

APPENDIX A

PLEADINGS FILED IN RECONSIDERATION PROCEEDING

PETITIONS FOR RECONSIDERATION

Amherst Alliance and the Virginia Center for the Public Policy
ARSO Radio Corporation
Bennco, Inc.
Capitol Broadcasting Company, Inc.
Center for the Creative Community and the Association of Independent Video and Filmmakers
Consumer Federation of America and Consumers Union
Cumulus Media, Inc.
Diversity and Competition Supporters (filed by Minority Media and Telecommunications Council on behalf of American Hispanic Owned Radio Association; Civil Rights Forum on Communications Policy; League of United Latin American Citizens; Minority Business Enterprise Legal Defense and Education Fund; National Asian American Telecommunications Association; National Association of Latino Independent Producers; National Coalition of Hispanic Organizations; National Council of La Raza; National Hispanic Media Coalition; National Indian Telecommunications Institute; National Urban League; Native American Public Telecommunications, Inc.; PRLDEF-Institute for Puerto Rican Policy; UNITY: Journalists of Color, Inc.; Women's Institute for Freedom of the Press)*
Duff, Ackerman & Goodrich, LLC
Entercom Communications Corporation
Free Press
Future of Music Coalition
Galaxy Communications, L.P.
Great Scott Broadcasting
LIN Television Corporation and Raycom Media, Inc.
Main Street Broadcasting Company, Inc.
Mid-West Family Broadcasting
Monterey Licenses, LLC
Mt. Wilson FM Broadcasters, Inc.
National Association of Black Owned Broadcasters, Inc. and the Rainbow/PUSH Coalition, Inc.
National Organization for Women
Nexstar Broadcasting Group, LLC
Office of Communication of the United Church of Christ, Inc.; Black Citizens for a Fair Media; Philadelphia Lesbian and Gay Task Force; and Women's Institute for Freedom of the Press
Saga Communications, Inc.
Treasure and Space Coast Radio
WJZD, Inc.
WTCM Radio, Inc.

* withdrew Petition for Reconsideration on April 7, 2004

COMMENTS TO PETITIONS FOR RECONSIDERATION

Bonneville International Corporation
Diversity and Competition Supporters
MBC Grand Broadcasting, Inc.
National Association of Broadcasters
Newspaper Association of America
Paxson Communications Corporation
Office of Communication of the United Church of Christ, Inc.; Black Citizens for a Fair Media;
Philadelphia Lesbian and Gay Task Force; and Women's Institute for Freedom of the Press
University of Southern California/KUSC(FM)
Viacom, Inc.
Vinson & Elkins LLP

REPLIES TO PETITIONS FOR RECONSIDERATION

Cumulus Media, Inc.
Diversity and Competition Supporters
Entercom Communications Corporation
Mt. Wilson FM Broadcasters, Inc.
National Association of Broadcasters
Sinclair Broadcast Group, Inc.

APPENDIX B

SUPPLEMENTAL INITIAL REGULATORY FLEXIBILITY ANALYSIS

46. As required by the Regulatory Flexibility Act (RFA),¹ the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) in the Notice of Proposed Rulemaking (NPRM) in MB Docket No. 02-277.² Additionally, the Commission has prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the proposals in this *Further Notice of Proposed Rulemaking (Further Notice)*. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the deadlines for comments on the *Further Notice*. The Commission will send a copy of the *Further Notice*, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).³ In addition, the *Further Notice* and the Supplemental IRFA (or summaries thereof) will be published in the Federal Register.⁴

A. Need for, and Objectives of, the Proposed Rules

47. The *Further Notice* invites comment on how to address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*,⁵ and, pursuant to Section 202(h) of the Telecommunications Act of 1996, on whether the media ownership rules are “necessary in the public interest as the result of competition.”⁶ In the *Prometheus Remand Order*, the court affirmed some Commission decisions and remanded others for further Commission justification or modification.⁷ We issue this Supplemental IRFA due to the passage of time since the release of the NPRM

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² 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, *Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18503, 18558 App. A (2002).

³ See 5 U.S.C. § 603(a).

⁴ See *id.*

⁵ *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004) (“*Prometheus*”), stay modified on rehearing, No. 03-3388 (3d Cir. Sept. 3, 2004) (“*Prometheus Rehearing Order*”), cert. denied, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) (“1996 Act”); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (“Appropriations Act”) (amending Sections 202(c) and 202(h) of the 1996 Act). Section 202(h) requires the Commission to periodically review its media ownership rules to determine “whether any of such rules are necessary in the public interest as the result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.”

⁷ See *Prometheus Rehearing Order*. Accordingly, except for revisions to the local radio ownership rule, the preexisting ownership rules remain in effect. See *Further Notice, supra*, at para. 2 and n.10.

in this proceeding and in order to invite comment on the effect on small entities of the proposals in this *Further Notice*. We particularly solicit comment from all small business entities, including minority-owned and women-owned small businesses. We especially solicit comment on whether, and if so, how, the particular interests of these small businesses may be affected by the rules.

48. The *Further Notice* discusses the local TV ownership rule, the local radio ownership rule, Cross-Media Limits and the Dual Network rule; details the issues raised in the *Prometheus Order* regarding the Commission's decision with respect to each of these rules; and invites comment on how to address those issues.

B. Legal Basis

49. This *Further Notice* is adopted pursuant to sections 1, 2(a), 4(j), 303, 307, 309, 310, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, and Section 202(h) of the Telecommunications Act of 1996.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

50. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁸ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹¹

51. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than \$13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."¹²

⁸ 5 U.S.C. § 603(b)(3).

⁹ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

¹⁰ *Id.*

¹¹ 15 U.S.C. § 632.

¹² OMB, North American Industry Classification System: United States, 1997, at 508-09 (1997) (NAICS Code 51320 which was changed to 51520 in October 2002). This category description continues, "These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in produced programming. See *id.* at 502-505, NAICS code 512110. Motion Picture and Video Production; Code 512120, Motion Picture and Video Distribution, code 512191, 19 FCC Rcd 15238 (continued .)

According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of June 6, 2005, about 852 (66 percent) of the 1,286 commercial television stations in the United States have revenues of \$12 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations¹³ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the attribution rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

52. An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

53. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has \$6.5 million or less in annual receipts as a small business.¹⁴ Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."¹⁵ According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of June 6, 2005, about 10,425 (95 percent) of 11,000 commercial radio stations in the United States have revenues of \$6 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations¹⁶ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

54. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small

(Continued from previous page) _____

(2004). Teleproduction and Other Post-Production Services, and code 512199, Other Motion Picture and Video Industries.

¹³ "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

¹⁴ See NAICS code 515112.

¹⁵ *Id.*

¹⁶ "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

businesses to which they apply may be over-inclusive to this extent.

55. **Daily Newspapers.** The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.¹⁷ Census Bureau data for 2002 show that there were 5,159 firms in this category that operated for the entire year.¹⁸ Of this total, 5,065 firms had employment of 499 or fewer employees, and an additional 42 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

56. Depending on the rules adopted as a result of this Notice of Proposed Rule Making, the Report and Order (R&O) ultimately adopted in this proceeding may contain new or modified information collections. We anticipate that none of the changes would result in an increase to the reporting and recordkeeping requirements of broadcast stations, newspapers, or applicants for licenses. As noted above, we invite small business entities to comment in response to the *Further Notice*.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

57. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁹

58. We are directed under law to describe any alternatives we consider, including alternatives not explicitly listed above.²⁰ This *Further Notice* initiates the next quadrennial review of the media ownership rules and seeks public comment on the issues raised by the Prometheus Remand Order. Thus, it invites comment on how to address the court's decisions in the Prometheus Remand Order with respect to the local TV ownership rule, the local radio ownership rule, and the cross-media limits. In addition, the *Further Notice* asks for comment on whether the dual network rule remains necessary in the public interest as a result of competition.²¹ The *Further Notice* also seeks comment on the minority ownership proposals made by Minority Media and Telecommunications Council in comments in the 2002 biennial

¹⁷ 13 C.F.R. § 121.201; NAICS code 511110.

¹⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 511110 (issued Nov. 2005).

¹⁹ 5 U.S.C. § 603(c).

²⁰ 5 U.S.C. § 603(b).

²¹ The Petitioners in *Prometheus* did not appeal the Commission's retention of the rule

ownership proceeding.²² Parties' discussions of alternatives that are in their submitted comments will be fully considered. We especially encourage small entity comment.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

²² See *Further Notice* at paragraph 5. In the *2002 Biennial Review Order*, the Commission said that it would commence a separate proceeding specifically aimed at increasing ownership opportunities in the media industry for minorities and females. *2002 Biennial Review Order*, 18 FCC Rcd 13634, 13636 paras. 46, 50.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rule Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 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; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets (MB Docket Nos. 06-121, 02-277, and MM Docket Nos. 01-235, 01-317 and 00-244).

Today, the Commission opens a process to review its media ownership rules, a topic of vital importance to our democracy. We begin this dialog in a neutral and even-handed fashion. The action responds to the Third Circuit's decision in *Prometheus Radio Project v. FCC*.

It has been nearly three years since the Third Circuit stayed the Commission's previous rules¹ and nearly two years since the Third Circuit instructed the Commission to respond to the court with further justification or amended rules.²

As we embark upon this comprehensive review, the Commission should take into account the competitive realities of the media marketplace while also ensuring the promotion of the important goals of localism and diversity. As the item indicates, the Commission will look carefully at the relationship between media ownership and localism as it moves forward with this rulemaking. To that end, the Commission will incorporate into this proceeding the efforts undertaken on this issue since the last examination of our media ownership rules.

Public input is integral to this process. The Commission has adopted an extended comment period of 120 days. 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. I look forward to hearing from the American people on a variety of subjects at these hearings such as the impact of the Commission's rules on localism, campaigns and community event coverage, minority ownership, and various types of programming like children's and family-friendly programming and independent and religious programming. The Commission also is creating a new webpage on this topic that will further contribute to making this an open and transparent process.

Finally, the Commission will initiate studies to address unanswered questions about the impact of media ownership. We will seek the resources necessary for comprehensive studies. They will be on a variety of topics that will incorporate issues including how the public gets its news and information, competition across media platforms, marketplace changes since we last reviewed our ownership rules, localism, independent and diverse programming and the production of children's and family-friendly programming.

¹ *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

² *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004).

I look forward to working with my colleagues on each of these efforts and on these issues of great importance to the industry and the listening and viewing public.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING IN PART, DISSENTING IN PART

Re: *2006 Quadrennial Regulatory Review & 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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definition of Radio Markets* (MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 00-244)

One thing we can probably all agree on is the need to start this proceeding. It has been two years since the Third Circuit sent back to us the misguided handiwork of the previous Commission. We owe the court a response to its instruction to revisit this proceeding and to do it right this time. Additionally, Congress instructed us to review all our media ownership rules in a quadrennial review, which by statute must commence this year—another reason why we should proceed. Meanwhile, the rush to consolidation continues. Since we last voted on this issue three years ago, there have been more than 3300 TV and radio stations that have had their assignment and transfer grants approved. So even under the old rules, consolidation grows, localism suffers and diversity dwindles. For these reasons, I agree that we need to start this proceeding now.

But in Washington, things aren't always what they seem. In fact, this innocuous-looking document initiates the single most important public policy debate that the FCC will tackle this year. Don't let its slimness fool you. It means that this Commission has begun to decide on behalf of the American people the future of our media. It means deciding whether or not to accelerate media concentration, step up the loss of local news and change forever the critical role independent newspapers perform for our Country.

It's tempting to see this debate as important only to giant media moguls. Some companies want the government to make the decision to rush into more media concentration behind closed doors in sequestered Washington bureaucracies. But I believe that Americans need to know what the FCC is doing and that we have a solemn obligation to encourage public participation in the decision. It's important because if we make the wrong decision our communities and our country will suffer. This debate will have far reaching implications for the credibility of information Americans get from the media—for the vitality of the civic dialogue that determines the direction of our democracy—and for whether TV and radio offer entertainment that is creative, uplifting and local or degrading, banal and homogenized.

Let's review some history. We all know that in 2003 the FCC tried to eliminate important safeguards that protected media diversity, localism and competition. A majority of Commissioners approved *stunning*—there is no other word for it—rules that would allow one corporation to own, in a single community, up to three TV stations, eight radio stations, the cable system, the only daily newspaper and the biggest Internet provider. How can it be good for our Country to invest such sweeping power in one media mogul or one giant corporation?

Three years ago the FCC tried to inflict this massive wave of further consolidation onto an already highly concentrated media industry. The majority of the Commission voted to do so without seeking adequate input from the American people, without conducting adequate studies and without even revealing to the country what the new rules would be before forcing a vote. I pleaded with the majority to

do more comprehensive research, to ask the tough questions and to halt the blind rush to more consolidation. *My pleading fell on deaf ears. A public, transparent process was not what was wanted.* Instead, our far-reaching review of critical media concentration protections was run as a classic inside-the-Beltway process with too little outreach from the Commission and too little opportunity for public participation.

The Commission's stealth process three years ago and the ownership rules that resulted from it galvanized Americans all across this country. In response, millions of Americans from right and left, Republican and Democrat, concerned parents, creative artists, religious leaders, independent businesses, civil rights activists and labor organizations united to protest the Commission's actions. Senators and members of Congress from both parties and from all parts of the country called for those rules to be overturned. Commissioner Adelstein and I traveled the country attending hearings on this issue. On media consolidation, there are no red or blue states—there is only an all-American, grassroots issue about what government proposes to do to the people's airwaves. The Senate voted twice to overturn the rules and the House, it was clear to all, would have done so if permitted to vote. In time, the court held that the FCC's ownership rules were legally and procedurally flawed, sending them back to the FCC to begin again, which brings us to today.

All of that is wrapped up in this little document. Don't underestimate it. We have a choice to make. Will we repeat the mistakes of the past? Or will we work for a process and an outcome that respect the millions of Americans that care deeply about their communities' media and what their kids watch, hear and read? We'll soon know what choice the FCC makes. We'll undoubtedly have some hearings and some research this time—I think at least that part of the lesson has been learned. But Americans know the difference between a fig leaf and a real commitment.

If you see hearings in your hometown, instead of a just a few preselected cities, you'll know. If you see FCC Commissioners come to listen to your point of view personally, instead of expecting you to hire a \$500 an hour lobbyist to get heard, you'll know. If the FCC contracts for independent, well-funded studies and seeks public comment on those studies, instead of buying a few-half hearted, time-crunched papers that slide into the record without comment, you'll know. And, critically, if the FCC shows you the specific rules that will reshape the American media before forcing a vote, instead of rushing from this short document to a final vote, you'll know.

You should expect your government to do more this time. We ought to be able to work together and do better. I hope we can. The answer will become apparent in the months ahead. The process we are launching will have to be watched and validated every step of the way.

To be successful in this effort, we will need to work really hard, get around the country, look at various markets, collect the data and reach out to build an adequate record. Good, sustainable rules are the result of an open public process, a serious attempt to gather all the relevant data and a commitment to transparency. Bad rules and legal vulnerability result from an opaque regulatory process and inadequate data.

- ***Public Process:*** This time we need to include the people in our process instead of trying to exclude them. We need to hear from anybody who has a stake in how this is resolved. And everyone has an interest and a stake. I asked for some dozen themed hearing around the country, so we could examine the impact of media consolidation on such topics as minorities, senior citizens, religious broadcasters, family-friendly programming, jobs, independent programming, those with disabilities, campaign coverage and payola. We couldn't get agreement on these. But we will monitor closely any hearings

that are held under Commission auspices and if they fall short of true openness and inclusiveness, I will do my part to make that known. Good hearings must include all sides of the debate and be held in diverse communities around the country. Last time, I learned fifty times more about what is going on in various media markets at grassroots hearings and town hall meetings than I ever could have learned by isolating myself in my office inside the Beltway and reading formal comments. And citizens have a right to expect direct access to decision-makers at the FCC. When a regulatory agency is charged by the law with important public policy matters, it has the obligation to reach out, explain and solicit citizen input. A handful of generalized FCC hearings are not themselves enough. I hope citizens in hundreds of communities across this country will gather to discuss the future of the media. These issues deserve to be discussed in every community because they are going to affect every community. For my part, I stand ready to attend as many of these community hearings as I can.

- **Research and Data:** This time, we also need better research and a willingness to ask the tough questions. We need independent studies on the impact of media concentration in a variety of markets so that the FCC can base its decisions on a more solid foundation. Last time a number of in-house studies were undertaken, but they didn't ask most of the questions that needed to be asked and both their methodologies and conclusions received widespread criticism. We are talking here about understanding a mega-billion dollar industry, and a few studies done on the cheap just are not going to tell us what we need to know. What we need instead are independent researchers to produce some real data on important questions like the impact on independence when newspapers and broadcasters are owned by the same conglomerate, the impact of increasing consolidation on minorities and the correlation between media concentration and broadcast indecency. These are only a few of the questions we need to understand before we vote. I, for one, would be reluctant to vote on final rules unless and until we have the information and analysis needed to inform our votes.
- **Transparency:** This time, we need a transparent process that ensures we understand the full implications of our decisions—both the intended consequences and the unintended ones. Such a process makes inevitably for better policy. It also makes for better buy-in from the people. And it would enhance the sustainability of Commission decisions in court. A transparent process is especially critical for issues of this magnitude when the Notice asks broad, general questions. Let's remember the beating the Commission took in court for failing to inform the American people of its proposals last time before we were required to vote. I am deeply disappointed that this Notice does not contain a specific, up-front commitment to share proposed media concentration rules with the American people in advance of a final vote. I do not see how we can be transparent and comply with the dictates of the Third Circuit without letting the American people know about and comment on any new standards of measurement that we adopt in developing our ultimate decision. I frankly fear that in the absence of a Further Notice and lacking a commitment to a comprehensive final Order incorporating all of the ownership rules, an attempt could be made to split off one or two rules and ram them through the Commission. This must not be allowed to happen and I dissent in part because such protections for the people are lacking in today's proposal.

Finally, there are two other aspects of this item that should give us all pause. I am disappointed that localism is not front-and-center in this proceeding. For decades the Commission has interpreted the Communications Act to require broadcasters to be responsive to local concerns and to represent a diversity of views and opinions. Localism and media ownership are inextricably linked. Ownership interests have a duty to air programming responsive to the needs and interests of their communities. But if we really want our local stations to be accountable to our local community, why should citizens who want to dial up local station owners have to call from one end of the Country to another? Is it really good

for our Country for distant powers in New York or Los Angeles to dictate so much of what we see, hear and read in our hometown? These are important questions that go right to the heart of this proceeding. But you won't find them asked here. Instead, the Commission goes to great lengths to isolate our stalled *localism proceeding from today's media ownership proceeding*. The most this Notice does is commit our staff to compiling a summary of the dated record we have in our localism docket. Though there is bipartisan support for completing our localism proceeding before revving up media ownership, the Commission will apparently choose to leave localism stuck at the starting gate.

I am also disappointed that this item fails to commit to specific efforts to advance ownership by minorities. The Third Circuit took the Commission's earlier decision to the woodshed for sidelining proposals to advance minority ownership. Despite this, all we can muster up here are a few questions about this glaring challenge. Why won't we commit to studying the state of minority media ownership in this country and the impact that consolidation has had? Are we afraid of what the facts might show? It is no excuse to argue that many of the nation's broadcast licenses were given away decades ago when women and people of color were unlikely to obtain them. Those sins of omission need to be excised and new strategies to encourage diversity in ownership and jobs and programming need to be put in place. While people of color make up over 30 percent of our population, they own only 4.2 percent of the nation's radio stations and 1.5 percent of the nation's TV stations! More recent statistics suggest that even these numbers are in free fall. I believe the ownership of our media should look more like the diversity of our people. But if all the Commission does is ask a few pat questions and then sweep this issue under the rug one more time, we are not laying the groundwork for progress.

Let me conclude with a challenge to our nation's media to take up this issue, highlight it, give it the attention it merits, inform the debate and spark a national conversation on these issues all across this broad land of ours. With relatively few exceptions, the media—big media especially—failed the test last time, and failed it badly. I hope that was not because some very important media enterprises have financial interests riding on the outcome of the ownership proceeding. Major media companies are at pains to assure us their newsgathering operations are independent of their corporate interests. Here is an excellent opportunity to test that proposition. Because ignoring the issue of media concentration is not going to make it go away.

Launching this proceeding is the easy part. Now comes the hard work. So much hangs in the balance. If we are serious about it and do not treat this proceeding as business-as-usual, if we approach these issues with receptivity on all sides to hard facts and compelling evidence and if we reach out—really reach out—to people all across this land, I believe the Commission can arrive at a decision that will withstand judicial and Congressional scrutiny and more importantly, the scrutiny of the American people. I for one am ready to roll up my sleeves and work with my colleagues to get the job done and done right this time. The American people have a right to expect more from this Commission than they got from the previous one.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART**

Re: 2006 Quadrennial Review & 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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definitions of Radio Markets, Notice of Proposed Rule Making

We are required by law and by the Third Circuit Court of Appeals to launch this proceeding. It is entirely necessary that we do so. Congress requires a quadrennial review of all of our media ownership rules, and we must respond to the Third Circuit remand of our 2003 ownership decision. Appropriately, this broad inquiry responds to both requirements.

Unfortunately, the manner in which the Commission is launching this critical proceeding is totally inadequate. It is like submitting a high-school term paper for a Ph.D. thesis. This Commission failed in 2003, and if we don't change course, we will fail again.

The large media companies wanted, and today they get, a blank check to permit further media consolidation. The Notice is so open-ended that it will permit the majority of the Commission to allow giant media companies to get even bigger at the time, place and manner of their choosing. That is the reason I have refused to support launching this proceeding until now, and it is why I am dissenting from the bulk of this Notice. This Notice is thin gruel to those hoping for a meaty discussion of media ownership issues.

In particular, this item lacks commitment to three basic building blocks of a successful rulemaking on media ownership – an issue that affects the daily lives of every single American. First, the process does not commit to giving the public an opportunity to comment on specific proposals *before* any changes to the rules are finalized. Second, it does not commit to completing the localism proceeding and rulemaking *before* changing the ownership rules. Finally, it does not commit to making any final decision in a comprehensive manner. Given the history of this proceeding, these failings are astonishing.

Our ill-fated June, 2003, decision was rejected by Congress, the courts and the public. The United States Senate voted on a bipartisan basis to reject the bulk of Order and have us start from scratch. The court found that the Commission fell “short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis.”¹ Three million citizens, from right to left and virtually everyone in between, weighed in to oppose our decision. It is my sincere hope that we can avoid failing the test again, but doing better will require a commitment to openness and the democratic process that is largely absent from today's Notice.

It is all the more inexcusable in the wake of the unprecedented rejection of the Commission's 2003 decision that we launch such a shallow process today. The Third Circuit gave us explicit suggestions on how to meet the challenge, which we ignore today at our own

¹ *Prometheus Radio Project v. FCC*, 373 F. 3d 373, 436 (3rd Cir. 2004), *cert. denied*, 73 U.S.L.W. (U.S. June 13, 2005).

peril. In its opinion, the court specifically decided to remand, in part, to give the Commission “an opportunity to cure its questionable notice.”² In clear and certain terms, the court said “it is advisable that any new “metric” for measuring diversity and competition in a market be made subject to public notice and comment *before* it is incorporated into a final rule.”³

I believe success or failure of this proceeding will depend to a large extent on the Commission’s willingness to listen to American people. Consequently, I am deeply troubled by the majority’s refusal to provide assurance that the public will have an opportunity to comment on specific proposals before new rules are finalized. The Court, common sense and simple fairness all demand that we allow public comment on the specific rules that are likely to change the media landscape for generations to come.

If the Commission had released its proposals in 2003 for further public comment, as I advocated at that time, we could have avoided many of the problems that led to the Court’s rejection of our rules. This time, we have no excuse. This time, we have been warned. We cannot slip rule changes through quietly, based on a vague notice, to avoid controversy. It is too late for that. Our process for deciding these rules should be open and transparent. The goal of this proceeding should be to do the job right – not “pull a fast one” on the American people.

Second, it would be unacceptable to finalize any decisions regarding media ownership until we *complete* our localism proceeding, which began in 2003 in direct response to the millions of Americans who expressed outrage at the Commission’s relaxation of media ownership rules. Then-Chairman Michael Powell said the Commission “heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns.”⁴ Unanimously, the Commission launched the localism proceeding because we had failed to use the structural media ownership rules to address the public’s concerns.

Now, three years later, the localism proceeding has languished in the bowels of the Commission. We have failed to complete the field hearings we promised the American people. We have failed to complete important research studies on the extent to which there is sufficient coverage of local civic affairs, music and programming on radio and television. We have failed to produce final rules on any aspect of localism, including minimum public interest standards or license renewal processing guidelines. Simply put, we have failed to protect the interests of the American people.

Third, the rules are intended to work together, regulating the ownership of media assets in all urban, suburban and rural markets in the United States. On this point, I am profoundly disappointed that there is no commitment to handle any final rule changes in a comprehensive manner. It is especially discouraging that this Notice does not specifically seek comment on how all the media ownership rules work together, in tandem. . If the Commission decides to allow further consolidation in one field, such as newspaper/broadcast cross-ownership, we need to know at the same time how we might move on, for example, the duopoly rule. To split them, and operate in a vacuum, is to willfully ignore our responsibility to regulate the number of outlets a

² *Id.* at 411

³ *Id.* at 412 (emphasis added).

⁴ FCC Press Release, “FCC Chairman Powell Launches Localism in Broadcasting Initiative, August 20, 2003. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf

single owner can control in any given community. Moreover, the courts have asked us to ensure the consistency of our rules, and we cannot do so without a comprehensive final order. Any attempt to modify the rules individually may be good politics, but it would be poor public policy and a great disservice to the American people.

There are many other infirmities in this Notice. Given the circuit court's admonishment that there must be a "rational connection between the facts found and the choice made,"⁵ there is an urgent need for the Commission to complete research papers and reports, which provide professional and objective information about current market conditions, trends and future expectations of the radio, television and newspaper sectors. The urgent need for this research is much more pronounced in light of the compelling public interest in promoting diversity and localism the media marketplace.

There are many key issues that deserve their own separate hearing, including the impact of media consolidation on minorities, children, the elderly, Americans with disabilities, and those who live in rural areas. We should also hold hearings on the potential effects of rule changes on indecency and family-friendly fare, religious broadcasting, independent programming, coverage of campaign and community events, music and the creative arts and the growth of the Internet, to name a few.

It was my hope that by issuing this Notice today the Commission would seriously endeavor to review the media ownership rules, in accordance with the statutory mandate to promote diversity, localism and competition. Instead, we seem to be repeating past mistakes. Regrettably, this Notice contains major flaws that could set the stage for another destructive rollback of consumer protection rules.

The task ahead requires transparency, leadership, bipartisanship, consensus building, thoughtful deliberation, and genuine participation by the American people. Fortunately, there is still time to get it right. I remain hopeful the Commission will change course and conduct a process that fulfills our legal responsibilities and reflects the best interests of the public. The American people deserve nothing less.

⁵ *Prometheus*, 373 F. 3d at 390 (quoting *Burlington Truck Ones, Inc v. U.S.*, 371 U.S. 156, 168 (1962)).

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: 2006 Quadrennial Regulatory Review and 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, et al., MB Docket Nos. 06-121 and 02-277, MM Docket Nos. 01-235, 01-317 and 00-244.

With today’s *Further Notice of Proposed Rulemaking (Further Notice)*, we invite the public to comment on how to address the issues raised by the U.S. Court of Appeals for the Third Circuit in the *Prometheus* decision and concurrently initiate the next quadrennial review of the media ownership rules as required by Section 202(h) of the Telecommunications Act of 1996.

The future is under construction right now, and we need to be addressing issues like this one in order to create an environment that allows markets to work while still protecting the interests of consumers. My recent trip to China drove home how interconnected today’s media world really is. As China prepares for the 2008 Olympic Games, I now realize how Americans will have the instantaneous experience of these games from a world away not just from the American media but from the global media. As we move forward, we must realize that the world is indeed interconnected and that American companies must be able to compete in order to continue to be global leaders in the media marketplace.

Moreover, I believe that it is critical that we, as policymakers, do not lose touch with how communications technology, and the decisions we make in this arena, may serve to improve, enhance, educate, and maybe even inspire the lives of all Americans. Media ownership will affect issues as diverse as the quality and quantity of children’s television, the diversity of opinions in our nation’s political discourse, or how we get important information in the event of an emergency. I look forward to the public’s input on the issues presented by this *Further Notice*. In particular, I hope that we can help consumers understand the importance of the issues we are discussing and give them an opportunity to make their voices heard. I am committed to working with my FCC colleagues to ensure that our actions further competition, localism, and diversity in the global media marketplace.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: 2006 Quadrennial Regulatory Review and 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, et al., MB Docket Nos. 06-121 and 02-277, MM Docket Nos. 01-235, 01-317 and 00-244

With this Further Notice, we embark on the Commission's next comprehensive review of the broadcast ownership rules. Our rules must take into account the dramatic changes that have occurred in the media landscape since the Commission adopted them. At the same time, we must ensure that the rules continue to promote the long-standing values of competition, diversity and localism that lie at the foundation of our nation's broadcasting system.

I hope that our review will result in a reasoned framework that answers the legal and evidentiary issues posed to us by the Third Circuit in the *Prometheus* decision and resolves the regulatory uncertainty that followed the appeal of the Commission's 2002 order through the courts. The questions asked in the Further Notice provide a solid start to our inquiry.

As our experience with the 2002 biennial review revealed, the debate over broadcast ownership is a debate about the vitality of our democracy and the appropriate balance among competitive efficiencies, diversity of voices and local focus. The debate elicits the opinions and passions of people from all walks of life from all over the country. I am eager to learn more about the issues from the perspectives of all of the interested parties, be they broadcasters, consumers, academics, artists or others.

I thank Donna Gregg and the Media Bureau staff for their hard work on this important proceeding. I support the Further Notice and commend the Chairman on his strong leadership in this area.

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

<i>In the Matter of</i>)	
)	
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**

David Honig
Executive Director
Minority Media and Telecommunications Council
3636 16th Street, N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net
Counsel for the Diversity and Competition Supporters

Of Counsel:

Aja Byrd
Earle K. Moore Fellow
Minority Media and Telecommunications Council
(Bar Admission Pending)

August 23, 2006

Table of Contents

	<u>Page</u>
Introduction	1
Summary	3
I. The Further Notice Contains Three Profoundly Serious Omissions	6
A. The Further Notice Fails To Identify And Describe MMTC's Proposals	6
B. The Further Notice Fails To Consider The Definition Of A Socially And Economically Disadvantaged Business	12
C. The Further Notice Fails To Include All Legal Justifications For Minority Ownership Policies	13
II. The Flaws In The Further Notice Have Caused Serious Injury	14
III. Failure To Correct The Further Notice Would Be Reversible Error	15
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	19
Conclusion	23
Appendix A: Diversity And Competition Supporters	
Appendix B: Minority Ownership Proposals and Suggestions	

Introduction

In this motion, the Diversity and Competition Supporters (collectively, “MMTC”)¹ 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. FCC², (2) its failure to refer to or seek comment on a definition of a socially and economically disadvantaged business (“SDB”),³ 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.⁴ 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

¹ 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.

² 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).

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

⁴ 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.⁵ Further, the Commission contemplates examination of minority ownership in a public forum.⁶ 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.⁷ 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,⁸ or that are otherwise no longer “necessary in the public interest” do need to be “repealed or modified.”⁹ 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

⁵ 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.

⁶ 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.”)

⁷ 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.

⁸ See 47 U.S.C. §257.

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

back to its earliest days.¹⁰ 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."¹¹ Fundamentally, to "address these proposals" in any meaningful way, the Commission must identify and describe them.¹² 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

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

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

¹² 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,¹³ the Commission also failed to identify and describe 12 of MMTC's 14 proposals.¹⁴

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,¹⁵ 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,¹⁶ ten rely on an SDB definition.¹⁷ 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"),¹⁸ 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.¹⁹

¹³ 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").

¹⁴ 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.

¹⁵ 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.")

¹⁶ See Appendix B, items 1-14.

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

¹⁸ 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.

¹⁹ 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) MMTTC’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.²⁰ 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.²¹ 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,²² 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,²³ and that are

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

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

²² 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).

²³ 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,²⁴ 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;²⁵ 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.²⁶

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).”²⁷ 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

²⁴ 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%.

²⁵ 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.”)

²⁶ 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.

²⁷ Prometheus, 373 F.3d at 421.