

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

In the Matter of)	
)	
2006 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. 06-121
)	
)	
2002 Biennial 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. 02-277
)	
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MM Docket No. 01-235
)	
Rules and Policies Concerning Multiple Ownership of Radio Radio Broadcast Stations in Local Markets)	MM Docket No. 01-317
)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies)	MB Docket No. 04-228

To the Commission

**REPLY COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS IN
RESPONSE TO THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

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Appendix: Diversity And Competition Supporters

Summary

The 29 Diversity and Competition Supporters (collectively “DCS”)¹ respectfully offer these Reply Comments in response to the Second Further NPRM.² References to the 38 pending minority ownership proposals track the numbering system in DCS’ Initial Comments in Response to the Second NPRM (filed October 1, 2007) (“DCS 2007 Initial Comments”).³

The Commission has ample statutory authority under Sections 151, 154(i), 309(j) and several other provisions of the Communications Act of 1934 and the Telecommunications Act of 1996 to adopt minority ownership programs. The main source of such authority is the market entry barriers section of the Communications Act, 47 U.S.C. §257.

A central question in adopting new policies is the definition of a socially and economically disadvantaged business (SDB) that would be used to classify members of the beneficiaries of these policies. DCS strongly favors the adoption of race-conscious SDB definitions because a race-neutral definition is likely to be unacceptably dilute in its impact. A

¹ The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277. A list of its 29 members is found in the Appendix.

² 2006 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. 06-121 et al. (Second Further Notice of Proposed Rulemaking), 22 FCC Rcd 14216 (2007) (“Second Further NPRM”). The Second Further NPRM responds to DCS’ Motion for the Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice, MB Docket No. 06-121 (August 23, 2006) (“DCS 2006 Motion”) by creating a comment track on minority ownership. DCS and the NAB each sought extensions of time through November 21, 2007 to file Reply Comments responsive to the Second Further NPRM. In denying those requests, the Bureau provided that an extension of time granted earlier for comments on ten media ownership studies “should afford relief to parties who plan to file reply comments in response to the [Second Further NPRM], as well as comments and/or reply comments in response to the commissioned studies.” Order, MB Docket No. 06-121, DA 07-4107 (released October 12, 2007). Consequently, these Reply Comments are timely filed. DCS is completing five additional sets of materials: (1) a summary of the comments and reply comments of other parties in response to specific minority ownership proposals; (2) an analysis of the impact of the Failing Station Solicitation Rule (“FSSR”); (3) the testimony of approximately 20 minority broadcasters; (4) a survey of financial institutions active in the minority broadcasting space, and (5) a paradigm for an interim disadvantaged business classification that could be used while the Commission completes the work necessary to arrive at a race-conscious SDB definition. DCS will submit these materials shortly with a request for ex parte consideration. See p. 20 infra.

³ The Second Further NPRM, Appendix A, referenced 34 proposals. In their Initial Comments, DCS discussed 32 of those 34 proposals (excluding Proposal #11 (JOAs), which has been rendered moot by the evolution of shared services agreements, and Proposal #27 (Clearinghouse of Stations for Sale), which further analysis indicates would be ineffective). See DCS Initial Comments, MB Docket No. 06-121 (October 1, 2007) (“DCS 2007 Comments”).

race-conscious SDB definition can be developed in compliance with constitutional norms under at least three compelling governmental interests: (1) promoting diversity of information and viewpoints; (2) remedying the present effects of past and present discrimination; and (3) promoting competition.

However, the task of developing the record necessary to satisfy stringent judicial expectations may have to be re-started because the Commission has allowed the key Section 257 studies to become stale. Further, before turning to race-conscious remedies, the agency must attempt in good faith a variety of race-neutral remedies, a task the Commission has not begun. Thus, unavoidably, some time will elapse before the Commission can promulgate and apply a race-conscious SDB definition. Yet the application of a small business definition in the meantime would do nothing to advance minority ownership, since the class of small businesses is so racially dilute as to be virtually meaningless. Consequently, the agency should develop an interim “disadvantaged business” classification that is much less dilute than the “small business” classification. DCS is framing such a classification and vetting it with stakeholders.

I. The Commission Has Statutory Authority To Adopt Minority Ownership Policies

The Second Further NPRM asks for a demonstration of the agency’s statutory authority to promote media and ownership diversity.⁴ Although the Commission has recognized that its statutory authority derives from several provisions of the Communications Act, its Further NPRM in this proceeding omitted reference to 47 U.S.C. §257,⁵ the market entry barriers

An additional six proposals (numbered 35-40 for ease of reference) were also included there. Id. Thus DCS’ Initial Comments addressed a total of 38 proposals.

⁴ Second Further NPRM, 22 FCC Rcd at 14220-21 ¶¶14-16.

⁵ In 2006, the Commission cited seven jurisdiction-granting provisions of the Communications Act of 1934 and one provision of the Telecommunications Act of 1996. 2006 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. 06-121 et al. (Further Notice of Proposed Rulemaking), 21 FCC Rcd 8834, 8851 ¶¶42-43 (2007) (citing 47 U.S.C. §§151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996). Absent from this list of provisions is 47 U.S.C. §257. See DCS 2006 Motion at 13-14.

provision of the Communications Act and the primary source of jurisdiction to advance minority ownership.

Section 257 does more than support media and ownership diversity; it specifically directs the Commission to eliminate identified market entry barriers facing small businesses and businesses owned by women and minorities.⁶ Section 257 establishes a “National Policy” under which the Commission shall promote “diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity.”⁷ Section 257 was drafted with the promotion of minority ownership in mind and gives Commission jurisdiction over the preservation and promotion of minority broadcast ownership.⁸

When a government agency considers race as a classification in its proceedings, decisions based upon such a classification are analyzed under strict scrutiny. Those decisions must serve a compelling interest and be narrowly tailored to meet that interest.⁹ The Supreme Court continues to recognize the compelling government interests in promoting diversity in higher education and remedying the effects of past discrimination.¹⁰ One of the primary objectives of Section 257 is the promotion of diversity of media voices.¹¹ Section 257 also directly addresses

⁶ 47 U.S.C. §257(a).

⁷ 47 U.S.C. §257(b).

⁸ Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

[W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country’s maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field...Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (Statement of Rep. Collins).

⁹ See Adarand Constructors v. Peña, 515 U.S. 200, 227, 235 (1995) (“Adarand”).

¹⁰ See Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738, 2752-53 (June 28, 2007) (citations omitted) (“Parents”).

¹¹ 47 U.S.C. §257(b).

the Commission's interest in remedying past discrimination. In the context of government action designed to remedy its past discrimination, courts will analyze the government's evidence of actual discrimination, past or present.¹² A federal agency may take race-conscious action to address past discrimination in a national context.¹³

In the first Section 257 proceeding, in 1996, the Commission found that discrimination can be a market entry barrier.¹⁴ As the Commission has pointed out, Congress has found that past discrimination has resulted “in a severe underrepresentation of minorities in the media of mass communications.”¹⁵ Therefore, not only is promotion of media and ownership diversity mandated by Section 257, the Commission may act on that mandate in a constitutional manner because of the compelling interests in promoting diversity, as mandated by Congress, and remedying the effects of past discrimination, also found by Congress.

II. The Commission Can Develop A Workable Race-Conscious SDB Definition

In the Second Further NPRM, the Commission seeks comment on the definition of an SDB and, in so doing, the Commission consolidated the SDB definition docket (MB Docket No. 04-228) with this proceeding.¹⁶ In the SDB definition docket, MMTTC filed extensive comments

¹² See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (“Croson”) (the history of school desegregation in Richmond did not point to discrimination in the local construction industry); see also Parents, 127 S.Ct. at 2752 (race-conscious government action, after past discrimination is remedied, may only continue if justified on another basis).

¹³ See Sherbrooke Turf v. Minnesota Department of Transportation, 345 F.3d 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004) (“Sherbrooke Turf”) (Congressional findings of past discrimination in government highway contracting were sufficient to support need for race-based remedial measures); Western States Paving Co. v. Washington Department of Transportation, 407 F.3d 983, 998 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006) (“Western States”) (federal programs take on a compelling interest nationwide, even where evidence of past discrimination did not come from or apply each state individually). As such, federal race-conscious programs may address past discrimination in a broader context, unlike Croson and Parents, where regional ordinances were specific to that state or locale. See Croson, 488 U.S. at 505 (the history of school desegregation in Richmond did not point to discrimination in the local construction industry); see also Parents, 127 S.Ct. at 2752.

¹⁴ See Market Entry Barriers Notice of Inquiry, 11 FCC Rcd 6283, 6306 ¶¶36-38 (1996).

¹⁵ See Market Entry Barriers Notice of Inquiry, 11 FCC Rcd at 6294 ¶19 (citing H.R. Conference Report No. 97-765, 97th Cong., 2d Sess., 1982 at 43).

¹⁶ Second Further NPRM, 22 FCC Rcd at 14219 ¶9 (consolidating MB Docket No. 04-228 with this proceeding).

and expert testimony addressing the constitutional issues attendant to the framing of a judicially sustainable SDB definition.¹⁷ MMTC respectfully incorporates these comments herein.

A. The Origin Of The Term “Socially And Economically Disadvantaged Business”

The term “socially and economically disadvantaged business” (“SDB”) has its origin in the Small Business Act.¹⁸ The Small Business Act defines “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities” and defines “economically disadvantaged individuals” as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”¹⁹

The SDB definition figured in Adarand, a case brought by a subcontractor that was not awarded a guardrail portion of a federal highway project. The contractor, Adarand Constructors, Inc., challenged the constitutionality of a federal program designed to provide highway contracts to disadvantaged business enterprises. Under this program, a contractor would receive additional compensation if it hired subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.²⁰ A federal law required that “the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to

¹⁷ Comments of MMTC in MB Docket No. 04-228 (filed October 12, 2004).

¹⁸ 15 U.S.C. §631.

¹⁹ 15 U.S.C. §637(a)(5); 15 U.S.C. §637(a)(6)(A).

²⁰ Adarand, 515 U.S. at 205.

Section 8(a) of the Small Business Act.”²¹ Adarand Constructors maintained that the presumption set forth in the statute discriminates on the basis of race in violation of the Fifth Amendment obligation not to deny anyone equal protection of the law.²²

The Court discussed at length its equal protection jurisprudence through Croson and concluded that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”²³ The Court failed to follow what it characterized as the “surprising turn” taken in Metro Broadcasting, Inc. v. FCC, which held that “benign” federal racial classifications need only satisfy intermediate scrutiny.²⁴

B. How The Commission Can Arrive At A Sustainable SDB Definition

In arriving at an SDB definition the Commission must answer five questions, each discussed seriatim:

1. Can the problem of minority underrepresentation in media ownership be overcome without resort to race-conscious measures?
2. Can a race-conscious program satisfy strict scrutiny?
3. Does the Commission have the underlying data necessary to develop effective minority ownership programs – race conscious or otherwise?
4. How many race-neutral initiatives must the Commission attempt before it reaches the question of whether it must adopt race-conscious initiatives?
5. What classification mechanism should the Commission use in the interim while a race-conscious definition is being developed, validated and affirmed?

²¹ Id. (quoting 15 U.S.C. 637(d)(2), (3)).

²² Adarand, 515 U.S. at 205.

²³ Id. at 223.

²⁴ Adarand, 515 U.S. at 225, discussing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

1. Race-Conscious Measures Will Be Necessary To Cure Minority Underrepresentation In Media Ownership

As DCS has long maintained, the problem of minority ownership is so severe that it is unlikely that race-neutral initiatives alone will be sufficient to cure it.²⁵ The Commission operated three race-conscious programs for approximately two decades ending in 1995, but during that time minority ownership only reached about 3% by numbers (and a far lower percentage in asset value).²⁶ Minority ownership has stagnated now that the Commission is operating no effective programs aimed at advancing minority ownership.

To be sure, some initiatives can impact minority ownership just as effectively regardless of whether the initiatives are structured as race-neutral or race-conscious.²⁷ Certainly the Commission should promptly implement each such initiative that poses no impracticalities. However, since most broadcast regulation involves apportioning a resource for which there are far more potential suitors than there are opportunities, highly dilute race-neutral programs will result in the apportionment of the resource almost exclusively to nonminorities. Once that happens, it would become impossible to reapportion the resource without forced divestitures, a step to be avoided in broadcast regulation except as a last resort. Therefore, the Commission should first ask whether its preferred “small business” race-neutral classification can be framed

²⁵ See DCS 2003 Comments at 81 (“the Commission should expressly leave open the option of turning to a race-conscious plan, as a last resort, if that is necessary to bring about the integration of the ownership ranks of democracy’s most important industries.”)

²⁶ The most reasonable recommendation the Commission has received of late is that it should “[d]evelop meaningful programs to double the number of minority and female owned broadcast stations within the next five years.” Testimony of Andrew Jay Schwartzman, President and CEO, Media Access Project, FCC Localism Hearing, October 31, 2007, at 2. DCS cannot conceive of a package of race-neutral steps that could achieve this goal.

²⁷ A classic example of such an initiative is Proposal #37, contemplating the retention on air of both of an AM Expanded Band owners’ stations if one of the stations is sold to a small business. See DCS 2007 Comments at 47-50. This race-neutral proposal was submitted jointly by MMTC, the Independent Spanish Broadcasters Association, the National Association of Black Owned Broadcasters, the Office of Communication of the United Church of Christ, Inc. and eleven broadcast licensees. Another example is Proposal #35, which contemplates the relaxation of the grandfathered cluster transfer deadline for cluster purchasers who will resell stations to small businesses. *Id.* at 40-41. This proposal has been endorsed by 48 parties, including six civil rights and public interest organizations, 16 media brokerages, 21 radio broadcast companies and five financial institutions and capital providers. See Reply Comments of 48 Parties, RM-11388 (October 5, 2007).

in a way that is not hopelessly dilute. Unfortunately, while sincere efforts have been made to arrive at a small business definition,²⁸ it appears that a small business classification, no matter how framed, will be so dilute as to be virtually impotent.²⁹ It follows, then, the Commission must be prepared to apply narrowly tailored race-conscious initiatives if – as is very likely – race-neutral initiatives fail to cure the problem.

2. A Race-Conscious SDB Definition Can Satisfy Strict Scrutiny

All race-conscious government action is analyzed under strict scrutiny and therefore must be narrowly tailored to further a compelling government interest.³⁰ The Supreme Court has recognized compelling government interests in remedying the effects of past discrimination and promoting diversity in higher education.³¹ DCS has encouraged the Commission to also ground race-conscious initiatives on the goal of promoting competition.³²

²⁸ Clear Channel proposes a two-part definition that would include any entity that (1) does not hold an attributable interest in more than 50 radio stations nationally and does not hold an attributable interest in any radio station in the local market where the transaction would take place, and (2) does not hold an attributable interest in more than six television stations nationally and does not hold an attributable interest in any television station in the local market where the transaction would take place. See Comments of Clear Channel Communications on Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (October 1, 2007) at 2. The Office of Communication of the United Church of Christ, Inc. et al. prefer that if a race-neutral definition is used, it be based on a revenue test, with the revenue limit “set low enough to ensure that a business is genuinely economically disadvantaged. However, in recognition that a successful broadcast venture requires a significant capital investment, it should also be set high enough to ensure that the business will be a viable one.” Reply Comments of the Office of Communication of the United Church of Christ, Inc., National Organization for Women Foundation, Media Alliance, Common Cause and Benton Foundation, MB Docket No. 06-121 (filed October 16, 2007) (“UCC Reply Comments”) at 4.

²⁹ In a 2003 study performed for MMTC, Kofi Ofori found that 88% of commercial radio stations were owned by small businesses, using the SBA’s (then applicable) \$6M in revenue test, and that only 4.5% of small businesses were minority owned. See Statement of Kofi Ofori, §2 (September 3, 2003) appended as Annex 2 to DCS’ Petition for Reconsideration in MB Docket No. 02-277 (filed September 4, 2003). Whether the Commission uses a station count test or a revenue test, if it sets the bar too high, virtually no minority owned companies would qualify. If it sets the bar too low, the only qualifying entities would be new entrants - a classification that includes wealthy and successful former CEOs of large broadcast companies. For example, in FM Auction 37, the two top winners had each run very large broadcast companies. Minority new entrants can almost never prevail against well-financed former executives of large companies. See UCC Reply Comments at 6.

³⁰ See *Adarand*, 515 U.S. at 227.

³¹ See *Parents*, 127 S.Ct. at 2752-53.

³² See Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 2, 2003) (“DCS 2003 Comments”) (incorporated by reference herein) at 61-65 (discussing how minority ownership promotes competition). Competition has always seemed to DCS to be a compelling governmental interest. It is the Commission’s top priority, and certainly the inability of minorities and women to unlock their intrinsic

a. **Promoting Diversity**

Justice Kennedy’s controlling opinion in Parents held that diversity is a compelling educational goal that school districts may pursue using race conscious measures that are not based on “systematic, individual typing by race.”³³ Thus, while every race-conscious government action is subject to strict scrutiny, “[n]ot every decision influenced by race is equally objectionable.”³⁴ The use of race in a particular context matters when reviewing such action.³⁵

In the context of diversity as a compelling government interest, the Supreme Court has found in Grutter v. Bollinger that “universities occupy a special niche in our constitutional tradition,” and that “the robust exchange of ideas” is “of paramount importance.”³⁶ Race may be considered individually with each current or potential student, but may not be the determining factor in a government-sponsored educational diversity initiative.³⁷

The Supreme Court’s decision in Grutter provides constitutionally sound guidance for defining an SDB program aimed at promoting diversity. Grutter involved allegations that race was considered the predominant factor in the government’s decision.³⁸ However, the Supreme Court disagreed, finding that race was only one of many factors that the government

entrepreneurial, managerial and creative talent could not be more anticompetitive. Cf. Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24129 (2002) (reconsideration pending on other grounds) (Separate Statement of Commissioner Kevin J. Martin) (“A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition” (emphasis supplied)). The Supreme Court has not yet spoken on whether competition is a compelling governmental interest, however. Therefore, while preserving the point, we focus herein only on diversity and remediation.

³³ Parents, 127 S.Ct. at 2792 (Kennedy, J., concurring).

³⁴ See Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (internal quotations and citations omitted) (“Grutter”).

³⁵ Id.

³⁶ See Grutter, 539 U.S. at 329.

³⁷ See id. at 334.

³⁸ Id. at 317. Grutter involved a law school admissions policy that was alleged to have considered race as the predominant factor in admissions decisions. Id. at 317.

considered,³⁹ and that the government undertook a “highly individualized” review of each applicant to consider how each individual might contribute to the institution’s diversity goals.⁴⁰

The law school admissions program considered in Grutter did not limit diversity to race, but made special reference to groups that historically had been subjected to discrimination.⁴¹ The law school’s administration tracked the level of diversity to assess the number of entrants from groups with different perspectives than members of groups that have not been the victims of discrimination.⁴² The law school relied on expert reports that highlighted the benefits of diversity including the dilution of racial stereotypes.⁴³

Justice O’Connor found that the law school pursued a permissible goal of attaining a diverse student body and that this goal only required a good faith effort to come within range of that goal.⁴⁴ Attaining a diverse student body was at the heart of the law school’s institutional mission, and good faith in pursuing that mission is presumed absent evidence to the contrary.⁴⁵

In analyzing the constitutional restraints of such a program, Justice O’Connor declared that context matters when the government uses an applicant’s race as part of the decision making process and that not all decisions where race is considered are equally objectionable.⁴⁶ Race may be considered a plus factor, so long as the applicant competes with other qualified applicants in a

³⁹ Id. at 324.

⁴⁰ Id. at 337. The law school’s goal was to attain a diverse educational environment. Id.

⁴¹ Id. at 316. Following this rationale, past discrimination based on gender or physical disability could be relevant factors for an SBD program as well.

⁴² Id. at 318-319.

⁴³ Id. at 319.

⁴⁴ Id. at 328, 335.

⁴⁵ Id. at 329.

⁴⁶ Id. at 327.

“flexible, non-mechanical” way that does not “insulate” any group, racial or otherwise, from competition.⁴⁷

In broadcasting, pursuit of diversity of voices is paramount⁴⁸ and race is one of many factors that may add to a broadcast licensee’s life experiences and shape her perspectives, thereby enhancing diversity of viewpoints and diversity of information. The pursuit of the government’s mission to obtain a diverse student body in Grutter is closely analogous to the Commission’s mandate to pursue a diversity of voices.⁴⁹ Just as “freedoms of speech and thought” associated with higher education “occupy a special niche in our constitutional tradition,”⁵⁰ so too does the right of the people to have access to the exchange of words and ideas

⁴⁷ Id. at 334-335.

⁴⁸ See DCS 2003 Comments at 66-71 (discussing how minority ownership promotes diversity of viewpoints). For decades, the Commission has acknowledged the importance of broadcast diversity. See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 979, 981 (1978) (“Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment”); Amendment of Section 73.3555 of the Commission’s Rules, Broadcast Multiple Ownership Rules, 4 FCC Rcd 1723, 1724 ¶7 (1989) (“Although one of the structural purposes underlying our multiple ownership rules is to encourage diversity in the ownership of broadcast stations, we have encouraged ownership diversity as a means of promoting diversity of program sources and viewpoints, not as an end in itself”); 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd 13620, 13630 ¶30 (2003), aff’d in part and remanded in part, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004), stay modified on rehearing, No. 03-3388 (3d Cir., September 3, 2004), cert. denied, 125 S. Ct. 2902 (2005) (“[O]ur rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints.”) Courts have agreed and upheld the Commission’s authority promote diversity. See, e.g. FCC v. National Citizens Committee for Broadcasting 436 U.S. 775, 795 (1978) (affirming the Commission’s authority “to conclude that the maximum benefit to the public interest would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole”) (internal quotations omitted); Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1162 (D.C. Cir. 1992) citing id. at 794-795 (discussing the Commission’s broad authority “to determine where the public interest lies in the regulation of broadcasting to foster diversity”); Fox Television Stations v. FCC, 280 F.3d. 1027, 1042-43 (D.C. Cir. 2002) (agreeing with the Commission that “protecting diversity is a permissible policy” objective, noting that “[i]n the context of the regulation of broadcasting, ‘the public interest’ has historically embraced diversity”) (citation omitted).

⁴⁹ See 47 U.S.C. §257(b) (“[T]he Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.”)

⁵⁰ Grutter, 539 U.S. at 329.

provided by a diverse group of broadcast licensees.⁵¹ Just as the “robust exchange of ideas” is of paramount importance to a state university,⁵² so too should it be of paramount importance for the Commission to encourage the exchange of robust and diverse viewpoints by providing licenses to a diverse group of applicants that have been socially disadvantaged. If the “diffusion of knowledge and opportunity through public institutions of higher learning must be accessible to all individuals regardless of race or ethnicity,”⁵³ then surely the diffusion of diverse ideas and viewpoints via broadcast spectrum owned by the people must be equally if not more important considering that more people have access to broadcast media than they do to higher education.⁵⁴

An SDB program based on diversity would not be rigid or inflexible over time, but would be periodically assessed to determine the benefits of diversity that it was designed to produce.⁵⁵ It should be limited over time, and it should feature periodic review,⁵⁶ which the Commission already undertakes for many of its regulations.⁵⁷ The SDB definition should also be drafted with good-faith consideration of workable race neutral alternatives.⁵⁸ As such, an SDB definition that considers race as one of many diversity factors, and that is carried out by the Commission in good faith, with periodic review, could sustain judicial scrutiny.

⁵¹ See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (discussing the people’s “collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”)

⁵² Grutter, 539 U.S. at 329 (citing Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1978)).

⁵³ Grutter, 539 U.S. at 331.

⁵⁴ Ownership and control of broadcast spectrum, a “natural resource,” rests with the people. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 173-74 (1973). The U.S. Census Bureau reported that in 2006, only 28% of adults 25 and older reported they were college graduates. See U.S. Census Bureau Press Release, Educational Attainment in the United States: 2006, available at <http://www.census.gov/Press-Release/www/releases/archives/education/009749.html>.

⁵⁵ See Grutter, 539 U.S. at 330.

⁵⁶ Id. at 342.

⁵⁷ See, e.g., Telecommunications Act of 1996, Pub. L. 104-104, §202(h), 110 Stat. 56, 111-12 (mandating that the Commission review its ownership rules biennially to determine which rules are “necessary in the public interest as the result of competition.”)

⁵⁸ See Grutter, 539 U.S. at 339.

b. Remediating Past And Present Discrimination

The Supreme Court has recognized that if the government becomes a passive participant by allowing racial exclusion to occur, the government has a compelling interest in ensuring “that public dollars, drawn from the tax contributions of all citizens, do not finance the evil of private prejudice.”⁵⁹ DCS has submitted extensive evidence that the Commission was a passive participant in discriminatory practices that gave nonminorities a two-generation headstart in broadcast ownership.⁶⁰ Thus, an SDB definition applicable to media ownership that considers race should withstand judicial scrutiny because there is ample evidence to support remedial measures that consider race as a factor.

An SDB definition applicable to a remedial program would require a showing of both social and economic disadvantage. In other industries, programs that focus generally on race-neutral factors of business size and economic strength prior to specifically addressing the minority-ownership status of the entity have survived judicial review.⁶¹ For example, in recent years, courts have upheld post-Adarand U.S. Department of Transportation (“DOT”) regulations that conferred certain benefits to socially and economically disadvantaged individuals through its disadvantaged business enterprise (“DBE”) program.⁶² The regulations rested on strong evidence compiled by the government demonstrating decades of discrimination in the industry.⁶³ However, the statute applied a rebuttable presumption that most minority groups are socially and

⁵⁹ Croson, 488 U.S. at 492 (citing Norwood v. Harrison, 413 U.S. 455, 465 (1973)).

⁶⁰ See DCS 2003 Comments at 19-35. For decades the Commission routinely and deliberately granted broadcast licenses to segregationist companies and colleges, thereby facilitating the exclusion of minorities from broadcast employment and ownership. See, e.g. Southland Television, 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that because Louisiana’s movie theater segregation law was not inconsistent with the Communications Act, a segregationist movie theater owner could hold a television license). Several other examples of how the Commission promoted segregation in broadcasting are provided in the DCS 2003 Comments at 22-23 ns. 38-40.

⁶¹ See Sherbrooke Turf, 345 F.3d at 970.

⁶² Id. at 968-69.

⁶³ Id. at 970.

economically disadvantaged, thereby subjecting it to strict scrutiny.⁶⁴ The Eighth Circuit determined that the program had flexibility in many ways including that it allowed the government to seek waivers and exemptions from the DBE requirements, the DBE program had durational limits, the program's goals were tied to markets relevant to DBE participation, and the DBE program minimized race by making it a relevant, but not determinative factor.⁶⁵ The Ninth Circuit later agreed with this determination, adding that the DOT regulations ensured that a non-minority could qualify as a DBE and that wealthy minorities could not receive the benefits of the DBE program intended for the economically disadvantaged.⁶⁶

Stated generally, a narrowly-tailored SDB program based on remedying past discrimination in the industry may contain race-conscious classifications that benefit minorities, provided the program is flexible in that non-minorities are able to qualify for the program and that minority-owned businesses that are not truly disadvantaged could not qualify for economic benefits of the program. This should not bar a financially sound minority-owned business from qualifying as an SDB based on diversity. Following Grutter, the SDB program should consider all qualities that a broadcast applicant can lend to diversity.⁶⁷

3. The Commission Lacks The Statistical And Empirical Databases Necessary To Develop Effective Minority Ownership Policies – Race-Conscious Or Otherwise

To satisfy judicial expectations – indeed, to make sound policy regardless of judicial expectations – the Commission would need to complete up-to-date research documenting the

⁶⁴ Id. at 968-69.

⁶⁵ Id. at 972-73.

⁶⁶ See Western States, 407 F.3d at 995. However, in Western States, the application of the regulation failed because the government did not have sufficient evidence to demonstrate past discrimination in the local region where the petitioner did business. Id. at 1003. See also Sherbrooke Turf, 345 F.3d at 969 n. 4 (citing Adarand, 515 U.S. at 259-62 (Stevens, J., dissenting)) (discussing premise that programs ensuring that wealthy minority-owned enterprises do not receive benefits intended for disadvantaged enterprises is relevant to narrow tailoring).

⁶⁷ See Grutter, 539 U.S. at 337 (stating that “serious consideration to all the ways an applicant might contribute to a diverse educational environment” should be given when considering applicants) (emphasis provided).

manner and extent to which minority and women broadcasters have experienced significant disadvantages in media ownership entry and growth. In 2000, the Commission published considerable research on these subjects⁶⁸ (the five “Section 257 Studies”) but these studies were based on mid-1990’s data that may be stale by now.⁶⁹ Thus, the Commission might be expected by a reviewing court to start all over again. Certainly the Commission’s most recent research study on minority ownership is not sufficient to validate a race conscious initiative,⁷⁰ as its

⁶⁸ The Section 257 Studies can be found at http://www.fcc.gov/opportunity/meb_study/ and http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

⁶⁹ Data staleness was the entirely predictable result of the Commission’s own negligence. Although the Section 257 Studies were published in December 2000, the Commission did not seek comment on them in an inquiry until 2004. See Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies, Public Notice, 19 FCC Rcd 10491 (MB 2004). Then the Commission failed to seek comment in a rulemaking context on an SDB definition until it issued the Second Further NPRM in August 2007. Thus the Commission now is faced with a record based on ten-year old data. While DCS believes that most of the circumstances shown in the Section 257 Studies remain just as valid today, a reviewing court might require an agency to support any proposal for race conscious relief with more contemporaneous data. Indeed, the minority station ownership database upon which the Commission relies is grossly inaccurate, as Free Press has pointed out. See S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007) at 12-14 (identifying several serious deficiencies in the FCC’s data collection and reporting).

⁷⁰ Arie Beresteanu and Paul B. Ellickson, “Minority and Female Ownership in Media Enterprises” (June 2007) (“Study #7”). Study #7 cannot be used as a basis for developing minority ownership policy. See Comments of Catherine J.K. Sandoval, Carolyn Byerly and Akilah Folami, MB Docket No. 06-121 (October 19, 2007), with which DCS concurs. For example, Study 7 surprisingly regards initiatives to advance minority ownership as restrictive and thus as impediments to competition (*id.* at 13) although unlocking minorities’ underutilized entrepreneurial, management and creative talent, and bringing new energy and capital to the transactional table, are demand-generating and competition-promoting on their face. Further, Study 7 suggests that curing minorities’ inadequate access to capital is solvable only through “either chang[ing] the aggregate distribution of wealth or otherwise increas[ing] access to capital markets” (*id.* at 10) without recognizing that it is the Commission itself that plays a dominant role in the generation or withholding of access to capital in broadcasting. Decisions on where a station’s transmitter can be sited, whether it faces competitors who exploit structural rules with fraudulent ownership structures, and whether it can monetize its subchannels are prime examples of the Commission’s profound influence on broadcasters’ asset values, creditworthiness and investment potential. See, respectively, DCS Proposal #12: Opening FM Spectrum for New Entrants, discussed in DCS 2007 Comments at 22-25; Proposal #10: Zero Tolerance for Ownership Rule Abuse, discussed in DCS 2007 Comments at 19-22; and Proposal # 36: Use of the Share-Time Rule to Foster Ownership of DTV and FM Subchannels, discussed in DCS 2007 Comments at 41-47. Indeed, the Commission has repeatedly acknowledged its own extensive influence on access to capital for small, minority, and women-owned business. See, e.g., Reallocation and Service Rules for 698-746 MHz Spectrum Band (Television Channels 52-59), 17 FCC Rcd 1022, 1090-91 ¶176 (2002), recon. denied, 17 FCC Rcd 11613 (2002) (discussing that the Commission’s reasoning for not granting bidding credits for rural telcos was the failure to demonstrate historical lack of access to capital); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, 15 FCC Rcd 476, 530-31 ¶135 and n. 313 (2000) (discussing the creation of bidding credits to ease difficulties of minorities and women in gaining access to capital); Federal-State Joint Board on Universal Service: Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas, 14 FCC Rcd 21177, 21255 ¶179 (1999) (discussing Commission rules that enable small, minority and women-owned businesses “to overcome historical difficulties in gaining access to capital”); Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 14 FCC Rcd 12541, 12545-46 ¶10 (1999)

authors acknowledge.⁷¹ Nor has the Commission’s minority ownership database met the agency’s usually high standards for statistical and empirical information.⁷²

Fortunately, Justice Kennedy’s opinion in Parents held that a state actor may compile racial statistics for the purpose of making civil rights policy.⁷³ If earlier cases left any doubt of this, Justice Kennedy’s opinion in Parents settled the question by not only permitting but encouraging the collection of data by race as a means to achieve a diverse student body.⁷⁴

4. The Commission Must Attempt A Wide Variety Of Race-Neutral Initiatives

Under strict scrutiny review, upon finding that a race-conscious government action addresses a compelling government interest, the examination turns to whether the government’s plan is narrowly tailored to achieve that government interest.⁷⁵ In his controlling opinion in

(discussing how adoption of equity/debt standard would not hinder the ability to gain access to capital); Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, 12 FCC Rcd 18600, 18664-65 ¶154 (1997) (discussing a tiered bidding credit structure to address businesses access to capital).

⁷¹ See Study #7, at 2 (“due to the nature and quality of the available data, we are not able to reach strong conclusions, so our recommendations should be viewed more as points of discussion, rather than a prescription for policy.”)

⁷² On this point, Study #7 is absolutely correct. See Study #7, at 2 (“The data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”) Compare, e.g., FCC Wireline Competition Bureau, Industry Analysis Division, “Trends in Telephone Service” (February 2007), which like most Commission statistical reports is a model of accuracy, care and insight.

⁷³ Collection of data is a constitutional, race-neutral activity that the Commission may undertake. The Equal Protection Clause of the Fourteenth Amendment does not forbid the government from creating classifications, but keeps that government from “treating differently persons who are in all relevant respects alike.” Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). The government may draw distinctions between individuals provided it is relevant to a legitimate governmental objective. See Lehr v. Robinson, 463 U.S. 248, 265 (1983). Raw, statistical data on race and ethnicity may be collected, regardless of a party’s fear of misuse. See United States v. New Hampshire, 539 F.2d 277, 279-80 (1st Cir.), cert. denied, 429 U.S. 1023 (1976) (data is considered relevant if it relates to the statutory duties of the government agency). See Safeway Stores v. NLRB, 691 F.2d 953, 956 (10th Cir. 1982) (citing NLRB v. Acme Indus. Co., 385 U.S. 432 (1967)); see also Caulfield v. Board of Education of the City of New York, 583 F.2d 605, 611 (2nd Cir. 1978) (collection of racial and ethnic data of school employees was deemed to relate to government’s statutory authority and duty to alleviate discrimination). These methods of tracking data and performance could be incorporated into part of an SBD program.

⁷⁴ Parents, 127 S.Ct. at 2792 (Kennedy, J., concurring) (“Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including ... tracking enrollments, performance, and other statistics by race.”)

⁷⁵ See Adarand, 515 U.S. at 235 (citing Fullilove v. Klutznick, 448 U.S. 448, 496 (1980)); see also Parents, 127 S.Ct. at 2760 (citing Grutter, 539 U.S. at 339).

Parents, Justice Kennedy gives some suggestions as to how a school district may pursue its diversity goals, without race-based classifications, “including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race.”⁷⁶ So long as the government’s programs do not define students by race, “it is unlikely any of them would demand strict scrutiny.”⁷⁷ When applied to the broadcasting industry, these race-neutral methods outlined in Parents translate fairly well into several DCS proposals, including:

Selecting strategic business locations

- Proposal #12: Opening FM Spectrum for New Entrants⁷⁸
- Proposal #36: Use of the Share-Time Rule to Foster Ownership of DTV and FM Subchannels⁷⁹
- Proposal #38: Permitting AM Stations to use FM Translators.⁸⁰

Funding special programs that would benefit a small or economically disadvantaged businesses that include minority-owned entities

- Proposal #5: Structural Rule Waivers for Creating Incubator Programs⁸¹
- Proposal #6: Bifurcation of Channels for Share-Times with SDBs⁸²
- Proposal #7: Structural Rule Waivers for Financing Construction of an SDB’s Unbuilt Station⁸³

⁷⁶ Parents, 127 S.Ct. at 2792 (Kennedy, J., concurring).

⁷⁷ Id. (citing Bush v. Vera, 517 U.S. 952, 958 (1996)).

⁷⁸ See DCS 2007 Comments at 22-24.

⁷⁹ Id. at 41-47.

⁸⁰ Id. at 50-51.

⁸¹ Id. at 11-14.

⁸² Id. at 14-15.

⁸³ Id. at 15-17.

- Proposal #8: Nonattribution of EDP Interests in SDBs⁸⁴
- Proposal #24: Advocacy of Tax Deferral Legislation Designed, to the Extent Possible, to Foster Minority Ownership⁸⁵
- Proposal #28: Extension of the Community Reinvestment Act (CRA) to Encourage Financial Institutions to Provide Debt Financing to Broadcasters⁸⁶
- Proposal #29: Encourage More Local and Regional Banks to Participate in SBA Guaranteed Loan Programs for Broadcast and Telecom Ventures⁸⁷
- Proposal #30: Establishment of a Fund of Funds⁸⁸
- Proposal #31: Revision of the Distress Sale Policy to Institute Case-by-Case Review of Purchasers' Qualifications⁸⁹
- Proposal #32: Reservation, for a Company that Finances or Incubates an SDB, of First Place in the Queue to Form a Duopoly in a Market for which only a Limited Number of Duopolies are Permissible⁹⁰
- Proposal #33: Relaxation of Foreign Ownership Restrictions⁹¹
- Proposal #37: Retention On Air of AM Expanded Band Owners' Stations if One of the Stations is Sold to an SDB⁹²

Recruiting minorities as bidders for broadcast assets

- Proposal #1: Equal Transactional Opportunity: Barring Discrimination on the Basis of Race or Gender in Broadcast Transactions⁹³
- Proposal #2: Transfer Restriction of Grandfathered Clusters to SDBs⁹⁴

⁸⁴ Id. at 17-19.

⁸⁵ Id. at 28-29.

⁸⁶ Id. at 32.

⁸⁷ Id. at 33-34.

⁸⁸ Id. at 34-35.

⁸⁹ Id. at 35-36.

⁹⁰ Id. at 36-37.

⁹¹ Id. at 37-39.

⁹² Id. at 47-50.

⁹³ Id. at 5-7.

⁹⁴ Id. at 7-9.

- Proposal #34: Extension of Divestiture Deadlines in Mergers Where Applicants have Actively Solicited Bids for Spin-off Properties from SDBs⁹⁵
- Proposal #35: Relaxation of the Grandfathered Cluster Transfer Deadline for Cluster Purchasers Who Will Resell Stations To Small Businesses⁹⁶
- Proposal #36: Use of the Share-Time Rule to Foster Ownership of DTV and FM Subchannels⁹⁷

Training personnel that would enhance minority ownership or participation in the industry

- Proposal #39: Convening of an Access to Capital Conference⁹⁸
- Proposal #40: Preparation of a Guidebook On Diversity⁹⁹

Collecting data on performance/management levels and participation of all races in the industry

- Proposal #26: Ongoing Longitudinal Research on Minority and Women Ownership Trends¹⁰⁰

Although these are important steps, DCS believes it highly unlikely that these steps, by themselves, would prove sufficient to cure the generations-old, endemic problem of minority underrepresentation in media ownership. Unfortunately, it may take years for the Commission to test these race-neutral initiatives and discover whether they were adequate.

⁹⁵ Id. at 39-40.

⁹⁶ Id. at 40-41.

⁹⁷ Id. at 41-47.

⁹⁸ Id. at 51-52.

⁹⁹ Id. at 52-53.

¹⁰⁰ Id. at 30-31.

5. The Commission Should Develop A Non-Dilute Interim Classification To Use While It Perfects A Race-Conscious Definition

As demonstrated in the preceding section, an SDB definition can be perfected and sustained but that will take time. Minority and women broadcasters cannot wait years more for relief. They needed it yesterday, and so did the public.

Therefore it would be desirable for the Commission to develop the least dilute race-neutral classification mechanism as an interim step while the agency completes the task of developing a race-conscious SDB definition. DCS has framed such an interim classification, and once the classification is perfected and vetted with stakeholders, DCS will submit it ex parte for the Commission's consideration.

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APPENDIX

THE DIVERSITY AND COMPETITION SUPPORTERS (DCS)

Alliance for Community Media
American Indians in Film and Television
Asian American Justice Center
Black College Communication Association
Center for Asian American Media
Independent Spanish Broadcasters Association
International Black Broadcasters Association
Latinos in Information Sciences and Technology Association
League of United Latin American Citizens
Minorities and Communication Division of the Association for Education in Journalism and
Mass Communications
Minority Business Enterprise Legal Defense and Education Fund
Minority Media and Telecommunications Council
Multicultural Broadband Trade Association
National Association of Black Telecommunications Professionals
National Association of Hispanic Publications Foundation
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Congress of American Indians
National Council of Churches
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Institute for Latino Policy
National Puerto Rican Coalition
National Urban League
Native American Public Telecommunications, Inc.
Puerto Rican Legal Defense and Education Fund
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press