information,[98] and second, absent remedial steps, additional media consolidation would accelerate the sharp decline in minority ownership since 2001.[99]

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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[98] See MMTC 2003 Comments, pp. 66-71.

[99] 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

Exhibits 3-6 of the Supplemental Comments of Diversity and Competition Supporters, MB Docket No. 02-277, filed January 27, 2003).

APPENDIX A

DIVERSITY AND COMPETITION SUPPORTERS [1]

August 23, 2006

Center for Asian American Media [2]
Independent Spanish Broadcasters Association [3]
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 [4]
National Urban League
Native American Public Telecommunications, Inc.
Puerto Rican Legal Defense and Education Fund [5]
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

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[1] 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.

[2] Formerly the National Asian American Telecommunications Association.

[3] Successor to the American Hispanic Owned Radio Association.

[4] 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.

[5] 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 [1]

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

[1] Parties seeking additional information about any of these items may contact David Honig, Executive Director, Minority Media and Telecommunications Council, by mail at 3636 16th Street N.W., Suite B-366, Washington, D.C. 20010, or by e-mail at 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: MMTC 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. MMTC 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: MMTC 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-nighttime 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 leaves 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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STAFF EXECUTIVE SUMMARY

This Executive Summary outlines the purposes and findings of a series of market entry barrier studies released by the Federal Communications Commission (FCC) today. The FCC conducted these studies pursuant to Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257, which mandates that the FCC identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), which requires the FCC to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities. [1]

The studies released today are as follows:

1. Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?: prepared by a team of researchers from Santa Clara University (hereafter "Content/Ownership Study");

2. Study of the Broadcast Licensing Process: prepared by KPMG LLP Economic Consulting Services; consisting of three parts: History of the Broadcast Licensing Process; Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (hereafter "Broadcast Licensing Study");

3. FCC Econometric Analysis of Potential Discrimination: Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions: prepared by Ernst & Young LLP (hereafter "Auction Utilization Study");

4. Study of Access to Capital Markets and Logistic Regressions for License Awards by Auctions: prepared by Professor William Bradford at the University of Washington (hereafter "Capital Markets and Auctions Regression Study"); and

5. Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present: prepared by the Ivy Planning Group LLC (hereafter "Historical Study").[2]

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[1] In addition, the Commission has full authority and power to conduct an inquiry for "any question [that] may arise under any of the provisions of [the] Act" pursuant to Section 403 of the Act.

[2] One additional study that was also undertaken as part of this initiative was released in January, 1999. That study was When Being No. 1 Is Not Enough: the Impact of

The Applicable Legal Standards

Section 257 authorizes the Commission to eliminate any identified market entry barriers facing small businesses and businesses owned by women and minorities. Any programs designed to remove specific market entry barriers faced by minority-owned businesses must follow the standards set forth by the Supreme Court in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). In Adarand, the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision-making must serve a compelling governmental interest, and must be narrowly tailored to serve that interest. Although gender-based classifications need only satisfy intermediate scrutiny, see United States v. Virginia, 518 U.S. 515, 531-33 (1996), the FCC sought to examine together the justifications for implementing race- and gender-conscious measures, because any programs that might be developed would likely assist both women and minorities. If the evidence regarding the experiences of women and minorities would satisfy the strict scrutiny standards applicable to race-based provisions, then any programs the FCC might develop would also be able to meet the intermediate scrutiny test applicable to gender-based classifications. Accordingly, the FCC undertook these studies to help determine whether it has a compelling interest under the strict scrutiny standards to support programs promoting license ownership by women and minorities.[3]

There are two federal interests that could potentially provide the necessary factual predicate to meet the strict scrutiny test. First, there is the FCC's interest in promoting the broadcast of a diversity of views. It was on this basis that the Supreme Court upheld two FCC programs in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). These programs were: (1) an enhancement for minority ownership in comparative hearings for broadcast licenses; and (2) the FCC's distress sale policy, which provided special procedures for the transfer of broadcast licenses to minority owned firms. Through these policies, the FCC sought to promote the broadcast of a diversity of opinions and information by facilitating diversity of ownership among broadcast stations. However, it is not clear whether the Supreme Court would find that this interest is a compelling one. Metro Broadcasting was decided under the intermediate scrutiny standard before Adarand dictated that strict scrutiny should apply to federal programs. Moreover, in the employment context, the United States Court of Appeals for the District of Columbia Circuit has held that promoting broadcast diversity does not constitute a compelling

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Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations, prepared by the Civil Rights Forum on Communications Policy (hereafter the "Advertising Study"). This study provided substantial anecdotal evidence that advertisers often exclude radio stations serving minority audiences from ad placements and pay them less than other stations when they are included.

[3] If the evidence warrants the adoption of programs to promote ownership of FCC licenses by minorities and women, any such programs must also be narrowly tailored to further the particular compelling interest upon which the program is based. The studies only examine the compelling interest prong of the strict scrutiny test, because any narrow tailoring inquiry would be part of the process of developing a specific program.

governmental interest. See Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), petition for rehearing denied, 154 F.3d 487, and suggestions for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998). Nonetheless, the Adarand decision only overruled Metro Broadcasting to the extent that it applied intermediate rather than strict scrutiny, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), and in his dissent in Adarand, Justice Stevens provides a lengthy argument in support of the diversity rationale's ability to survive under strict scrutiny. 515 U.S. at 257-58 (Stevens, J., dissenting).[4] Accordingly, the possibility that this First Amendment interest would be accepted as compelling has been left open.

Second, there is the FCC's interest in remedying past discrimination. The FCC has already found in the Section 257 proceeding that discrimination can be a market entry barrier. See Market Entry Barriers Notice of Inquiry, 11 FCC Rcd 6283. Moreover, the governmental interest in remedying past discrimination has been found by a majority of the Supreme Court to meet the compelling interest standard. See Adarand, 515 U.S. at 237; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion); id. at 511 (Stevens, J., concurring in part and concurring in the judgment). As the Supreme Court stated in Adarand, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." 515 U.S. at 237.

To establish such a compelling interest, the governmental actor must show "'a strong basis in evidence for its conclusion that remedial action [i]s necessary.'" Croson, 488 U.S. at 500 (quoting Wygant v. Jackson Board of Educ., 476 U.S. 267, 277 (1986)). It is not sufficient to rely on general societal discrimination. Croson, 488 U.S. at 499. Rather, the government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a "passive participant." Croson, 488 U.S. at 492 (plurality opinion); id. at 519 (Kennedy, J., concurring in part and concurring in the judgment). Under the passive participant theory, a governmental actor must possess evidence that its own practices are "exacerbating a pattern of prior discrimination," and must "identify that discrimination, public or private, with some specificity," to establish the factual predicate necessary for race-conscious relief. Croson, 488 U.S. at 504. In this regard, an inference of discriminatory exclusion may arise "when there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged." Croson, 488 U.S. at 509 (plurality opinion); id. at 530 (Marshall, J., dissenting).

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[4] In addition, at least one federal appeals court has held that promoting diversity can be a compelling government interest. In Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997), the Seventh Circuit held that governments may have a compelling interest in ensuring diversity among law enforcement officers, specifically corrections officers. The Court found that it may be necessary to promote diversity to ensure the effectiveness of law enforcement, when a significant percent of the population under the authority of the law enforcement officers are themselves minorities.

The Research Questions Derived from the Legal Standards

The five market entry barrier studies released today explore a series of research questions posed by this strict scrutiny standard. They have been designed to examine both the diversity rationale and the remedial rationale and to evaluate whether the evidence supports them. No single study was designed to provide the definitive answer to this question. Rather, the studies should be evaluated together, along with other studies conducted in the field, to determine whether a compelling interest exists.

To probe the diversity rationale, the Commission contracted for the Content/Ownership Study. Specifically, this study was designed to examine whether the evidence shows that there is a nexus between the race or ethnicity of broadcast licensees and the content of the programming their stations provide. This study initially sought to measure the impact of station owners' gender as well, but the researchers were unable to gather sufficient data for women-owned stations. This study was based on survey data and used a sampling methodology that matched minority-owned stations with majority-owned stations without controlling for format. Additional research may be required to investigate the impact of format and provide further analysis of the impact of demographic and economic data.[5] The study also asks whether promoting a greater diversity of racial and ethnic groups among owners creates a greater diversity of programming on the airwaves. Given the First Amendment values behind the diversity rationale, the study focuses on speech that courts have held to be at the core of the First Amendment's protections: news and public affairs programming. In this regard, the study also examines whether the race or ethnicity of station owners affects the quantity of public affairs programming and whether it impacts the likelihood of stations to cover particular issues.

The remaining four studies all examine questions raised by the remedial rationale. Here, the FCC must ask whether there has been discrimination against minorities or women in the distribution of FCC licenses, either directly by the FCC, or through the FCC's passive participation in private acts of discrimination.

For the past fifty years, there have been four different methods by which an applicant could obtain an FCC license: comparative hearings, lotteries, auctions, and purchases on the secondary market. The FCC issued broadcast licenses through the comparative hearing process from the late 1940s through 1993, when the program was suspended in the wake of the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).[6] Under this process, singleton applications were granted provided that the applicant met

[5] However, there are previous studies that provide evidence of a relationship between owner race and the content of programming.

[6] In Bechtel, the Court held that factors used in the comparative hearings process were "arbitrary and capricious." 10 F.3d at 887. Following that decision, the FCC suspended all further comparative hearings.

basic minimum qualifications. If, however, the Commission received more than one application for a particular station, it referred the matter for a comparative hearing before an administrative law judge. In comparative hearings, the FCC evaluated competing applications for broadcast licenses according to a list of criteria set forth in a 1965 Policy Statement which sought to carry out the Commission's goals of furthering the "best practicable service to the public" and the "maximum diffusion of control of the media of mass communications."[7] From the late 1970s through the end of comparative hearings, the Commission awarded an enhancement to applicants with ownership interests by minorities and women. Following the suspension of comparative hearings, the Commission turned to auctions for distribution of broadcast licenses. The first broadcast auction was held in 1999.

As for licenses for wireless voice/data services, the FCC has issued these through lotteries and auctions. In 1981, Congress authorized the FCC to assign a broad range of licenses by lottery,[8] and lotteries were used for several years thereafter. Then in 1993, Congress sharply restricted the FCC's authority to use lotteries and, instead, gave the Commission authority to use auctions to award licenses for the rights to use the radio spectrum.[9] At present, auctions are the sole method for obtaining commercial licenses – broadcast or wireless – directly from the FCC. Finally, both broadcast and wireless licenses are also available through purchases on the secondary market. When licensees seek to sell or transfer their licenses, Section 310(d) of the Communications Act requires that they seek the Commission's approval. 47 U.S.C. § 310(d). However, Section 310(d) only permits the FCC to determine whether the proposed sale is acceptable, and prohibits the Commission from considering whether any person other than the proposed new licensee would better serve the public interest, convenience, and necessity.

One of the first research questions raised by the remedial rationale is the extent, if any, to which minorities and women may have been underrepresented in obtaining FCC licenses. As noted above, the Supreme Court has recognized that an inference of discrimination may be drawn "when there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion); id. at 530 (Marshall, J., dissenting).

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[7] See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), modified, 2 F.C.C.2d 667 (1966).

[8] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-737, amended, Communications Amendment Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, added Section 309(i) to the Communications Act. Some broadcast licenses for low power television stations were also distributed by lottery.

[9] As part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392, Congress added Section 309(j) to the Communications Act of 1934. 47 U.S.C. §§ 151 et seq.

Following this analysis in Croson, the lower federal courts have relied on a variety of "disparity indices" and "utilization ratios" in assessing whether the government has shown the necessary inference of discrimination.[10] Such data may assist the FCC to ascertain whether the evidence regarding participation by minorities and women in the market for FCC licenses creates "an inference of discriminatory exclusion" under Croson. See 488 U.S. at 509.

Two of the studies examine these utilization issues. The Broadcast Licensing Study calculates various measures of utilization for the distribution of broadcast licenses in the comparative hearing process and the Auction Utilization Study explores utilization measures for the allocation of wireless licenses through auctions. Both of these studies calculate and present multiple measures of utilization, which are explained at length in the reports.

Two points, however, are important to note here. First, in adapting the legal standards for utilization calculations to the FCC licensing context, the studies have followed a conservative approach. Adarand and Croson were both cases involving government contracting. Thus, to determine whether minority owned firms were underrepresented in obtaining government contracts, governments were directed to examine the utilization of minority firms compared to the total pool of qualified firms. See Croson, 488 U.S. at 501-02. In government contracting, this task is facilitated by the fact that most agencies maintain lists of eligible and qualified contractors. Thus, they may evaluate how often the minority and women owned firms win contracts compared to what one might expect based upon the number of such firms in the pool of qualified firms. In FCC licensing, however, there is no such list of qualified potential licensees. Nor are there any requirements for education or experience in order to acquire an FCC license. Thus, there is no readily apparent potential pool of qualified bidders.

Further, in some previous studies seeking to document discrimination in an industry, the researchers have attempted to expand the pool of qualified applicants by including those persons who would have applied had they not been barred by

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[10] See, e.g., Contractors Assoc. of Eastern Penn. Inc. v. City of Philadelphia, 6 F.3d 990, 1005, 1007 (3d Cir. 1993) (relies on "disparity index" measuring percentage of minority contractor participation in city contracts divided by the percentage of minority contractor availability in Philadelphia area, to find inference of discrimination sufficient to defeat summary judgment); Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1414-16 (9th Cir. 1991), cert denied, 503 U.S. 985 (1992) (relies upon comparison of percentage of available minority firms and percentage of contracts awarded to such firms to support inference of discrimination sufficient to defeat preliminary injunction against program). It is important to note that the existence of any statistical disparities would not be sufficient to demonstrate discrimination, and this data should not be taken as a suggestion that minorities and women should be represented among FCC licensees in any particular numbers.