Before the
Federal Communications Commission
Washington, D.C. 20554

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AUG 2 - 2007
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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	)	[redacted]
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 2007 **Released: August 1, 2007**

Comment Date: (October 1, 2007)
Reply Comment Date: (October 16, 2007)

By the Commission: Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing a joint statement.

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I. INTRODUCTION

1. The Commission has before it the "Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice" filed on August 23, 2006 (the "Motion for Withdrawal") by the Diversity and Competition Supporters (collectively, "MMTC").[1] MMTC states that the Commission's *Further Notice* in this proceeding[2] is flawed and should be withdrawn, revised, and republished. The *Further Notice* invited comment on the several media ownership rules adopted by the Commission in its *2002 Biennial Review Order*[3] and the pending petitions for reconsideration of the *2002 Biennial Review Order*, and initiates the statutorily mandated 2006 quadrennial review of the Commission's media ownership rules. Specifically, MMTC asserts that the *Further Notice* is deficient because it fails to: (1) identify and describe MMTC's minority ownership proposals remanded by the court in *Prometheus Radio Project, et al. v. FCC*;[4] (2) refer to or seek comment on a definition of a socially and economically disadvantaged business ("SDB"); and (3) identify Section 257 of the Telecommunications Act of 1996 as a central legal basis for minority ownership relief.[5] MMTC requests that the Commission restart the ownership proceeding.[6]

2. The *Further Notice* sought comment on MMTC's various proposals, as well as on the general issue of fostering minority and female ownership.[7] We urged commenters to explain the effects, if any, that their rule proposals would have on ownership of broadcast outlets by minorities, women and small businesses.[8] Given the impact of these issues on our comprehensive ownership review, we believe it would be beneficial to issue this *Second Further Notice* to set forth in greater detail the proposals MMTC

[1] The Diversity and Competition Supporters, which filed the Motion for Withdrawal on August 23, 2006, include the following entities: Center for Asian American Media, Independent Spanish Broadcasters Association, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of Churches, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Institute for Latino Policy, National Urban League, Native American Public Telecommunications, Inc., Puerto Rican Legal Defense and Education Fund, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

[2] *See 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,* Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006) ("*Further Notice*").

[3] *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,* 18 FCC Rcd 13620 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004).

[4] 373 F.3d 372 (3d Cir. 2004), *stay modified on rehearing,* No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

[5] MMTC Motion for Withdrawal at 1.

[6] *Id.* at 20.

[7] *See Further Notice*, 21 FCC Rcd at 8837-38 ¶¶ 5-6.

[8] *Id.* at 8837-38 ¶ 6.

identified in its Motion for Withdrawal and to clarify the record as requested by MMTC. Thus, in this *Second Further Notice*, we seek comment on the proposals MMTC submitted in the 2002 biennial review proceeding, as they are described in Appendix A hereto, as well as on the proposals submitted to the Commission by the Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee"), which are also described in Appendix A hereto and are set forth more fully in the Committee's recommendations to the Commission.[9] In order to consider fully the issues raised by MMTC, as discussed further below, we consolidate our ongoing section 257 proceeding with this proceeding.

3. We find it unnecessary to adopt the specific approach suggested by MMTC that we rescind and reissue the *Further Notice* in its entirety. The approach we take today, in conjunction with the initial *Further Notice*, provides ample notice to the commenting public on the specific issues germane to our media ownership review, including those raised by MMTC relating to ownership diversity.

II. BACKGROUND

4. In comments filed in the Commission's 2002 biennial review proceeding, MMTC proposed numerous measures to promote minority broadcast ownership.[10] In the subsequent *2002 Biennial Review Order*, the Commission listed 13 of MMTC's proposals, in addition to describing proposals other commenters submitted.[11] The Commission stated that, because a "more thorough exploration" of those comments was warranted, it would initiate a separate proceeding to address MMTC's 13 proposals and the other comments regarding minority and female broadcast ownership.[12] Responding to MMTC's concern that minorities lack equal transactional opportunities, the Commission also stated that it would create a federal advisory committee to study minority and female ownership issues.[13] In addition, the Commission adopted a transfer policy (the so-called "small business cluster transfer policy") intended to promote diversity of ownership, based largely on a proposal submitted by MMTC, which permits sales of grandfathered combinations that exceed the ownership limits to and by certain "eligible entities." Entities may transfer control of or assign an existing grandfathered combination to "eligible entities," defined as entities that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping.[14] In addition, eligible entities may sell existing grandfathered combinations without restriction.[15]

5. In the *2002 Biennial Review Order*, the Commission repealed its failed station solicitation rule ("FSSR"),[16] which is part of the Commission's waiver standard under the local television ownership rule. That waiver standard permits a television station purchaser to exceed local television ownership

[9] The mission of the Diversity Committee is to make recommendations to the Commission regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications related industries. The Diversity Committee launched in May 2003, and has made numerous recommendations to the Commission in furtherance of its mission. *See* http://www.fcc.gov/DiversityFAC/ for a full listing of Diversity Committee meetings, recommendations and white papers.

[10] *See* Initial Comments of Diversity and Competition Supporters (MB Docket No. 02-277), filed Jan. 2, 2003.

[11] *2002 Biennial Review Order*, 18 FCC Rcd at 13635-36 ¶¶ 47-49.

[12] *Id.* at 13636 ¶ 50.

[13] *Id.* at 13637 ¶ 52.

[14] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories).

[15] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13811 ¶ 490.

[16] *Id.* at 13708 ¶ 225.

limits if the acquired station is failed, failing, or unbuilt.[17] Under the FSSR, a waiver applicant was required to demonstrate that serious efforts had been made to secure an out-of-market buyer for the troubled station. A waiver was not granted unless the applicant could show that the in-market buyer was the "only reasonably available entity willing and able to operate the station" and that an out-of-market sale would result in an "artificially depressed price."[18] In the *2002 Biennial Review Order*, the Commission retained the waiver standard, but eliminated the FSSR requirement.[19]

6. On review, the U.S. Court of Appeals for the Third Circuit remanded the Commission's decision to address MMTC's 13 proposals in a separate rulemaking and ordered the Commission to address those proposals at the same time that it addresses the other remanded issues.[20] The court also remanded the Commission's decision to repeal the FSSR because the Commission did not address the potential impact of the repeal on minority television station ownership.[21]

III. DISCUSSION

A. Minority and Female Ownership Initiatives

1. Socially and Economically Disadvantaged Businesses ("SDBs")

7. MMTC argues that the Commission erred in the *Further Notice* by failing to seek specific comment on how to define SDBs, adding that the concept of SDBs is central to most of the minority ownership initiatives proposed in the 2002 biennial review proceeding.[22] MMTC states that the *Prometheus* opinion recognizes the importance of establishing a definition for SDBs because, in approving the small business cluster transfer policy, the court indicated that, by the next quadrennial review, the Commission would have the benefit of a stable definition of SDBs as well as implementation experience in order to reevaluate whether an SDB-based waiver policy would better promote the Commission's diversity objectives.[23] MMTC maintains that, without a definition for SDBs, the Commission cannot effectively evaluate the existing small business cluster transfer policy or its other proposals, as remanded by the *Prometheus* court.[24]

8. MMTC states that the issue of the SDB definition has already been fully briefed in the Commission's proceeding examining market entry barriers.[25] In that proceeding, initiated in 2004, the public was invited to comment on constitutionally permissible ways to further the mandate of Section 257

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[17] 47 C.F.R. § 73.3555 Note 7. A "failed" station is one that has not been in operation for at least four consecutive months due to financial distress or is a debtor in involuntary bankruptcy or insolvency proceedings. A station is "failing" if it has an all-day audience share of four percent or less and has had negative cash flow for three consecutive years. Permittees of unbuilt stations must demonstrate that they have made reasonable efforts to construct the station. *Id.*

[18] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, 12937-38 ¶¶ 75-76 (1999) ("*Local TV Ownership Report and Order*").

[19] *2002 Biennial Review Order*, 18 FCC Rcd at 13706-08 ¶¶ 221-26.

[20] *Prometheus*, 373 F.3d at 421 n.59.

[21] *Id.* at 420-21.

[22] MMTC Motion for Withdrawal at 12-13.

[23] *Id.* at 4-5, 12-13 (citing *Prometheus* 373 F.3d at 428 n.70).

[24] *Id.* at 12-13.

[25] *Id.* at 12; *see also* Comments of Minority Media and Telecommunications Council (MB Docket No. 04-228), filed Oct. 12, 2004.

of the Telecommunications Act of 1996,[26] which directs the Commission to identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, as amended ("the Act"),[27] which requires the Commission to further opportunities in the allocation of spectrum-based services for small and rural businesses and businesses owned by women and minorities.[28]

9. We invite comment on MMTC's proposal that the Commission define SDBs for purposes of analyzing policy initiatives in support of media ownership diversity. We ask that commenters address whether use of a proposed definition raises any constitutional concerns, practical concerns, or other considerations unique to the Commission's policy objectives, and we invite comment on its impact on small entities. To ensure full consideration of this issue, we will consolidate the MB Docket No. 04-228 proceeding commenced in 2004 with our review of the media ownership rules.

2. MMTC Proposals

10. We seek comment on the various proposals for increasing minority and female broadcast ownership identified by MMTC. As MMTC suggests, we have attached its description of these proposals as Appendix A.[29] The proposals include: (1) those that MMTC submitted for consideration in the 2002 biennial review proceeding;[30] (2) the MMTC proposals the Commission listed in the *2002 Biennial Review Order*, which the Third Circuit ordered the Commission to address on remand;[31] and (3) media-related recommendations of the Diversity Committee.[32] In discussing these proposals, commenters should address the various questions and issues set forth below.

11. In addition, as MMTC requests, we also seek comment on the efficacy of the FSSR in promoting minority and female broadcast ownership.[33] When out-of-market purchasers for a station are

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[26] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

[27] 47 U.S.C. § 309(j)(3)(B) (directing the Commission to further the objectives of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women").

[28] *See Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, Public Notice, 19 FCC Rcd 10491 (MB 2004). The Media Bureau also asked commenters to provide specific recommendations for building on the series of market entry barrier studies that the Commission released in December 2000. The studies are available on the Commission's web site at http://www.fcc.gov/opportunity/meb_study/ and http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

[29] MMTC Motion for Withdrawal at 18 n.82; *see also id.* at App. B. We have included the text of Appendix B to MMTC's Motion for Withdrawal as Appendix A hereto. Although we have modified the MMTC Appendix to eliminate a non-substantive footnote and to correct a few apparent minor typographical errors, we have not altered the descriptions, assessments, or legal analyses of the proposals, as submitted by MMTC. By incorporating these materials, we do not adopt any such descriptions, assessments, or analyses as official Commission policy; we are providing them only to specifically invite public comment on them.

[30] App. A, Proposals 1-14.

[31] App. A, Proposals 15-26; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13636 ¶ 49; *Prometheus*, 373 F.3d at 421 n.59.

[32] App. A, Proposals 27-34. The descriptions of the Diversity Committee recommendations are provided by MMTC, which is a member of the Diversity Committee but which does not represent the Diversity Committee as a whole. Although the Diversity Committee recommendations are not subject to the Third Circuit's remand, we are seeking comment on them to ensure a more complete record.

[33] MMTC Motion for Withdrawal at 5.

unavailable, the Commission permits ownership rule waivers for failed, failing and unbuilt stations because the in-market purchase of such stations is preferable to having frequencies go unused, even where the combination would violate the local television ownership rule.[34] In the *2002 Biennial Review Order*, the Commission determined that applicants seeking a waiver of the local television ownership rule no longer needed to comply with the FSSR requirement that they must first demonstrate the unwillingness of out-of-market buyers to offer a reasonable price for the failed, failing, or unbuilt station.[35] In eliminating the FSSR requirement, the Commission found that the efficiencies associated with the operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in the same market.[36] In remanding the Commission's repeal of the FSSR, the Third Circuit stated that the purpose of the FSSR was to ensure that minority broadcasters received notification of these station sales.[37] The Third Circuit found that the Commission's decision was arbitrary and capricious because it failed to discuss the effect of the repeal on minority ownership.[38]

12. We invite comment on the extent to which the FSSR or another construction of the rule could promote minority and female ownership. We ask commenters to provide concrete evidence rather than generalized assertions.

B. Constitutional Issues

13. Any measures to facilitate minority and female broadcast entry that are based on racial or gender classifications must satisfy the heightened constitutional standards that apply to governmental preferences for minorities and women under the Equal Protection Clause. The Supreme Court's ruling in *Adarand* requires that governmental classifications based on race must be analyzed under strict scrutiny, and are constitutional only if such classifications are narrowly tailored measures that further a compelling governmental interest.[39] Gender classifications are subject to intermediate scrutiny, under which the government's action must be substantially related to the achievement of an important objective.[40] In discussing a proposal targeted or designed to promote minority and female broadcast ownership, commenters should describe, consistent with relevant case law, how the proposal would satisfy constitutional standards. In particular, proponents of initiatives that rely on a definition of SDBs should explain in detail whether and how the definition would satisfy constitutional standards.

C. Statutory Authority

14. We also seek further comment on the Commission's statutory authority to address issues of minority and female ownership. Section 257 of the Act requires the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and

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[34] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12936-41 ¶¶ 73-87.

[35] *2002 Biennial Review Order*, 18 FCC Rcd at 13706-08 ¶¶ 221-26.

[36] *Id.* at 13708 ¶ 225.

[37] *Prometheus*, 373 F.3d at 420-21.

[38] *Id.*

[39] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The strict scrutiny standard for racial classifications was reaffirmed in the Supreme Court's decision upholding student body diversity in the context of higher education. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see also Parents Involved in Community Schools, Petitioner v. Seattle School District et al.*, 127 S. Ct. 2738, 75 USLW 4577 (No. 05-908, 05-915) (2007).

[40] *United States v. Virginia*, 518 U.S. 515 (1996); *see also Nevada Dept. of Human Resources v. Hibbs, et al.*, 538 U.S. 721 (2003).

ownership of telecommunications services and information services."[41] The statutory provision also specifically directs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices" in carrying out its Section 257 responsibilities.[42] In addition, in 1996, Congress amended Section 1 of the Act to make it clear that the Commission's mandate is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin or sex . . . .*"[43] We ask commenters to address whether and how these statutory provisions support the Commission's efforts to promote media ownership diversity.

15. Further, Section 309(j) of the Act requires the Commission to promote the dissemination of licenses to a wide variety of applicants, including members of minority groups and women. Section 309(j) directs the Commission to "ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[44] In addition, Section 309(j)(3)(B) requires the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[45]

16. We invite comment on the Commission's statutory authority to facilitate the licensing of spectrum-based services to a diversity of entities, including businesses owned by minority groups and women. Commenters should also address the limitations of these statutory provisions in light of recent court decisions as discussed, *supra*, regarding equal protection. We also solicit comment on any further statutory provisions that would enable the Commission to address ownership diversity, particularly in terms of fostering diversity of ownership among minorities and women.

IV. PROCEDURAL MATTERS

A. Comment Information

17. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (May 1, 1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or

[41] 47 U.S.C. § 257(a). Despite the apparent limitation of Section 257(a) to telecommunications and information services, the congressional directive to promote "the policies and purposes of this Act favoring diversity of *media* voices" in implementing Section 257(a) arguably brings broadcasting within the scope of Section 257. *Id.* (emphasis added). We invite comment on this interpretation of the statute.

[42] 47 U.S.C. § 257(b).

[43] 47 U.S.C. § 151, as amended (1997) (italicized clause added by the 1996 Act).

[44] 47 U.S.C. § 309(j)(4)(D).

[45] 47 U.S.C. § 309(j)(3)(B). Moreover, Section 309(j)(4)(D) requires the Commission "to consider the use of tax certificates, bidding preferences, and other procedures" to achieve its goals. 47 U.S.C. § 309(j)(4)(D).

rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Regulatory Flexibility Act

18. As required by the Regulatory Flexibility Act,[46] the Commission prepared an Initial Regulatory Flexibility Analysis ("IRFA") in the initial *Notice of Proposed Rulemaking* in the media ownership proceeding and a Supplemental Initial Regulatory Flexibility Analysis Act ("Supplemental IRFA") in the initial *Further Notice of Proposed Rulemaking* in the media ownership proceeding.[47] We have now prepared a Second Supplemental IRFA, which is set forth in Appendix B. Written public comments are requested on the Second Supplemental IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice*, and should have a separate and distinct heading designating them as responses to the Second Supplemental IRFA.

C. Paperwork Reduction Act

19. This document does not contain proposed information collections subject to the Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat. 163 (1995). Therefore, it does not contain

[46] *See* 5 U.S.C. § 603.

[47] *See Further Notice*, 21 FCC Rcd at 8854, App. B; *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2020 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18503, 18558, App. A (2002).

any proposed new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. No. 107-198, 116 Stat. 729 (2002).[48] However, depending on the rules adopted as a result of this *Second Further Notice*, the report and order ultimately adopted in this proceeding may contain information collections. *The Commission will provide a period for public comment on any PRA burdens contained in the report* and order and will submit such burdens to the Office of Management and Budget for approval when the report and order is adopted and released.

D. Ex Parte Information

20. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[49]

21. *Contact Information.* The Media Bureau contacts for this proceeding are Mania Baghdadi and Jamila Bess Johnson, both at (202) 418-7200. Press inquiries should be directed to Mary Diamond at (202) 418-2388.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, 307, 309, 310, and 533, and section 202(h) of the Telecommunications Act of 1996, this *Second Further Notice of Proposed Rulemaking* IS ADOPTED.

23. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, 307, 309, 310, and 533, and section 202(h) of the Telecommunications Act of 1996, NOTICE IS HEREBY GIVEN of the proposals described in this *Second Further Notice of Proposed Rulemaking.*

24. IT IS FURTHER ORDERED that MB Docket No. 04-228 SHALL BE consolidated with MB Docket No. 06-121 *et al.*

25. IT IS FURTHER ORDERED that MMTC's Motion for Withdrawal of the Further Notice of Proposed Rule Making and for the Issuance of a Revised Further Notice is granted to the extent described herein, and in all other respects, denied.

26. IT IS FURTHER ORDERED that MMTC's Request for Ruling on its Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice is granted to the extent described herein, and in all other respects, denied.

27. IT IS FURTHER ORDERED that comments and reply comments with regard to those matters raised in this *Second Further Notice of Proposed Rulemaking* will be due October 1, 2007 and October 16, 2007, respectively.

28. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Further Notice of Proposed*

[48] *See* 44 U.S.C. § 3506(c)(4).

[49] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

Rulemaking, including the Second Supplemental Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Minority Ownership Proposals and Suggestions[1]

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

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

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

SECTION I: MMTC PROPOSALS IN MM DOCKET 02-277

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

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

   Nature of Item: Formal rulemaking proposal

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

   Year First Proposed: 1994

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

[1] This Appendix is a verbatim copy of Appendix B to MMTC's Motion for Withdrawal, except that this Appendix reflects minor typographical corrections and the omission of a non-substantive footnote.

April 29, 2004

Relevance of SDB Definition: No

2. Transfer Restriction of Grandfathered Clusters to SDBs

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

Nature of Item: Formal rulemaking proposal

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

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

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

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

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

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: In 1998, Entravision submitted a petition for rulemaking which sought to revise the construction permit expiration standard established pursuant to 47 U.S.C. §§319(a)-(b) and implemented in 47 C.F.R. §73.3598. Entravision proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign language groups for at least 80% of their operating time. MMTC proposed a modification of Entravision's concept to make it applicable to all SDBs.

Year First Proposed: 1998

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

Relevance of SDB Definition: Yes

5. Structural rule waivers for creating incubator programs

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

Nature of Item: Formal rulemaking proposal

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

Year First Proposed: 1992

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

Relevance of SDB Definition: Yes

6. Bifurcation of channels for share-times with SDBs

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

Nature of Item: Formal rulemaking proposal

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

Year First Proposed: 2002

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

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: When a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest should be reserved a place in line to subsequently duopolize or crossown another same-market station. This reserved place in the queue, in markets where only a limited number of new combinations can be created under the local ownership rules, would provide an incentive to broadcasters to assist SDBs to build out their unbuilt permits.

Year First Proposed: 1999

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: The nonattributable nature of EDP Interests in SDBs would be grandfathered, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider. These arrangements would be permissible where (1) the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction"); (2) the Unrelated Transaction occurs at least a year after the EDP relationship was formed; (3) the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and (4) the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB.

Year First Proposed: 1999

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

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: MMTC offered two formulas suitable for crafting and implementing rules to promote diversity: (1) The "Tipping Point Formula" established how the Commission could ensure that local radio markets could preserve independent owners. This formula was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a tipping point in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market's cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction

would limit diversity. (2) The "Source Diversity Formula" expresses consumers' utility derived from marginal increases in source diversity. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale. This formula would require field-testing before it could be applied in practice to measure source diversity.

Year First Proposed: 2002

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

10. Zero tolerance for ownership rule abuse

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

Nature of Item: Formal rulemaking proposal

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

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: The Commission requires ownership attribution of most JSAs and LMAs. While this step promotes diversity, it also reduces the options available to financially troubled facilities seeking to survive. CWA proposed that JOAs, such as those used in the newspaper industry, could be used to help companies survive and to promote diversity at the same time. A JOA adapted to broadcasting would leave each station's program creation, program organization and distribution, and sales strategy and implementation in the hands of each station's licensees. At the same time, a genuine JOA allows both stations to take advantage of

operational synergies for non-program, non-sales related functions, such as accounting, engineering, and physical plant management. A JOA would not be attributable.

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

12. Opening FM spectrum for new entrants

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

Nature of Item: Formal rulemaking proposal

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

Year First Proposed: 2003

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

Relevance of SDB Definition: No

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: By implementing deregulation in stages, the Commission could measure

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

Year First Proposed: 2003

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

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

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

Nature of Item: Formal rulemaking proposal

Summary of Item: A system of market-based diversity credits would be created as an alternative to voice tests. A quantity of diversity credits would be given to SDBs, commensurate with the extent of their social and economic disadvantages. Diversity credits would also be given to the seller at the closing of a transaction that would result in greater structural diversity. If a transaction would add to concentration, the buyer would return a number of diversity credits to the Commission when the transaction closes. Finally, companies could buy or sell diversity credits to one another, thereby providing a market-based source of access to capital for SDBs. A similar paradigm used by the EPA has replaced much command-and-control environmental regulation. Diversity credits would (1) incentivize diversity, (2) disincentivize consolidation, (3) place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects, (4) serve as a mechanism to provide access to capital to SDBs, (5) capture the measure of diversity more precisely than an inherently approximate voice test, and (6) allow for easier administration than a system of voice tests and waivers.

Year First Proposed: 2003

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

Relevance of SDB Definition: Yes

SECTION II: MMTC'S INFORMAL SUGGESTIONS TO STAKEHOLDERS

15. Equity for specific and contemplated future acquisitions

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

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

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

Year First Proposed: 1977

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

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

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

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

Year First Proposed: 1977

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

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 1976

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

19. Creation of business planning centers

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 1992

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

21. Enhanced access to broadcast transactions

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 2002

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

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

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

Year First Proposed: 1984

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Private industry initiative

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

Year First Proposed: 1976

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

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

Location(s) in Record: Twelve Minority Ownership Solutions

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

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

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

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

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

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

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: Contemplates FCC policy statement or procedural rule

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

Year First Proposed: 1973

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: No

26. Ongoing longitudinal research on minority and female ownership trends

Location(s) in Record: Twelve Minority Ownership Solutions

Nature of Item: FCC or NTIA research initiative

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

Year First Proposed: 1995

Parallel Recommendation of Diversity Committee: none

Relevance of SDB Definition: Yes

SECTION III: PROPOSALS SPONSORED BY THE DIVERSITY COMMITTEE

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

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

Nature of Item: Private industry initiative

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

Year First Proposed: 2004

Relevance of SDB Definition: No

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

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

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

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

Year First Proposed: 2004

Relevance of SDB Definition: No

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

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

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

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

Year First Proposed: 2004

Relevance of SDB Definition: No

30. Establishment of a fund of funds

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

Nature of Item: Private industry initiative

Summary of Item: The FCC would initiate discussions with the major pension funds to encourage the establishment of a fund of funds that would place capital with minority focused private equity funds such as those belonging to the National Association of Investment

Companies (NAIC), which are led by minority management and which invest in opportunities led by women and minority entrepreneurs and/or in opportunities in underserved markets.

Year First Proposed: 2004

Relevance of SDB Definition: No

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

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

Nature of Item: Rulemaking recommendation

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

Year First Proposed: 2004

Relevance of SDB Definition: No

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

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

Nature of Item: Rulemaking recommendation

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

Year First Proposed: 1999

Relevance of SDB Definition: Yes

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

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

Nature of Item: Recommendation for rulemaking or policy statement

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

Year First Proposed: 2004

Relevance of SDB Definition: Yes

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

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

Nature of Item: Recommendation for rulemaking or policy statement

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

Year First Proposed: 1999

Relevance of SDB Definition: Yes

APPENDIX B

Second Supplemental Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act, as amended ("RFA")[1] the Commission has prepared this Second Supplemental Initial Regulatory Flexibility Analysis ("Second Supplemental IRFA") of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in the *Second Further Notice of Proposed Rule Making* ("*Second Further Notice*"). Written public comments are requested on this Second Supplemental IRFA. Comments must be identified as responses to the Second Supplemental IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this Second Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Second Further Notice* and the Second Supplemental IRFA (or summaries thereof) will be published in the Federal Register.[3]

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

2. The *Further Notice of Proposed Rule Making* in MB Docket Nos. 06-121, *et al.*,[4] invites comment on how to address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*,[5] and, pursuant to Section 202(h) of the Telecommunications Act of 1996, on whether the media ownership rules are "necessary in the public interest as the result of competition."[6] In *Prometheus*, the court affirmed some Commission decisions and remanded others for further Commission justification or modification.[7] In the *Second Further Notice*, we seek additional comment on specific proposals advocated by the Diversity and Competition Supporters (collectively, "MMTC") to foster minority and female ownership. In addition, the Commission will consolidate into the broadcast ownership proceeding the record established in MB Docket No. 04-228, in which the

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

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] *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*, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006) ("*Further Notice*").

[5] *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177); *see also 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*, 18 FCC Rcd 13620 (2003) ("*2002 Biennial Review Order*").

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

[7] *See Prometheus Rehearing Order*. Accordingly, except for revisions to the local radio ownership rule, the rule changes made in the *2002 Biennial Review Order* remain stayed, and the preexisting ownership rules remain in effect. *See Further Notice*, 21 FCC Rcd at 8836 n.10.

Commission solicited public comment on constitutionally permissible ways to further the mandates of Section 257 of the Telecommunications Act of 1996,[8] which directs the Commission to identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, as amended (the "Act"), [9] which requires the Commission to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities. The Commission previously published a Supplemental IRFA in connection with the *Further Notice.*[10] We issue this Second Supplemental IRFA in order to invite comment on the effects on small entities, including minorities and women, of the proposals identified in this *Second Further Notice.* We particularly solicit comment from all small business entities, including minority-owned and women-owned small businesses.

B. Legal Basis

3. The *Second Further Notice* is adopted pursuant to sections 1, 2(a), 4(i), 257, 303, 307, 309, 310 and 613 of the Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, 307, 309, 310, and 533, and Section 202(h) of the Telecommunications Act of 1996.

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

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[11] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[12] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[13] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[14]

5. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[15] According to

[8] 47 U.S.C. § 257.

[9] 47 U.S.C. § 309(j).

[10] *See Further Notice*, 21 FCC Rcd 8834, 8854, App. B (2006).

[11] 5 U.S.C. § 603(b)(3).

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

[13] *Id.*

[14] 15 U.S.C. § 632.

[15] OMB, North American Industry Classification System: United States, 1997, at 508-09 (1997) (NAICS Code 513120, which was changed to 515120 in October 2002). This category description continues, "These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, (continued....)

Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of July 10, 2007, about 880 (68 percent) of the 1,300 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[16] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

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

7. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[17] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[18] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of July 10, 2007, about 10,520 (95 percent) of 11,055 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[19] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

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

(Continued from previous page)
from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in produced programming. *See id.* at 502-505, NAICS Code 512110, Motion Picture and Video Production; Code 512120, Motion Picture and Video Distribution; Code 512191, Teleproduction and Other Post-Production Services; and Code 512199, Other Motion Picture and Video Industries.

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

[17] 13 C.F.R. § 121.201.

[18] *See* NAICS Code 515112.

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

9. **Daily Newspapers**. The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.[20] Census Bureau data for 2002 show that there were 5,159 firms in this category that operated for the entire year.[21] Of this total, 5,065 firms had employment of 499 or fewer employees, and an additional 42 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

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

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

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

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[22]

12. We are directed under law to describe any alternatives we consider, including alternatives not explicitly listed above.[23] The *Second Further Notice* describes and seeks comment on the minority ownership proposals made by MMTC in comments in the 2002 biennial ownership proceeding, as well as the recommendations of the Diversity Committee, and consolidates the record developed in MB Docket No. 04-228 with the record in MB Docket Nos. 06-121, *et al.* The proposals are intended to promote minority and female ownership, and we seek comment on the extent to which they would benefit small businesses, including those owned by minorities and women. We especially encourage small entities to comment on the proposals under consideration in this consolidated proceeding. We do not propose specific rules in the *Second Further Notice* but rather seek comment on a number of different proposals that could have an impact on small entities. Accordingly, we will describe the steps taken to minimize the significant impact on small entities and the significant alternatives that we consider in the Final Regulatory Flexibility Analysis.

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

None.

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[20] 13 C.F.R. § 121.201; NAICS Code 511110.

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

[22] 5 U.S.C. § 603(c).

[23] 5 U.S.C. § 603(b).

JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS AND COMMISSIONER JONATHAN A. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

Re: 2006 Quadrennial Review & 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definitions of Radio Markets, Ways to Further Section 257 Mandate and to Build on Earlier Studies, Second Further Notice of Proposed Rule Making

Yesterday, the Commission provided the public only 60 days to comment on ten research studies that took dozens of economists and lawyers over eight months to prepare. Today – August 1st, after 11 months of inaction, the majority is providing the same truncated time for public comment on proposals that it neglected to discuss last year, at the beginning of our review of the media ownership rules.

In *Prometheus*, the Third Circuit took the Commission seriously to task for failing to consider the impact of potential rule changes on minority media ownership. The Court also faulted the Commission for sidelining MMTC's proposals for advancing minority and disadvantaged businesses and directed that "[t]he Commission's rulemaking process in response to our remand order should address these proposals at the same time."[1] Yet, in its July 2006 *Further Notice*, the Commission could only muster up a few pat questions on this vital subject. On August 23, 2006, the Diversity and Competition Supporters – representing a broad array of minority and women's organizations – rightly asked the Commission to seek further comment on the specific proposals. There the matter has sat, until today.

We dissent to the inadequate time given for public comment. After mulling this over for almost one year, the Commission is all of a sudden in a hurry and it is the public that gets punished. Giving the American people only 60 days to comment on dozens of proposals is outrageous. Not only is it disturbingly consistent with yesterday's action, it is also eerily reminiscent of former Chairman Michael Powell's rush to judgment four years ago when he rammed through consolidation that would have, had it not been subsequently reversed, inflicted incalculable injury on America's media.

Now a new agenda seems to be brewing here. And whatever's being cooked up, the public is not being given sufficient time to take a close look. Maybe someone's worried that, once again, the public will spit it out.

[1] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 n.59 (3d Cir. 2004).