

# Minority Media and Telecommunications Council

3636 16<sup>th</sup> Street N.W., Suite B-366  
Washington, D.C. 20010  
Phone: 202-332-0500 Fax: 202-332-0503  
[www.mmtconline.org](http://www.mmtconline.org)

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December 5, 2012

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

RE: Supplement to the 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 is a supplement to the notice of *Ex Parte* Communications reporting on meetings on November 29 with: 1) Commissioner Jessica Rosenworcel, 2) Chairman Julius Genachowski, and 3) the Media Bureau and other offices.

After the meeting with the Media Bureau concluded, representatives of MMTC and NABOB continued the meeting in the offices of FCC Commissioner Clyburn with her and her staff. The same topics were discussed as previously reported.

Respectfully submitted,

*David Honig*

David Honig  
President  
Email: [dhonig@crosslink.net](mailto:dhonig@crosslink.net)

Attachment: 11/29/2012 *Ex Parte* Notice

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December 3, 2012  
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**Attached: 11/29/2012 *Ex Parte* Notice**

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Marlene Dortch, Esq.  
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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 Notice of *Ex Parte* Communications reports on meetings November 29 with: 1) Commissioner Jessica Rosenworcel, 2) Chairman Julius Genachowski, and 3) the Media Bureau and other offices.

**1) Commissioner Jessica Rosenworcel**

This reports on a meeting with Commissioner Jessica Rosenworcel and Policy Director Alex Hohen-Saric. MMTC representatives David Honig, President, Maurita Coley, Chief Operating Officer, and DeVan Hankerson, Director of Research, were present at the meeting.

During the meeting, 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 cross-ownership 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. We believe that due to the rate at which minority owners are disappearing, significant delays would have a devastating impact on minority ownership. 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

that could make it possible to implement race-conscious policies pursuant to Adarand.<sup>1</sup> However, there remain pending 47 race-neutral proposals submitted by the Diversity and Competition Supporters, a coalition of 50 organizations, in the Quadrennial Review Proceeding. These proposals do not require the studies that are required to implement race-conscious policies.<sup>2</sup> Some of the proposals include relaxing the Commission's restrictions on foreign investment in broadcast ownership found in 47 USC §310(b)(4),<sup>3</sup> providing incentives through structural rule waivers for broadcast companies who help finance and incubate small and disadvantaged businesses,<sup>4</sup> and promoting AM Channels 5 and 6 migration.<sup>5</sup> 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.<sup>6</sup>

- MMTC supports the Commission's short-term focus on the Form 323 data in the Report on Ownership of Commercial Broadcast Stations, but we believe this information is just a snapshot of the impact and practical implications of the rules. We believe that an additional comment process should not exceed 20 days with 10 days for reply comments and should conclude in January of 2013.
- MMTC wants to also support consensus, where possible, among the community of public interest and consumer groups, particularly as it relates to issues of structural ownership and cross-ownership. We hope to follow-up with the Commission on these issues after an upcoming meeting planned for December for public interest stakeholders.
- 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

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<sup>1</sup> 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).

<sup>2</sup> 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").

<sup>3</sup> 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").

<sup>4</sup> See id. at pp. 4-6.

<sup>5</sup> See id. at pp. 11-12.

<sup>6</sup> 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") ("Parents Involved").

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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, i.e., the Overcoming Disadvantage Preference, which has been pending at the Commission since 2010.<sup>7</sup> A full record on this question is necessary in light of Prometheus I and Prometheus II.<sup>8</sup>

During the meeting, I circulated copies of the Diversity and Competition Supporters’ comments filed in the media ownership proceeding,<sup>9</sup> along with an op-ed I wrote on the state of minority broadcast ownership,<sup>10</sup> and the amicus brief MMTC filed along with six former commissioners and a former commission general counsel in the Fisher v. University of Texas case currently under consideration by the U.S. Supreme Court.<sup>11</sup>

## 2) Chairman Julius Genachowski

This reports on a brief meeting with Chairman Genachowski; MMTC representatives David Honig, President; Maurita Coley, Chief Operating Officer; and DeVan Hankerson, Director of Research, were also present. During the meeting I made the following points:

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<sup>7</sup> 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 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” (“Overcoming Disadvantage Proposal”).

<sup>8</sup> 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).

<sup>9</sup> See Initial Comments of DCS and Supplemental Comments of DCS.

<sup>10</sup> 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).

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

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- MMTC does not support a significant delay in the media ownership proceeding. We believe that significant delays in that proceeding would have a devastating impact on the steady decline in minority owners in the broadcasting industry.
- We do, however, support additional time to consider the impact of some of the Commission's proposals on minority ownership. We believe that thirty additional days for the parties to file comments on that issue and others would be beneficial; for example, we would support a twenty-day lightning round of comments with ten days for reply comments. The use of this brief extension of time to improve the record on the many specific pending proposals aimed at advancing minority ownership, and to improve upon the research needed to ensure that decisions made in this area are well supported and wise, would be desirable.

### 3) **Media Bureau and other offices**

This reports on a meeting with William Lake, Media Bureau Chief; Sarah Whitesell, Deputy Chief, Media Bureau; Martha Heller, Deputy Chief, Industry Analysis Division, Media Bureau; Hillary DeNigro, Chief, Investigations and Hearings Division, Media Bureau; Brendan Holland, Assistant Division Chief, Industry Analysis Division, Media Bureau; Thomas Reed, Director, Office of Business Communications Opportunities; Elizabeth Andrion, Acting Chief Counsel and Senior Legal Advisor to FCC Chairman Julius Genachowski; FCC Commissioner Mignon Clyburn; Dave Grimaldi, Chief of Staff and Media Advisor for FCC Commissioner Mignon Clyburn; and Louis Paraertz, Legal Advisor, Wireless, International and Public Safety for FCC Commissioner Mignon Clyburn. Also present were James Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters (NABOB); Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters (NAB); Erin Dozier, Senior Vice President and Deputy General Counsel, National Association of Broadcasters (NAB), and Angela Campbell, Professor of Law, Georgetown Institute for Public Representation. Representing MMTC were David Honig, President; Maurita Coley, Chief Operating Officer; Joycelyn James, Senior Attorney and Cathy Hughes Fellow, and DeVan Hankerson, Director of Research.

During the meeting I made the following points:

- MMTC does not want the media ownership proceeding to be significantly delayed. We believe that due to the rate at which minority owners are disappearing, significant delays would have a devastating impact on minority ownership. 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 that could make it possible to implement race-conscious policies pursuant to Adarand.<sup>12</sup> However, there remain pending 47 race-neutral proposals submitted by the Diversity and Competition Supporters, a coalition of 50 organizations, in the Quadrennial Review Proceeding. These proposals do not require the studies that are required to implement

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<sup>12</sup> See Adarand at p. 227.

race-conscious policies.<sup>13</sup> Some of the proposals include relaxing the Commission's restrictions on foreign investment in broadcast ownership found in 47 USC §310(b)(4),<sup>14</sup> providing incentives through structural rule waivers for broadcast companies who help finance and incubate small and disadvantaged businesses,<sup>15</sup> and promoting AM Channels 5 and 6 migration.<sup>16</sup> 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.<sup>17</sup>

- MMTC supports the Commission in its consideration of the ODP standard<sup>18</sup>, as it is a race-neutral proposal. We believe that although the use of an individualized assessment in the ODP has some subjectivity, the Commission is uniquely equipped to resolve these issues and reduce the extent of subjectivity. We encourage the interest and engagement the Commission has shown as demonstrated by a Commissioner's suggestion to use the incubator program to pilot the ODP program. MMTC supports this approach, as it is better than non-action at the Commission on the issue of minority-ownership. We recommend that the Commission view the ODP as an option.
- MMTC does not want the Third Circuit court to issue a third remand on the issue of the Commissioner's diversity initiatives, and we propose adoption of the 47 race-neutral media proposals while the Commission simultaneously conducts the studies on the state of diversity in media pursuant to Adarand.<sup>19</sup> We recommend attention be given to the court's response if concrete plans, inclusive of accountability measures and realistic timelines, are not drafted. We do not support the use of the small business definition in the context of minority ownership; we believe it to be ineffectual, irrespective of the standard of review.
- MMTC supports use of the ODP standard as proposed in by the Diversity Committee, as it is a defined and targeted standard as opposed to the highly dilute small business definition. We hope that the Commission will track minority ownership rates with the level of commitment that it tracks broadband statistics on telecom and broadband adoption and use. On the issue of the nexus between minority ownership and diverse content, we must highlight the significant body of evidence that demonstrates that there is a rational basis for connecting the two.

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<sup>13</sup> See Initial Comments of DCS.

<sup>14</sup> See Supplemental Comments of DCS at pp. 9-10.

<sup>15</sup> See id. at pp. 4-6.

<sup>16</sup> See id. at pp. 11-12.

<sup>17</sup> See Parents Involved at p. 798.

<sup>18</sup> See Overcoming Disadvantage Proposal.

<sup>19</sup> See Adarand at p. 227.

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- MMTC supports the Commission's short-term focus on the Form 323 data in the Report on Ownership of Commercial Broadcast Stations, but we believe this information is just a snapshot of the impact and practical implications of the rules. We believe that an additional comment process should not exceed 20 days with 10 days for reply comments and should conclude in January of 2013.
- 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, i.e., the Overcoming Disadvantage Preference, which has been pending at the Commission since 2010.<sup>20</sup> A full record on this question is necessary in light of Prometheus I and Prometheus II.<sup>21</sup>

Respectfully submitted,

*David Honig*

David Honig

President

Email: [dhonig@crosslink.net](mailto:dhonig@crosslink.net)

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<sup>20</sup> See Overcoming Disadvantage Proposal.

<sup>21</sup> See Prometheus I at pp. 420-421. See also Prometheus II at p. 472.