

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

In the Matter of)	
)	
2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	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		

INITIAL COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS

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Introduction and Summary

The Diversity and Competition Supporters¹ (collectively “DCS”) respectfully submit these initial comments on the subject of minority ownership.

Although DCS is eager to file detailed comments, it would be futile for DCS to do that now because the Commission cannot adopt minority ownership policies -- or any other media ownership policies or rules -- unless it withdraws its fatally flawed FNPRM and restarts the proceeding. Therefore, DCS is submitting these Initial Comments as an Offer of Proof. Herein DCS describes what it would plead if the Commission cures the fatal errors in the FNPRM, and DCS describes twenty-one proposals it would offer if there were a chance the Commission could adopt any of them. Should the Commission cure the errors in the FNPRM, DCS will file thorough General Comments on minority ownership.

I. The Commission Cannot Adopt Rules Until It Restarts The Proceeding

In Prometheus, the Court called attention to DCS’ “proposals for advancing minority and disadvantaged business and for promoting diversity in broadcasting” and required the “rulemaking process in response to our remand order” to “address these proposals at the same time.”² Fundamentally, to “address these proposals” and meaningfully solicit comments on

¹ The Diversity and Competition Supporters is a coalition of 29 national organizations, created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277. Its membership includes essentially the same 17 organizations that participated in the 2002 Biennial Review, as well as 12 additional organizations joining on the occasion of this new round of pleadings in response to the 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121 (Further Notice of Proposed Rulemaking), 21 FCC Rcd 8834 (2006) (“FNPRM”). A list of the Diversity and Competition Supporters is found in Appendix A; additional organizations may join shortly. These Initial Comments and subsequent pleadings 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, 421 n. 49 (3d Cir. 2004) (“Prometheus”), stay modified on rehearing, No. 03-3388 (3d Cir., September 3, 2004) (“Prometheus Rehearing Order”), cert. denied, 545 U.S. 1123 (2005). See also Prometheus at 435 n. 82.

them, the Commission must identify and describe the proposals.³ In the FNPRM, the Commission failed to do that, an omission all the more unfortunate because the reason the Court remanded the proposals was that in its 2002 Biennial Review Order,⁴ the Commission also failed to identify and describe twelve of DCS' fourteen proposals.

On August 23, 2006, DCS filed its "Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice" ("Restart Motion"). In the Restart Motion, DCS asked the Commission to withdraw the FNPRM and 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,⁵ (2) its failure to refer to or seek comment on a definition of a socially and economically disadvantaged business ("SDB"), the linchpin of ten of DCS' original fourteen proposals,⁶ and (3) its failure to recite the central legal basis for minority ownership relief, Section 257 of the Telecommunications Act, 47 U.S.C. §257.⁷

An agency must avoid even the appearance of noncompliance with a remand order. When a remand requires an agency to issue a specific proposal for public comment, the agency, at a minimum, must identify and describe the proposal, set out its legal basis, and notify the public of any element of the proposal that is necessary for its adoption. These steps are necessary because they are conditions precedent to the creation of a full record and to the

³ In its Report and Order concluding the 2002 Biennial Review, the Commission misidentified twelve non-proposals as proposals, while failing to acknowledge the existence of twelve of DCS' 14 proposals. This history is detailed in the Restart Motion, pp. 6-15.

⁴ 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 (Report and Order), 18 FCC Rcd 13620 (2003) ("2002 Biennial Review Order").

⁵ See Restart Motion, pp. 6-12.

⁶ Id., pp. 12-13.

⁷ Id., pp. 13-14.

satisfaction of the notice requirement in the Administrative Procedure Act (“APA”), 5 U.S.C. §553(b).

Further, whether a rulemaking is undertaken ab initio or in response to a remand, an agency’s issuance of the “[g]eneral notice of proposed rulemaking” called for in 5 U.S.C. §553(b) must contemplate the possibility that the contemplated rule actually could be adopted.⁸ Yet adoption of DCS’ proposals is plainly impossible now, since (1) the FNPRM’s invitation to comment is so cursory and clumsily drawn that it is incomprehensible even to the agency’s own specialized staff office,⁹ and thus cannot possibly generate the full record of comments required to justify a rule;¹⁰ (2) the key legal basis for the rule appears nowhere in the rulemaking notice, a defect that cannot be cured after the fact at the Report and Order stage;¹¹ and (3) the definition of a socially and economically disadvantaged business (“SDB”) -- the linchpin of ten of the fourteen proposals -- is nowhere mentioned, thereby consigning those ten proposals to certain death.¹²

The APA, 5 U.S.C. §553(c), provides that an agency “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” It follows that when a rulemaking

⁸ See, e.g. National Tour Brokers Ass’n. v. ICC, 591 F.2d 896, 899 (D.C. Cir. 1978) (concluding that a purported notice of proposed rulemaking published in the Federal Register did not satisfy the “[g]eneral notice of proposed rulemaking” requirement of 5 U.S.C. §553(b) because the purported notice was “looking forward to the formulation of possible legislative amendments which might be proposed to Congress, not administrative rulemaking.”)

⁹ See Restart Motion, pp. 16-17.

¹⁰ To undertake to mitigate the damage, the Minority Media and Telecommunications Council (“MMTC”) has undertaken a campaign to encourage other parties to conduct research and file comments addressing minority ownership. Over the past month, representatives of MMTC have addressed this issue in four public meetings, including an FCBA CLE and an issue forum organized by the Rainbow/PUSH Coalition. MMTC’s Policy Committee has established a working group to refine and prioritize the various potential minority ownership initiatives. Certainly industry leaders are certainly thinking about this subject. See, e.g. “Media Analysts and Black community Leaders Excited about WVON/Clear Channel Deal,” Chicago Defender, August 17, 2006 (reporting on an initiative by which the owners of underpowered, share-time heritage Chicago Black talk station WVON(AM) was able to LMA Clear Channel’s AM 1690 kHz frequency with an option to buy).

¹¹ See Global Van Lines v. ICC, 714 F.2d 1290, 1297-99 (5th Cir. 1983); see also Restart Motion, pp. 19-20.

¹² See Restart Motion, p. 20.

notice, on its face, disables the agency from adopting rules, any supposed opportunity to file comments is not meaningful.¹³ A party to an agency proceeding is not required to perform a futile act,¹⁴ and it would be futile for DCS to file extensive comments now. No matter what those comments might contain, the parameters of the FNPRM guarantee that DCS cannot prevail because an adverse outcome has been predetermined.

The Restart Motion, which is unopposed,¹⁵ affords the Commission an opportunity to cure the errors in the FNPRM.¹⁶ The Commission's continued failure to act on the Restart Motion would consign minority ownership initiatives to a certain grave. Further, it would prevent the agency from adopting any other new rules since minority ownership is an indispensable element of structural regulation¹⁷ and minority ownership is not severable from the proceeding.¹⁸

If the Commission cures the otherwise fatal errors in the FNPRM, DCS will file detailed comments ("General Comments"), which will provide thorough arguments for adoption of DCS' minority ownership proposals.

¹³ Cf. McLouth Steel Products Corp. v. EPA, 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("[c]onsideration of comments as a matter of grace is not enough.")

¹⁴ The futility exception to the exhaustion requirement has been held to mean that "the law should not be construed idly to require parties to perform futile acts or to engage in empty rituals." Northern Heel Corp. v. Compo Indus., Inc., 851 F.2d 456, 461 (1st Cir. 1988). The possibility or even probability that an agency may deny relief is insufficient to trigger the exception. See, e.g. Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 106 (D.C. Cir. 1986). However, as in the instant proceeding, the futility exception can be triggered "by virtue of a preannounced decision by the final administrative decision-maker", White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988) or where a party has been denied access to administrative remedies, see, e.g. Christopher W. v. Portsmouth School Comm., 877 F.2d 1089, 1096-97 (1st Cir. 1989).

¹⁵ See Diversity and Competition Supporters' "Request for Ruling on 'Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice' and, in the Alternative, for Oral Argument and an Extension of the Comment Date" (filed September 11, 2006).

¹⁶ Defects in an original notice of proposed rulemaking can be cured by an adequate later notice. Forester v. CPSC, 559 F.2d 774, 788 (D.C. Cir. 1977).

¹⁷ See Restart Motion, p. 22.

¹⁸ Id., p. 22 and n. 96.

II. A Summary Of The Twenty-One Proposals DCS Would Like To Offer

In Appendix B, DCS summarizes and sets out the history of 21 proposals it will offer if the Commission restarts the proceeding. These proposals include the fourteen proposals it offered in the 2002 Biennial Review, all of which were remanded in Prometheus, four additional recommendations presented by the Commission’s Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”),¹⁹ and three new proposals.

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,²⁰ or that are otherwise no longer “necessary in the public interest” need to be “repealed or modified.”²¹ In that spirit, all of the 21 proposals set out in Appendix B are deregulatory except one: an obligation of nondiscrimination on the basis of race or gender in the sale of a broadcast station,²² which the Commission should be proud to adopt.

III. A Summary Of The Supportive Documentation DCS Would Like To Provide

The overwhelming weight of the evidence demonstrates that absent remedial steps, most consolidation tends to diminish minority ownership.²³ In our General Comments, we wish to address two particular types of deregulation that could present the greatest risks to minority ownership, particularly in medium markets: most new television duopolies or “triplolies,” and relaxation of the local radio ownership caps and subcaps. We are gathering the testimony of minority broadcasters on the positive and negative effects of consolidation on their businesses.

¹⁹ 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 (2003), §B.

²⁰ See 47 U.S.C. §257.

²¹ See Telecommunications Act of 1996, Section 202, codified at 47 U.S.C. §161.

²² See Appendix B, §I, item 1.

²³ See Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 2, 2003) (“DCS 2003 Comments”), pp. 35-60.

Our General Comments would also explain why the Commission's four rules and policies aimed at minority broadcast ownership have failed to prevent a decline in minority ownership levels, much less cure the scandalous under-inclusion of minorities in broadcast ownership.²⁴

Further, our General Comments would explain why token minority ownership initiatives are doomed to fail. Traditionally, when the Commission has addressed minority ownership at all, it has done so by choosing one or two modest initiatives, arranging for no post-adoption monitoring, then forgetting about the problem and moving on.²⁵ That is not how the Commission addresses other issues. Consider, for example, the Commission's multifaceted approaches to emergency communications,²⁶ the DTV conversion,²⁷ or multi-channel video.²⁸ Minority ownership didn't reach its current state overnight, and it didn't reach that state because of a single cause. Even a new tax certificate policy would be unlikely to cure the abysmal state

²⁴ These rules and policies are (1) the Failing Station Solicitation Rule (FSSR) (47 C.F.R. 73.3555 Note 7), the Transfer Restriction (2002 Biennial Review Order, 18 FCC Rcd at 13809-12 ¶¶487-90), Auction Bidding Credits (47 U.S.C. §309(j)(3)(B) and (4)(D)) and the Distress Sale Policy (Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978)).

²⁵ See Restart Motion at 9-10. The most recent example of this regulatory tokenism occurred in the 2002 Biennial Review, when the Commission adopted the Transfer Restriction. See 2002 Biennial Report, 18 FCC Rcd at 13636-37 ¶51 (predicting that this initiative will result in "greater participation in communications markets by small businesses, including those owned by minorities and women[.]"") The initiative was discussed in a section entitled "Minority and Female Ownership Diversity," which in all other respects was devoted to postponing rejecting, or ignoring proposed minority and female ownership initiatives. Id. at 13536-37 ¶¶46-52. Commissioner Adelstein predicted that "the transfer of entire grandfathered clusters to small entities is likely to prove a rare occurrence", id. at 13996, and history has proven him correct inasmuch as there has not been a single such transaction.

²⁶ See Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (NPRM), 21 FCC Rcd 7210, 7321-22 ¶6 (2006) (seeking comment on, inter alia, "(1) pre-positioning the communications industry and the government for disasters in order to achieve greater network reliability and resiliency; (2) improving recovery coordination to address existing shortcomings and to maximize the use of existing resources; (3) improving the operability and interoperability of public safety and 911 communications in times of crisis; and (4) improving communication of emergency information to the public" (fn. omitted)).

²⁷ See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television (NPRM), 19 FCC Rcd 18279, 18287-18357 ¶¶22-179 (2004) (seeking comment on, inter alia, channel elections, allotment changes, border interference, channel replication, analog channel surrender dates, and dozens of related issues).

²⁸ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (NPRM), 20 FCC Rcd 18581, 18588-92 ¶¶12-24 (2005) (seeking comment on dozens of issues, including the impact of state and local franchising on competition and consumer welfare, the reasonableness of local franchise conditions, the Commission's remedial authority if a local agency delays the grant of a competitive franchise, and the potential of buildout requirements to serve as barriers to entry).

of minority ownership.²⁹ A solution must therefore involve several initiatives, aimed generally and comprehensively at each of the three major aspects of the problem: access to capital, access to opportunity, and access to the spectrum resource.

The FNPRM asks parties whether minority ownership proposals present “any constitutional impediments to adoption[.]”³⁰ Of DCS’ 21 proposals, 14 are potentially race-conscious. A race-conscious initiative may be adopted if it is narrowly tailored to address a compelling governmental interest.³¹ In its General Comments, DCS would demonstrate how its proposals would address each of four compelling governmental interests: remedying the present effects of past discrimination, preventing further discrimination, promoting competition, and promoting diversity. Further, we would explain how our proposals are narrowly tailored in light of their reliance on the well-established concept of an SDB.³² DCS would propose a definition of an SDB that would be constitutionally sound and appropriate for the broadcasting industry.³³

²⁹ See Kenneth Robinson, “Broadcasting and Minority Ownership,” Telecommunications Policy Review, October 16, 2006, p. 2 (observing that radio station value stagnation would diminish the value of tax certificates to sellers, and noting the poor prospects for enactment of the requisite legislation in light of budget deficits).

³⁰ FNPRM, 21 FCC Rcd at 8837 ¶5.

³¹ Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995).

³² See generally Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1187 (10th Cir. 2000), cert. dismissed, 534 U.S. 103 (2001). 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.

³³ The Prometheus Court certainly appreciated the importance of an SDB definition. The Court let stand 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). See Prometheus, 373 F.3d at 426-27 (approving the Transfer Restriction); see also Prometheus Rehearing Order, p. 2 (permitting the Transfer Restriction to take effect). However, the Court added:

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.

Prometheus, 373 F.3d at 428 n. 70.

IV. A Summary Of The Four Rulemaking Procedures DCS Would Like To Propose

In our General Comments, we would like to recommend four methods by which the Commission can build a full record on minority ownership: by establishing databases suitable for longitudinal analysis;³⁴ holding public hearings specifically addressing minority ownership,³⁵ conducting a negotiated rulemaking,³⁶ and holding oral argument.³⁷ Given the extent of the minority underinclusion, the Commission's many decades of failed and abandoned minority ownership initiatives, and the Commission's current operation under a remand order, the Commission should use every reasonable means to resolve its minority ownership dilemma once and for all.

³⁴ See S. Derek Turner and Mark Cooper, "Out of the Picture: Minority & Female TV Station Ownership in the United States," Free Press, September 2006, pp. 7-8 (documenting grave inadequacies in the Commission's databases of minority and female broadcast owners and investors).

³⁵ See FNPRM, 21 FCC Rcd at 8859 (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.") The Commission has not yet announced whether any of these hearings will focus on particular issues integral to the docket, including minority ownership.

³⁶ See DCS 2003 Comments, pp. 145-47. Procedures for negotiated rulemakings are set out in 5 U.S.C. §561 et seq.

³⁷ Although neither the APA nor the Communications Act requires the holding of oral argument, Section 4(i) of the Communications Act certainly is flexible enough to allow the Commission to hold oral argument in any proceeding. The relevant rule is 47 C.F.R. §1.423. These hearings were common in the 1950s (e.g. UHF/VHF Intermixture, Color Television Standards). More recently, the Commission has avoided oral argument. See, e.g., Cable Television Syndicated Program Exclusivity Rules, 79 FCC2d 652, 660-61 (1980), in which the NAB sought oral argument and got turned down, and Deregulation of Radio, 46 RR2d 1201, 1204 (1979), in which citizen groups sought oral argument and were turned down. However, in light of the growing interest of members of the public in proceedings like this one, which is likely to generate millions of comments, it is time to revive the transparency and illuminative qualities achievable through oral argument.

Respectfully submitted,

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APPENDIX A

DIVERSITY AND COMPETITION SUPPORTERS¹

Alliance for Community Media
American Indians in Film and Television
Asian American Justice Center
Black College Communication Association
Center for Asian American Media
Independent Spanish Broadcasters Association
International Black Broadcasters Association
Latinos in Information Sciences and Technology Association
League of United Latin American Citizens
Minorities and Communication Division of the Association for Education in Journalism and
Mass Communications
Minority Business Enterprise Legal Defense and Education Fund
Minority Media and Telecommunications Council
Multicultural Broadband Trade Association
National Association of Black Telecommunications Professionals
National Association of Hispanic Publications Foundation
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Congress of American Indians
National Council of Churches
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Institute for Latino Policy
National Puerto Rican Coalition
National Urban League
Native American Public Telecommunications, Inc.
Puerto Rican Legal Defense and Education Fund
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

¹ Some of the Diversity and Competition Supporters, including the National Association of Hispanic Publications Foundation, may also file their own comments or join in other sets of comments.

APPENDIX B

TWENTY-ONE MINORITY OWNERSHIP PROPOSALS¹

Section I (items 1-14) contains the 14 proposals of the Diversity and Competition Supporters (“DCS”) in MB Docket No. 02-277, the 2002 Biennial Ownership Review. 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 15-18) contains four recommendations issued the Diversity Committee that do not track the proposals or suggestions in items 1-14.

Section III (items 19-21) contains three new proposals.

SECTION I: DCS PROPOSALS IN MB 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) (“DCS 2003 Comments”), pp. 115-120; MMTTC Letter to Hon. Michael Powell, MB Docket No. 02-277 (April 28, 2003) (“MMTTC April 28, 2003 Ex Parte”), pp. 11-19.

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

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: DCS 2003 Comments, pp. 107-109

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.

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. DCS 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: DCS 2003 Comments, p. 103

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

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. DCS 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: DCS 2003 Comments, pp. 104-105

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 ("MMTC") in MB Docket 01-317 (Radio Ownership), filed March 19, 2002 ("MMTC 2002 Comments"), pp. 111-173; Reply Comments of MMTC in MB Docket 01-317 (Radio Ownership), filed May 8, 2002 ("MMTC 2002 Reply Comments"), pp. 6-10; DCS 2003 Comments, pp. 106-107

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: DCS 2003 Comments, pp. 109-110

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: DCS 2003 Comments, pp. 110-112

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; Reply Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed February 3, 2003) (“DCS 2003 Reply Comments”), pp. 17-24; MMTC April 28, 2003 Ex Parte, pp. 6-7

Summary of Item: Two formulas in the record were offered as suitable for crafting and implementing rules to promote diversity: (1) MMTC’s “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) DCS’ “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 (Tipping Point Formula); 2003 (Source Diversity Formula)

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

10. Zero tolerance for ownership rule abuse

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

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; DCS 2003 Reply Comments, pp. 15-16

Summary of Item: The Commission requires ownership attribution of most JSAs and LMAs. While this step promotes diversity, it also reduces the options available to financially troubled facilities seeking to survive. CWA proposed that JOAs, such as those used in the newspaper industry, could be used to help companies survive and to promote diversity at the same time. A JOA adapted to broadcasting would leave each station's program creation, program organization and distribution, and sales strategy and implementation in the hands of each station's licensees. At the same time, a genuine JOA allows both stations to take advantage of operational synergies for non-program, non-sales related functions, such as accounting, engineering, and physical plant management. A JOA would not be attributable.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

12. Opening FM spectrum for new entrants

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

Summary of Item: The Commission has systematically broadened spectrum availability as a means of balancing consolidation with new entry. DCS 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: DCS 2003 Comments, pp. 84-101 and 145-147; Comments of Paxson Communications Corporation, MB Docket 02-277 (filed January 3, 2003), pp. 6-14; DCS 2003 Reply Comments, pp. 25-32

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. DCS 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: DCS 2003 Reply Comments, pp. 34-38; MMTC April 28, 2003 Ex Parte, pp. 8-10

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: PROPOSALS OF THE DIVERSITY COMMITTEE

15. 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

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

16. 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

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

17. 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

18. 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

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

SECTION III: NEW PROPOSALS

19. Retention on air of AM expanded band owners' stations if one of the stations is sold to an SDB

Prior History: Joint Petitioners (eleven broadcasters and four public interest and minority organizations) "Request for Waiver of Rules Requiring Return of AM Licenses," MM Docket No. 87-267 (filed March 27, 2006)

Summary of Item: AM licensees operating in the Expanded Band and having another AM station paired with the Expanded Band station are required to forfeit one of these AM allotments for cancellation on the fifth anniversary of the date on which the Commission issued the expanded band authorization. The Joint Petitioners asked the Commission to waive this requirement in order to allow the transfer of one of the stations to a recognized small business, or the station's retention by the licensee if the licensee is a small business.

Year First Proposed: 2006

Relevance of SDB Definition: No

20. Permitting AM stations to use FM translators

Prior History: Petition for Rulemaking of the National Association of Broadcasters, RM No. 11338 (filed July 14, 2006); see also Reply Comments of the National Association of Black Owned Broadcasters and MMTC, RM No. 11338 (filed September 6, 2006)

Summary of Item: Minority owners' asset values would increase substantially if AM stations could extend their signals using FM translators. The vast majority of minority owned stations are on the AM band, and these stations tend to have inferior facilities. This initiative would help cure this disparity in service that originated with the late entry of minorities into radio ownership, which was caused in significant part by regulatory barriers to entry.

Year First Proposed: 2006

Relevance of SDB Definition: No

21. Relaxation of the community of license and transmitter site rules

Prior History: Petition for Reconsideration of Diversity and Competition Supporters, MB Docket 02-277 (filed September 4, 2003), pp. 36-44. The Diversity and Competition Supporters withdrew the Petition for Reconsideration in order to fulfill the jurisdictional requirements of the Prometheus court. See Prometheus Radio Project v. FCC, 373 F.3d 372, 420 n. 56 (2004) (subsequent history omitted).

Summary of Item: The Commission should relax its community of license and transmitter site rules to the maximum extent permitted by Section 307(b) of the Communications Act. These rules undermine diversity and localism in three ways:

First, these rules artificially prevent large cities from having the number of local stations required to serve the cities' growing and more diverse populations. With more signals come more niche program offerings -- exactly what these diverse communities need. Thus, the relative paucity of full coverage big-city signals imposed by the community of license and transmitter site rules inhibits diversity.

Second, these rules deprive local communities of truly local service. High powered exurban stations seldom if ever “serve” the towns that technically serve as their communities of license. Instead, they aim at nearby large markets, where they are often not fully competitive because they lack full market coverage.

Third, these rules result in inferior service to minorities, who typically are confined by segregation and wealth disparities to central cities. Minority owned FM stations are disproportionately licensed to the suburbs -- a consequence of nonminorities’ 50-year first-mover advantage in securing the more attractive center city allotments.

We wish to propose that:

1. A licensee whose station is in an Arbitron market should be able to choose any community of license in its Arbitron market, as long as its operation there would not violate the interference rules.
2. A licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.
3. A station’s 60 dbu contour should be required to cover 50% of the population of the community of license, rather than 80% as presently required.

The first priority for move-ins would be stations owned by SDBs, and the second priority would be lower powered suburban facilities that could become competitive full market signals if moved in. After all of the move-in applications are processed, filing windows for drop-ins and signal upgrades would open up to allow for backfilling of the spectrum freed up by the move-ins. Consistent with the Section 307(b) priorities, these filing windows would open in this order:

1. Full power drop-ins that provide new or competitive local service whose audience will primarily be a rural community;
2. Rural LPFMs;
3. Rural translators;
4. Urban translators; and
5. Class of service, power, and tower height upgrades of full power stations.

Under this new paradigm to facilitate move-ins, not every exurban station could relocate, since relocation may be constrained by interference criteria rather than the community of license and transmitter site rules. However, where the community of license and transmitter site rules are the only impediments to a station becoming a move-in, our proposal would make it much easier to effectuate the move-in. Further, these new urban move-ins would also free up spectrum for new drop-ins tailored to provide rural service.

Year First Proposed: 2004

Relevance of SDB Definition: Yes.