

**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		

REPLY COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS

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The Diversity and Competition Supporters¹ (collectively “DCS”) respectfully submit these Reply Comments on the subject of minority and female ownership.²

I. The Commission’s Failure To Meaningfully Seek Comment on DCS’ Proposals And Related Questions Has Produced A Gravely Inadequate Record

On August 23, 2006, DCS filed a motion (the “Restart Motion”) asking the Commission to restart this proceeding for four reasons:

- (1) notwithstanding the Prometheus Court’s instruction that the Commission put DCS’ fourteen original minority ownership proposals out for public comment, the FNPRM failed even to identify or describe the proposals or provide correct and complete citations to them;³
- (2) the FNPRM also failed to identify or describe the four proposals, not also propounded by DCS, that were advanced by the Commission’s own Advisory Committee on Diversity for Communications in the Digital Age (the “Diversity Committee”);⁴
- (3) the FNPRM failed to satisfy the Prometheus Court’s expectation that the Commission would define a socially and economically disadvantaged business (“SDB”),⁵ the linchpin of ten of DBS’ proposals and of two of the Diversity Committee’s four proposals not also filed by DCS; and

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. These Reply Comments 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 As with DCS’ Initial Comments, DCS is filing these Reply Comments as an Offer of Proof, since it would be futile to offer detailed comments until the Commission acts on the Restart Motion. See DCS Initial Comments (filed October 23, 2006), p. 1.

³ 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) (calling attention to DCS’ “proposals for advancing minority and disadvantaged business and for promoting diversity in broadcasting” and requiring the “rulemaking process in response to our remand order” to “address these proposals at the same time.”) See also Prometheus at 435 n. 82, and in the Restart Motion, pp. 6-12.

⁴ See Restart Motion, pp. 10, 18. In a footnote, the FNPRM mentioned that the Diversity Committee had offered proposals, but the FNPRM did not identify or describe them. See id., 21 FCC Rcd at 8837 n. 15.

⁵ See Prometheus, 373 F.3d at 428 n. 70.

(4) the FNPRM failed to recite 47 U.S.C. §257 (“Section 257”) as the key legal basis for minority ownership initiatives.⁶

The Restart Motion was unopposed. Many well-respected broadcast companies,⁷ media organizations,⁸ and public interest organizations⁹ have expressed their general agreement with the relief sought in the Restart Motion.

The errors in the FNPRM were not harmless by any means. Now that comments in the docket have been filed, we know that the FNPRM’s flaws had devastating consequences. The record on minority ownership remedies is nearly fallow, as DCS feared.¹⁰ Although nearly 200 substantial formal comments were presented in the docket, it appears that:

⁶ See Restart Motion, pp. 13-14. Section 257(c) provides that “[e]very 3 years...the Commission shall review and report to Congress on [] (1) any regulations prescribed to eliminate barriers within its jurisdiction...and (2) the statutory barriers...that the Commission recommends be eliminated[.]” 47 U.S.C. §257(c). That triennial report, due on December 31, 2006, has not yet been provided to Congress.

⁷ See, e.g., Comments of Smaller Market Broadcasters Coalition (consisting of Barrington Broadcasting Group, Cordillera Communications, Fisher Communications, Inc., Freedom Broadcasting, Inc., LIN Television Corp., Morgan Murphy Stations, Quincy Newspapers, Raycom Media, Drewry Communications and Schurz Communications, Inc.) (filed October 23, 2006), p. 27 n. 67:

The Smaller Market Commenters do not address the important societal question of female and minority ownership. By offering no suggestions for this issue, the Smaller Market Commenters do not undervalue its importance. It may be, however, that the duopoly and minority/women issues are so complex that for the sake of clear thinking and manageable decision-making, they should be addressed separately, though generally in contemporaneous proceedings.

⁸ See, e.g., Comments of the National Association of Hispanic Journalists (NAHJ) (filed October 23, 2006), p. 16 (“[w]e are concerned that the Commission has not addressed the [Prometheus] court’s concerns in the current proceeding. Meanwhile, the number of minority owners continues to decline”); Comments of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition (filed October 23, 2006), pp. 3-4 (“[i]n order to develop an adequate record, the Commission must begin by addressing the issues raised by the [DCS] motion....the Commission must issue a revised FNPRM” to rectify the deficiencies in the FNPRM.)

⁹ See, e.g., Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation (“UCC Comments”) (filed October 23, 2006), p. 2 (noting that in response to the Prometheus Court’s remand for consideration of the DCS proposals, “the Commission provides no proposals of its own, nor does it indicate its views about the desirability, effectiveness, or legality” of the DCS proposals, and “[i]n fact, the FNPRM fails to even identify the relevant [DCS] proposals”); Comments of Prometheus Radio Project (filed October 23, 2006), p. 10 (encouraging the Commission to “provide new and procedurally sufficient notice of various proposals to enhance minority and female ownership in the broadcasting industry.”)

¹⁰ See Restart Motion, p. 15, in which DCS predicted:

With only limited time and resources for the preparation of comments, the parties understandably will assign a low priority to proposals the Commission did not see fit to identify and describe. If the public comes to suspect that the Commission no longer regards minority ownership as a high priority, few comments will be filed on that subject. Should that happen, the Commission might ultimately have to conclude that the record only justifies the adoption of inadequate, inefficient or unsustainable policies, or is

- DCS’ Proposals. Of the hundreds of substantial commenters, only eight (four of which are minorities, women or public interest groups), and the Consumer Advisory Committee, addressed any of the DCS proposals. Eight of the proposals drew two or fewer comments, and five drew none at all. See Appendix B *infra*.
- The Diversity Committee’s Proposals. Only one comment was filed in response to each of two of the Diversity Committee’s four (unduplicated) proposals. See Appendix C *infra*.
- SDB definition. Only three commenters, two of them public interest organizations, addressed the SDB definition. See Appendix D *infra*.
- Section 257. Only two commenters, both of them public interest organizations, had anything to say about Section 257.¹¹ See Appendix E *infra*.

II. Deregulation Proponents Almost Universally Disregarded The Commission’s Request That They Explain The Impact Of Their Proposals On Minority And Female Ownership

The Commission urged commenters to explain how their rulemaking proposals would affect minority and female ownership (the “Deregulation Justification Question”).¹² Although dozens of broadcasters filed pro-deregulatory comments, only three of these commenters undertook to answer the Deregulation Justification Question. See Appendix F *infra*.¹³

too sparse to justify the adoption of any minority ownership policies at all. That would mean that until the 2010 quadrennial proceeding, the nation would continue to waste the entrepreneurial, managerial, professional and creative resources of a third of its people in the stewardship of its most influential industries (fn. omitted).

¹¹ Even if the parties had addressed Section 257, such comments could not have cured the Commission’s failure to cite Section 257 in the FNPRM as a key basis for minority ownership rules and policies. If an agency wishes to rely on a statute as a basis for a rule, the agency’s notice of proposed rulemaking must have given notice of the agency’s intention to rely on the statute. See, e.g., Global Van Lines v. ICC, 714 F.2d 1290, 1297-99 (5th Cir. 1983).

¹² See FNPRM, 21 FCC Rcd at 8837 ¶6 (“we urge commenters to explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses.”) While laudable, the Deregulation Justification Question does not cure the Commission’s error in failing meaningfully to seek comment on DCS’ specific proposals, which were generally aimed at pro-actively advancing minority ownership. Rather, the Deregulation Justification Question is aimed at an entirely different issue – whether structural deregulation would make state of minority and female ownership even worse than it is now.

¹³ These three commenters – Bonneville International Corp., Clear Channel Communications, Inc. and Multicultural Radio Broadcasting, Inc. – have each presented serious arguments deserving consideration. DCS will address these arguments after the Commission acts on the Restart Motion.

Several public interest organizations filed comments showing why minority and female ownership is important and how scandalously sparse it is.¹⁴ For its part, the Commission's Consumer Advisory Committee recently adopted, without dissent, the "Further Recommendation Regarding the 2006 Quadrennial Regulatory Review of the Commission's Media Ownership Rules" ("Consumer Advisory Committee Recommendation") (Appendix G infra) that endorses several of DCS' proposals and sets out the reasons why minority ownership matters.¹⁵

The public interest organizations make a strong case for why most new deregulation would tend to inhibit minority and female ownership and, at a minimum, why a solution to the minority and female ownership dilemma should precede consideration of structural deregulation.¹⁶ Read together with all but three of the deregulation proponents' failure to answer the Deregulation Justification Question, the public interest organizations' comments underscore

¹⁴ See generally the comments filed by the Office of Communication of the United Church of Christ, Inc. et al. (UCC), Consumers Union et al., Prometheus Radio Project, the National Association of Black Owned Broadcasters et al. (NABOB), the National Association of Hispanic Journalists (NAHJ) and American Women in Radio and Television (AWRT), all of which are discussed herein and in Appendices B and C infra.

¹⁵ The Consumer Advisory Committee Recommendation states in pertinent part:

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

Minority ownership promotes competition by ensuring that all sources of intellectual and creative capital are put to their highest use, and because an integrated industry serves the public better and thus competes more effectively than a segregated industry. Minority ownership promotes diversity because minority owners serve interests and address needs not served or often recognized by most majority media.

Id. (Introduction).

¹⁶ See, e.g., Comments of Consumers Union, Consumer Federation of America and Free Press (filed October 23, 2006), p. 22 (drawing attention to research showing that "minority owners tend to thrive in more competitive (less concentrated) markets and that relaxation of media ownership limits in the past have led to less minority ownership, rather than more" (citing Compendium Study 13, at 257-267, attached to Consumers Union Comments)); UCC Comments, p. 3 ("[b]ecause of the interrelationship between media ownership rules and policies designed to promote ownership opportunities for minorities and women, the Commission should have policies to ensure that minorities and women have opportunities to own broadcast stations in place before it takes any action that would further relax existing ownership limits" (emphasis in original)). Similarly, the Consumer Advisory Committee "recommends that the Commission adopt rules to promote ownership opportunities for minorities, women and people with disabilities before it considers other changes to its media ownership rules." Consumer Advisory Committee Recommendation, supra, Section I (Diversity).

why the Commission lacks a sufficient record basis at this time to justify most new ownership deregulation.

III. The Emptiness Of The Record Underscores The Need For Prompt Action On DCS' Proposal To Restart This Proceeding

Without a full record on minority and female ownership, the Commission will be unable to adopt rules that both protect and promote minority and female ownership.¹⁷ Since minority and women's participation is an integral aspect of structural ownership policy,¹⁸ the Commission's failure to take the steps that would yield a full record is likely to be fatal to any new structural rules the Commission might adopt.¹⁹ Consequently, rather than risking yet another remand, the Commission should grant DCS' unopposed Restart Motion forthwith. In doing so, the Commission should renew the Deregulation Justification Question and state that a deregulatory (or re-regulatory) proposal that fails to answer the Deregulation Justification Question will be deemed incapable of adoption on grounds of incompleteness.

Broadcasters almost uniformly endorse ownership diversity in their industry. Not a single comment filed in this docket contended that the Commission should not take steps to promote minority ownership. Research findings submitted by Consumers Union demonstrate that minority owners are more likely than other broadcasters to serve the needs of their

¹⁷ See, e.g., TRAC v. FCC, 750 F.2d 70, 78 (D.C. Cir. 1984) (determining that the record was incomplete and directing the Commission to act on a rulemaking proceeding that the agency delayed for years). When an issue in an notice of proposed rulemaking generates few comments, the Commission routinely refuses to adopt a proposed rule. See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands (Third Report and Order), 16 FCC Rcd 2703, 2727-28 ¶¶ 57-59 (2001) (when the Commission sought comment on two proposals and received no comments on one of them, it refused to consider that issue in the rulemaking; as to the second proposal, the Commission noted the limited scope of the comments and found that there was insufficient interest to warrant rulemaking); cf. Extending Wireless Telecommunications Services to Tribal Lands, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 4775, 4778 ¶9 and 4781-82 ¶16 (2003) (having received only four comments in the proceeding, the Commission invited additional comments to "develop a more complete and up-to-date record.")

¹⁸ See Restart Motion, pp. 22-23.

¹⁹ Id.

communities.²⁰ UCC has documented in great detail how minority and female owned stations increase program diversity, break down stereotypes, provide better service for underserved segments of the population, increase civic participation, and help remedy past discrimination in which the Commission was at least a passive participant.²¹

Notably and commendably, leading broadcasters have undertaken sustained and substantial pro-active initiatives to advance minority and female ownership.²² Yet these initiatives cannot do the job all by themselves. A healthy, free, and nondiscriminatory marketplace would never have produced the current dilemma in which minorities and women – comprising over 2/3 of Americans – together own less than 4% of the industry’s asset value.²³ With few exceptions, minorities and women in broadcasting have been unable to fully unlock the entrepreneurial, managerial and creative abilities the Creator equally apportioned to them. Thus the marketplace has utterly failed minority and women broadcasters – as well as America’s broadcast listeners and viewers. In light of this grave market failure, we have the unusual case where some degree of regulatory intervention is justified²⁴ and – we submit – compelled by the

²⁰ See Comments of Consumers Union, *supra*, p. 20 (citing Compendium Studies 4, at 59-61, and 12, at 125-238 (attached to Consumers Union’s Comments)).

²¹ See UCC Comments, *supra*, pp. 16-25.

²² For example, Clear Channel Communications, Inc., with the assistance of MMTC, has undertaken to invite and encourage minority, women and new entrant broadcasters to participate in the bidding process for all of its television stations and for the hundreds of radio stations it has offered for sale. Active recruitment, and providing information on how to navigate the transactional process and secure access to capital, provide good examples of what a public-spirited company can do on its own initiative to promote diversity. The Commission’s Consumer Advisory Committee has recommended that the Commission “[e]ncourage voluntary industry efforts to assist minority entrepreneurs, and taking account of these efforts, both in crafting new regulations and in evaluating their impact as they are phased into operation.” Consumer Advisory Committee Recommendation, *supra*, Section I (Diversity), Recommendation 6.

²³ The asset value estimate is MMTC’s. The quality and sufficiency of data on the extent of minority and female ownership leaves much to be desired. See UCC Comments, *supra*, pp. 4-9 (reviewing the research on this issue).

²⁴ As Commissioner McDowell recently declared:

I trust free people acting within free markets to make better decisions than those of us in government. For the most part, government should do all that it can to get out of the way and to remove barriers to entry. However, there are times when the government should address market failure so new entrepreneurial ideas have a chance to compete in the market place and succeed or fail on their own merits -- and their own

arc of justice. All institutions in society, including and especially the Commission, must pull an oar to solve this problem.

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merits alone. Any remedies applied to market failure should be narrowly-tailored, and sunseted, to maximize freedom for all market players, especially consumers.

Remarks of FCC Commissioner Robert M. McDowell, Media Institute Dinner, October 16, 2006, p. 2.

APPENDIX A

THE DIVERSITY AND COMPETITION SUPPORTERS (DCS)¹

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, have also filed their own comments or joined in other sets of comments.

APPENDIX B

SUMMARY OF COMMENTS ON DCS' FOURTEEN ORIGINAL MINORITY BROADCAST OWNERSHIP PROPOSALS

Set out below is a summary of initial comments in MB Docket 06-121, as well as Consumer Advisory Committee recommendations, that discuss the 14 DCS Minority Ownership Proposals remanded in Prometheus.

General Endorsements

All of DCS' proposals were endorsed by the AFL-CIO and by AFTRA. See AFL-CIO Comments (filed October 23, 2006), pp. 62-67; AFTRA Comments (filed October 23, 2006), pp. 29-30.

In Reply Comments filed this date, the Smaller Market Broadcasters Coalition states, inter alia, that "Coalition members are generally sympathetic, with exceptions, to a number of proposals advanced by [DCS] to promote a pro-minority and female station ownership environment." Smaller Market Broadcasters Coalition Reply Comments (filed January 16, 2007), p. 22.

Comments on Specific Proposals

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

The Commission's Consumer Advisory Committee recommends that the Commission "[r]equire "Equal Transactional Opportunity" – analogous to Equal Employment Opportunity – barring discrimination on the basis of race or gender in broadcast transactions. The FCC should design a nondiscrimination and modest outreach program in a manner that provides 'transactional transparency' and does not disrupt the expectations of station sellers that potential buyers be qualified and observe confidentiality." Further Recommendation of the Consumer Advisory Committee Regarding 2006 Quadrennial Regulatory Review of the Commission's Media Ownership Rules (adopted November 3, 2006) ("Consumer Advisory Committee Recommendation"), Appendix G infra, Section I (Diversity), Recommendation 2.

The Office of Communication of the United Church of Christ, Inc. et al. ("UCC") endorses an equal transactional opportunity rule and provide extensive background on the proposal and its endorsement by the Commission's Advisory Committee on Diversity for Communications in the Digital Age. Further, UCC urges the Commission to "require sellers to undertake outreach efforts to find qualified minority and women buyers, if not in all cases, at least in those situations where sales are necessary to comply with the ownership limits." Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation Comments (filed October 23, 2006) ("UCC Comments"), pp. 28-30.

2. Transfer Restriction of Grandfathered Clusters to SDBs

The National Association of Broadcasters advocates “[a]llowing a group owner to transfer grandfathered station combinations to a class of entities larger than the class of ‘eligible entities’ defined by the FCC in the 2002 Biennial Review Order.” National Association of Broadcasters Comments (filed October 23, 2006), p. 125.

The National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition urge the Commission to “require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters. If the Commission does not eliminate its grandfathering policy, the Commission should allow minority owned companies to own stations equal to the number of stations owned by the largest group owner in the market” and “allow station clusters to be sold to minority owned companies, regardless of the size of the minority owned company.” National Association of Black Owned Broadcasters and Rainbow/PUSH Coalition Comments (filed October 23, 2006) (“NABOB Comments”), p. 10.

UCC opposes grandfathering and advocates a reduction in ownership limits. UCC Comments, supra, pp. 25-27 and 28 n. 123.

Clear Channel Communications, Inc. opposes the prohibition on the intact transfer of grandfathered radio combinations. Clear Channel Communications, Inc. Comments (filed October 23, 2006), pp. 73-76. However, if the transferability restriction is retained, Clear Channel urges the Commission to expand the class of eligible entities to whom grandfathered combinations may be transferred. Clear Channel points out that “many of the clusters subject to forced breakup” under the 2003 rules “would be valued at amounts that far exceed the annual revenue of ‘eligible entities.’” Id. at 78 (fn. omitted, emphasis in original). Thus, since the transferability restriction went into effect, “there has not been a single sale of a grandfathered combination. The FCC’s ‘exception’ to its transferability restriction has therefore been completely ineffective as a means of furthering the agency’s purported goal of increasing participation in the radio industry by small businesses, including those owned by minorities and women.” Id. at 80 (emphasis in original). Consequently, the “eligible entity” standard should be broadened “to include a wider range of companies in order to increase the likelihood that the exception will serve its intended purpose of furthering the ability of small businesses, including those owned by minorities and women, to expand their presence in or to enter the radio business.” Id.

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

Granite Broadcasting Corp. proposes a variation of this concept. Granite would permit the creation of a duopoly by a minority owned broadcaster even if the transaction would not otherwise qualify under the Failing Station Solicitation Rule (FSSR). Granite Broadcasting Corp. Comments (filed October 23, 2006), p. 10.

UCC endorses this proposal but notes that “without meaningful ownership limits, there will be little or no need for spin-offs.” UCC Comments, supra, p. 27.

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

The Consumer Advisory Committee recommends that the Commission “[b]uild incentives into the rules to reward licensees for trading with, selling to, or incubating socially and economically disadvantaged businesses, including but not limited to minorities. For example allowing holders of expiring construction permits to sell the permits to socially and economically disadvantaged businesses, as an alternative to forfeiting the permits entirely.” Consumer Advisory Committee Recommendation, Appendix G infra, Section I (Diversity), Recommendation 3.

5. Structural rule waivers for creating incubator programs

Nexstar Broadcasting endorsed this proposal. Nexstar Broadcasting Comments (filed October 23, 2006), p. 20.

The National Association of Broadcasters proposes that the Commission should “allow[] a group owner to retain ownership of broadcast licenses above the local ownership limits where the owner LMAs or JSAs stations to small businesses and/or grants such entities options to purchase stations.” NAB Comments, supra, p. 125.

UCC endorses this proposal, but notes that “the success of this proposal turns on having strict ownership limits.” UCC Comments, supra, p. 28.

6. Bifurcation of channels for share-times with SDBs

None.

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

None.

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

Nexstar Broadcasting proposes relaxing the EDP rule for nonattributable holders of small business entities. Nexstar Broadcasting Comments, supra, p. 20.

The NAB proposes eliminating or revising the EDP rule, e.g., “to allow a group owner to acquire an interest in a small business that is above the EDP threshold, even where such interest would place the group owner above the local ownership limits in a given market, so as to avoid discouraging investments in small businesses.” NAB Comments, supra, p. 125.

American Women in Radio and Television (AWRT) proposes “[r]evision the current attribution rules to eliminate the EDP regulation for the limited purpose of allowing large broadcasters to invest in legitimate small businesses owned by women and minorities.” AWRT Comments (filed October 23, 2006), pp. 9-10.

UCC endorses this proposal. UCC Comments, supra, pp. 35-37. However, UCC but notes that “[w]ithout strong ownership limits, exceptions would rarely be necessary, thus rendering ineffective [this] means of promoting minority and female ownership.” Id., p. 28 n. 123.

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

None.

10. Zero tolerance for ownership rule abuse

The Consumer Advisory Committee recommends that the Commission “[a]dopt a Zero Tolerance Policy for ownership structure abuse, thereby assuring that if new rules are adopted, companies will not push the limits even farther, on a de facto basis, than the Commission wishes to go.” Consumer Advisory Committee Recommendation, Appendix G infra, Section I (Diversity), Recommendation 4. The Consumer Advisory Committee also “recommends that the Commission insure that the media ownership rules it does retain or modify are aggressively enforced. The CAC recommends that the Commission clearly state that it will not endorse efforts to evade the spirit of its ownership rules through devices like Local Market Agreements (LMAs) and Joint Services Arrangement (JSAs). An LMA, or time brokerage agreement, is a type of contract in which the licensee of a broadcast station makes available blocks of broadcast time to a broker, who then supplies the programming to fill that time and sells the commercial spot announcements to support the programming. JSAs are agreements for the joint sales of broadcast commercial time. Without effective enforcement these agreements could lead to “virtual duopolies” in markets where such ownership is prohibited. The CAC also recommends that the Commission ensure and provide clear guidance that requests for ownership rules waivers will be closely scrutinized.” Id., Section IV (Enforcement).

UCC endorses this proposal because the Commission “should not tolerate abuse of its ownership rules because failure to do so undermines the opportunities for minorities and women to obtain stations and other public interest goals.” UCC Comments, supra, p. 38.

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

None.

12. Opening FM spectrum for new entrants

The Consumer Advisory Committee recommends that the Commission “[m]anage radio spectrum more efficiently -- including modernizing the antiquated FM allotments process -- so as to create opportunities for new entrants to build and operate their own facilities. There are three ways the Commission could achieve this result: (i) The Commission could create two new FM classes: Class A1 (1,500 watts

at 100 meters) and Class A2 (1,000 watts at 50 meters); (ii) The Commission could perform a comprehensive engineering search of the FM spectrum to identify the most-needed new allotment opportunities; (iii) The Commission could replace FM station classes with pure interference-based criteria.” Consumer Advisory Committee Recommendation, Appendix G infra, Section I (Diversity), Recommendation 1.

The NAB advocates “[m]odifying the auction rules to promote investments by group owners in small businesses (e.g., allowing a greater degree of investment by group owners in small businesses without stripping such businesses of “designated entity” status). NAB Comments, supra, p. 125.

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

The Consumer Advisory Committee endorses this proposal, recommending that the Commission “[p]hase new regulations into operation cautiously through a Staged Implementation Plan. If the Commission changes media ownership rules, the regulations should take effect in a series of logical Stages (i.e., large markets, then medium, then small; or a few percentage points of permissible market power added at each Stage). Before each Stage, the Commission should measure diversity, competition, localism and minority ownership levels, and each deregulatory Stage would take effect only if each of these measurements shows that the factor being measured is healthy. This procedure will ensure that those lacking quick access to capital (particularly minorities) will have sufficient time to reconfigure themselves in order to compete effectively in the new regulatory environment. A Staged Implementation Plan would avoid the market dislocations that often attend sudden deregulation, and it would have the highly desirable effect of allowing the Commission to terminate its current practice of evaluating requests for waivers of its ownership rules.” Consumer Advisory Committee Recommendation, Appendix G infra, Section I (Diversity), Recommendation 5.

Entravision Holdings LLC proposes continuing oversight, including periodic reports by those who have been permitted to take advantage of consolidation. Entravision Holdings LLC Comments (filed October 23, 2006), p. 17.

NABOB urges that “[a]s a part of its public interest review, the Commission should assess the impact on minority ownership of all assignment of license and transfer of control applications.” NABOB Comments, supra, p. 11.

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

None.

APPENDIX C

SUMMARY OF COMMENTS ON THE MINORITY BROADCAST OWNERSHIP PROPOSALS OFFERED BY THE FCC'S ADVISORY COMMITTEE ON DIVERSITY

Set out below is a summary of initial comments in MB Docket 06-121 that discuss the minority broadcast ownership proposals (not also presented by DCS) that were offered by the Commission's Advisory Committee on Diversity for Communications in the Digital Age.

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

None.

2. 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

Granite Broadcasting Corp. proposes a variation of this concept, under which minority broadcasters would be first in such a queue. Granite Broadcasting Corp. Comments (filed October 23, 2006), p. 10.

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

None.

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

The National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition oppose this proposal, urging that the Commission "should eliminate its policy of granting 6, 12 and 18 month waivers of the broadcast ownership rules, which waivers are ostensibly to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications. The Commission's approach to granting waivers has been so exploited by the large group owners as to make the current ownership rules 'window dressing.'" National Association of Black Owned Broadcasters and Rainbow/PUSH Coalition Comments (filed October 23, 2006), p. 11.

APPENDIX D

SUMMARY OF COMMENTS ON THE DEFINITION OF A SOCIALLY AND ECONOMICALLY DISADVANTAGED BUSINESS (SDB)

Set out below is a summary of initial comments in MB Docket 06-121 that discuss the definition of a socially and economically disadvantaged business (SDB).

Prometheus Radio Project offered a thorough legal analysis showing why a race-conscious SDB definition would pass constitutional muster. Prometheus Radio Project Comments (filed October 23, 2006), pp. 10-23.

The Office of Communication of the United Church of Christ, Inc., et al. urge the Commission to define an SDB in the manner used by the Department of Transportation and the Environmental Protection Agency, which have preferences for SDBs in contracting and also include women as a presumed socially disadvantaged group. Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation Comments (filed October 23, 2006) (“UCC Comments”), pp. 33-35. UCC also notes that the Commission is obliged by the Prometheus decision to arrive at a “stable definition of SDBs” and “reevaluate whether an SDB-waiver will better promote the Commission’s diversity objectives.” UCC Comments, supra, p. 37 (citing Prometheus Radio Project v. FCC, 373 F.3d 372, 426-28 (2004) (subsequent history omitted)).

Clear Channel Communications points out that in order to determine the logical revenue cap for an “eligible entity” [i.e., the “disadvantaged” element of an SDB definition] under the provision allowing the intact transfer of grandfathered non-compliant radio combinations to eligible entities, the Commission is obliged by the Prometheus decision to ‘reevaluate...in the next quadrennial review’ (this proceeding) whether a change in the revenue cap ‘will better promote the Commission’s diversity objectives’ based on the ‘several years of implementation experience’ that the Court predicted the FCC would have gained.” Clear Channel Communications, Inc. Comments (filed October 23, 2006), p. 80 and n. 240 (citing Prometheus, supra, 373 F.3d at 428 n. 70).

APPENDIX E

SUMMARY OF COMMENTS ON SECTION 257 AS A LEGAL BASIS FOR DCS' AND OTHER MINORITY OWNERSHIP PROPOSALS

Set out below is a summary of initial comments in MB Docket 06-121 that discuss 47 U.S.C. §257 (“Section 257”) as a legal basis for DCS’ and other minority ownership proposals.

Consumers Union, Consumer Federation of America and Free Press point out that “[t]he Commission is obligated by statute to eliminate ‘market entry barriers for entrepreneurs and other small businesses’ and to do so by ‘favoring diversity of media voices.’” Consumers Union, Consumer Federation of America and Free Press Comments (filed October 26, 2006), p. 23.

American Women in Radio and Television (AWRT) points to Section 257(a)’s requirement that the Commission identify and eliminate market entry barriers. AWRT emphasizes the important role entrepreneurs small businesses play in “encouraging innovation and niche operations, and bringing a unique and diverse voice to the public airwaves.” American Women in Radio and Television (AWRT) Comments (filed October 26, 2006), pp. 7-8.

APPENDIX F

SUMMARY OF COMMENTS ADDRESSING THE IMPACT OF SPECIFIC DEREGULATORY PROPOSALS ON MINORITY AND FEMALE OWNERSHIP

Set out below is a summary of initial comments in MB Docket 06-121 that address the impact of specific deregulatory proposals on minority and female ownership.

Bonneville International Corp. Comments (filed October 23, 2006): advocates relaxation of newspaper/radio crossownership; notes that minority owned newspapers might benefit from radio ownership, and minority radio broadcasters might desire the opportunity to start up a newspaper. Id. at 14.

Multicultural Radio Broadcasting, Inc. Comments (filed October 23, 2006): advocates elimination of the local radio subcaps. Multicultural notes that minorities disproportionately own AM stations and could grow their holdings or merge with one another without anti-competitive impact if the subcap (at least as to AM stations) were eliminated. Id. at 3-5.

Clear Channel Communications, Inc. Comments (filed October 23, 2006): advocates elimination of the local radio subcaps, contending that AM stations should not be regarded as inferior facilities and that “ethnic and minority-oriented AM stations present the most likely targets of entry-level acquisitions by small businesses, including minorities. Among the important issues for consideration in this proceeding is the advancement of minority broadcast ownership. The Commission cannot purport to foster this objective while retaining separate service ownership limits based on the ‘inferiority’ of ethnic stations.” Id. at 70. Further, lifting the subcaps “is likely to trigger significant acquisition activity, as broadcasters seek to realign their local market clusters by acquiring certain in-market stations while divesting others. The divested properties will in many cases provide opportunities for affordable purchases by modestly capitalized and entry-level owners, including minorities, women and small businesses, who have previously found affordable ownership opportunities to be few and far between.” Id. at 72.

The Office of Communication of the United Church of Christ, Inc., et al. urge the Commission to retain the AM/FM subcaps because “FM stations have tremendous technological and economic advantages” and the limit on AM stations promotes new entry because minorities and women disproportionately own AM stations but own very few stations in the aggregate. Thus, if the AM subcap were removed, “large companies could bid up the price of AM stations and further erode this abysmally low representation.” Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation Comments (filed October 23, 2006), pp. 84-85.

APPENDIX G

FURTHER RECOMMENDATION OF THE CONSUMER ADVISORY COMMITTEE REGARDING 2006 QUADRENNIAL REGULATORY REVIEW OF THE COMMISSION'S MEDIA OWNERSHIP RULES

Adopted November 3, 2006 by unanimous vote (with one abstention)

The Commission's Consumer Advisory Committee (CAC) recommends that the Federal Communications Commission adopt media ownership rules that create an environment for civic discourse where numerous, independently-owned, institutionally-distinct media outlets are accessible to the public including people with disabilities, responsive to local needs and reflective of diverse socio-economic and cultural points of view.

INTRODUCTION

The Commission's stated goals in reviewing and possibly revising its media ownership rules are to promote localism, competition and diversity. From the earliest days of broadcasting, federal regulation has sought to foster the provision of programming that meets local communities' needs and interests. Thus, the FCC has licensed stations to serve local communities and it has obligated them to serve the needs and interests of their communities. Stations may fulfill this obligation by presenting local news and public affairs programming and by selecting programming based on the particular needs and interests of the station's community. Further, one of the FCC's purposes in retaining the national TV ownership rule has been "to preserve the power of affiliates in bargaining with their networks and thereby allow the affiliates to serve their local communities better."

The FCC has relied on the principle that competitive markets best serve the public because such markets generally result in lower prices, higher output, more choices for buyers, and more technological progress than markets that are less competitive. In general, the intensity of competition in a given market is directly related to the number of independent firms that compete for the patronage of consumers.

Diversity advances the values of the First Amendment, which, as the Supreme Court stated, "rests on the assumption that *the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.*" The FCC has elaborated on the Supreme Court's view, positing that "*the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.*"

The FCC has considered four aspects of diversity:

- *Viewpoint diversity* ensures that the public has access to "a wide range of diverse and antagonistic opinions and interpretations." The FCC attempts to increase the diversity of viewpoints ultimately received by the public by providing opportunities for varied groups, entities and individuals to participate in the different phases of the broadcast industry

- *Outlet diversity* is the control of media outlets by a variety of independent owners.
- *Source diversity* ensures that the public has access to information and programming from multiple content providers.
- *Program diversity* refers to a variety of programming formats and content.

Since 1973, minority media ownership has been a goal of the Commission's structural ownership regulation. However, recent research shows that 1) Women comprise 51 percent of the entire U.S. population, but own a total of only 67 stations, or 4.97 percent of all stations in the US, 2) Minorities comprise 33 percent of the entire U.S. population, but own a total of only 44 stations, or 3.26 percent of all stations, 3) Hispanics or Latinos comprise 14 percent of the entire U.S. population, but only own a total of 15 stations, or 1.11 percent of all stations, 4) Blacks or African Americans comprise 13 percent of the entire U.S. population but only own a total of 18 stations, or 1.3 percent of all stations, 5) Asians comprise 4 percent of the entire U.S. population but only own a total of 6 stations, or 0.44 percent of all stations, and 6) Non-Hispanic White owners controlled 1,033 stations, or 76.6 percent of the all stations.

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

Minority ownership promotes competition by ensuring that all sources of intellectual and creative capital are put to their highest use, and because an integrated industry serves the public better and thus competes more effectively than a segregated industry. Minority ownership promotes diversity because minority owners serve interests and address needs not served or often recognized by most majority media.

RECOMMENDATION

I. Localism, Competition, and Diversity

The CAC reiterates its call that the Commission adopt rules that will promote the core values of localism, competition, and diversity, and that will expand the multiplicity of voices and choices that support our marketplace of ideas and that sustain American democracy and creativity. Specifically, accessibility for people who are disabled – including appropriate quality captioning and description – should be part of each broadcast station's mandate.

Localism

The CAC recommends that the Commission adopt rules that encourage local ownership of media outlets. In addition, the CAC again calls on the Commission to define the consumer interest obligations of broadcasters so that local communities know what to expect from licensees and that these media outlets disclose their public service in an easily-accessible format.

Competition

As representatives of consumers, the CAC recognizes the benefits of competition to be innovation, better services and lower prices. The CAC recommends that the Commission adopt rules that it can justify with the delivery of these benefits and manifested through increased responsiveness to community needs and increased diversity of programming.

Diversity

The CAC recommends that the Commission adopt rules to promote ownership opportunities for minorities, women and people with disabilities before it considers other changes to its media ownership rules. Specifically, the CAC asks the Commission to consider six steps to design its structural rules to promote and protect minority ownership:

- 1) **Manage radio spectrum more efficiently -- including modernizing the antiquated FM allotments process -- so as to create opportunities for new entrants to build and operate their own facilities.** There are three ways the Commission could achieve this result:
 - i. The Commission could create two new FM classes: Class A1 (1,500 watts at 100 meters) And Class A2 (1,000 watts at 50 meters).
 - ii. The Commission could perform a comprehensive engineering search of the FM spectrum to identify the most-needed new allotment opportunities.
 - iii. The Commission could replace FM station classes with pure interference-based criteria.
- 2) **Require “Equal Transactional Opportunity”** – analogous to Equal Employment Opportunity – barring discrimination on the basis of race or gender in broadcast transactions. The FCC should design a nondiscrimination and modest outreach program in a manner that provides “transactional transparency” and does not disrupt the expectations of station sellers that potential buyers be qualified and observe confidentiality.
- 3) **Build incentives into the rules to reward licensees for trading with, selling to, or incubating socially and economically disadvantaged businesses, including but not limited to minorities.** For example allowing holders of expiring construction permits to sell the permits to socially and economically disadvantaged businesses, as an alternative to forfeiting the permits entirely.
- 4) **Adopt a Zero Tolerance Policy for ownership structure abuse**, thereby assuring that if new rules are adopted, companies will not push the limits even farther, on a de facto basis, than the Commission wishes to go.
- 5) **Phase new regulations into operation cautiously through a Staged Implementation Plan.** If the Commission changes media ownership rules, the

regulations should take effect in a series of logical Stages (i.e., large markets, then medium, then small; or a few percentage points of permissible market power added at each Stage). Before each Stage, the Commission should measure diversity, competition, localism and minority ownership levels, and each deregulatory Stage would take effect only if each of these measurements shows that the factor being measured is healthy. This procedure will ensure that those lacking quick access to capital (particularly minorities) will have sufficient time to reconfigure themselves in order to compete effectively in the new regulatory environment. A Staged Implementation Plan would avoid the market dislocations that often attend sudden deregulation, and it would have the highly desirable effect of allowing the Commission to terminate its current practice of evaluating requests for waivers of its ownership rules.

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

II. A Complete Record

The CAC recommends that the Commission compile a complete record, including independent research studies, so that it can make an informed decision. Studies should include updated analyses of concentration in radio and television markets and accurate analysis of the number, location and type of broadcast stations owned by minorities, women and people with disabilities.

The CAC urges the Commission freeze all media ownership rulemaking until a full Inspector General investigation can be performed on recently-disclosed FCC studies concerning media ownership. Further, the CAC recommends expansion of the investigation in order to search for any more suppressed research including the results of a contract worth over \$300,000 with Edison Media Research to analyze local radio content.

III. Full Notice

In July, the CAC recommended that the Commission provide full notice and a significant comment period on the specific proposals, as warranted, so that the public knows what new rules the Commission is considering. Shortly after, the Commission released its current Further Notice of Proposed Rulemaking (FNPRM) in this proceeding. Upon review, the CAC finds the Commission is not being specific enough in its inquiry to generate relevant comments. The CAC recommends the Commission adopt and release another FNPRM with specific proposals concerning the changes to media ownership rules it plans to vote on.

IV. Enforcement

The CAC recommends that the Commission insure that the media ownership rules it does retain or modify are aggressively enforced. The CAC recommends that the Commission clearly state that it will not endorse efforts to evade the spirit of its ownership rules through devices like Local Market Agreements (LMAs) and Joint Services Arrangement (JSAs). An LMA, or time brokerage agreement, is a type of contract in which the licensee of a broadcast station makes available blocks of broadcast time to a broker, who then supplies the programming to fill that

time and sells the commercial spot announcements to support the programming. JSAs are agreements for the joint sales of broadcast commercial time. Without effective enforcement these agreements could lead to “virtual duopolies” in markets where such ownership is prohibited.

The CAC also recommends that the Commission ensure and provide clear guidance that requests for ownership rules waivers will be closely scrutinized.

V. *CAC Assistance*

The CAC offers to assist the Commission with the above recommendations by working with Commission staff to create specific language for the above recommendations.