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

In the Matter of:	)	
	)	
Petition for Rulemaking to Expand the Commission's Broadcast Advertising Nondiscrimination Rule to Cable, Satellite and Telecommunications Services	)	RM No. _____
	)	
	)	

To the Commission

PETITION FOR RULEMAKING

The Minority Media and Telecommunications Council ("MMTC"), pursuant to Section 1.401 of the Commission's rules,[1] respectfully submits this Petition for Rulemaking to expand the Commission's broadcast advertising nondiscrimination rule[2] to cable, satellite and telecommunications services. The time has come for the Commission to ban advertising discrimination on all platforms where its licensees air commercial advertisements. Like terrestrial radio, cable, satellite, and multi-channel telecommunications video deliver audiences segmented by race and language, and thus are vulnerable to advertising discrimination aimed at discouraging customer patronage of advertisers' establishments based on the customers' race or national origin. Extending the nondiscrimination rule to all FCC-regulated industries that provide content to consumers would fall squarely in line with the Commission's goals of platform neutrality and regulatory parity. A rulemaking proceeding should be initiated promptly to ensure an equal footing for all services in the fight against advertising discrimination.

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[1] 47 C.F.R. §1.401 (2009).

[2] See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, 5941-42 ¶¶49-50 (released March 5, 2008) ("Broadcast Diversity Order") (requiring broadcasters renewing their licenses to certify on Form 303-S that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses).

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I. The History and Dynamics Of Advertising Discrimination

In the Broadcast Diversity Order, the Commission acknowledged that it has been aware of advertising discrimination for over 20 years.[3] In 1984, the Commission held an en banc hearing on the insidious practice, carried out by certain advertisers, rep firms and ad agencies, of excluding some radio stations from their advertising buys with written or unwritten "no urban/no Spanish" dictates.[4] In 1999, the Commission sponsored a study that documented the impact of these and other discriminatory advertising practices on minority owned and minority formatted broadcasters.[5]

Typically, advertisers intend for these dictates to minimize the proportion of African American or Hispanic customers patronizing an advertiser's venue (e.g. a car dealership, nightclub or housing development), or they presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service (e.g. jewelry, specialty foods, or airline

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[3] Id. (citing Kofi Ofori in "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999)). Ofori also notes that over 30 years ago, in 1978, the Commission stated that advertisers held preconceived notions that "minority consumers are unimportant and do not represent a particularly lucrative market. Consequently, advertisers are less inclined to purchase time on minority-owned stations." Ofori, at 2 (citing Report on Minority Ownership in Broadcasting, Federal Communications Commission, 1978, at 25).

[4] See Ofori, supra.

[5] Id. Ofori's study found that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn. Anecdotal data collected in the study suggested that, in some instances, the media buying process is influenced by stereotypical perceptions of minorities, presumptions about minority disposable income, a desire to control product image and unfounded fears of pilferage. The study identified two particularly egregious practices: "no urban/Hispanic dictates" (an advertiser's instructions to its agency to refuse to buy airtime on stations with Black or Spanish formats) and "minority discounts" (an advertiser's refusal to pay as much to reach minority audiences as it would pay to reach White audiences, other factors being equal). A follow up regression analysis by Ofori (not sponsored by the Commission), "Minority Targeted Programming: An Examination Of Its Effect On Radio Station Advertising Performance" (January, 2001) found that advertisers paid less for time on stations owned by minorities (especially standalone stations), stations having minority formats, and stations targeted to young audiences. These factors appeared to be a proxy for "no urban/Hispanic dictates" and "minority discounts."

travel). Sometimes these dictates give effect to the prejudices of advertisers. More commonly, these dictates infect the advertising marketplace with advertisers' incorrect readings of their non-minority customers' prejudices.[6] In this way, these dictates distort the marketplace by driving down minority owned and programmed stations' power ratios because of the race of members of the stations' audiences. Such behavior frustrates the Commission's diversity policy objectives. In addition, economists believe that such discriminatory behavior hinders competition.[7]

The Diversity and Competition Supporters ("DCS") proposed a ban on broadcast complicity in advertising discrimination as a method to ensure that broadcast licensees are not a party to a scheme to restrict advertising on the basis of consumers' race or national origin.[8] The Commission agreed and adopted the Broadcast Advertising Nondiscrimination Rule,[9] which was the first new federal civil rights mandate since 1977. The Rule requires that broadcasters, upon license renewal, "certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination...intended to minimize the proportion of African

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[6] Customer preference discrimination is unlawful. See Diaz v. Pan American World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (rejecting the airline's defense that its females-only hiring policy for "stewardesses" was justified by male passengers' preference to served by women).

[7] More than a decade ago, Andrew Brimmer concluded that discrimination against African Americans in the labor market resulted in a loss of over $240 billion dollars per year to the American economy. Steven A. Ramirez, What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics, 54 J. Legal Educ. 365, 371 (2004) (citing Andrew F. Brimmer, The Economic Cost of Discrimination Against Black Americans, in Margaret C. Simms, ed., Economic Perspectives on Affirmative Action 11 (1995)). Brimmer's conclusions are still valid today, however because his conclusions only considered discrimination against African Americans, not other minority groups or women, the loss would now be equal to over $400 billion per year. Id. at 373-74.

[8] As mentioned in comments submitted during the proceeding, seldom are certifications on a license renewal application made lightly. See Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed October 1, 2007) at 27. MMTC was counsel for and a member of DCS, a coalition of national organizations created in 2002 to advance the cause of minority ownership.

[9] See Broadcast Diversity Order, 23 FCC Rcd at 5941-42 ¶¶49-50.

American or Hispanic customers patronizing an advertiser's venue – or that presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service."[10]

The Rule's impact promises to be quite substantial for the broadcast industry. In 2008, the radio industry generated estimated annual gross revenues of $16.7 billion.[11] Given a conservative estimate that minority programmed and multilingual stations draw just 15% of the industry's gross revenues, even a mere 5% increase in advertising revenue for these broadcasters would translate to $125,250,000 in additional revenue. MMTC estimates that full compliance with the Broadcast Advertising Nondiscrimination Rule would restore to minority radio and television broadcasters, cable and satellite channels and multi-channel video programming services about $200,000,000 in uncollected annual revenues.[12]

II. Banning Advertising Discrimination On All Platforms Harmonizes With The Commission's Goals Of Platform Neutrality And Regulatory Parity

A signature goal of the Commission is platform neutrality – the concept that regulations designed for one type of media or telecom service should apply equally to competing services. Regulatory parity goes in hand with this goal and the Commission has based several of its decisions on this principle.[13] However, the Commission's civil rights regulations do not follow the model of platform neutrality or regulatory parity.[14]

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[10] Id.

[11] BIAfn, "Radio Industry Revenues Continue to Slide Downward in 2008 (December 2, 2008), available at http://www.bia.com/081202_2008IIRadio4thEdition.asp (last visited February 16, 2009).

[12] In response to whistleblower complaints lodged with MMTC since the Commission adopted the Rule, MMTC has identified at least ten large advertisers engaged in deliberate advertising discrimination. Among the offenders are businesses in the automotive sales, cruise ship, resort, food, hotel, hair salon and specialty retail industries.

[13] See, e.g., Qwest Petition for Forbearance, Memorandum Opinion And Order, 45 RR2d 87, 93 ¶52 2008 FCC LEXIS 8123 (released March 21, 2008) (stating that increased competition and regulatory parity serve the public interest); Bright House Networks, LLC, 23 FCC Rcd 5857, 5867 ¶30 (2008) (stating that "[r]egulatory parity...is important to ensure a level playing field");

Discriminatory practices do not respect competitive boundaries or delivery platforms. The anti-discrimination standards enunciated in the Broadcast Diversity Order ought to apply *across the full range of services that are subject to the Commission's jurisdiction. The* Commission should now take the next logical step and extend its nondiscrimination efforts to the cable, satellite and telecommunications industries.

Conclusion

The time has come for the Commission to apply its civil rights policies consistently by banning advertising discrimination across all platforms that air commercial advertising. Therefore, MMTC requests that the Commission promptly issue a notice of proposed rulemaking

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Promotion of Competitive Networks in Local Telecommunications Markets, Report and Order, 23 FCC Rcd 5385, 5387 ¶5 (2008) (discussing the importance of regulatory parity in the Commission's determination to remove impediments to fair competition); Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 5351, 5363 ¶24 (2008) (inquiring whether satellite carriers should have the same DTV obligations as cable providers in the interest of regulatory parity and consumer benefit); id. at 5380 ("We continue to strive for regulatory parity in our policymaking") (separate Statement of then Chairman Kevin J. Martin); Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Third Report and Order, 23 FCC Rcd 5319, 5321 ¶4 (2008) (extending regulatory parity to streamline and harmonize Commission rules); id. at 5342 (discussing the Commission's "commitment to ensure we achieve regulatory parity by applying a consistent regulatory framework across platforms") (separate Statement of then Chairman Kevin J. Martin); Telephone Number Requirements for IP-Enabled Services Providers, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19540 ¶17 (2007) (applying regulatory parity to "minimize marketplace distortions arising from regulatory advantage"); Petition of ACS of Anchorage, Inc., Memorandum Opinion And Order, 22 FCC Rcd 16304, 16336 ¶69 (2007) (stating that regulatory parity between competitors is in the public interest); Telecommunications Services Inside Wiring Customer Premises Equipment, Report and Order, 22 FCC Rcd 10640, 10680 (2007) (stating "we achieve regulatory parity by applying a consistent regulatory framework across platforms") (separate Statement of Chairman Kevin J. Martin); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd 5901, 5921¶55 (2007) (ensuring regulatory parity for services regardless of delivery platform to meet Congressional mandate to promote broadband service).

[14] Since 1976, EEO rules have covered all FCC-regulated industries but there has never been a common carrier EEO enforcement program. The rule to promote minority procurement, imposed by a 1993 congressional mandate, applies only to cable systems and those rules have never been implemented.

in which the Commission would propose to extend its Broadcast Advertising Nondiscrimination Rule to the cable, satellite and telecommunications services.

Respectfully submitted,

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