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

In the Matter of

Review of Technical Policies and Rules)
Presenting Obstacles to Implementation)
of Section 307(b) of the Communications)
Act and to the Promotion of Diversity)
and Localism)

RM: RM-11565

To the Commission

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MMTC RADIO RESCUE PETITION FOR RULEMAKING

By: David Honig
Executive Director
Joycelyn F. James
John W. Jones Fellow
Jacqueline Clary
Counsel
Minority Media and
Telecommunications Council
3636 16th Street, NW
Suite B-366
Washington, D.C. 20010
202-332-0500
www.mmtconline.org
dhonig@crosslink.net

Of Counsel:

Joycelyn Tate, Associate Media Broker, MMTC

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**SUMMARY AND VALUE PROPOSITION FOR THE
MMTC RADIO RESCUE PETITION FOR RULEMAKING¹**

The radio industry gravely needs an economic rescue, and the FCC can provide one. By granting this Radio Rescue Petition quickly, the FCC can provide lenders and investors with assurance that the federal government stands behind the survival and sustainability of this industry that is so vital to public service, public safety, minority entrepreneurship and democracy.²

The revision and deletion of outdated and ineffective engineering rules is a matter of grave import for the Commission, not only because the broadcasting industry is ready for these rules to be changed, but also because Congress demands it.

Section 257 of the Communications Act of 1934, as amended (“the Act”), directs the Commission to eliminate market entry barriers for small businesses and entrepreneurs for the purpose of promoting “...diversity of media voices, vigorous economic competition,

¹ This Petition represents the institutional views of the Minority Media and Telecommunications Council (“MMTC”) and is not intended to represent the individual views of MMTC’s officers, directors, advisors or members of its Section 307(b) Task Force. MMTC warmly expresses its appreciation to the members of its Section 307(b) Task Force, each of whom gave generously of their pro bono time to assist in researching and developing some of the issues in this Petition: Parul Desai, Frank Jazzo, Mark Lipp, Frank McCoy, Jack Mullaney, Julian Shepard, Melodie Virtue, Howard Weiss and Scott Woodworth.

² On July 13, 2009, MMTC joined with Radio One et al. in Comments in response to the Notice of Proposed Rule Making in MB Docket No. 09-52 (Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (“Rural Radio NPRM”). We contended that many of the proposals advanced in the Rural Radio NPRM would adversely impact minority broadcasters while offering no material benefit to rural radio listeners and thus, unfortunately, would take the Commission in the opposite direction from the thrust of this Petition.

technological advancement, and promotion of the public interest, convenience, and necessity.”³

Congress has also explicitly stated its policy favoring deregulation, having directed in the context of structural ownership regulation that “[t]he Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”⁴ Indeed, a regulation premised upon circumstances no longer extant cannot be sustained.⁵

The seventeen proposals contained within this petition are offered to promote diversity, localism and competition, to remedy the effects of past discriminatory policies against minorities and women, and to provide an urgently needed stimulus for the broadcasting industry as a whole.⁶ The Commission should adopt these proposals because they provide race-neutral methods of promoting the public interest.⁷

³ 47 U.S.C. §257(a)-(b).

⁴ Cf. 47 U.S.C. §161(b) (applicable to the structural ownership rules).

⁵ See City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented....Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”); see also Geller v. Federal Communications Commission, 610 F.2d 973, 980 (D.C. Cir. 1979) (“Even assuming that the rules in question initially were justified...it is plain that that justification has long since evaporated. The Commission’s general rulemaking power is expressly confined to promulgation of regulations that serve the public interest[.]”).

⁶ See Promoting Diversification of Ownership In the Broadcasting Services. Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, 5924 ¶2 (rel. March 5, 2008) (“Broadcast Diversity Order”) (recognizing the essential nature of a diverse media).

⁷ Compare Adarand v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to judicial review under strict scrutiny and must be narrowly tailored to further a compelling government interest).

As detailed throughout this petition, certain archaic broadcast engineering rules operate as market entry barriers, effectively stifling diversity and impeding competition. These rules are at odds with Congressional intent and are ultimately detrimental to minority entrepreneurs as well as the American public, which is currently deprived of the opportunity to benefit from the education and experience of listening to a diverse array of viewpoints and perspectives.⁸

The elimination of these market barriers would improve the general state of broadcasting and ease the path of entry for small businesses and entrepreneurs by allowing stations more flexibility in station location and operations. This flexibility, especially with respect to site location, is instrumental toward allowing small, women- and minority-owned stations to operate in close proximity to diverse, urban areas.

Modernization of the engineering rules would especially assist small, minority, and women broadcasters, which have suffered numerous injustices as a result of misadministration by prior commissions.⁹ Today, small, minority, and women owned stations struggle to comply

⁸ See FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978) (“Acute under-representation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved, and the larger, non-minority audience will be deprived of the views of minorities.”)

⁹ See Supplemental Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233 (May 18, 2008) at 2-4.

with anachronistic engineering regulations, which are often costly and burdensome, making it even more difficult for small stations to survive.¹⁰

Minority groups were not allowed into broadcasting until two generations after the industry was born.¹¹ As a result of this late entry, minorities were often able to acquire only those stations with inferior technical parameters and exurban site locations.¹² Further, minority broadcast ownership does not remotely reflect the representation of minorities in the overall population. Despite the fact that minorities comprise over one-third of the population in the

¹⁰ See, e.g., Letter from David Honig, Executive Director of MMTC to Hon. Kevin J. Martin, Chairman, FCC (Sept. 8, 2008) at 1-2, available at www.mmtconline.org (follow link to "Law & Policy" and follow link to "AM Directional Antenna Verification – September 8, 2008") (last visited May 19, 2009). "AM stations are currently subject to overly complex, burdensome and unnecessary regulatory requirements relating to maintenance, operation and improvement of AM directional antenna systems. AM stations must routinely take field strength measurements to track changes in signal levels at specified monitor points, which frequently go out of tolerance due to circumstances beyond the AM licensees' control...an AM station typically must engage the services of an RF consulting engineer to identify the source of the problem, a very costly and time consuming process. Pending the resolution...the AM station is required to operate at a reduced power...")

¹¹ See *id.* at 2.

¹² See *id.* at 3-4. See also Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233, p. 3 (April 28, 2008) ("**MMTC Localism Comments**"). "The vast majority of the minority-owned stations are on the AM band, and these stations tend to have inferior facilities...In 2001, 5.9% of AM stations were minority owned; a minority owned station was 43% more likely to be an AM station than was a non-minority owned station. Only 3.9% of the low-band (540 kHz to 800 kHz) stations were minority owned; minorities were 36% less likely than non-minorities to own these desirable facilities. Further, 33.9% of minority owned AM stations operated between 1410-1600 kHz, and minorities were 19% more likely than non-minorities to own these generally less desirable high band facilities." *Id.*, citing to Advisory Committee on Diversity, FM Radio Recommendations, June 11, 2004, pp. 2-4 (citing Kofi Ofori, "Radio Local Market Consolidation & Minority Ownership" (MMTC, March 2002)).

United States, minorities own a mere 7.7 percent of full-power commercial radio stations.¹³

Further, many large markets that are majority-minority are served almost entirely by non-minority owned media.¹⁴

Finally, we ask the Commission to exercise special care when applying the proposals in this Petition to stations serving Native American reservations and tribal lands. These stations often serve as the only lifeline for emergency services in Native American communities.¹⁵ Native American sovereign entities, which are a political rather than a racial classification,¹⁶ would benefit from many of the proposals in this Petition because rural-to-urban move-ins often

¹³ S. Derek Turner, *Off The Dial, Female and Minority Radio Station Ownership in the United States*, Free Press, at 4, 17 (June 2007) (“Free Press Report”), available at http://www.stopbigmedia.com/files/off_the_dial.pdf (last visited June 22, 2009).

¹⁴ *Id.* at 7 (stating “23 of the 293 U.S. Arbitron radio markets have “majority-minority” populations. But in these markets, too, the percentage of radio stations owned by people of color is far below the percentage of minority populations.”) See also *id.* at 43 (Spanish, then Religion and Urban formats account for “two-thirds of all minority owned stations but only 15 percent of the stations not owned by minorities.”)

¹⁵ See Support for the Center for Native American Public Radio’s Request Urging the Federal Communications Commission to Hold an Official Commission Media Ownership Hearing within Indian Country Focusing on Tribal Broadcast Ownership Issues, National Congress of American Indians, Resolution #SAC-06-093C, p. 2 (Oct. 16, 2006), available at <http://www.ncai.org/ncai/resolutions/doc/SAC-06-093C.pdf> (last visited June 25, 2009) (“Native radio stations are essential institutions in their communities serving as critical means of communication by providing hard news and information about tribal sovereignty, health, public safety, public service announcements and community events and other tribal issues...Native radio supports the efforts of Native Nations to police and secure their often remote homelands as part of homeland security and emergency preparedness by keeping citizens informed of news and information about emergencies and disasters[.]”).

¹⁶ Native American Sovereign governments are distinct from racial classifications because unlike racial classifications which are subject to strict scrutiny, the Constitution expressly grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...” U.S. CONST. art. I, §8.

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free up spectrum for new rural stations. However, in the interest of protecting stations already serving these areas, MMTC offers as a blanket exception to this Petition that stations providing local service to Native American reservations and tribal lands should not be permitted to abandon that service.

INTRODUCTION

The Minority Media and Telecommunications Council (“MMTC”) proposes seventeen specific revisions to the Commission’s broadcast technical rules to ensure that there are no unnecessary obstacles that inhibit the ability of broadcasters, particularly small, women, and minority broadcasters, to improve their stations and serve media-poor communities.

America’s radio industry is endangered and it needs to be rescued now.¹⁷ The broadcasting industry as a whole suffers from a debilitating economic paralysis, and most small, women, and minority-owned broadcasters are on life support. As the operator of the nation’s only minority-owned media brokerage, MMTC is keenly aware that the current financial crisis has all but destroyed the broadcasting industry’s equity value. Lenders have tightened access to capital. Local governments continue to restrict the construction of new towers. Competition from new technologies and the Internet challenge broadcasters’ economic stability.

¹⁷ See President-Elect Barack Obama, Remarks at George Mason University, As Prepared for Delivery, American Recovery and Reinvestment Act (given Jan. 8, 2009) (noting that the U.S. is in the “midst of a crisis unlike any we have seen in our lifetime”).

MMTC anticipates that these proposals will receive broad support by many diverse organizations and companies, as was the case in 1978 when the Commission adopted the Tax Certificate Policy.¹⁸

MMTC is not asking for a bailout for broadcasters. We are only asking the Commission to consider lifting outdated and unnecessary technical obstacles to competition and diversity. While not intended to be all-encompassing, the proposals in this Radio Rescue Petition are a starting point for a comprehensive evaluation of AM, FM and, in some cases, TV technical rules, as our changing demographics generate new demand for more stations in large cities.

1. ESTABLISH AN "AM TRANSITION FEDERAL ADVISORY COMMITTEE" TO MAKE RECOMMENDATIONS FOR THE USE OF CHANNELS 5 AND 6 POST DTV TRANSITION

Now that the DTV transition has taken place, the time has come for the Commission to determine the best use of Channels 5 and 6. This is an especially important proposal due to the breadth of opportunity that is presented by this spectrum for an exodus and – in today's economic climate – probably saving AM radio while also eliminating a great deal of interference among AM stations that choose to remain in the AM band.

In MB Docket No. 07-294, the Commission solicited comments on a proposal advanced by 29 national organizations -- the Diversity and Competition Supporters (MMTC et al. or DCS)

¹⁸ See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 982 (1978) ("A similar proposal was advanced by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General Electric Broadcasting Company and the National Black Media Coalition.")

to reallocate TV Channels 5 and 6 for FM broadcasting.¹⁹ In response, a variety of interested parties submitted proposals to expand various broadcast services. One proposal, submitted by the Broadcast Maximization Committee (“BMC”), is of particular interest to MMTC. BMC suggested that within the spectrum vacated by the analog TV Channel 5 and 6 stations post transition, there would be enough space for a major expansion of the noncommercial educational service (“NCE”), a reallocation of the low power FM service (“LPFM”), and enough space for all interested AM stations to migrate to the Channel 5 and 6 band (between 76 to 88 MHz).

Because of the potential to completely transform AM radio, it should be handled by creating a high profile advisory committee – the “Advisory Committee on the AM Transition” - to work through the technical details and arrive at a plan agreeable to all stakeholders. The model is the Advisory Committee on Advanced Television Services in the DTV transition, created at a time when the Commission recognized DTV’s potential to transform television.²⁰

¹⁹ See Broadcast Diversity Order, 23 FCC Rcd at 5956 ¶100 (stating “We agree with DCS that this proposal could yield tremendous opportunities for new entrants, and we seek comment on it.”)

²⁰ See Bernard J. Lechner, High-Definition-Television (HDTV) Technology, *Information Display Magazine*, Nov. 2007 Vol. 23, No. 11, available at <http://www.informationdisplay.org/article.cfm?year=2007&issue=11&file=art3> (last visited June 23, 2009) (“...the FCC created an Advisory Committee on Advanced Television Services (ACATS to gather information on possible systems and to recommend a standard to the FCC...ACATS voted on November 28, 1995 to recommend that the FCC adopt the Advanced Television Systems Committee (ATSC) standard.”) See also Fritz J. Messere, *Advanced Television Systems Committee*, The Museum of Broadcast Communications, available at <http://www.museum.tv/eotvsection.php?entrycode=advancedtele> (last visited June 23, 2009) (“Advanced Television Systems Committee membership consists of 53 organizations including representatives from the National Association of Broadcasters, the National Cable Television Association, the Institute of Electrical and Electronics Engineers, the Electronic Industries Association and the Society of Motion Picture and Television Engineers.”)

The Advisory Committee on the AM Transition would bring together representatives of noncommercial and commercial interests, full and low power interests, AM/FM and TV broadcasters, translator supporters and HD radio advocates to make suggestions on how to best achieve the exodus of AM radio to the 5/6 band.

If the use of these channels is developed properly, the benefits will be in accord with the Congressional mandate of promoting diversity.²¹ This is an especially important opportunity for minority-owned stations, which are predominately AM stations, to serve the same large audiences as majority-owned FM stations.²²

Adopting this proposal would foster diversity as well as conserve judicial, legislative and Commission resources. While the goals of promoting diversity and localism were reaffirmed by recently introduced legislation that proposes to eliminate the third adjacent channel spacing protection to full service stations,²³ questions remain as to the Commission's scope of authority to eliminate second-adjacent interference protections.²⁴ However, the issues

²¹ See 47 U.S.C. §257 (1996).

²² See MMTC Localism Comments at 3.

²³ See Local Community Radio Act of 2009, H.R. 1147, 111th Cong. §2 (2009); Local Community Radio Act of 2009, S. 592, 111th Cong. §2 (2009).

²⁴ See National Association of Broadcasters v. FCC, D.C. Cir., Case No. 08-117, Slip Op. at 15 (June 5, 2009) ("NAB v. FCC") ("Congress spoke directly to third-adjacent channel minimum protections but was silent regarding the Commission's authority to reduce or eliminate protections for other channels.") The Court also found that NAB's challenge to the Commission's procedures allowing an LPFM to obtain a waiver of minimum distance requirements was not ripe for review. Id. at 22. Since MMTC lacks empirical data showing the impact and identifying any unintended consequences of a relaxation of second adjacent channel protection, MMTC has taken no position on that subject at this time.

surrounding second-adjacent and third-adjacent channels could be entirely eliminated with the migration of the LPFM service to the Channel 5/6 spectrum.

2. REQUEST THE REMOVAL OF AM NIGHTTIME COVERAGE FROM SECTION 73.24(i) OF THE COMMISSION'S RULES

The elimination of the AM nighttime coverage rule would allow AM radio stations to improve daytime broadcasts to consumers, reduce burdensome operating costs, and conserve the Commission's scarce resources.

The nighttime coverage rule for AM stations requires, *inter alia*, that "for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. Thus, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher"²⁵ (the "nighttime coverage" rule). The Commission allowed for some flexibility when it clarified how to attain substantial compliance with the nighttime coverage rule. Substantial compliance is achieved by showing either 80% coverage of the "area" or 80% of the "population" within the political boundaries of the community of license.²⁶ In addition, the FCC will waive these requirements such that a new site may comply with pre-annexation boundaries

²⁵ 47 C.F.R. §73.24(i). "That for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. That, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That for stations in the 1605-1705 kHz band, 50% of the principal community is encompassed by the 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That, Class D stations with nighttime authorizations need not demonstrate such coverage during nighttime operation." *Id.*

²⁶ Pamplin Broadcasting, Inc., 23 FCC Rcd 649, 652 (2008).

as opposed to requiring coverage of the entire community including its newly annexed areas.²⁷ Nevertheless, it is still possible that the Commission may find that the annexed areas must be served upon finding that significant future development is likely.²⁸ The effect of the nighttime coverage rule is to unduly burden AM stations, thereby hampering their ability to improve daytime coverage. Even in cases where the applicant wishes to use only one site, the site must comply with both the daytime and nighttime coverage requirements. The ability to increase daytime coverage while using the same site is limited by the physics of nighttime propagation and protection requirements. The hardships imposed on AM stations as a result of the nighttime coverage rule can be exacerbated by a station's loss of its AM antenna site, change in community boundaries, and/or situations in which a station cannot initially demonstrate substantial compliance at the application stage.

When an existing AM station loses its antenna site, it may become increasingly difficult or impossible for that station to comply with the nighttime coverage rule. For example, if an old site originally located within a particular community becomes overrun by development with higher land valuations, this development and the rising associated land costs would make site relocation to an outer, less-developed area imperative because AM station ground systems require large parcels of land. However, moving to less developed areas may mean that 80%

²⁷ Bay City Communications Corp., 83 FCC2d 210, 212 (1980).

²⁸ See Broadcasting, Inc., 20 FCC2d 713, 718 (Rev. Bd. 1969) (where the percentages of population deviation were minimal "absent a finding of significant future growth"). The Commission also reviews whether the areas excluded from coverage do not contain urbanized residential areas, such as in New England towns, where township boundaries bear little resemblance to urbanized areas. See Andy Valley Broadcasting System, Inc., 12 FCC2d 3, 4 (1968).

coverage of the community of license at night is not possible, even though the daytime 5 mV/m contour would encompass the entire community of license from the same location.

Changes in community boundaries also pose problems for compliance with the nighttime coverage rule. These changes occur as a result of the passage of time and growth in the community. Initial sites that were able to comply with the nighttime coverage rule may no longer be in compliance as communities annex adjacent areas and change their boundaries. The resulting political boundaries can have unusual shapes that are impossible to fit within the required 80% nighttime coverage contour.

The nighttime coverage rule also serves as an entry barrier by requiring substantial compliance to be demonstrated in the application for a new site. Failure to demonstrate substantial compliance at the application stage results in waiver requests, which require expensive reports that either analyze each pocket of land to justify why it is not necessary to provide the requisite signal strength, or demonstrate that no other site can possibly be used that would comply with the rule. The applicant must endure uncertainty and delay, as it is not known whether the FCC will grant the waiver.²⁹

To do away with these negative effects, the Commission should eliminate (or, at the very least, relax) the nighttime coverage rule. Elimination of the rule would allow AM stations to have much greater flexibility in site selection and the ability to move farther away from

²⁹ For instance, in Pamplin, 23 FCC Rcd at 650, n.2, the Commission decision was made in January 2008, but the application was filed in January 2000. In situations where site loss is imminent, a station's survival could be doomed by waiting eight years to find out if its waiver request will be granted.

developed and costly downtown areas, owing to larger daytime city grade contours. Without this rule change, in order to maximize its daytime coverage and provide the requisite nighttime community coverage, the AM licensee is faced with the additional and extraordinary cost of maintaining two AM transmission sites. Elimination of the nighttime community coverage requirement would remove this enormous burden.

Further, the elimination or relaxation of the nighttime coverage rule is consistent with the Commission's treatment of other AM policies. For example, Class D stations (former daytime stations) that have some nighttime service are not required to meet nighttime community coverage requirements. When the FCC adopted rules for the AM Expanded Band, it relaxed the nighttime coverage requirement from 80% to 50% because "close-in sites suitable for AM antennas are increasingly difficult (and expensive) to find."³⁰ The Commission recognized that "the 50% requirement nonetheless insures a signal of significant quality to the community of license and the added flexibility...to locate...facilities at cost effective locations."³¹

The Bureau previously granted waivers of the community coverage requirement for the purpose of enabling a minority-owned station to target coverage to minority populations within the community of license.³² However, the proposal we advance today is race and gender neutral, such that the elimination or revision of the nighttime coverage rule would help all owners of AM

³⁰ See Review of the Technical Assignment Criteria for the AM Broadcast Service, 6 FCC Rcd 6273, 6322 ¶153 (1991).

³¹ Id. at 6323 ¶158.

³² See e.g., Brunson Broadcasting Co. of Maryland, Inc., 50 RR2d 941, 942 (Broadcast Bur. 1981).

stations substantially improve their daytime coverage. This flexibility would enable licensees to find new sites when their old sites are no longer available to them, thus providing an opportunity for struggling stations to find more cost efficient sites from which to operate, improve daytime service to the public, and conserve Commission resources by eliminating the need to review waiver requests on a case-by-case basis.

3. MODIFY PRINCIPAL COMMUNITY COVERAGE RULES FOR COMMERCIAL STATIONS

This proposal would allow commercial stations to have increased flexibility in site location and opportunities to improve the quality of broadcast for their target audience. The rule currently provides that commercial stations must provide coverage to 80 percent of their community of license.³³ The purpose of the community coverage rule is to provide sufficient signal coverage to the community of license.³⁴

³³ The commercial FM rule states that a station must cover 100 percent of the community of license from its transmitter site. The Commission, however, has a “longstanding policy” to waive the rule to the 80% level. CMP Houston-KC, LLC, 23 FCC Rcd 10656, 10657 n. 8 (2008). “The Commission traditionally accepts proposals that would cover at least 80 percent of the community of license as constituting substantial compliance” with the rule. See Barry Skidelsky, 7 FCC Rcd 5577, 5577 ¶3 (1992) (citing John R. Hughes, 50 Fed. Reg. 5679 (1985)).

³⁴ See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making, 20 FCC Rcd. 11169, 11184 ¶¶41-44 (2005) (discussing a proposal to change the standards for relocating a station where the station is the community’s only local service, “Because a station has a particular obligation to serve its community of license, a proposal claiming to provide first local transmission service is properly evaluated based on the community itself, rather than the community plus any outlying areas that might also receive aural service from the proposed facility.”) See also Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, Report and Order, 94 FCC2d 152, 153 ¶3 (1980) (“When a new station is desired...[t]he proposed station must be located at a sufficient distance from pertinent co-channel and adjacent channel stations and still be capable of providing a strong signal over the desired community.”)

Many commercial stations, including most minority-owned stations, have difficulty covering their target audiences due, in part, to restrictions currently imposed by the Commission's community coverage rules.³⁵ Further, the rule limits the ability of commercial stations to move or make improvements because, if one of these stations wants to change its site, it must demonstrate that the station would cover at least 80 percent of the community from the new site. Often this proves to be impossible and it usually leads to a protracted waiver proceeding at a high cost in Commission resources.³⁶ Relaxing the rule would eliminate the need for waivers and permit Commission resources to be better used elsewhere.

It is also extremely difficult in and around large urban areas to find new tower sites. This difficulty, combined with the current commercial coverage requirements, limits commercial stations from changing sites and making other improvements that benefit the public interest.

To alleviate the hardships posed by the commercial coverage rule, the Commission should amend Sections 73.24(i) and 73.315(a) of the Commission's Rules, which govern the community of license coverage requirements for commercial stations,³⁷ to conform to the coverage requirements for non-commercial educational (NCE) stations.³⁸

³⁵ In some cases, communities have expanded and boundaries have changed since stations were originally licensed and these stations do not currently provide a 70 dBu signal to the community of license.

³⁶ See, e.g., Community Communications Corp., 5 FCC Rcd 3413 (1990); Northland Broadcasters, 4 FCC Rcd 6508 (1989); George S. Flinn, Jr., 5 FCC Rcd (1990); Lester H. Allen, 15 FCC2d 767 (1968); Mid-Ohio/Capital Communications Limited Partnership, 5 FCC Rcd 424 (1990); Quality Broadcasting Corp., 62 FCC2d 586 (1977).

³⁷ 47 C.F.R. §§73.24(i) and 73.315(a).

³⁸ See 47 C.F.R. §73.515.

Section 73.515 of the Commission's Rules requires NCE stations to provide coverage to at least 50 percent of the community of license with a 60 dBu signal.³⁹ If a commercial station were permitted to cover only 50 percent of its community of license, then the remaining 50 percent of the community, in nearly all cases, would still receive a very listenable signal. Thus, modification of this rule would provide commercial licensees additional flexibility without materially frustrating the purpose of the rule.⁴⁰

MMTC believes that modification of these rules will directly benefit small, women, minority, and all other broadcast licensees by providing them with additional flexibility for site location. As the Commission recognized when it modified the NCE community coverage rule, permitting NCE stations to cover 50 percent of the community of license "should ensure

³⁹ See 47 C.F.R. §§73.515 and 73.24. The commercial FM rule, 47 C.F.R. §73.315, bases coverage on a station's 70 dBu contour, and the commercial AM rule, 47 C.F.R. §73.24, bases coverage on a station's 5 mV/m contour. The NCE rule, Section 73.515, bases coverage on a station's 60 dBu contour.

⁴⁰ In a related vein, there is currently a distinction between the coverage required at the allotment stage and that required at the application stage for commercial FM stations desiring to change community of license, channel, or class of channel. Specifically, applicants at the allotment stage must demonstrate coverage to 100 percent of the community of license. In 2006, the Commission eliminated the rulemaking stage of community of license change proposals. See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Report and Order, 21 FCC Rcd 14212, 14213 ¶¶4-9 (2006) ("FM Amendments Report and Order"). This followed the previously eliminated rulemaking stage for channel and class of channel changes. See Amendment of the Commission's Rules To Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4736 ¶10 (1993). These changes are now accomplished by one-step applications. Thus, the distinction between the community coverage requirements should be eliminated and the 50 percent threshold should be adopted at both the allotment and application stages.

sufficient flexibility in siting facilities and reaching target audiences.”⁴¹ At the same time, the Commission stated, “this modification balances the Commission’s mandate under Section 307(b) of the Act with the service, technical, and financial realities of operation NCE FM stations.”⁴² This same flexibility should be afforded to commercial stations.

4. REPLACE MINIMUM EFFICIENCY STANDARD FOR AM STATIONS WITH A “MINIMUM RADIATION” STANDARD

This proposal would reduce the regulatory burden on AM stations, particularly lower frequency AM stations, by increasing the flexibility in antenna choice and site selection and allowing stations to increase power and use less land. The Commission’s minimum efficiency rules are found in Sections 73.45, 73.186 and 73.189 of the Rules.⁴³

The minimum efficiency standard dates back to the dawn of the Federal Radio Commission. In a 1927 letter to Dr. Ralph Bown, President of the Institute of Radio Engineers, the Committee on Standardization of the Institute of Radio Engineers shed light on the origins of

⁴¹ Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules 15 FCC Rcd 21649, 21670 ¶42 (2000).

⁴² Id.

⁴³ See 47 C.F.R. §§73.45, 73.186 and 73.189. “All applicants for new, additional, or different AM station facilities and all licensees requesting authority to change the transmitting system site of an existing station must specify an antenna system, the efficiency of which complies with the requirements for the class and power of station. (See §§73.186 and 73.189.)” 47 C.F.R. §73.45(a).

the minimum efficiency standard.⁴⁴ The letter makes several recommendations on best practices in power measurement⁴⁵ and discusses the rationale behind requiring antenna efficiency:

“...it is known that the efficiencies of antennas and the absorbing tendencies of various territories may vary widely from one station to another. Considering first the antenna efficiencies, it is evident that due to this factor two stations having identical transmitting sets of equal power rating may nevertheless deliver into space quite different amounts of power. This obviously puts a premium on good antenna efficiency, since the station with the better antenna, other things being equal, will give stronger signals to its listeners. Good antenna efficiency is certainly desirable, but it is a fair question as to whether this way of favoring it is just in all cases. For instance, to render a given service a station may find it cheaper to use a high-power set and an inefficient antenna than to use a lower-power set and a better antenna, since conditions local to the station may make an efficient antenna very expensive to construct. Yet either alternative might give identical service to the public.”⁴⁶

As shown by this letter, in 1927 electric power was in short supply while land was widely available. Given the relative availability of land and electric power resources at that time it was appropriate to choose to use more land to conserve power. However, today, the relative availability of land and electric power are exactly reversed.⁴⁷ In circumstances, such as here,

⁴⁴ See Letter to Dr. Ralph Bown, President, Institute of Radio Engineers (August 20, 1927) (on file with the National Archives and MMTTC).

⁴⁵ *Id.* at 4 (“Your committee...recommends that broadcasting stations be rated in power in terms of antenna input computed by multiplying the plate-circuit input of the power vacuum tube or tubes by an assumed vacuum-tube efficiency[.]”)

⁴⁶ *Id.* at 5.

⁴⁷ See e.g., Ruben N. Lubowski et al., Major Uses of Land in the United States, 2002, Economic Information Bulletin Number 14, United States Department of Agriculture (May 2006), available at <http://www.ers.usda.gov/publications/EIB14/eib14.pdf> (last visited June 24, 2009) (demonstrating how land use has changed over the years). “Urban land area quadrupled from 1945 to 2002, increasing at about twice the rate of population growth over this period...[in terms of land ownership]. Over 60 percent (1,378 million acres) of U.S. land is privately owned. The Federal Government owns nearly 28 percent...State and local governments own about 9

where the factual premise linking the regulation to the public interest has disappeared and no other fact, by itself, will support the regulation, the Commission must reevaluate the regulation to conform to its public interest obligation.⁴⁸

The Commission expects its technical standards to be “based on the best engineering data available.”⁴⁹ However, a generation ago, the Commission acknowledged that these rules were outdated.⁵⁰

percent... Over 2 percent... is in trust by the Bureau of Indian Affairs.” *Id.* at v. “The most consistent trends in major uses of land (1945-2002) have been an upward trend in special-use and urban areas...” *Id.* at 5. See also *Electric Power Annual 2007: A Summary*, Energy Information Administration Brochures (rel. April 2009), available at <http://www.eia.doe.gov/bookshelf/brochures/epa/epa.html> (last visited June 24, 2009) (demonstrating the recent strides made in increasing the generation of electric power, “In 2007, net generation of electric power increased 2.3 percent to 4,157 billion kilowatt hours (kWh) from 4,065 billion kWh in 2006.”) See also *Estimated Primary Energy Consumption in the United States, Selected Years, 1635-1945*, available at http://www.eia.doe.gov/aer/pdf/pages/sec13_e_1.pdf (last visited June 24, 2009) (total estimated consumption of fossil fuels in 1930 was 21.468 Quadrillion Btu and total estimated consumption of renewable energy in 1930 was 23.680 Quadrillion Btu). *Compare U.S. Energy Consumption by Energy Source, 2003-2007* (rel. April 2009), available at http://www.eia.doe.gov/cneaf/solar/renewables/page/trends/table1_1.pdf (last visited June 24, 2009) (total energy consumption of all energy sources, including fossil fuels, electricity net imports, nuclear electric power and renewable energy was 101.545 Quadrillion Btu).

⁴⁸ See *Geller v. FCC*, 610 F.2d at 980.

⁴⁹ 28 Fed. Reg. 13596 (1963) (Section 73.181(b) describes the standards for collecting data) (on file with MMTC).

⁵⁰ See *Re-Examination of Technical Regulations, Notice of Inquiry and Proposed Rule Making*, FCC 83-67, 48 Fed. Reg. 14399 ¶11 (1983); *Report and Order*, 99 FCC2d 903 (1984). “Much of the rationale behind these [minimum performance standards] is no doubt seated in the traditional regulatory concepts applied to the broadcast services and the high degree of standardization and uniformity of technical quality which is a part of that traditional view of the service. The broadcast service of today, however, is quite different from that of many years ago. There appear to be stronger market incentives today to control performance and thus reduce the

A rule that requires minimum efficiency imposes substantial hardship on lower frequency stations because, provided that the minimum radiation is achieved, efficiency levels are immaterial. Currently, lower frequencies are having trouble meeting the minimum efficiency standard due to the large size of the antenna required to meet the standard. Although frequencies are inversely related to antenna size—the lower the frequency, the larger the antenna must be—lower frequencies provide better coverage. Thus, using minimum radiation rather than minimum efficiency allows the lower frequencies more flexibility in powering the station.

MMTC proposes that the Commission replace “minimum efficiency” for AM antennas with “minimum radiation” in mV/m, thereby allowing AM stations to use very short antennas and enjoy more flexibility in site selection including rooftop installations.

By replacing “minimum efficiency” with “minimum radiation,” the Commission would allow increased flexibility in antenna choice and site selection. This flexibility will enable small businesses and entrepreneurs, operating in the lower frequency band, many of whom are having trouble meeting the efficiency levels, to continue their operations by increasing power and using less land, thus providing the opportunity to move closer to larger, more viable areas.

5. ALLOW FM APPLICANTS TO SPECIFY CLASS C, C0, C1, C2 AND C3 FACILITIES IN ZONE I AND IA

Allowing FM stations to specify Class C, C0, C1, C2 and C3 facilities in Zones I and IA would reduce spectrum warehousing in Class B areas and allow lower class stations to upgrade.

need for detailed regulations.” Re-Examination of Technical Regulations, Notice of Inquiry and Proposed Rule Making, 48 Fed. Reg. 14399 ¶11.

This proposal would also increase spectrum efficiency by extending the application of proven Zone II protections.

The current rules governing FM authorized power are cumbersome and difficult to navigate for stations seeking to improve their services. FM stations have limited ability to specify desired classes. Only “Class A, B1 and B stations may be authorized in Zones I and I-A. Class A, C3, C2, C1, C0 and C stations may [only] be authorized in Zone II.”⁵¹

To promote efficiency and improvement of service, the Commission should allow applicants for existing FM stations and new allotments to specify Class C, C0, C1, C2 and C3 facilities in Zones I and IA (i.e., anywhere in the U.S.) rather than in Zone II exclusively. Such Class C stations would receive protection to their ‘C’ protected contours (60 dBu) rather than the 54 dBu (Class B) and 57 dBu (Class B1) contours that would otherwise apply in those zones. Stations’ “interfering contours” would likewise be based on Class C standards. Such proposals must work within the existing spacing rules as provided in Sections 73.207, 73.215 or 73.213.⁵² Stations opting to retain Class B status would continue to be protected with respect to their existing contour protections unless they change their class, including a change to a Class C station.

This proposal would promote diversity by reducing spectrum warehousing and increasing spectrum efficiency. Allowing stations to specify class C, C0, C1, C2 and C3 facilities in Zones I and IA would reduce “spectrum warehousing” in the crowded northeast and other class B areas,

⁵¹ 47 C.F.R. §73.210.

⁵² 47 C.F.R. §§73.207, 73.215 and 73.213.

enabling class C stations, which could fit in full compliance with current interference and spacing rules, to upgrade, move closer to areas needing service, and in some cases even make room for new full power aural services. This change would increase spectrum efficiency because the lesser protection distances and ratios proven to work in Zone II could then apply in other zones.

6. REMOVE NON-VIABLE FM ALLOTMENTS

Removing non-viable FM allotments would increase spectrum efficiency by allowing others to expand into these areas.

Numerous vacant allotments waste space on the spectrum because of an uncertain and complicated rulemaking procedure, favoring maintenance of the vacant allotment, is required before the Commission will delete it.⁵³ Almost four years have elapsed since the Commission postponed removing “non-viable” FM allotments.⁵⁴ With the electronic database now showing over 700 vacant allotments, the time is ripe for the Commission to revisit this proposal.⁵⁵

⁵³ First Broadcasting Investment Partners, LLC, Amendment of the Commission’s Rules Governing Modification of FM and AM Authorizations, Petition for Rulemaking, at 19 (filed on March 5, 2004) (“First Broadcasting Petition for Rulemaking”).

⁵⁴ Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making, 20 FCC Rcd 11169, 11172 ¶11 (2005).

⁵⁵ See 47 C.F.R. §73.202.

These burdensome regulations result in inefficient use of spectrum space, which literally bar participation from new entrants and make it difficult for existing stations to improve or expand their service.⁵⁶

The Commission should remove non-viable FM allotments. As the Commission auctions vacant allotments, the allotment for any channel placed for auction that does not produce a successful bidder should be deleted. Allotments should be deleted where any winning bidder fails to construct and license the facility, unless the permit is sold to a qualified eligible entity in accordance with the Broadcast Diversity Order.⁵⁷

Deleting non-viable FM allotments would foster diversity by allowing stations to upgrade and expand thus enabling increased minority and new entrant participation and higher quality broadcasting. Deleting vacant allotments would also promote diversity by allowing space for other stations to expand. The deletion of these allotments would benefit the communities where vacant allotments are situated by allowing other stations to take their places and provide new service.⁵⁸

⁵⁶ See, e.g., First Broadcasting Petition for Rulemaking at 19-20 (stating “these [vacant] allotments—which provide no current benefits to the public whatsoever—prevent other licensees from expanding their signal coverage. In addition, the presence of these long-vacant allotments thwarts the addition of new allocations in nearby more populated areas which could obtain an allotment and support a station if the vacant allotment was not present.”)

⁵⁷ See Broadcast Diversity Order, 23 FCC Rcd at 5927 ¶¶6 -9 (defining the term “eligible entity”). The FCC’s Advisory Committee on Diversity for Communications in the Digital Age has under consideration a new, race-neutral eligible entity definition based on Full File Review (“FFR”) that would be considerably less dilute in impact than the “small business” standard now in effect. References to “eligible entity” herein should not be read as an implicit endorsement of the “small business” standard.

⁵⁸ See First Broadcasting Petition for Rulemaking at 22.