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March 5, 2012

Chairman Julius Genachowski  
Commissioner Robert McDowell  
Commissioner Mignon Clyburn  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: MB Dkt. No. 09-182, 2010 Quadrennial  
Review – Review of the Commission's Broadcast  
Ownership Rules and Other Rules Adopted Pursuant to  
Section 202 of the Telecommunications Act of 1996

MB Dkt. No. 07-294, Promoting Diversification of  
Ownership in the Broadcasting Services

Dear Chairman Genachowski, Commissioner McDowell, and Commissioner Clyburn:

On behalf of the undersigned members of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership to promote and protect the rights of all persons in the United States, we write to offer our views in this proceeding, and to express our concern that the Commission is falling short on its affirmative obligation to promote diversity in media ownership.

The civil rights community has long regarded the expansion of minority and female ownership in media as an important goal because of the powerful role the media plays in the democratic process, as well as in shaping perceptions about who we are as individuals and as a nation. Though the most recent numbers available (which are already out of date) demonstrate that ownership diversity is, in the Commission's own words, "dismal," the Commission's notice fails to take into account its new proposal's impact on ownership diversity. This omission will further exacerbate already low levels of ownership by women and people of color, break a string of past Commission promises, and also violate the mandate of two decisions by the U.S. Court of Appeals for Third Circuit.<sup>1</sup> We urge the Commission to immediately take action to improve its data collection about the ownership of women and people of color, to improve its record on how to increase that ownership, and to cease any and all proposals to permit further media consolidation until it can comply with the court mandate.<sup>2</sup>

<sup>1</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004) (*Prometheus I*); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3rd Cir. 2011). (*Prometheus II*).

<sup>2</sup> Specifically, we oppose relaxation of any media ownership rules, including all local broadcast ownership rules and the newspaper-broadcast cross ownership, the radio-television cross ownership rule and the dual network rule. We also commend to the Commission's attention the separate filings of UCC OC Inc. *et al*, and the National Hispanic Media Coalition in this docket.

**Current ownership levels by women and people of color are “dismal.”** The Commission has recognized that, despite efforts to promote broadcast station ownership by people of color and women to foster diversity, “the overall level of minority and female ownership in the broadcast industry remains dismal.”<sup>3</sup> This conclusion is borne out by the available data.

People of color and women control very small percentages of broadcast stations. For example, a study by Free Press using 2007 data found that people of color controlled 3.15 percent of full-power commercial television stations, while women controlled 5.87 percent.<sup>4</sup> The study also tracked a sample of forty stations that were minority-owned in 1998 and found that seventeen were subsequently sold to non-minority owners. Of the seventeen, nine of these transactions would not have been possible under the prior, more restrictive, ownership rules. Of the eight sales that would have been permitted under the old ownership rules, seven were “to large station group owners, and may not have occurred if not for the pressures of increased industry consolidation.”<sup>5</sup> The study concludes that the relaxation of media ownership rules has negatively affected minority and female owners and prevented these groups from achieving ownership rates in harmony with either the general population or other industries.<sup>6</sup>

In 2007, Free Press released a similar study on minority and female ownership of full-power commercial radio stations, finding that 7.7 percent of full-power commercial radio stations were owned by people of color and 6 percent were owned by women.<sup>7</sup> It also found that “white male... station owners tend to own more stations than their minority and female counterparts,”<sup>8</sup> and that markets with minority and female owners tend to have fewer stations per owner,<sup>9</sup> suggesting that minority and female owners are more successful in markets with less concentration. The study concludes that in radio, as in television, increased ownership concentration negatively affects minority and female owners.<sup>10</sup>

A 2009 study by Professor Catherine Sandoval combined Free Press’s research with additional sources to produce a more comprehensive analysis of minority ownership of commercial, full-power radio stations.<sup>11</sup> In particular, Sandoval incorporated data from the FCC’s Application database, allowing her to examine

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<sup>3</sup> *Promoting Diversification of Ownership, Report and Order and 4<sup>th</sup> FNPRM*, 24 FCC Rcd 5896, 5997 (2009) (“*Diversity 4<sup>th</sup> FNPRM*”).

<sup>4</sup> S. Derek Turner, Free Press, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* 12, 14 (2007), <http://www.freepress.net/files/otp2007.pdf>.

<sup>5</sup> *Id.* at 23.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> S. Derek Turner, Free Press, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (2007), [http://www.freepress.net/files/off\\_the\\_dial.pdf](http://www.freepress.net/files/off_the_dial.pdf).

<sup>8</sup> *Id.* at 24 (finding white owners average 3.9 stations, male owners average 4.1 stations, minority owners average 2.6 stations, and female owners average 2.1 stations).

<sup>9</sup> *Id.* at 30.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> Catherine J. K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* 4 (2009), <http://www.radiodailynews.com/mmtcreport.pdf>.



the ownership of 11,249 AM and FM stations. Her study found that 815 radio stations (7.24 percent) were owned or controlled by people of color.<sup>12</sup>

Sandoval found that overall minority ownership has “remained flat” between 2007 and 2009, even as the number of commercial radio stations increased.<sup>13</sup> The study also found that 53 percent of minority owners obtained their first licenses prior to the enactment of the Telecommunications Act of 1996, which “ended restrictions on the number of stations a corporation could control nationally and dramatically raised the number of stations that could be under common control in a local market.”<sup>14</sup>

The limited data provided in the NPRM provide a similarly gloomy snapshot of television station ownership by people of color and women. As noted in the NPRM at ¶¶155-56, Commission staff has reviewed the 2009 biennial ownership filing of full power television stations, finding that, out of a total 1,394 stations, 9 (0.6 percent) are owned by African Americans, 10 (0.7 percent) by American Indians or Alaska Natives, 9 (0.6 percent) by Asian Americans, 1 by Native Hawaiian or Pacific Islanders, and 36 (2.6 percent) by Hispanics or Latinos, for a total of 65 (4.6 percent) minority-owned stations.<sup>15</sup>

**The Commission cannot continue to ignore the mandate of the U.S. Court of Appeals: it must consider the impact on ownership by women and people of color *before* it permits further consolidation.** In light of this data, it is shocking that the Commission has ignored court directives not once, but twice, to delay further media consolidation until it considers its impact on ownership levels by people of color and women. In 2002 the U.S. Court of Appeals for the Third Circuit reversed proposed media consolidation rules because, in part, the Commission had ignored its obligation to look at both issues together. The court directed that on remand, the Commission was to consider “proposals for enhancing ownership opportunities for women and people of color which the Commission had deferred for future consideration” and specifically told the Commission to consider the proposals “at the same time” it addressed other questions on remand.<sup>16</sup> Despite this directive, the Commission launched its 2006 Quadrennial Review without seeking comment on specific proposals to address ownership by people of color and women.<sup>17</sup> It was only after a public outcry that the Commission issued a second notice on the matter.<sup>18</sup> Despite the court directive, a second notice, and a full record, the Commission in its decisions

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<sup>12</sup> *Id.* at 5. As of 2009, Sandoval determined that 139 stations were owned by Hispanic Americans, 129 stations were owned by African Americans, thirty-four were owned by Asian Americans or Asian/Pacific Islanders, and fourteen were owned by Native Americans. *Id.* at 8.

<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> *Id.* at 4, 13.

<sup>15</sup> Although this figure is slightly higher than the 3.15 percent found by Turner, both sets of FCC data are lacking necessary information in key areas. First, Turner’s study was based on FCC data from 2007 that did not include any stations owned by a sole proprietor or partnerships of natural persons. Although these categories of owners included in the 2009 data analyzed by the FCC staff, that data was incomplete for a different reason: the staff was unable to determine the race and gender of the owners of 308 (22.1 percent) stations.

<sup>16</sup> *Prometheus I*, 373 F.3d at 435, n.82 and 421, n.59.

<sup>17</sup> *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 Rulemaking*, 21 FCC Rcd 8834 (2006).

<sup>18</sup> *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, 2d FNPRM*, 22 FCC Rcd 14215, 14216 (2007).



issued at the end of 2007 nonetheless failed to analyze the impact of the rule changes it made on ownership opportunities for women and minorities.<sup>19</sup>

In its review of the Commission's decision, the Third Circuit concluded, "[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, ... the Commission has in large part punted yet again on this important issue."<sup>20</sup> The court's directive could not be more clear: "We re-emphasize that *the actions required on remand should be completed within the course of the Commission's 2010 Quadrennial Review* of its media ownership rules."<sup>21</sup>

Despite the court's unambiguous directives, the Commission is now proposing to postpone *all* meaningful diversity-related action until 2014. The NPRM states at ¶158 that "[a]lthough we would prefer to be able to propose specific actions in response to the Third Circuit's remand of the measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time." Instead, the Commission proposes to undertake certain action in preparation for the 2014 Quadrennial Review.<sup>22</sup>

This proposal is simply unacceptable. The Commission's decision to delay action until the next Quadrennial Review violates the Court's order and is not consistent with the Commission's previously-stated priorities. Simply put, the Commission may not relax any of its broadcast ownership limits until it has fully complied with the court's mandate.

**The Commission must remedy its failure to collect and analyze adequate data.** The Leadership Conference, along with several members of the coalition, have been asking the Commission to improve its data collection and release for years. It has been 14 years since the FCC expanded its collection of ownership data on Form 323 to include race and gender, and the public has yet to see a complete and accurate collection and release of this data. The Commission's failure in this regard has greatly affected its ability to create sound policy.

The Commission has ignored repeated requests to address this issue in a meaningful way. According to comments filed in 2006, the United Church of Christ, OC Inc. and National Organization for Women: "While the FCC does collect this information, it collects incomplete data and fails to make this data available to the public in a timely manner. ... [S]ole proprietors and partnerships of natural persons are exempt from filing. Moreover, because group owners need only file once for all of their stations, it is difficult for the staff to determine whether every station has filed. Most importantly, the FCC staff conducts no analysis of the data relevant to the reason for its collection.... It took two years for the FCC

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<sup>19</sup> 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, Report and Order, 23 FCC Rcd 2010 (2008) ("2008 Order"); 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, Report and Order and 3<sup>rd</sup> FNPRM, 23 FCC Rcd 5922 (2008) ("Diversity Order").

<sup>20</sup> *Prometheus II*, 652 F.3d at 471-72.

<sup>21</sup> *Id.* at 472 (emphasis added).

<sup>22</sup> The proposed steps are "1) Continue to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services we license; 2) Commission appropriately-tailored research and analysis on diversity of ownership; and 3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership.

to even post the 2001 data. Nor does the FCC perform the most basic types of analysis, such as breaking down the data by type of station ownership or geographic location.”<sup>23</sup>

As UCC OC Inc. noted in its 2007 comments, even the FCC’s own economists had concluded that, “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis, while a study by the FCC staff admitted that data provided by the Media Bureau were “noisy and incomplete.”<sup>24</sup> Similarly, NOW and others pointed out how the studies commissioned for the 2006 Quadrennial review “were hampered in achieving their intended purpose by insufficient data regarding women’s ownership of broadcast stations.”<sup>25</sup>

As we lay out below, though the Commission adopted improvements to the Form 323 data collection process in response to these complaints, these improvements have never been effectuated.

In May 2009, the Commission improved its data collection to limit the number of exceptions to the data and directed its staff to revise Form 323’s electronic interface so that the ownership data “is incorporated into the database that is searchable, and can be aggregated and cross-referenced.”<sup>26</sup> Yet the data was not collected until more than a year later, and was not released until February 2011. The first analysis of the July 2010 data was not released until early 2012, with the release of the NPRM in this docket. Although this analysis reports minority ownership, it does so for only one category of stations – full power commercial broadcast television stations. It does not report on the data for low-power television stations, a service that was intended to offer ownership opportunities for minorities and women. Nor does it examine AM radio or FM radio, which is thought to provide entry points for minorities and women. Moreover, the Commission’s analysis consists entirely of tallies, which count the total number of full-power commercial television stations owned by minorities. The Commission does not examine the interaction between minority ownership and other variables, does not offer any conclusions based on its data, and provides no analysis whatsoever of female broadcast ownership.

Researchers that have tried to analyze the data on their own have found the documentation insufficient. There is no searchable database, and the data released has to be downloaded into a database program that it not widely used and is expensive to purchase.

Flawed collection methods and missing data have resulted in significant gaps in the Commission’s analysis. The NPRM acknowledges at ¶156 that the Media Bureau has no information for 64 stations, or 4.5 percent of the total, and that it was not able to categorize the race or ethnicity of 244 stations, or 17.5 percent of the total. Moreover, the Commission’s ownership data is incomplete because of its decision to exempt certain broadcaster owners from the data filing requirement because it concluded that it had not

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<sup>23</sup> Comments of Office of Communication of United Church of Christ, Inc., et al., MB Dkt. No. 06-121, at 39-40 (filed Oct. 23, 2006).

<sup>24</sup> Comments of Office of Communication of United Church of Christ, Inc., et al, MB Dkt. No. 06-121, at 11 (filed Oct. 1, 2007) (discussing Ari Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (June 2007) and C. Anthony Bush, *Minority and Women Broadcast Ownership Data*, at Study 2, Appendix A, at 18 (July 24, 2007)).

<sup>25</sup> Comments of National Organization for Women Foundation, et al., MB Dkt. No. 06-121, at 6 (filed Oct. 22, 2007).

<sup>26</sup> *Diversity 4<sup>th</sup> FNPRM*, 24 FCC Rcd at 5903-5910.



given sufficient notice under the Administrative Procedure Act.<sup>27</sup> Although the Commission indicated in October 2009 that it would seek comment on whether to include the non-attributed owners, it has never taken the necessary step of Federal Register publication to initiate that process. This information is needed to assess whether the FCC's changes in the attribution rules designed to help minority and women owned broadcasters to attain financing are working as intended.

The FCC has recognized that any meaningful analysis of minority and female ownership trends requires a longitudinal analysis of ownership.<sup>28</sup> The Commission now has data from the Free Press studies for 2007, as well as its own data for both 2009 and 2011. Yet, the Commission has not provided any longitudinal analysis. In fact, it has not yet made the data sets from the December 1, 2011 filings available to the public at all.

Finally, the FCC has not commissioned any outside studies regarding broadcast station ownership by minorities and/or women. In response to the Media Bureau's Public Notice announcing the studies it was undertaking and seeking suggestions for additional studies, UCC, NOW, the Communications Workers of America and others expressed concern that none of the studies were intended to assess the impact of the ownership rules on minority and female ownership.<sup>29</sup> However, the Commission has not conducted any further studies, rendering the record incomplete.

The Third Circuit made clear that the Commission's job is to collect the data it requires. In *Prometheus II*, the Court acknowledged that the Commission's 2009 Order set "in motion a process for collecting better data as a basis for informed policy making."<sup>30</sup> It found that "[w]hile this is certainly a welcome and long overdue step, it does not remedy the existing data gap in the Diversity Order. We anticipate that it will, however, lay necessary groundwork for the Commission's actions on remand."<sup>31</sup> The Court elaborated that:

Stating that the task is difficult in light of *Adarand* does not constitute 'considering' proposals.... The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor. We ... anticipate that [the FCC] will act with diligence to synthesize and release existing data

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<sup>27</sup> On reconsideration of May 2009 Order, the Commission exempted "holders of certain nonattributable interests" from the ownership filing requirement. CITE.

<sup>28</sup> *Diversity Order*, 23 FCC Rcd at 5942

<sup>29</sup> The comments suggested additional studies to examine the following questions: "(1) has the relaxation of the TV duopoly rules affected the number of television stations owned by minorities and women? ; (2) has re-implementation of the failed station solicitation rule increased minority and female ownership? ; (3) has the relaxation of the radio rules (both generally and by counting noncommercial stations in the numerical limits) affected the number of stations owned or controlled by minorities and women? ; (4) has the FCC's decision to permit the transfer of grandfathered combinations in violation of the local ownership limits to certain eligible small businesses resulted in an increase in the number of broadcast stations owned by women or minorities?" Comments of UCC OC Inc. et al., MB Dkt. 09-182, at 2 (filed July 7, 2010).

<sup>30</sup> *Prometheus II*, 652 F.3d at 471.

<sup>31</sup> *Id.*



such that studies will be available for public review *in time for the completion of the 2010 Quadrennial Review*.<sup>32</sup>

Instead, the Commission concludes in its notice at ¶158, “We recognize that the data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission. Although we would prefer to be able to propose specific actions in response to the Third Circuit’s remand of the measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time.”

The Commission’s failure in light of the need and the court’s directives are difficult to comprehend particularly for an agency that has championed data-driven decision-making.<sup>33</sup> The Commission is ignoring the impact on ownership by women and people of color and is failing to get the data it needs to address the problem. These actions seriously threaten the likelihood of getting diverse viewpoints through the airwaves, and is a matter of grave concern for the constituencies that The Leadership Conference represents.

We plan to actively participate in this proceeding and would appreciate meeting with you at the earliest opportunity to discuss these matters. Please contact Leadership Conference Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, UCC Office of Communication, Inc., at 202-841-6033, or Chris Calabrese, ACLU, at 202-715-0839, or Corrine Yu, Leadership Conference Managing Policy Director at 202-466-5670, if you would like to discuss the above issues or any other issues of importance to The Leadership Conference.

Sincerely,

American Civil Liberties Union  
Center for Community Change  
Common Cause  
Communications Workers of America  
Leadership Conference on Civil and Human Rights  
NAACP  
National Organization for Women Foundation  
United Church of Christ, Office of Communication, Inc.

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<sup>32</sup> *Prometheus II*, 652 F.3d at 471 n.42 (emphasis added).

<sup>33</sup> See, e.g., News Release, FCC Launches Data Innovation Initiative, June 29, 2010.