

Minority Media and Telecommunications Council

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January 10, 2013

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 Auction)

Dear Ms. Dortch:

This reports on a meeting held January 9, 2013 with Elizabeth Andrion, Acting Chief Counsel and Senior Legal Advisor to Chairman Genachowski. MMTTC representatives David Honig, President, and Maurita Coley, Chief Operating Officer, were also present at the meeting.

During the meeting I made the following points:

1. 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 Overcoming Disadvantage Preference, which has been pending at the Commission since 2010.¹ A full record on this question is necessary in light of *Prometheus I* and *II*.² Incentive auctions should be considered in conjunction with the Overcoming Disadvantages Preference, designated entities, and bidding credits

¹ See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking, 2012 FCC LEXIS 4169 ¶296 (2012). See also 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 for 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).

² 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).

paradigms. The FCC has been on the record for many years saying that minority ownership is intertwined with diversity. It is inappropriate to separate diversity issues from these major proceedings.

2. MMTC reiterated its stance on cross-ownership such that we no longer object to the relaxation of the newspaper-broadcast cross-ownership rule **so long as it does not diminish minority ownership**.³ Cross-ownership today would usually further the public interest by supporting print and broadcast journalism and helping to invigorate a declining newspaper industry.⁴ The FCC could alleviate some of the concerns raised by opponents of this rule change because of its potential adverse impact on media diversity by implementing pending proposals to increase diversity. Structural rule changes, such as the incubator proposal,⁵ would create new voices in the industry. MMTC is opposed to bifurcating diversity issues from media ownership issues. If these dockets are separated, the momentum to address diversity issues will fall. The FCC should use the approach used in 2006 Quadrennial, which was released in December, 2007; namely, to tee up the diversity issues in the media ownership proceedings, rule on some of the issues in this proceeding, and issue a further notice to decide on the diversity proposals that are not ripe for consideration in this proceeding. Examples of the success of this approach include the advertising non-discrimination rule which came out of that proceeding.
3. MMTC reiterated its point that the Commission's rule restricting foreign investment in broadcasting (Section 310 (b)(4) of the Communications Act) is outdated. Much has changed since the policy's rationale was developed in 1912. Today, one of the primary barriers to diverse participation in broadcasting is access to capital. Foreign sources are looking to infuse capital in our broadcast service and are open to reciprocity. Relaxing broadcast foreign ownership restrictions to grant the Media Bureau discretion to review applications and decide on a case-by-case basis whether to allow foreign investment in broadcasting could make a big difference for diverse and multi-lingual broadcasting. Something has to be done to stop the slow decline of radio broadcasting.⁶
4. A coalition of 50 organizations submitted 47 race-neutral proposals in the Quadrennial Review proceeding.⁷ We hope the Commission will begin to rule on these proposals while

³ 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) at p. 40, available at <http://apps.fcc.gov/ecfs/document/view?id=7021898416> (last visited Jan. 10, 2012) ("Initial Comments of DCS").

⁴ See *id.* at pp. 41- 42.

⁵ See *id.* at p. 22.

⁶ Radio still has America's ear for more than an hour and a half each day, See, e.g., Inside Radio (Oct. 24, 2012) (chart attached).

⁷ See Initial Comments of DCS at pp. 45- 46.

developing studies on the mechanics and potential desirability of race-conscious measures.⁸ Under Adarand, it is appropriate to have an intention to benefit minorities as long as the implementation is race-neutral. As noted in item #2 above, the Commission should address the 47 race-neutral diversity proposals as the Commission addressed them in the 2007 Quadrennial.

5. Proposals that rely on the vacated eligible entity definition should not be abandoned; instead the Commission should consider race-neutral measures, such as the Diversity Committee's Overcoming Disadvantages Preference, that could apply to these proposals while the Commission works to create a valid eligible entities definition.⁹ The Overcoming Disadvantages Preference (ODP) recommended by the Commissioner's Diversity Committee may be imperfect; however we recommend that the Commission adopt it on a trial basis, with appropriate caps that would prevent abuse by applicants who are not intended to be benefited by the ODP.
6. Incubator Proposal: While the Commission conducts its participation studies, it should adopt NABOB's and MMTC's incubator proposal, using the Overcoming Disadvantages Preference, on an interim basis.
7. With respect to merger policy, we have been very grateful for efforts made by the Commission to include entrepreneurial opportunities in its consideration. We hope to see the Commission continue to focus on entrepreneurial opportunity as a way to further the public interest. Further, the Commission should also 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.
8. The due date for the 2012 Section 257 Report has passed (December 31, 2012). The last two reports were late.¹⁰ MMTC hopes that the Commission will complete the 257 Report in a timely and thorough manner.

⁸ 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").

⁹ See Initial Comments of DCS at p. 21.

¹⁰ The Commission submitted its first report in 1997. See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 12 FCC Rcd 16,802 (rel. May 8, 1997). The second report was released 2000. See Section 257 Report to Congress, 15 FCC Rcd 15,376 (rel. Aug. 10, 2000). The third report was adopted on December 31, 2003 and released in 2004. See Section 257 Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, 19 FCC Rcd 3034 (rel. Feb. 12, 2004). The fourth report, due in 2006, was released several months late in 2007. See Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 22 FCC Rcd 21,132 (rel. Dec. 6, 2007). The fifth report, due in 2009, was released in

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Respectfully submitted,

David Honig

David Honig
President and Executive Director

2011. See Section 257 Triennial Report to Congress, Identifying and Eliminating, Market Entry Barriers, For Entrepreneurs and Other, Small Businesses, 26 FCC Rcd 2909 (rel. March 3, 2011).

Inside Radio Article (Oct. 24, 2012)

- Television, Online, and Radio comprise the top three consumption platforms.
- Radio still has a large audience tuning in even without data on the digital audience.
 - Average adult consumes 92 minutes of radio daily.
 - This is a slight decrease from previous years (down 2 minutes from 2011) but not an alarming one.

Average Time Spent per Day with Major Media by US Adults, 2009-2012				
<i>minutes</i>				
	2009	2010	2011	2012
TV	267	264	274	278
Online	146	155	167	173
Radio	98	96	94	92
Mobile (nonvoice)	22	34	54	82
Print*	55	50	44	38
—Newspapers	33	30	26	22
—Magazines	22	20	18	16
Other	44	47	45	36
Total	632	646	678	699

*Note: time spent with each medium includes all time spent with that medium, regardless of multitasking; for example, 1 hour of multitasking on a PC while watching TV is counted as 1 hour for TV and 1 hour for online;
*offline reading only
Source: eMarketer, Oct 2012*

Chart Reference:

Radio still has America's ear for more than an hour and a half each day, Inside Radio (Oct. 24, 2012)