

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

1201 Connecticut Avenue, N.W., Suite 200, Washington, D.C. 20036
(202) 463-8970 • Fax: (202) 429-0657

BOARD OF DIRECTORS

BENNIE L. TURNER
President

MICHAEL L. CARTER
Vice President

KAREN E. SLADE
Treasurer

LOIS E. WRIGHT
Counsel to the Board

CAROL MOORE CUTTING
*Northeastern Regional
Representative*

ALFRED G. LIGGINS, *Southeastern
Regional Representative*

JAMES E. WOLFE, Jr., *Midwestern
Regional Representative*

MICHAEL V. ROBERTS
Television Representative

ARTHUR BENJAMIN
*Mid-Atlantic Regional
Representative*

WASHINGTON OFFICE

JAMES L. WINSTON
*Executive Director
and General Counsel*

December 11, 2012

VIA ELECTRONIC FILING

Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: MB Docket No. 09-182 (2010 Quadrennial Review), MB Docket
No. 07-294 (Diversification of Ownership)**

Dear Chairman Genachowski:

The National Association of Black Owned Broadcasters, Inc. ("NABOB") is very concerned about the reported intention of the Commission: (1) to further relax its media ownership rules, specifically its television-newspaper cross-ownership rule and its radio-newspaper cross-ownership rule, and (2) to adopt a definition of "eligible entity" that still will not be designed to increase ownership of broadcast facilities by minorities, seventeen years after the *Adarand*¹ decision.²

Any relaxation of any of the Commission's ownership rules will further the ongoing precipitous decline in minority broadcast ownership. NABOB urges the Commission to delay issuance of the report and order in this proceeding until the Commission has adopted a policy to promote minority ownership of broadcast

¹ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995).

² NABOB, in joint comments with the Rainbow PUSH Coalition, has participated in all of the Commission's previous quadrennial reviews, and has put forth numerous proposals for the promotion of minority ownership. In this quadrennial review, however, NABOB joined the Diversity and Competition Supporters coalition in their initial comments. Given the reported direction the Commission apparently is taking in this proceeding, NABOB will file separately going forward in this proceeding.

facilities, as required by the U.S. Third Circuit Court of Appeals in the *Prometheus* case.³ If the Commission proceeds to adopt a report and order at this time, and that report and order does not adopt a policy to promote minority ownership, the Commission must, at a bare minimum, provide a clear commitment, complete with a timetable, for completing the necessary studies and for adopting such a policy.

I. The *Prometheus II* Decision Requires The Commission To Refrain From Changing Any Of Its Media Ownership Rules Until It Has Determined The Impact Of Any Such Changes On Minority Ownership

In the *Prometheus II* decision, the Third Circuit Court of Appeals stated:

Despite our prior remand [in *Prometheus I*] requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue.⁴

The Court then instructed the Commission to: (1) “consider the effect of its rules on minority and female ownership,”⁵ (2) consider alternative proposals and definitions for the revenue-based eligible entity definition (such as a socially disadvantaged business (SDB) definition) “before it completes its 2010 Quadrennial Review,”⁶ and (3) “synthesize and release existing data [on female and minority ownership] such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.”⁷

Unfortunately, the Commission expressed in the NPRM in this proceeding that it has no intention of completing the work directed by the Court. Thus, in the NPRM in this proceeding the Commission stated, “[T]he 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.”⁸ The Commission continued, “[W]e plan to

³ *Prometheus Radio Project v. Federal Communications Commission*, 652 F.3d 431 (3d Cir. 2011) (“*Prometheus II*”).

⁴ *Prometheus II*, 652 F.3d at 471.

⁵ *Id.*

⁶ *Id.* at 438, 471.

⁷ *Id.* at 471 n. 42.

⁸ 2012 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules, and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 09-182, FCC 11-186 (December 22, 2011) (“NPRM”), at par. 158.

undertake the following actions in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity, including female and minority ownership.”⁹ However this rationale for doing nothing in this proceeding was rejected by the Court in *Prometheus II*:

Stating that the task is difficult in light of *Adarand* does not constitute “considering” proposals using an SDB definition. 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.¹⁰

In spite of these clear instructions from the Court, the Commission is apparently preparing to issue a report and order in this proceeding that accomplishes nothing the Court directed it to achieve with respect to promotion of minority ownership.¹¹ The *Prometheus II* decision makes clear that the Commission may not relax any of its rules until it “considers the effect of its rules on minority and female ownership.”¹² To do otherwise would ignore the clear directions of the Court, and constitute a failure to meet the Commission’s statutory obligation to promote minority ownership.

II. Relaxation Of The Commission’s Cross-Ownership Rules Will Negatively Impact Minority Ownership

The Court’s decision in *Prometheus II* placed upon the Commission the burden of demonstrating that a relaxation of any of its ownership rules will not negatively impact minority ownership. This is a burden the Commission cannot meet, because the relaxation of any of its ownership rules will have a negative impact on minority ownership. As shall be described in

⁹ *Id.*

¹⁰ *Prometheus II*, 652 F.3d at 471 n. 42.

¹¹ On December 3, 2012, the Commission issued a Public Notice announcing a thirty day window for parties to comment on the data released by the Commission on November 14, 2012, in this proceeding, reporting the results of the Commission’s data collection on the ownership of broadcast facilities, which includes information on the ownership by minorities and women. However, it is clear from press reports that the Commission had concluded its Quadrennial Review before this data was made available to the public. This raises questions about the extent to which public comment will be considered in the report and order in this proceeding.

¹² *Prometheus II*, 652 F.3d at 471.

Section IV below, the consolidation of ownership in the broadcast industry over the past sixteen years has had a devastating effect on minority ownership. The manner in which that consolidation affects the average minority station owner is as follows:

Minority radio station owners generally tend to own one or two radio stations. When, in 1996, large companies were allowed to own up to eight radio stations in the largest markets, minority owners found themselves in a very difficult position. Large radio group owners could approach advertisers with a single sales force offering up to eight different radio formats, including perhaps a format specifically targeting minority audiences, and purport to deliver all of the desired demographics for that advertiser. A minority owner, programming only to the minority audience, could find advertisers declining to advertise on the minority owned station, based upon the purported ability of the group owner to deliver the minority audience as part of a group buy, at a discounted price.

If these same large radio group owners are now allowed to combine their multiple station ownership advantage with ownership of a daily newspaper, the group owner will be able to combine the radio and newspaper sales forces, and will be able to offer advertisers a combined radio-newspaper buy, which will leave minority owners even more disadvantaged in their efforts to compete in the marketplace.¹³ If the Commission looks at the potential impact of further relaxation of its cross-ownership rules on minority owners, it will see that further relaxation of its ownership rules can only have a negative impact and will further the decline of minority broadcast station ownership.

III. The Commission Must, At A Bare Minimum, Provide A Clear Commitment To Developing A Policy To Promote Minority Ownership, With A Timetable For Completing The Necessary Studies To Adopt Such A Policy

As stated above, the Commission is obligated by the *Prometheus II* decision to continue this proceeding until it has completed the studies required and adopted a policy to promote minority ownership. However, if the Commission proceeds to adopt a report and order in this proceeding without adopting such a policy, the Commission must, at a minimum, demonstrate to

¹³ This discussion of the disadvantage at which minority radio stations must compete is even more applicable to minority television station owners. The television industry is much more difficult for minorities to enter and compete, because, unlike radio, existing owners can purchase all of the most desirable programming and deny a small station access to that programming. In radio, a small station can obtain access to the same music as all existing competitors. Indeed, the Commission's ownership data which shows the continuing precipitous decline of African American owned television stations, supports the arguments presented here.

the Third Circuit Court of Appeals¹⁴ that it is not ignoring this issue or putting it off until some unspecified date in the future.

The Commission should set forth in this order:

1. The studies previously prepared by the Commission or others, which the Commission believes will help meet the requirements of the *Adarand* decision.
2. The studies the Commission will prepare that will provide the final information required to comply with the requirements of the *Adarand* decision.
3. The timetable when the Commission will complete these studies.
4. The timetable when the Commission will complete its analysis for adopting a new policy to promote minority ownership.¹⁵

IV. The Commission Must Act To Reverse the Decline in Minority Ownership In This Proceeding

The decline in minority ownership of broadcast facilities has been building for over a decade.

A. In 1995, over the strenuous objections of NABOB and various public interest organizations, Congress passed, and the President signed, legislation repealing the minority tax certificate. Also in 1995, the Supreme Court issued the *Adarand* decision, which the Commission has interpreted to preclude it from having a minority ownership policy. In 1996, Congress passed, and the President signed, the Telecommunications Act of 1996, which allowed broadcast companies to own an unlimited number of radio stations nationwide and as many as eight in a single market. It also allowed greater concentration of ownership of television stations.

¹⁴ In the *Prometheus II* decision, the Court remanded the case to the Commission, but retained jurisdiction. 652 F.3d at 472. Thus, the Court has clearly indicated its intention to review any action, or failure to act, by the Commission in this proceeding.

¹⁵ NABOB recognizes that the Commission cannot prejudge the results of its studies, and therefore cannot promise to create a policy that is specifically designed to promote minority ownership. However, the Commission can establish a timetable by which it will determine whether it can create a policy to promote minority ownership.

B. Over the next decade a handful of major companies consolidated their ownership of the broadcast industry. This resulted in a precipitous decline in the number of African American companies owning broadcast stations.

NABOB's data show the following declines for African American companies owning broadcast stations:

1995	Radio companies	146
	TV companies	10
	Radio stations	250
	TV stations	23
2012	Radio companies	68
	TV companies	5
	Radio stations	225
	TV stations	8

C. This situation has gotten even worse because of the current recession. From 2005 to 2009, at least 59 minority owned radio stations were transferred to bankruptcy trustees, trusts established for the benefit of creditors, or to trustees for debtors-in-possession attempting to reorganize under Chapter 11 of the Bankruptcy Code.¹⁶ Most of these bankruptcy cases resulted in the minority owners losing ownership of the stations. In addition, 18 minority owned stations requested permission from the Commission to cease operations due to financial difficulties.¹⁷

V. Conclusion

The Commission has for decades recognized that diversity of ownership in the nation's broadcast industry is an important part of protecting the First Amendment rights of all Americans to receive a free flow of information and opinion from diverse voices. The voices of minority communities are being silenced by the decline in minority ownership. The Commission must take concrete steps to end this loss of voices.

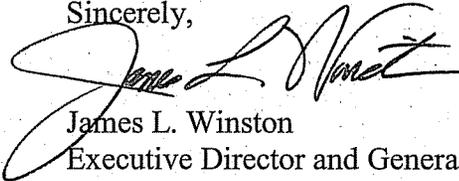
¹⁶ *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, by Catherine J. K. Sandoval, Assistant Professor, Santa Clara University School of Law, November 2009 (the "Sandoval Study").

¹⁷ *Id.* The Sandoval Study has not been updated since 2009, but press reports indicate that this trend of bankruptcies is continuing.

Chairman Julius Genachowski
December 11, 2012
Page Seven

It has been seventeen years since the U. S. Supreme Court's decision in *Adarand*, and the Commission has been without a policy to promote minority ownership for that entire time period. An order in this proceeding which continues the long history of dawdling and delay that has characterized the Commission's approach to creating such a policy will send a very negative message to minority communities and the Court of Appeals. NABOB urges the Commission to end the delay and move with conviction and determination to create a policy that will help to slow the continuing decline in minority ownership.

Sincerely,



James L. Winston
Executive Director and General Counsel

JLW/kn

cc: Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai