

Minority Media and Telecommunications Council

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November 28, 2012

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication, MB Docket No. 09-182 (2010 Quadrennial Review), MB Docket No. 07-294 (Diversity Proceeding), IB Docket No. 11-133 (Foreign Ownership), Docket No. 12-268 (Incentive Auctions)

Dear Ms. Dortch:

This reports on meetings held on November 27, 2012 with Commissioner Robert W. McDowell and Legal Advisor Erin A. McGrath; and Commissioner Ajit Pai and Legal Advisor Nicholas Degani. MMTC representatives David Honig, President, Maurita Coley, Chief Operating Officer, and Kenneth Mallory, Staff Counsel, were also present at the meetings.

During the meetings I made the following points:

- In the media ownership proceeding, MMTC filed comments regarding several structural rules. MMTC has revised its position on cross-ownership to support the relaxation of the television station/newspaper cross-ownership rule, so long as relaxation of the rule would not harm the state of minority ownership. However, MMTC does not support further relaxation of the television duopoly rule or the radio/TV crossownership rule because of the harmful impact we believe these combinations have on minority ownership. Further, MMTC supports waivers of the local radio rule for broadcasters if they finance and incubate small and disadvantaged businesses so as to create a new voice.
- MMTC does not want the media ownership proceeding to be significantly delayed. While we applaud the Commission for its efforts to collect data, and we agree that it is important for the Commission to complete studies on the state of diversity in media, to collect data, and to build a record to implement race-conscious policies pursuant to

Adarand,¹ the Diversity and Competition Supporters, a coalition of 50 organizations, submitted 47 race-neutral proposals in the Quadrennial Review Proceeding that do not require the studies that are required to implement race-conscious policies.² Some of the proposals include relaxing the Commission's restrictions on foreign investment in broadcast ownership found in 47 USC §310(b)(4),³ providing incentives through structural rule waivers for broadcast companies who help finance and incubate small and disadvantaged businesses,⁴ and promoting AM Channels 5 and 6 migration.⁵ We recommend that the Commission rule on these race-neutral proposals – most of which are unopposed - while developing studies on the mechanics and potential desirability of race-conscious measures.⁶

- With respect to merger policy, we hope to see the Commission continue to focus on entrepreneurial opportunity as a way to further the public interest. We would like to see the Commission create a public interest statement or “best practices” guidelines for wireless mergers and asset sales that would provide clarity for investors. The Commission should work with the Department of Justice to consider the many variables as to what constitutes “the market,” including whether the company serves traditionally underserved populations, and what impact a merger would have on those consumers.
- The Incentive Auction Notice of Proposed Rulemaking is deficient in that the FCC failed to solicit comments and therefore provide adequate notice of the Diversity Committee's existing race and gender neutral proposal on the Overcoming Disadvantage Preference, which has been pending at the Commission since 2010.⁷ A full record on this question is necessary in light of Prometheus I and Prometheus II.⁸

¹ See Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995) (“Adarand”) (supporting the proposition that all race-based government action is analyzed under strict scrutiny review and must be narrowly tailored to further a compelling government interest).

² See Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, MB Docket Nos. 09-182, 07-294 (March 5, 2012) (“Initial Comments of DCS”).

³ See Supplemental Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, MB Docket Nos. 09-182, 07-0294, pp. 9-10 (April 3, 2012) (“Supplemental Comments of DCS”).

⁴ See id. at pp. 4-6.

⁵ See id. at pp. 11-12.

⁶ See Parents Involved in Community Schools v. Seattle School District No. 1 et al., 551 U.S. 701, 798 (2007) (Kennedy, A., concurring) (“measures other than differential treatment based on racial typing of individuals first must be exhausted.”)

⁷ See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking, 2012 FCC LEXIS 4169 ¶296 (2012). Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference

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During the meetings, I circulated copies of the Diversity and Competition Supporters' comments filed in the media ownership proceeding,⁹ along with a transcript of an op-ed I wrote on the state of minority broadcast ownership,¹⁰ and a copy of an amicus brief MMTC filed along with six former commissioners and a former commission general counsel in the Fisher v. University of Texas case currently being reviewed by the U.S. Supreme Court.¹¹

Respectfully submitted,

David Honig

David Honig
President

for Overcoming Disadvantage, Public Notice, 25 FCC Rcd 16854 (rel. Dec. 2, 2010); Preference of Overcoming Disadvantage, Advisory Committee on Diversity for Communications in the Digital Age, Oct. 14, 2010, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Recommendation on Preference for Overcoming Disadvantage” (last visited Oct. 26, 2012).

⁸ See Prometheus Radio Proj. v. FCC, 373 F.3d 372, 420-421 (3d Cir. 2004) (“Prometheus I”). See also Prometheus Radio Proj. v. FCC, 652 F.3d 431, 472 (3d Cir. 2011) (“Prometheus II”) (retaining jurisdiction while vacating and remanding various FCC rules, including those that relied on the arbitrary and capricious definition of eligible entities).

⁹ See Initial Comments of DCS and Supplemental Comments of DCS.

¹⁰ See David Honig, The FCC Must Act Now to Rescue Minority Broadcast Ownership, Broadband and Social Justice Blog (Nov. 20, 2012), available at <http://broadbandandsocialjustice.org/2012/11/the-fcc-must-act-now-to-rescue-minority-broadcast-ownership/> (last visited November 27, 2012).

¹¹ Fisher v. University of Texas, 631 F.3d 213 (2011), cert. granted, 2012 U.S. LEXIS 1652 (2012).