

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
2014 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)	MB Docket No. 14-50
)	
)	MB Docket No. 09-182
2010 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)	
)	
)	MB Docket No. 07-294
)	
Promoting Diversification of Ownership In the Broadcasting Services)	MB Docket No. 04-256
)	
Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets)	

To The Commission

**COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS
COUNCIL IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED
RULEMAKING**

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Summary

The Minority Media and Telecommunications Council (“MMTC”) cannot support the lack of any meaningful progress on diversity initiatives pending before the Commission. The *Further Notice of Proposed Rulemaking* (“*FNPRM*”) released April 15, 2014, contains numerous fatal flaws, as detailed in our Petition for Clarification, filed with the Commission on June 13, 2014 and challenges in the D.C. Circuit of the U.S. Court of Appeals. Notably, the Commission summarily dismissed 23 specific diversity proposals without analysis and the Commission failed to justify its inaction in developing a constitutionally sustainable eligible entities program. The flawed *FNPRM* and uncertainty in the status of this proceeding make filing extensive comments at this time futile. Thus, MMTC files these abbreviated comments to preserve issues on the record from the above captioned proceedings, and attaches our Motion to for Leave to Intervene filed with the D.C. Circuit of the U.S. Court of Appeals, discussing the flaws in the *FNPRM*.

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The Minority Media and Telecommunications Council (“MMTC”) submits these comments in response to the *Further Notice of Proposed Rulemaking* (“FNPRM”) released April 15, 2014.¹ While we note the completion of the 2010 quadrennial ownership review after much delay, we believe that the current *FNPRM* contains numerous flaws, as detailed in our Petition

¹ See *2014 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 and Report and Order*, MB Docket No. 14-50, 29 FCC Rcd 4371 (Apr. 15, 2014) (“FNPRM”).

for Clarification, filed with the Commission on June 13, 2014.² Numerous parties, including MMTC,³ have also challenged the *FNPRM* in the D.C. Circuit of the U.S. Court of Appeals.⁴ The flawed *FNPRM* and uncertainty in the status of this proceeding make filing extensive comments at this time futile. Thus, MMTC files these abbreviated comments to preserve issues on the record from the above captioned proceedings, and attaches our Motion to for Leave to Intervene filed with the D.C. Circuit of the U.S. Court of Appeals, discussing the flaws in the *FNPRM*.

I. There Are Numerous Flaws in the *FNPRM* that Preclude the Commission from Achieving its Policy Goals

The Commission’s stated goals for the *FNPRM* include “fostering competition, localism, and diversity” and it seeks comment on “the appropriate framework within which to evaluate and address minority and female interests as they relate to the broadcast ownership rules.”⁵ Unfortunately, despite these stated goals, the *FNPRM* does not invite comment on many specific proposals, some of which remain pending from the 2006 and 2010 quadrennial review proceedings.

² See Petition for Clarification, MB Docket No. 14-50 (June 13, 2014), available at <http://mmtconline.org/wp-content/uploads/2014/06/MMTC-Rev-Petition-for-Clarification-Quad-Review-06-13-14.pdf> (last visited July 24, 2014). The Commission has yet to act upon this Petition.

³ See *Prometheus Radio Project v. Federal Communications Commission*, Case No. 14-113 (D.C. Cir. filed Jun. 23, 2014) (MMTC Motion for Leave to Intervene); *Howard Stirk Holdings, LLC v. FCC, et al., Order on Motion to Intervene*, No. 14-1090 (D.C. Cir. filed July 21, 2014) (granting MMTC’s motion).

⁴ A number of the cases challenging the *FNPRM* have been consolidated. See, e.g., *Howard Stirk Holdings, LLC v. FCC, et al.*, No. 14-1090 (D.C. Cir. filed July 21, 2014) (consolidating cases 14-1091, 14-1092, and 14-1113), *National Assoc. of Broadcasters v. FCC, et al.*, No. 14-1072 (D.C. Cir. filed June 23, 2014), *Nexstar Broadcasting v. FCC, et al.*, No. 14-1091 (D.C. Cir. filed May 30, 2014), *National Assoc. of Broadcasters v. FCC, et al.*, No. 14-1092 (D.C. Cir. filed June 2, 2014), *Prometheus Radio Project v. FCC, et al.*, No. 14-1113 (D.C. Cir. filed June 18, 2014).

⁵ *FNPRM* at ¶14.

A. Omission of Meaningful Discussion of 23 Diversity Proposals from the 2006 and 2010 Quadrennial Reviews Essentially Uncouples the Diversity Proceeding from the Quadrennial Review.

Given that the quadrennial review from 2010 was incomplete and overdue, the Commission decided to incorporate the record from the 2010 quadrennial review into the 2014 docket to, in part, “resolve the ongoing 2010 proceeding.”⁶ This proceeding also includes *Promoting Diversification of Ownership In the Broadcasting Services* (“*Diversity Docket*”).⁷ However, contrary to its stated intentions, the Commission refused to consider 23 long-pending diversity proposals in the *FNPRM*, despite that they were each squarely within the scope of the *2010 Quad Review* and unquestionably within the scope of the above-captioned *Diversity Docket*.⁸ The Commission’s dispensed with these proposals in a single sentence: “*Although these proposals are accompanied by detailed and thoughtful analysis, and some of them may warrant further consideration, we believe that they are outside the scope of this proceeding (our emphasis added).*”⁹ Thus the omission appears to have swept away these proposals for no valid

⁶ “To accomplish both objectives, with this Further Notice of Proposed Rulemaking (“*FNPRM*”) we are initiating this 2014 Quadrennial Review; incorporating the existing 2010 record into this proceeding.” *FNPRM* at ¶1.

⁷ “Also, we seek additional comment on issues referred to us in the Third Circuit’s remand in *Prometheus II* of certain aspects of the Commission’s 2008 *Diversity Order*.” *FNPRM* at ¶7 citing *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011) (“*Prometheus II*”); see also *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008).

⁸ See *2014 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 and Report and Order*, MB Docket No. 14-50, 79 Fed. Reg. 28995 (May 20, 2014) at ¶317 (“*FNPRM*”). MMTTC lists these proposals, and others that the Commission deferred consideration, to preserve the issues for record, *infra* at Sec. IV.

⁹ *Id.* at ¶¶316-317.

reason, although many of them have been pending before the Commission for years¹⁰ and although many of them could contribute to reversing the paucity of minority and women ownership that has been a stain on the Commission's jurisprudence for decades.

The proposals are within the scope of this proceeding, and the Commission has a poor record of acting on proposals that have been postponed.¹¹ Given the current state of minority ownership, further delay on proposals to increase diversity in media ownership is unacceptable.

B. The Commission Failed to Develop a Meaningful Eligible Entities Program and Mischaracterized the Overcoming Disadvantages Preference.

Despite its stated goals, the *FNPRM* fails to include meaningful proposals to advance diversity, and does not promote the creation of a meaningful eligible entities program as was directed by the Third Circuit of the U.S. Court of Appeals.¹² Despite the Court's clear directives,

¹⁰ For example, five proposals that were introduced by the Commission's Advisory Committee on Diversity for Communications in the Digital Age have languished before the Commission for almost a decade. See Proposals 5, 36, 41, 45, and 46 *infra* at Sec. IV.

¹¹ As documented in our Brief in *Prometheus I*, the Commission failed to act on diversity proposals in at least six proceedings prior to the 2002 ownership proceeding that prompted the initial review before the Third Circuit. See Brief for American Hispanic Owned Radio Assn., *et al.* as Intervenor at 7-9, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004) (No. 03-3388 *et al.*) available at <http://mmtconline.org/lp-pdf/BroadcastOwn-Brief.pdf> (last visited June 4, 2014). There have been a number of proceedings where the Commission "repeatedly failed to keep its promises to consider new minority ownership policies." *Id.* at 7-8. For example, at that time in 2003, "a 1992 structural rulemaking lay dormant for so long that they were rolled into the 1995 minority ownership rulemaking – which also remains dormant. A 1999 rulemaking proposal by Entravision Communications still awaits action. Two 1999 proposals by MMTC, which the FCC deferred for further study in 2001, remain pending and were not mentioned in the R&O." *Id.* at 8 (citations omitted). Other examples include "the 1992 Cable Act implementation proceeding, [where] the FCC ignored proposals for minority ownership filed by one of the only two minority owned cable channels, Caribbean Satellite Network ("CSN") and failed to list CSN in the decision's Appendix as a commenter. In the digital audio broadcasting proceeding, the FCC did not mention the minority ownership issue despite extensive comments, reply comments, and a minority market demand study filed by the NAACP, LULAC and others." *Id.* at 8-9 (citations omitted). Deferring diversity proposals repeatedly – while the underlying problem festers and gets worse – can no longer be deemed acceptable.

¹² *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2003) ("*Prometheus I*"); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011).

the *FNPRM* reverts to the flawed eligible entities definition based upon Small Business Administration size standards with little regard for whether it will effectively promote minority media ownership.¹³ Further, the *FNPRM* discounts a substantive proposal on the record that would advance minority ownership. The Overcoming Disadvantages Preference (“ODP”), presented by the Commission’s own Federal Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”), was mischaracterized as a race-conscious measure that would be subject to heightened scrutiny.¹⁴ Unlike the description given in the *FNPRM*, the ODP proposal recommends a review of an applicant’s ability to overcome disadvantage based on a number of factors not specific to ethnicity or gender.¹⁵ The Diversity Committee recommendations listed eight potential factors for consideration,¹⁶ – none of which is race or gender conscious, or even one step removed from race or gender consciousness, such as

¹³ *FNPRM* at ¶¶243, 267. “We tentatively conclude that a revenue-based eligible entity standard is an appropriate and worthwhile approach for expanding ownership diversity *whether or not the standard is effective in promoting ownership of broadcast stations by women and minorities.*” *Id.* at ¶267 (emphasis added).

¹⁴ *FNPRM* at ¶300 n.915.

¹⁵ See Advisory Committee on Diversity for Communications in the Digital Age. Recommendation on to Preference for Overcoming Disadvantage (Oct. 13, 2010) at 10, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html> then follow link to “[Recommendation on Preference for Overcoming Disadvantage](#)” (last visited July 24, 2014).

¹⁶ *Id.* at 4. “Physical disabilities or psychological disorders that rendered professional or business advancement substantially more difficult than for most individuals; physical or emotional trauma suffered in connection with military service; unequal access to institutions of higher education, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination; unequal access to credit, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination; unequal treatment in hiring, promotions, and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment, or unequal treatment in other business opportunities; exclusion without cause from business or professional organizations or from social and professional associations with students or teachers; retaliatory or discriminatory behavior by an employer or an educational institution; or social patterns or pressures which have discouraged the individual from pursuing education or business opportunities or which have made pursuing such opportunities more difficult.” *Id.*

whether the applicant had experienced race or gender discrimination. Rather, the preference is for whether the applicant has demonstrated the initiative and entrepreneurial spirit that enabled her to overcome her disadvantages.¹⁷ The Commission should do its part to accurately state the nature of the proposal in the *FNPRM* in order to receive meaningful public comment.

II. MMTC Supports the Commission’s Proposal to Monitor Joint Sales and Shared Services Agreements to the Extent that they do not Hinder Minority Participation

MMTC has long supported transparency as to the real party in interest where structural ownership is in question. MMTC supports the Commission’s proposed requirement to disclose shared service agreements (“SSAs”).¹⁸ Numerous parties have already submitted comments on SSAs throughout the 2010 Quadrennial Review proceeding urging the Commission to immediately require disclosures and determine that these arrangements are attributable.¹⁹ Further, MMTC supports the Commission’s action to make television joint sales agreements (“JSAs”) with a 15% advertising time threshold in the same market as attributable.²⁰ However, waivers should be applied to encourage minority ownership. At a time when minority ownership levels are extremely low,²¹ applying a waiver to a carefully crafted JSA or SSA could sometimes support the public interest goals of promote inclusion of MWBEs when used as an incubator to

¹⁷ *See id.* at 5-6.

¹⁸ *FNPRM* ¶¶320, 328-340.

¹⁹ *See e.g. FNPRM* ¶320 (“Commenters in a number of proceedings have expressed concern about the impact on competition, localism, and diversity of agreements whereby one station shares studio space, operational support, staff, programming, and/or other services or support with a separately owned station.”) *See also FNPRM* ¶¶323-327 (summarizing relevant comments submitted in FCC dockets).

²⁰ *FNPRM* ¶¶340-365.

²¹ According to the most recent Form 323 data, racial and ethnic minorities own less than 10% of stations in any broadcast service (*e.g.* full power full power commercial television stations, low power television stations (including Class A stations), commercial AM radio stations and commercial FM radio stations). *See Report on Ownership of Commercial Broadcast Stations*, MB Docket No. 14-50 (rel. June 27, 2014) at ¶¶6-7.

save a struggling station. The Commission should consider waivers to the attribution rules in these very limited circumstances where there is no alternative way to save the television station or promote diversity.²²

III. The Commission Should Consider Preventing Discrimination, and Remediating the Present Effects of Past Discrimination among its Policy Goals.

The *FNPRM* tentatively concludes that preventing discrimination and remediating past discrimination in FCC licensing should not be considered among its policy goals for broadcast structural regulation.²³ The Commission was not persuaded by comments detailing how racists and segregationists were allowed to receive and renew their licenses irrespective of the public interest.²⁴ We encourage the Commission to review the record, particularly the 2010 Initial Comments of the Diversity and Competition Supporters, that detailed the Commission's history of erecting market entry barriers that kept minorities out of the media industry and validating discriminatory practices of segregationist licensees.²⁵ Today's lack of opportunity, inclusion,

²² See MMTTC Supports FCC Action on JSAs and SSAs, available at <http://mmtconline.org/wp-content/uploads/2014/03/MMTC-Release-JSAs-SSAs-030614.pdf> (last visited June 25, 2014).

²³ “We are not persuaded by the comments in the record that it would be appropriate to adopt any additional formal policy goals. We seek comment on this tentative conclusion.” *FNPRM* at ¶14 n. 29, citing Initial Comments of the Diversity and Competition Supporters, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182 (Mar. 5, 2012) at 5, available at <http://mmtconline.org/wp-content/uploads/2012/04/DCS-QuadRev-Comments-030512.pdf> (last visited July 24, 2014) (proposing that the Commission adopt the goals of remediating the present effects of past discrimination and preventing future discrimination).

²⁴ See Comments of the Diversity and Competition Supporters, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182 (June 12, 2010) at 18 n. 63, available at <http://mmtconline.org/wp-content/uploads/2010/04/DCS%202010%20MediaOwnComments%20071210.pdf> (last visited July 24, 2014) (“DCS 2010 NOI Comments”) (citing *Columbus Broadcasting Company, Inc.*, 40 FCC 641 (1965) (issuing only an admonishment in response to the FBI's well-documented allegation that a radio licensee helped incite the 1962 riot in which Whites tried to prevent James Meredith from integrating the University of Mississippi (two people were killed))).

²⁵ See Comments of the Diversity and Competition Supporters, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182 (June 12, 2010) at 18-20 (citing Initial Comments of the Diversity and Competition Supporters, 2002 Biennial Regulatory Review *et al.*, MB Docket No.

and access to capital for minority licensees are continued evidence of the present effects of past discrimination. Efforts to remedy the effects of this discrimination and – as with the EEO rules – to prevent discrimination²⁶ - would support the Commission’s other goals of competition and viewpoint diversity. The agency should therefore include remediation and prevention of discrimination as policy goals.

IV. MMTC Urges the Commission to Adopt the Following 34 Proposals to Encourage Media Ownership by MWBEs, and Incorporates them by Reference from our Previous Comments in these Conjoined Proceedings.

- Proposal 5 Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings²⁷
- Proposal 6 Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations²⁸
- Proposal 7 Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters²⁹
- Proposal 10 Extend the Cable Procurement Rule to Broadcasting³⁰

02-277 (Jan. 2, 2003), pp. 20-31 (detailing how societal discrimination and government inaction caused minorities disproportionate ownership of stations with weak technical facilities and relative exclusion from broadcast ownership) (“2002 Biennial Review Comments”).

²⁶ See e.g. *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM*, 17 FCC Rcd. 24018, 24039 ¶57 (2002).

²⁷ DCS Supplemental NPRM Comments at 13. See also DCS 2007 Initial Comments at pp. 29-30; 2007 DCS Supplemental *Ex Parte* Comments at p. 12; DCS Third FNPRM Comments at pp. 27-29; Recommendations on Spectrum and Access to Capital, New Technologies Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (June 14, 2004) at p. 3, available at http://transition.fcc.gov/DiversityFAC/adopted-recommendations/spectrum_and_access.pdf (last visited July 31, 2014) (“Diversity Committee Recommendations on Spectrum and Access to Capital”).

²⁸ DCS Supplemental NPRM Comments at 14. See also Recommendation of the Funding Acquisition Task Force, Media Issues Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (Dec. 3, 2009) at p. 6, available at <http://transition.fcc.gov/DiversityFAC/meeting120309.html>, then follow link to “Funding Acquisitions” (last visited July 31, 2014) (“Funding Acquisitions Recommendation”).

²⁹ DCS Supplemental NPRM Comments at 15.

³⁰ DCS Supplemental NPRM Comments at 21. See also Recommendation on Procurement Issues, Emerging Technologies Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (June 10, 2008), available at

- Proposal 12 Bifurcate Channels for Share-Times with SDBs³¹
- Proposal 14 Use the Time-Share Rule to Allow Broadcasters to Share Frequencies to Foster Ownership of DTV and FM Subchannels³²
- Proposal 15 Retention On Air of AM Expanded Band Owners' Stations if One of the Stations Is Sold to an SDB³³
- Proposal 16 Relax the Main Studio Rule³⁴
- Proposal 17 Clarify that Eligible Entities Can Obtain 18 Months to Construct Major Modifications of Authorized Facilities³⁵
- Proposal 18 Extend the Three-Year Period for New Stations Construction Permits for Eligible Entities and SDBs³⁶
- Proposal 19 Create Medium-Powered FM Stations³⁷
- Proposal 20 Authorize Interference Agreements³⁸
- Proposal 21 Harmonize Regional Interference Protection Standards; Allow FM Applicants to Specify Class C, CO, C1, C2 and C3 Facilities in Zones I and IA³⁹

<http://transition.fcc.gov/DiversityFAC/061008/procurement-061008.pdf> (last visited July 31, 2014) (“Diversity Committee Procurement Recommendation”) (recommending the Commission examine extending the procurement requirements to all platforms).

³¹ DCS Supplemental NPRM Comments at 24. *See also* DCS 2007 Initial Comments at pp. 14-15. *See also* Comments of the Minority Media and Telecommunications Council, MM Docket No. 01-317 (Mar. 21, 2002) at pp. 111-173; 2004 Recommendation on Incentive Based-Regulations at p. 7.

³² DCS Supplemental NPRM Comments at 28. *See also* DCS 2007 Initial Comments at pp. 41-47.

³³ DCS Supplemental NPRM Comments at 34. *See also* DCS 2007 Initial Comments at pp. 47-50.

³⁴ DCS Supplemental NPRM Comments at 36.

³⁵ DCS Supplemental NPRM Comments at 38.

³⁶ DCS Supplemental NPRM Comments at 42.

³⁷ DCS Supplemental NPRM Comments at 44. *See also* Recommendation on Diversifying Ownership in the Commercial FM Radio Band, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Oct. 4, 2004) (“Commercial FM Radio Band Recommendation”), available at <http://transition.fcc.gov/DiversityFAC/adopted-recommendations/AdoptedFMRadioRules.pdf> (last visited July 31, 2014).

³⁸ DCS Supplemental NPRM Comments at 45. *See also* Commercial FM Radio Band Recommendation.

³⁹ DCS Supplemental NPRM Comments at 47. *See also* Commercial FM Radio Band Recommendation.

- Proposal 22 Relax the Limit of Four Contingent Applications⁴⁰
- Proposal 26 Create a New Local “L” Class of LPFM Stations⁴¹
- Proposal 27 Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process⁴²
- Proposal 28 Redefine Community of License as a “Market” for Section 307 Purposes⁴³
- Proposal 29 Increase Broadcast Auction Discounts to New Entrants⁴⁴
- Proposal 30 Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments⁴⁵
- Proposal 31 Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid⁴⁶
- Proposal 32 Require Bidders to Specify an Intention to Bid Only on Channels With a Total Minimum Bid of Four Times Their Deposits⁴⁷
- Proposal 33 Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity⁴⁸
- Proposal 35 Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences⁴⁹
- Proposal 36 Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts⁵⁰

⁴⁰ DCS Supplemental NPRM Comments at 48.

⁴¹ DCS Supplemental NPRM Comments at 61.

⁴² DCS Supplemental NPRM Comments at 62.

⁴³ DCS Supplemental NPRM Comments at 63. See Recommendation on Diversifying Ownership in Terrestrial Radio, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2007) (“Diversifying Ownership Recommendation”); *see also* Commercial FM Radio Band Recommendation.

⁴⁴ DCS Supplemental NPRM Comments at 65.

⁴⁵ DCS Supplemental NPRM Comments at 66.

⁴⁶ DCS Supplemental NPRM Comments at 67.

⁴⁷ DCS Supplemental NPRM Comments at 68.

⁴⁸ DCS Supplemental NPRM Comments at 69. *See also* DCS 2007 Initial Comments at pp. 53-54.

⁴⁹ DCS Supplemental NPRM Comments at 72.

⁵⁰ DCS Supplemental NPRM Comments at 74. *See also* Recommendation for an Online Diversity Resource Directory, Career Advancement Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2004), available at

- Proposal 37 Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests⁵¹
- Proposal 38 Remove Non-Viable FM Allotments⁵²
- Proposal 40 Create a New Civil Rights Branch of the Enforcement Bureau⁵³
- Proposal 41 Legislative Recommendation to Expand the Telecommunications Development Fund (TDF) Under Section 614 and Finance TDF with Auction Proceeds⁵⁴
- Proposal 42 Legislative Recommendation to Amend Section 257 to Require the Commission to Annually Review and Remove or Affirmatively Prohibit Known Market Entry Barriers⁵⁵
- Proposal 43 Legislative Recommendation to Clarify Section 307(b) to Provide that Rules Adopted to Promote Localism are Presumed to be Invalid if They Significantly Inhibit Diversity⁵⁶
- Proposal 44 Legislative Recommendation to Amend the FTC Act (15 U.S.C. §§ 41-58) to Prohibit Racial Discrimination in Advertising Placement Terms and Advertising Sales Agreements⁵⁷

<http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Resource Directory” (last visited July 31, 2014) (“Recommendation on Online Diversity Resource Directory”); *see also* Funding Acquisitions Recommendation at pp. 2-4.

⁵¹ DCS Supplemental NPRM Comments at 75. *See also* Preliminary Report and Recommendation, Transactional Transparency and Related Outreach Committee, Advisory Committee on Diversity in the Digital Age (May 14, 2004) at 3, available at <http://transition.fcc.gov/DiversityFAC/meeting061404.html>, then follow link to “Preliminary Report and Recommendation” (last visited July 31, 2014).

⁵² DCS Supplemental NPRM Comments at 76.

⁵³ DCS Supplemental NPRM Comments at 80. *See also* Letter from David Honig, Executive Director of MMTTC, to Hon. Michael J. Copps, Interim Chair of the Federal Communications Commission, RE: Structural and Procedural Reforms in FCC Operations (Jan. 21, 2009) at p. 3, available at http://mmtconline.org/lp-pdf/MMTC_Letter_on_FCC_Processes_012109.pdf (last visited July 31, 2014); Diversity Committee Procurement Recommendation *supra* n. 30.

⁵⁴ DCS Supplemental NPRM Comments at 81. *See also* Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6 (recommending that the type of funding and amount of funding available through TDF be expanded); Recommendations from the March 24, 2010 Meeting, Advisory Committee for Diversity in the Digital Age (Mar. 24, 2010) at p. 2, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Recommendations from the March 24, 2010 Meeting” (last visited July 14, 2014) (“Diversity Committee 2010 TDF Recommendation”).

⁵⁵ DCS Supplemental NPRM Comments at 83.

⁵⁶ DCS Supplemental NPRM Comments at 85.

- Proposal 45 Legislative Recommendation to Amend Section 614 to Increase Access to Capital by Creating a Small and Minority Communications Loan Guarantee Program⁵⁸
- Proposal 46 Legislative Recommendation to Amend Section 614 to Create an Entity to Purchase Loans Made to Minority and Small Businesses in the Secondary Market⁵⁹
- Proposal 47 Legislative Recommendation to Provide a Tax Credit for Companies that Donate Broadcast Stations to an Institution Whose Mission is or Includes Training Minorities and Women in Broadcasting).⁶⁰

Throughout the course of the Quadrennial proceedings, MMTC has been disappointed by the Commission's failure to make diverse participation a top priority. MMTC once again urges the Commission to take a hard look at policies behind the dwindling level of diversity in the broadcasting industry, the agency's failure to provide a basis for progress, and the Courts direct orders to stop ignoring this important issue.

⁵⁷ DCS Supplemental NPRM Comments at 87.

⁵⁸ DCS Supplemental NPRM Comments at 89. *See also* Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6.

⁵⁹ DCS Supplemental NPRM Comments at 90. *See also* Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6.

⁶⁰ DCS Supplemental NPRM Comments at 90.

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August 6, 2014

ATTACHMENT

MMTC MOTION FOR LEAVE TO INTERVENE

Prometheus Radio Project (Petitioner) v. Federal Communications Commission and United States of America (Respondents), Case No. 14-113 (D.C. Cir. filed June 23, 2014)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PROMETHEUS RADIO PROJECT,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES OF
AMERICA

Respondents.

Case No. 14-1113

MOTION FOR LEAVE TO INTERVENE

Pursuant to 28 U.S.C. § 2348, 47 U.S.C. § 402(e), Rule 15(d) of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15(b), the Minority Media and Telecommunications Council (“MMTC”) files this Motion for Leave to Intervene in the above-captioned matter in support of Prometheus Radio Project (“Petitioner”). Petitioner seeks review of *2014 Quadrennial Regulatory Review, Further Notice of Proposed Rulemaking*, 79 Fed. Reg. 29010 (May 20, 2014), and *2014 Quadrennial Regulatory Review, Report and Order*, 79 Fed. Reg. 28996 (May 20, 2014) (“*2014 Quad Review*”).

MMTC is a national not-for-profit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications, and broadband industries, and is the leading advocate for minority participation in the communications industries. MMTC also operates a media and telecom brokerage and owns and operates broadcast stations that it uses to train minorities and women in broadcast sales, management and entrepreneurship. MMTC’s interests will be substantially affected by this Court’s review of the *2014 Quad Review*.

With the *2014 Quad Review*, the Commission seeks to resolve issues pending from the 2010 Quadrennial Review, including resolution of issues remanded by the Third Circuit Court of Appeals in 2003 and 2011. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2003) (“*Prometheus I*”) (remanding the 2002 Diversity Order, *2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003), with instructions to consider diversity proposals); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 472 (3d Cir. 2011) (“*Prometheus II*”) (remanding the 2006 Diversity Order, *2006 Quadrennial Regulatory Review, Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010 (2008), reiterating its 2002 instructions to consider diversity proposals). Among the issues the Commission was ordered to address on remand in *Prometheus I* were a number of diversity proposals introduced in the 2002 Quadrennial Review by a coalition of national organizations known as the Diversity and Competition Supporters (“DCS”), of which MMTC is a member and serves as counsel. *Prometheus I*, 373 F.3d at 421, n.59. The Commission was also ordered to revise its flawed revenue-based eligible entities definition – twice – and adopt a definition that would promote media ownership by minorities and women because the record lacked substantial evidence of its potential to be effective. *See Prometheus I*, 373 F.3d at 428, n.70; *see also Prometheus II*, 652 F.3d at 469-471.

For the reasons stated in the Petition for Review, Or In The Partial Alternative, A Petition for A Writ of Mandamus, *Prometheus Radio Project v. FCC*. No. 14-1113 (D.C. Cir. May 22, 2014), MMTC agrees that the *2014 Quad Review* should be judicially reviewed. Further, as an intervenor we wish to set out additional aspects of the Commission’s treatment of minority ownership issues that are troubling.

First, the Commission failed to address over two dozen diversity proposals with reasoned analysis, despite two prior remands from the Court with instructions to address diversity proposals on the record *within* the Quadrennial Review proceedings. MMTC has petitioned the Commission for clarification, seeking an erratum regarding the disposition of certain diversity proposals in the *2014 Quad Review*, some of which are related to issues raised by Petitioner.¹

Second, regarding treatment of the eligible entities definition, the Commission has failed to justify its inaction on gathering the data necessary to move forward with a constitutionally sound eligible entities program. Instead, the Commission ignored the Court's direction and reverted to the flawed eligible entities definition based upon Small Business Administration size standards. *2014 Quad Review* ¶¶243, 267. The Court was clear in its expectation that the Commission must develop a workable eligible entities standard to promote minority and female ownership. *See Prometheus I*, 373 F.3d at 428, n.70; *see also Prometheus II*, 652 F.3d at 469-471. Not only is the revenue-based definition contrary to the directive of the Court, the agency conceded that it has no data to indicate that this standard, which was previously rejected on judicial review, will work to promote minority and female media ownership today. *2014 Quad Review* ¶ 267. Further, from the mischaracterization of the race-neutral Overcoming Disadvantages Preference ("ODP") as requiring heightened judicial scrutiny, it appears the Commission failed to properly consider this proposal, expressing that it lacked the time and

¹ To be clear, this request was not for reconsideration of the Order, but clarification of a portion of the *2014 Quad Review*. The Commission summarily disposed of 23 of the proposals with a single sentence, "[a]lthough these proposals are accompanied by detailed and thoughtful analysis, and some of them may warrant further consideration, we believe that they are outside the scope of this proceeding." *2014 Quad Review* ¶317. In the face of the mandate to consider them in conjunction with the Quadrennial Review, the *2014 Quad Review* sweeps away these proposals with no justifiable reason. They are well within the scope of the proceeding and the Commission said as much when it declared it would seek comment on them *within* the quadrennial review. *See 2010 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, Notice of Proposed Rulemaking*, 26 FCC Rcd 17489, 17555 ¶169 ("*2010 NPRM*"). Many of the diversity proposals had support from other organizations and the Commission's own Advisory Committee on Diversity for Communications in the Digital Age ("Diversity FACA"), and some have been pending before the agency for almost a decade. Should the Commission issue an erratum correcting its error, we will not need to pursue this issue in this appellate proceeding.

resources to engage in such a licensing preference. *2014 Quad Review* ¶¶ 299-300. ODP was proposed by the Commission's own Advisory Committee on Diversity for Communications in the Digital Age as an effective, race-neutral means to increase ownership diversity while the Commission could work toward building a record to support a socially disadvantaged business ("SDB") eligible entities definition.

Taken together, we believe that Commission's failure to address minority and women ownership as being "outside the scope of this proceeding" is clear error, and its continued "kicking the can down the road" on issues of media ownership by minorities and women is indefensible. After repeatedly ignoring the Court's directives on addressing diversity proposals and the eligible entities definition, the Commission once again proposed no new actions within the *2014 Quad Review* that would increase participation by minorities and women in media ownership. As Petitioner Prometheus Radio Project has shown, the Commission has defied repeated instructions from the Third Circuit, and has not seriously attempted to show that has a coherent plan to effectively address the longstanding paucity of minority ownership in broadcasting.

Petitioner Prometheus Radio Project also seeks to challenge key aspects of the Commission's new policy on Joint Sales Agreements ("JSAs") and Shared Services Agreements ("SSAs"). The Commission's new rule attributes ownership when two television stations in the same market are operating under a JSA and where one station sells more than 15% of the weekly advertising time for the other. *2014 Quad Review* ¶340. The Commission's decision on SSAs seems to have disregarded significant concerns expressed in comments that such agreements limit viewpoint diversity and competition in a local market. *2014 Quad Review* ¶¶320, 328.

Should leave to intervene be granted, MMTC will explain how these revised rules affect minority media ownership.

For the reasons set forth above, MMTC respectfully requests that this Court grant MMTC leave to intervene as a party in interest in the proceeding.

Respectfully submitted,

/s/David Honig

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PROMETHEUS RADIO PROJECT,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES OF
AMERICA

Respondents.

Case No. 14-1113

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Minority Media and Telecommunications Council (“MMTC”) submits that it is a non-profit organization incorporated in the District of Columbia. MMTC has no parent corporation, nor is there a publicly held corporation that owns stock or interest in MMTC. MMTC advocates for minority participation in the communications industries, seeking to preserve and expand minority ownership and equal employment opportunity in these industries.

Respectfully submitted,

/s/David Honig

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of June, 2014, I electronically filed the foregoing Motion for Leave to Intervene and Corporate Disclosure Statement, and sent copies via first class mail to the following parties:

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