distribute Appendix B, such a mailing, by itself, would not satisfy the public notice requirement of 5 U.S.C. §553(b). Over half a million comments were filed in the 2002 Biennial Review. See 2002 Biennial Review Order, 18 FCC Rcd at 13624 ¶9. OCBO’s mailing list does not include most of those persons and others who might wish to file proposals and comments about minority ownership if they had the facts before them.

<sup>83</sup> Even assuming that the Commission is not required by law to set out the Diversity Committee’s recommendations, it would be wise to do so in any event. That modest step would help ensure that the 29 Committee members’ 15 months of work would not go to waste.

with other issues in the FNPRM, develop their own minority ownership proposals, and provide the Commission with the record it needs to develop the minority ownership initiatives that the public deserves.

#### **IV. The Only Way To Correct The Flaws In The Further Notice Is To Withdraw It, Revise It, And Republish It In The Federal Register**

A rulemaking proceeding must be restarted if it adopts a substantive rule change that would be subject to the prior notice requirement contained in 47 C.F.R. §1.412. For example, in its 1998 Cable Public File Streamlining Reconsideration Order,<sup>84</sup> the Commission restarted a proceeding because the Commission inadvertently had not published the proposed rule in the Federal Register.<sup>85</sup> The proceeding had actually concluded, so the Commission had to vacate the rule and start over again.

The substantive rule figuring in the 1998 Cable Public File Streamlining Reconsideration Order was the definition of a “small cable system” for the purpose of the cable public file recordkeeping requirements (47 C.F.R. §76.1700) as one having fewer than 5,000 subscribers; previously, a small cable system was defined for §76.1700 purposes as one having fewer than 1,000 subscribers.<sup>86</sup> The task of defining an SDB is the same kind of task as defining a small cable system. On their face, each of MMTC’s proposals also plainly contemplates a substantive rule within the meaning of 47 C.F.R. §1.412. Finally, the omission of Section 257 from the FNPRM is also a fatal flaw, since it is well established that if a notice of proposed rulemaking fails to include a legal authority that is central to the issue, a reviewing court will hold the rule

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<sup>84</sup> 1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements, CS Docket No. 98-132 (Order on Reconsideration and Further Notice of Proposed Rulemaking), 15 FCC Rcd 9298 (2000) (“1998 Cable Public File Streamlining Reconsideration Order”).

<sup>85</sup> Federal Register publication of proposed substantive rules is contemplated by 47 C.F.R. §§0.411(b)(2), 0.445(c) and 1.412(a)(1).

<sup>86</sup> Id. at 9299-9300 ¶¶4-5.

invalid.<sup>87</sup> Consequently and unfortunately, the Commission can only correct the FNPRM by issuing a new rulemaking notice and publishing the new notice in the Federal Register.<sup>88</sup>

Here is an example, using the SDB issue, that illustrates why a new rulemaking notice is required. Suppose the Commission failed to issue and publish a new rulemaking notice and then, when it concludes this proceeding, it decides to limit the Transfer Restriction – which presently applies to all small businesses – to the narrower category of SDBs. A non-SDB small business (let’s call it “Alpha”) could then fairly assert that it lacked notice of the opportunity to apprise the Commission of why it should retain its eligibility under the Transfer Restriction. On the other hand, suppose the Commission ultimately adopts only a weak SDB definition or no SDB definition at all. An SDB (“Beta”) could then fairly assert that it lacked notice of the opportunity to advocate an SDB definition from which it was hoping to benefit. Under either scenario, Alpha or Beta would maintain, correctly, that the final substantive rule defining SDBs was not a logical outgrowth of an initial notice that did not mention SDBs or otherwise allude to the SDB issue.<sup>89</sup>

The wrong way to correct the FNPRM’s errors would be to publish a new notice that restarts the clock only for MMTC’s proposals, Section 257 and the SDB definition, such that comments on these matters would be due later than comments on the other issues.<sup>90</sup> Such a procedure would unbundle minority ownership from the corpus of the rulemaking. For three reasons, that would be a mistake. First, creating one comment track for most issues and a separate comment track for minority ownership would be unfaithful to the Court’s instruction

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<sup>87</sup> See, e.g., Global Van Lines v. ICC, 714 F.2d 1290, 1297-99 (5<sup>th</sup> Cir. 1983).

<sup>88</sup> The original notice in the Federal Register contains nothing identifying or describing MMTC’s proposals. See p. 7 supra. That error should be corrected as well.

<sup>89</sup> A change in a rule is a “logical outgrowth” of a notice of proposed rulemaking “if interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004) (citing City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. Cir. 2003)).

<sup>90</sup> Obviously it would be patently unfair for the Commission to issue a revised further notice that gives the public less time to address the minority ownership issues than the time available to address the other issues.

that the Commission consider MMTC's proposals "at the same time" as it considers the other structural issues.<sup>91</sup> Second, a two-track rulemaking would be cumbersome and confusing, since the Commission has asked commenters to "explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses."<sup>92</sup> Certainly it would be awkward for commenters to file four pleadings (two sets of comments and two sets of reply comments), the first and third of which would address minority ownership's impact on their other proposals and the second and fourth of which would address minority ownership exclusively. Third, separating minority ownership from competition, localism, and other aspects of diversity would be a serious policy blunder. After it is separated from other structural issues, minority ownership tends to be forgotten, as it was after its separation in 1995 from the television duopoly and attribution dockets to which it formerly had been joined.<sup>93</sup> Putting minority ownership onto a separate rulemaking track would also manifest a profound shift in ownership policy by stigmatizing minority ownership as separate, unequal, and inferior to the Commission's other structural objectives.

Starting any proceeding again is a significant step, and it should not be taken lightly. Yet for better or worse, that is what the APA evidently requires in this circumstance. There has been a false start, and the runners must return to their blocks. Fortunately, the proceeding has just

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<sup>91</sup> Prometheus, 373 F.3d at 421 n. 59; see also id. at 435 n. 82.

<sup>92</sup> FNPRM at 4 ¶6.

<sup>93</sup> In 1995, the Commission simultaneously opened cross-referenced proceedings on attribution, local television ownership, and minority and female ownership. See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities MM Docket No. 94-149 (NPRM), 10 FCC Rcd 2788 (1995) ("1995 Minority Ownership NPRM"). However, after Adarand III, the Commission decoupled the minority ownership docket from the local television and attribution dockets. See Review of the Commission's Regulations Governing Television Broadcasting (Second Further NPRM), 11 FCC Rcd 21655 (1996). By 1999, the Commission had issued reports and orders in the local television and attribution dockets. Yet the Commission still had not addressed the proposals contained in the 1995 minority ownership docket, some of which had been rolled over from an earlier minority ownership docket that was initiated in 1992. See 1995 Minority Ownership NPRM, 10 FCC Rcd at 2788 n. 2; see also Revision of Radio Rules and Policies (Reconsideration), 7 FCC Rcd 6387, 6391-92 ¶¶20-26 (1992) (seeking comment on incubator proposals advanced by Chairman Sikes and by NABOB). On January 11, 2002, without

begun and, commendably, the Commission does not seem to be in a rush.<sup>94</sup> Thus, a restart now would create only a slight inconvenience – a bump in the road compared to the 1998 Cable Public File Streamlining proceeding, which had been completed before a new rulemaking notice had to be issued.<sup>95</sup> On the other hand, a refusal to restart would doom most or all of the rules contemplated by the FNPRM. A reviewing court will reject an entire set of rules when a flawed portion “played an integral part in the Commission’s evaluation of the [rules] as a whole” (emphasis supplied) and the remaining rules, after severance of the flawed portion, “would not have accomplished the Commission’s...goals at it described them.”<sup>96</sup> Minority ownership easily meets this “integral part” test because it is deeply and inextricably intertwined with the other key aspects of the Commission’s media ownership policies in two ways: first, minority ownership advances the Commission’s objectives of advancing competition<sup>97</sup> and promoting diversity of

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action on the proposals pending therein, the Commission terminated its 1995 minority ownership docket, MM Docket No. 94-149. Termination of Stale or Moot Docketed Proceedings (Order), 17 FCC Rcd 1199 (2002).

<sup>94</sup> See FNPRM at 27 (Statement of Chairman Kevin J. Martin) (announcing plans for six public hearings).

<sup>95</sup> See 1998 Cable Public File Streamlining Reconsideration Order, 15 FCC Rcd at 9899 ¶4, discussed at p. 19 supra.

<sup>96</sup> See Maryland Broadcasters, 253 F.3d at 736. In theory, the Commission could hold that minority ownership is severable from the other rules. That would be difficult for two reasons. First, the Court has already frowned on the Commission’s promise to consider MMTC’s proposals in a separate proceeding. See Prometheus, 373 F.3d at 421 n. 59. Second, the Commission has recognized minority ownership’s interdependence with the other media ownership issues when it asked the parties to set forth “the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses.” See FNPRM at 4 ¶6. That is exactly the kind of holding that prevents severability. See Maryland Broadcasters, 253 F.3d at 736 (argument for severability of one option of the EEO rules was undercut by Commission’s assertion that without that option broadcasters would not have sufficient flexibility in their operations under the other option of the EEO rule). Indeed, holding that minority ownership is severable would require the Commission to reverse years of pronouncements that minority ownership is an indispensable element of its structural ownership policies. See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13637 ¶51 (“Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.”) In addition to conflicting with Congressional direction (see n. 38), a new policy that regards minority ownership as irrelevant to competition and diversity would be difficult to justify with a “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

<sup>97</sup> See MMTC 2003 Comments, pp. 61-65.

information,<sup>98</sup> and second, absent remedial steps, additional media consolidation would accelerate the sharp decline in minority ownership since 2001.<sup>99</sup>

MMTC neither seeks nor wants avoidable delay, but no one wants a second remand, especially parties who sincerely believe they can justify relaxation of one of the rules affecting their companies. A second remand could delay implementation of minority ownership initiatives (and other media ownership rule revisions) until 2011, when the next quadrennial review concludes. That would be intolerable. Although MMTC cannot discern a way to avoid restarting the clock, it is willing to confer with Commission officials to explore whether there is a lawful means of avoiding that outcome.

### **Conclusion**

Minority ownership is the “O-ring” of this proceeding: indispensable, yet easy to disregard while going full speed ahead with the mission. This mission is a second attempt to consider new multiple ownership rules. Much is at stake. It makes no sense to risk this mission in order to test the limits of how little notice an agency can provide and still have its rules affirmed. Especially when it is under a remand and a stay, the Commission should provide expansive and indisputably clear notice.

WHEREFORE, to follow the mandate, and demonstrate to the Court, to Congress and the public that it really means to correct the tailspin in minority broadcast ownership, the Commission should enumerate and describe the proposals of MMTC and the Diversity

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<sup>98</sup> See MMTC 2003 Comments, pp. 66-71.

<sup>99</sup> See MMTC 2003 Comments, pp. 35-60. As MMTC has documented through expert testimony, greater consolidation, especially in local radio and television, would adversely impact minority ownership. See, *inter alia*, Statement of Dr. Hubert Brown, Assistant Professor, S.I. Newhouse School of Public Communications, Syracuse University, January 15, 2003; Declaration of Dr. Jannette L. Dates, Dean, School of Communications, Howard University, January 20, 2003; Declaration of Dr. C. Ann Hollifield, Associate Professor and Coordinator of the Michael J. Faherty Broadcast Management Laboratory, Department of Telecommunications, University of Georgia, January 21, 2003; Declaration of Dr. Philip M. Napoli, Assistant Professor of Communications and Media Management, Graduate School of Business, Fordham University, January 15, 2003 (contained, respectively, in

Committee, seek comment on the definition of an SDB, and include Section 257 as a legal basis for the contemplated rules. To perform these steps in the manner specified by law, the Commission should withdraw the FNPRM and promptly issue a revised further notice that implements the mandate and complies with the APA, the RFA, and the Commission's rules.

Respectfully submitted,

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August 23, 2006

**APPENDIX A**

**DIVERSITY AND COMPETITION SUPPORTERS**<sup>1</sup>

**August 23, 2006**

Center for Asian American Media<sup>2</sup>  
Independent Spanish Broadcasters Association<sup>3</sup>  
League of United Latin American Citizens  
Minority Business Enterprise Legal Defense and Education Fund  
Minority Media and Telecommunications Council  
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 Institute for Latino Policy<sup>4</sup>  
National Urban League  
Native American Public Telecommunications, Inc.  
Puerto Rican Legal Defense and Education Fund<sup>5</sup>  
UNITY: Journalists of Color, Inc.  
Women's Institute for Freedom of the Press

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<sup>1</sup> The members of the Diversity and Competition Supporters in the 2002 Biennial Review Proceeding are the same as those joining in this motion, with one exception: the Civil Rights Forum on Communications Policy is no longer in operation. Name and organizational changes are described in the footnotes below.

<sup>2</sup> Formerly the National Asian American Telecommunications Association.

<sup>3</sup> Successor to the American Hispanic Owned Radio Association.

<sup>4</sup> Formerly the Institute for Puerto Rican Policy. The Institute had been a project of the Puerto Rican Legal Defense and Education Fund. See n. 5 supra.

<sup>5</sup> Formerly PRLDEF-Institute for Puerto Rican Policy. The Institute for Puerto Rican Policy is now independent of the Puerto Rican Legal Defense and Education Fund. See n. 4 infra.

## APPENDIX B

### MINORITY OWNERSHIP PROPOSALS AND SUGGESTIONS<sup>1</sup>

Section I (items 1-14) contains the 14 proposals of the Diversity and Competition Supporters (“MMTC”) in MM Docket No. 02-277. The FCC’s Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee) also proposed eight of these items, as noted therein.

Section II (items 15-26) contains 12 informal suggestions made by the Minority Media and Telecommunications Council at a November 6, 2002 meeting of stakeholders at the Commerce Department. These were not the Diversity and Competition Supporters’ proposals in the media ownership proceeding; rather, they were the Minority Media and Telecommunications Council’s informal suggestions to stakeholders. The Diversity Committee also proposed one of these items, as noted therein.

Section III (items 27-34) contains recommendations issued the Diversity Committee that do not track the proposals or suggestions in items 1-26. Among these, items 27-30 are nonregulatory recommendations, and items 31-34 are regulatory recommendations. The Diversity Committee has propounded 17 recommendations germane to media ownership: eight tracking items in Section I, one tracking an item in Section II, and the eight items in Section III.

#### SECTION I: MMTC PROPOSALS IN MM DOCKET 02-277

1. Equal transactional opportunity policy -- barring discrimination on the basis of race or gender in broadcast transactions

Location(s) in Record: Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 2, 2003) (“MMTC 2003 Comments”), pp. 115-120; MMTC Letter to Hon. Michael Powell, MM Docket No. 02-277 (April 28, 2003) (“MMTC April 28, 2003 Ex Parte”), pp. 11-19.

Nature of Item: Formal rulemaking proposal

Summary of Item: Race and gender discrimination in the sale of broadcast stations would be banned, consistent with 47 U.S.C. §151. The seller would certify compliance by checking a box on a Form 314 or Form 315 application.

Year First Proposed: 1994

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<sup>1</sup> Parties seeking additional information about any of these items may contact David Honig, Executive Director, Minority Media and Telecommunications Council, by mail at 3636 16<sup>th</sup> Street N.W., Suite B-366, Washington, D.C. 20010, or by e-mail at [dhonig@crosslink.net](mailto:dhonig@crosslink.net).

Parallel Recommendation of Diversity Committee: Transactional Transparency Recommendations, May 14, 2004, p. 4; White Paper on Equal Transactional Opportunity, April 29, 2004

Relevance of SDB Definition: No

2. Transfer Restriction of Grandfathered Clusters to SDBs

Location(s) in Record: MMTC 2003 Comments, pp. 107-109

Nature of Item: Formal rulemaking proposal

Summary of Item: The seller of a grandfathered cluster would not have to break it up if it were sold to an SDB. In the 2002 Biennial Review, the Commission adopted a provision for the transfer intact of a grandfathered cluster, but decided that small businesses, rather than SDBs, would constitute the class of eligible buyers. MMTC seeks to develop a definition of “socially and economically disadvantaged business” (SDB) that would be appropriate for broadcasting and be constitutionally sound. SDBs are a subset of small businesses. Like other small businesses, they are economically disadvantaged; but unlike other small businesses, they are also socially disadvantaged. Their social disadvantage stems from individualized factors or from their membership in a class (such as a racial group in a particular industry) for which discrimination has inhibited entry and financing. An SDB definition is desirable because it would be less dilute in its impact on minorities by omitting, for example, the children of millionaires who, as new entrants, can qualify as small businesses although they have never been disadvantaged.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

3. Structural rule waiver for selling a station to an SDB, where the sale to the SDB is ancillary to a transaction that otherwise would be barred by an ownership rule

Location(s) in Record: MMTC 2003 Comments, p. 103

Nature of Item: Formal rulemaking proposal

Summary of Item: A company contemplating a transaction that would otherwise be barred by an ownership rule (perhaps one that would qualify in the future, e.g., if the Commission adopted a staged implementation of deregulation program; see item 13 infra) would be permitted to complete the transaction if it sells stations to SDBs.

Year First Proposed: 1995 (concept originally advanced by NTIA in 1977)

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, pp. 5-6

Relevance of SDB Definition: Yes

4. Tolling buildout deadlines for selling expiring construction permits to SDBs

Location(s) in Record: MMTTC 2003 Comments, pp. 112-115 (originally a petition for rulemaking filed by Entravision Holdings LLC, RM-9567 (filed March 10, 1998))

Nature of Item: Formal rulemaking proposal

Summary of Item: In 1998, Entravision submitted a petition for rulemaking which sought to revise the construction permit expiration standard established pursuant to 47 U.S.C. §§319(a)-(b) and implemented in 47 C.F.R. §73.3598. 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 language groups for at least 80% of their operating time. MMTTC proposed a modification of Entravision's concept to make it applicable to all SDBs.

Year First Proposed: 1998

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, pp. 9-10

Relevance of SDB Definition: Yes

5. Structural rule waivers for creating incubator programs

Location(s) in Record: MMTTC 2003 Comments, pp. 104-105

Nature of Item: Formal rulemaking proposal

Summary of Item: The Commission would act on still-pending incubator plans developed in 1992 by Chairman Sikes and by NABOB. With constitutionally required modifications, these plans would allow a company to acquire more than the otherwise-allowable number of stations in a market if the company establishes a program that substantially promotes ownership by disadvantaged businesses. The incubator programs could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance.

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, pp. 6-7

Relevance of SDB Definition: Yes

6. Bifurcation of channels for share-times with SDBs

Location(s) in Record: Comments of the Minority Media and Telecommunications Council in MB Docket 01-317 (Radio Ownership), filed March 19, 2002) (“MMTC 2002 Comments”), pp. 111-173; Reply Comments of the Minority Media and Telecommunications Council in MB Docket 01-317 (Radio Ownership), filed May 8, 2002) (“MMTC 2002 Reply Comments”), pp. 6-10; MMTC 2003 Comments, pp. 106-107

Nature of Item: Formal rulemaking proposal

Summary of Item: The Commission would create a new class of “Free Speech Stations.” They would be independently owned by SDBs, have at least 20 non-overnight hours per week of airtime, and be primarily devoted to non-entertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated “Entertainment Station.” A cluster owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act, which allows for an exception to the local radio ownership rule when a new station is created. That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a cluster could grow steadily up to the limits allowed by antitrust law.

Year First Proposed: 2002

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, pp. 7-8

Relevance of SDB Definition: Yes

7. Structural rule waivers for financing construction of an SDB’s unbuilt station

Location(s) in Record: MMTC 2003 Comments, pp. 109-110

Nature of Item: Formal rulemaking proposal

Summary of Item: 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 should be reserved a place in line to subsequently duopolize or crossown another same-market station. This reserved place in the queue, in markets where only

a limited number of new combinations can be created under the local ownership rules, would provide an incentive to broadcasters to assist SDBs to build out their unbuilt permits.

Year First Proposed: 1999

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

8. Grandfathering of nonattribution of EDP (equity debt-plus) interests in SDBs

Location(s) in Record: MMTC 2003 Comments, pp. 110-112

Nature of Item: Formal rulemaking proposal

Summary of Item: The nonattributable nature of EDP Interests in SDBs would be grandfathered, 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. These arrangements would be permissible where (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.

Year First Proposed: 1999

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, pp. 8-9

Relevance of SDB Definition: Yes

9. Mathematical touchstones: tipping points for the nonviability of independently owned radio stations in a consolidating market, and quantifying source diversity

Location(s) in Record: MMTC 2002 Reply Comments, pp. 22-27; MMTC Reply Comments, pp. 17-24; MMTC April 28, 2003 Ex Parte, pp. 6-7

Nature of Item: Formal rulemaking proposal

Summary of Item: MMTC offered two formulas suitable for crafting and implementing rules to promote diversity: (1) The “Tipping Point Formula” established how the Commission could ensure that local radio markets could preserve independent owners. This formula was based on the premise that independent owners

each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a tipping point in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market's cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity. (2) The "Source Diversity Formula" expresses consumers' utility derived from marginal increases in source diversity. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale. This formula would require field-testing before it could be applied in practice to measure source diversity.

Year First Proposed: 2002

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

10. Zero tolerance for ownership rule abuse

Location(s) in Record: MMTC 2003 Comments, pp. 123-127

Nature of Item: Formal rulemaking proposal

Summary of Item: Structural abuse is endemic due to limited enforcement resources, the ease of concealing abuse, and the high financial rewards for rulebreaking. Structural rule relaxation would be easier to accept if the Commission holds the line on abuse through a Zero Tolerance Policy focused on clear standards, pro-active investigations, evidentiary hearings, and strict penalties for rule violations.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

11. Use of Joint Operating Agreements (JOAs) as an alternative to Local Marketing Agreements (LMAs) and Joint Sales Agreements (JSAs)

Location(s) in Record: Comments of the Communications Workers of America (CWA) in MB Docket 02-277 (filed January 2, 2003), pp. 4-5 and 48; MMTC Reply Comments, pp. 15-16

Nature of Item: Formal rulemaking proposal

Summary of Item: The Commission requires ownership attribution of most JSAs and LMAs. While this step promotes diversity, it also reduces the options available to financially troubled facilities seeking to survive. CWA proposed that JOAs, such as

those used in the newspaper industry, could be used to help companies survive and to promote diversity at the same time. A JOA adapted to broadcasting would leave each station's program creation, program organization and distribution, and sales strategy and implementation in the hands of each station's licensees. At the same time, a genuine JOA allows both stations to take advantage of operational synergies for non-program, non-sales related functions, such as accounting, engineering, and physical plant management. A JOA would not be attributable.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

12. Opening FM spectrum for new entrants

Location(s) in Record: MMTC 2003 Comments, pp. 128-141; MMTC April 28, 2003 Ex Parte, pp. 10-11

Nature of Item: Formal rulemaking proposal

Summary of Item: The Commission has systematically broadened spectrum availability as a means of balancing consolidation with new entry. MMTC proposed three methods by which the FCC could open the FM radio spectrum to new entrants: (1) create two new classes of FM stations suitable for serving small communities; (2) perform a comprehensive engineering search of the FM spectrum to identify the most-needed new drop-in opportunities; and (3) replace FM station classes with pure interference-based criteria.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: Recommendation on Diversifying Ownership in the Commercial FM Radio Band, October 4, 2004, as amplified by the Recommendations of the Subcommittee on New Technologies, June 11, 2004, containing eight relevant subparts: (1) create medium power FM stations; (2) replace the FM Table with interference-based allotment criteria; (3) allow Class A stations to use low towers and higher-than-standard power while retaining appropriate ERP levels; (4) conduct a comprehensive channel search for new FM allotments; (5) harmonize regional interference protection standards; (6) repeal the third-adjacent FM contour rules; (7) relax the community of license and transmitter site rules; and (8) authorize interference agreements.

Relevance of SDB Definition: No

13. Staged implementation of deregulation, coupled with a negotiated rulemaking

Location(s) in Record: MMTC 2003 Comments, pp. 84-101 and 145-147; Comments of Paxson Communications Corporation, MB Docket 02-277 (filed January 3, 2003), pp. 6-14; MMTC Reply Comments, pp. 25-32

Nature of Item: Formal rulemaking proposal

Summary of Item: By implementing deregulation in stages, the Commission could measure the impact of deregulation while it is underway, and implement mid-course corrections when needed to protect diversity, competition, localism and minority ownership. MMTC proposed that the Commission would implement its new ownership rules over a ten-year period in five two-year stages. In even numbered years, the Commission would use quantitative tests to measure diversity, competition, localism and minority ownership. If these tests showed ill health on any of these four factors, the Commission would take corrective steps in the odd-numbered years. If a subsequent even-year measurement showed continued ill health, the Commission could apply the brakes until market conditions change. Paxson Communications offered a similar proposal. The coefficients of a staged implementation plan could be worked out in a negotiated rulemaking involving representatives of all of the stakeholders in the proceeding.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

14. Market-based, tradable Diversity Credits as an alternative to voice tests

Location(s) in Record: MMTC Reply Comments, pp. 34-38; MMTC April 28, 2003 Ex Parte, pp. 8-10

Nature of Item: Formal rulemaking proposal

Summary of Item: A system of market-based diversity credits would be created as an alternative to voice tests. A quantity of diversity credits would be given to SDBs, commensurate with the extent of their social and economic disadvantages. Diversity credits would also be given to the seller at the closing of a transaction that would result in greater structural diversity. If a transaction would add to concentration, the buyer would return a number of diversity credits to the Commission when the transaction closes. Finally, companies could buy or sell diversity credits to one another, thereby providing a market-based source of access to capital for SDBs. A similar paradigm used by the EPA has replaced much command-and-control environmental regulation. Diversity credits would (1) incentivize diversity, (2) disincentivize consolidation, (3) place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects, (4) serve as a mechanism to provide access to capital to SDBs, (5) capture the measure of

diversity more precisely than an inherently approximate voice test, and (6) allow for easier administration than a system of voice tests and waivers.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: Transactional Transparency Recommendations, May 14, 2004, p. 3; White Paper on Diversity Credits, May 22, 2004

Relevance of SDB Definition: Yes

## **SECTION II: MMTC'S INFORMAL SUGGESTIONS TO STAKEHOLDERS**

15. Equity for specific and contemplated future acquisitions

Location(s) in Record: MMTC, Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002, Tab 10 ("Twelve Minority Ownership Solutions")

Nature of Item: Private industry initiative; but see item 29 infra, proposing collaborative role for FCC in creating a fund of funds)

Summary of Item: Broadcast companies would collaborate with one another and with institutional investors to create new targeted funds specializing in providing equity for broadcast new entrants.

Year First Proposed: 1977

Parallel Recommendation of the Diversity Committee: none (but see item 29 infra)

Relevance of SDB Definition: No

16. Debt on favorable terms – enhanced outreach and access to debt financing by major financial institutions

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative (but see items 28 and 29 infra, proposing collaborative role for FCC)

Summary of Item: Broadcast companies would solicit commitments from large institutional lenders to work with new entrants in providing debt financing for acquisitions, with or without the participation of the SBA as a guarantor.

Year First Proposed: 1977

Parallel Recommendation of Diversity Committee: none (but see items 28 and 29 infra)

Relevance of SDB Definition: No

17. Investments in institutions specializing in minority and small business financing

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: Broadcast companies would invest in existing funds with proven track records of success as participants in the financing of new entrants. The Quetzal/J.P. Morgan Fund, the Telecommunications Development Fund (TDF), the Broadcast Capital Fund and other Small Business Investment Corporations (SBICs) are examples of these funds.

Year First Proposed: 1976

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

18. Assistance – cash and in-kind – to institutions that train future minority media owners

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: Media institutions would provide assistance to colleges and other programs that provide minorities the skill sets needed to transition from management to ownership. Examples of these institutions are Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs) and other programs, particularly the National Association of Broadcasters Education Fund (NABEF)'s Broadcast Leadership Training (BLT) Program.

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

19. Creation of business planning centers

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: Business planning centers, typically affiliated with universities, would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing and pursue acquisitions.

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

20. Executive loans, and engineers on loan to minority owned companies and applicants

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: The broadcasting industry would create an executive loan program, following the examples of similar programs in other industries. Loaned executives or engineers would work on the staffs of minority broadcasters fulltime for six months to two years.

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

21. Enhanced access to broadcast transactions

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: Sellers would give minority new entrants a first look at their properties, allowing them a headstart for due diligence and financing.

Year First Proposed: 2002

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

22. Nondiscrimination provisions in advertising sales contracts, designed to expressly avoid such practices as “no urban/no Spanish” dictates

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Contemplates FCC or FTC policy statement or rule

Summary of Item: Rep firms, ad agencies, broadcasters and advertisers would agree to use a standard provision in advertising sales contracts that would confirm that the parties to these contracts will not participate in a scheme to restrict advertising because of the membership in a minority group of the targets of the foregone advertising. The FTC or FCC would obtain certifications that this contract provision is always used in ad sales contracts.

Year First Proposed: 1984

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

23. In-house incubation and mentoring programs for future minority owners

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

Summary of Item: Established media companies would develop their own in-house programs to incubate and mentor future minority owners, including their own executives who might wish to transition into ownership. These initiatives would have no regulatory tie-ins.

Year First Proposed: 1976

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

24. Enactment of tax deferral legislation designed, to the extent possible, to foster minority ownership

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Legislation; FCC has recommended it to Congress several times

Summary of Item: The Commission would continue to recommend to Congress the adoption of a tax deferral program to replace the former Tax Certificate Policy, under which a seller was able to defer capital gains taxes on the sale of a media property to a minority controlled firm. The new program would be focused on SDBs rather than only on minorities, and it would be extended to telecommunications. In recent years, Senator John McCain, Congressman Charles Rangel and Congressman Bobby Rush have each introduced legislation along these lines.

Year First Proposed: 1977; in effect from 1978-1995 as the Tax Certificate Policy (see 68 FCC2d 979 (1978)); repealed by Congress in 1995; restoration often proposed since 1995

Parallel Recommendation of Diversity Committee: Financial Issues Recommendations, June 14, 2004, pp. 14-15; Transactional Transparency Recommendations, May 14, 2004, pp. 2-3

Relevance of SDB Definition: Yes (included in bills sponsored by Senator John McCain and by Congressman Bobby Rush)

25. Examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Contemplates FCC policy statement or procedural rule

Summary of Item: All general mass media rulemaking proceedings (except individual FM or TV allotment proceedings) would include a request for comment on how the proposed rules affected minority entrepreneurship or could be tailored to have a positive impact on minority entrepreneurship.

Year First Proposed: 1973

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

26. Ongoing longitudinal research on minority and female ownership trends

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: FCC or NTIA research initiative

Summary of Item: The FCC or NTIA would conduct an annual, authoritative survey of minority and female ownership trends. As a longitudinal instrument, it could track this data over time, enabling scholars to examine the impact of rule changes on minority and female ownership.

Year First Proposed: 1995

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

### **SECTION III: PROPOSALS SPONSORED BY THE DIVERSITY COMMITTEE**

27. Clearinghouse through which licensees could announce availability of stations for sale

Location(s) in Record: Diversity Committee, Financial Issues Recommendations, June 14, 2004, pp. 13-14

Nature of Item: Private industry initiative

Summary of Item: The National Association of Broadcasters and/or the National Association of Media Brokers could create a website or other clearinghouse through which licensees with stations for sale could seek minority buyers.

Year First Proposed: 2004

Relevance of SDB Definition: No

28. Extension of the Community Reinvestment Act (CRA) to encourage financial institutions to provide debt financing to broadcasters

Location(s) in Record: Diversity Committee, Financial Issues Recommendations, June 14, 2004, p. 15

Nature of Item: Recommendation for FCC to propose rule revisions to the Treasury Department

Summary of Item: The FCC would work with the Treasury Department to expand the application of the CRA credit to encourage financial institutions to place capital in private equity funds led by minority and female entrepreneurs, or in funds that invest in communities of color. A similar incentive mechanism could be explored with the appropriate regulatory agencies to encourage pension funds, insurance companies and other financial institutions to place monies with such equity funds.

Year First Proposed: 2004

Relevance of SDB Definition: No

29. Encourage more local and regional banks to participate in SBA guaranteed loan programs for broadcast and telecom ventures

Location(s) in Record: Diversity Committee, Financial Issues Recommendations, June 14, 2004, p. 16

Nature of Item: Recommendation for FCC and SBA to expand outreach to banks

Summary of Item: The FCC would work closely with the SBA to educate and encourage more local and regional banks (which have not been heavily involved in broadcast or telecom lending) to make loans through the SBA's 7(a) or 504 programs.

Year First Proposed: 2004

Relevance of SDB Definition: No

30. Establishment of a fund of funds

Location(s) in Record: Diversity Committee, Financial Issues Recommendations, June 14, 2004, pp. 16-17

Nature of Item: Private industry initiative

Summary of Item: The FCC would initiate discussions with the major pension funds to encourage the establishment of a fund of funds that would place capital with minority focused private equity funds such as those belonging to the National Association of Investment Companies (NAIC), which are led by minority management and which invest in opportunities led by women and minority entrepreneurs and/or in opportunities in underserved markets.

Year First Proposed: 2004

Relevance of SDB Definition: No

31. Revision of the Distress Sale Policy to institute case-by-case review of purchasers' qualifications

Location(s) in Record: Diversity Committee, Recommendation on the Distress Sale Policy, June 1, 2004; Financial Issues Recommendations, June 14, 2004, pp. 18-19

Nature of Item: Rulemaking recommendation

Summary of Item: The Distress Sale Policy, in existence since 1978 but seldom used recently, would be revised to ensure that it satisfies the narrow tailoring prong of strict scrutiny. In particular, a potential buyer, of any race, would demonstrate that its proposed service to the community would address needs unmet by existing media. Service to minority audiences could be an unmet need.

Year First Proposed: 2004

Relevance of SDB Definition: No

32. Reservation, for a company that finances or incubates an SDB, of first place in the queue to form a duopoly in a market for which only a limited number of duopolies are permissible

Location(s) in Record: Diversity Committee, Financial Issues Recommendations, June 14, 2004, pp. 17-18; White Paper on Incentive-Based Regulations, May 23, 2004, p. 9

Nature of Item: Rulemaking recommendation

Summary of Item: When the local market voice test limits how many LMAs may be created, a company wishing to have its application to create an LMA considered first could reserve a place in the application queue by financing or incubating an SDB.

Year First Proposed: 1999

Relevance of SDB Definition: Yes

33. Relaxation of foreign ownership restrictions (see 47 U.S.C. §310(b)(4))

Location(s) in Record: Diversity Committee, Adoption of a Declaratory Ruling on Section 310(b)(4) Waivers, December 10, 2004

Nature of Item: Recommendation for rulemaking or policy statement

Summary of Item: The Commission would consider whether a noncontrolling investment from foreigners (e.g. up to 49%) could be permitted where the investment would help eliminate a barrier to access to capital for domestic minority owned broadcasters as contemplated by 47 U.S.C. §257.

Year First Proposed: 2004

Relevance of SDB Definition: Yes

34. Extension of divestiture deadlines in mergers where applicants have actively solicited bids for spin-off properties from SDBs

Location(s) in Record: Diversity Committee, Recommendation on Merger Review, October 15, 2004

Nature of Item: Recommendation for rulemaking or policy statement

Summary of Item: The Commission has recognized that minorities, especially new entrants, often need additional time to line up financing. Therefore, the Commission would announce a policy of generally affording more time for divestitures where the applicants solicit bids from SDBs for spinoff properties.

Year First Proposed: 1999

Relevance of SDB Definition: Yes

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