

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651,  
03-3665, 03-3675, 03-3708, 03-3894, 03-3708, 03-3951 & 03-4073

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents,

FOX ENTERTAINMENT GROUP, INC., FOX TELEVISION STATIONS,  
INC., NATIONAL BROADCASTING COMPANY, INC., TELEMUNDO  
COMMUNICATIONS GROUP, INC., VIACOM, INC., NEWSPAPER  
ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF  
BROADCASTERS, OFFICE OF COMMUNICATION OF THE UNITED  
CHURCH OF CHRIST, INC., AMERICAN HISPANIC OWNED RADIO  
ASSOCIATION, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY,  
LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MINORITY  
BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND,  
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,  
NATIONAL ASIAN AMERICAN TELECOMMUNICATIONS  
ASSOCIATION, NATIONAL ASSOCIATION OF LATINO INDEPENDENT  
PRODUCERS, NATIONAL COALITION OF HISPANIC ORGANIZATIONS,  
NATIONAL COUNCIL OF LA RAZA, NATIONAL HISPANIC MEDIA  
COALITION, NATIONAL INDIAN TELECOMMUNICATIONS INSTITUTE,  
NATIONAL URBAN LEAGUE, NATIVE AMERICAN PUBLIC  
TELECOMMUNICATIONS, INC., PRLDEF-INSTITUTE FOR PUERTO  
RICAN POLICY, UNITY: JOURNALISTS OF COLOR, INC., WOMEN'S  
INSTITUTE FOR FREEDOM OF THE PRESS, GANNETT CO, INC., BELO  
CORP., MORRIS COMMUNICATIONS COMPANY, LLC, NASSAU  
BROADCASTING HOLDINGS, INC., NASSAU BROADCASTING II, LLC,  
SUNBELT COMMUNICATIONS COMPANY, PRESS COMMUNICATIONS,  
LLC, TRIBUNE COMPANY, DIVERSIFIED COMMUNICATIONS, FAMILY  
STATIONS, INC., SIMMONS MEDIA GROUP, LLC,

(continued)

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651,  
03-3665, 03-3675, 03-3708, 03-3894, 03-3708, 03-3951 & 03-4073

MILLCREEK BROADCASTING, LLC, CONSUMER FEDERATION OF  
AMERICA, CONSUMERS UNION, UNIVISION COMMUNICATIONS, INC.,  
AND CAPITOL BROADCASTING CORPORATION,

Intervenors,

and consolidated cases.

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On Petitions for Review of an Order of  
the Federal Communications Commission

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**BRIEF OF INTERVENORS AMERICAN HISPANIC OWNED RADIO  
ASSOCIATION, CIVIL RIGHTS FORUM ON COMMUNICATIONS  
POLICY, LEAGUE OF UNITED LATIN AMERICAN CITIZENS,  
MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND  
EDUCATION FUND, MINORITY MEDIA AND  
TELECOMMUNICATIONS COUNCIL, NATIONAL ASIAN AMERICAN  
TELECOMMUNICATIONS ASSOCIATION, NATIONAL ASSOCIATION  
OF LATINO INDEPENDENT PRODUCERS, NATIONAL COALITION OF  
HISPANIC ORGANIZATIONS, NATIONAL COUNCIL OF LA RAZA,  
NATIONAL HISPANIC MEDIA COALITION, NATIONAL INDIAN  
TELECOMMUNICATIONS INSTITUTE, NATIONAL URBAN LEAGUE,  
NATIVE AMERICAN PUBLIC TELECOMMUNICATIONS, INC.,  
PRLDEF-INSTITUTE FOR PUERTO RICAN POLICY, UNITY:  
JOURNALISTS OF COLOR, INC., AND WOMEN'S INSTITUTE FOR  
FREEDOM OF THE PRESS**

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October 21, 2003

**Corporate Disclosure Statement**

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press respectfully state that each of them is a nonprofit organization having no parent corporations or stock.

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October 21, 2003

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### **Statement Of Subject Matter Jurisdiction**

The Intervenors herein (collectively “MMTC”)<sup>1/</sup> subscribe to the Statement of Subject Matter Jurisdiction found in the Brief of Prometheus Radio Project et al. (“Prometheus Main Brief”). The Federal Communications Commission (“FCC”) also has subject matter jurisdiction over the preservation and promotion of minority broadcast ownership under 47 U.S.C. §§151, 257 and 309(j) (1996).

### **Statement Of Appellate Jurisdiction**

MMTC subscribes to the Statement of Appellate Jurisdiction in the Prometheus Main Brief.

### **Statement Of Interest**

Intervenors are trade, consumer, civic and professional organizations. They include the two largest Hispanic organizations (League of United Latin American Citizens (“LULAC”) and National Council of La Raza), the organizations representing the nation’s Hispanic broadcasters (American Hispanic Owned Radio Association) and minority journalists (UNITY-Journalists of Color, Inc.), and some of the most respected African American, Asian American and Native American organizations. Each intervenor participated in the proceedings below.

MMTC seeks, inter alia, (1) an order vacating the FCC’s repeal of the Failing Stations Solicitation Rule (“FSSR”), which the FCC created to ensure that

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<sup>1/</sup> Some pleadings were filed only by intervenor Minority Media and Telecommunications Council. These have been adopted by each intervenor, who all participated in FCC MB Docket 02-277 under the name “Diversity and Competition Supporters.” Petitioner National Council of the Churches of Christ in the United States was also among the Diversity and Competition Supporters.

minorities have opportunities to buy television stations; and (2) an order requiring the FCC, before the stay is lifted, to rule on each of the thirteen proposals discussed herein. See p. 49 infra. Absent this relief, the FCC's decisions to remove protections for minority and disadvantaged business ownership, and to disregard eight proposals to promote minority and disadvantaged business ownership and five proposals to generally promote diversity and competition, will deprive intervenors' members of (1) broadcast service addressing their needs and interests, (2) the ability to disseminate their views to the widest possible spectrum of the American public, and (3) opportunities to become broadcast owners and to compete fairly with other broadcast owners.

### **Statement of Issues**

1. Whether, when it repealed FSSR, the FCC erroneously (1) failed to provide any notice that the FSSR was under review, (2) acted contrary to congressional direction; (3) failed to consider the reason the FSSR was created, (4) acted without any record evidence, and (5) failed to rationally explain its decision.

The Notice of Proposed Rulemaking (“NPRM”)<sup>2/</sup> in the MB Docket 02-277 (the “Omnibus Proceeding”) did not mention the FSSR.<sup>3/</sup>

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<sup>2/</sup> 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 (Report and Order and Notice of Proposed Rulemaking), 17 FCC Rcd 18503 (2002) (“NPRM”), JA3450.

<sup>3/</sup> While discussing a different subject, MMTC identified some of the FSSR's advantages. MMTC Ex Parte Letter to Hon. Michael Powell, April 28, 2003 (“MMTC April 28, 2003 Ex Parte”) at 18-19, JA5257-5258; see also id. at 19 n. 37, JA5258 and discussion at 14 n.27 infra.

In the Omnibus Proceeding's Report and Order ("R&O"),<sup>4/</sup> the FCC repealed the FSSR. 18 FCC Rcd at 13708 ¶225, JA0127.

2. Whether the FCC erroneously (1) failed to meaningfully analyze and rationally review three MMTC proposals aimed at preserving broadcast ownership by disadvantaged and minority businesses, (2) failed to mention the existence of the five other MMTC proposals aimed at preserving broadcast ownership by disadvantaged and minority businesses; and (3) failed to mention the existence of all five MMTC proposals aimed at fostering diversity and competition generally.

The NPRM sought comment on minority ownership, 17 FCC Rcd at 18521 ¶50, JA3468. MMTC presented eight proposals for ownership by disadvantaged businesses, including minority businesses, in, inter alia: Initial Comments of Diversity and Competition Supporters, MB Docket 02-277 (filed January 2, 2003) ("MMTC Comments") at 103-20, JA4387-4404, and the MMTC April 28, 2003 Ex Parte at 11-19, JA5250-5258. In the R&O, the FCC rejected one proposal and postponed action on two others. 18 FCC Rcd at 13634-37 ¶¶46-52, JA0052–0054. It failed to note the existence of the other five proposals aimed at disadvantaged and minority business ownership.

In the NPRM, 17 FCC Rcd at 18516-26 ¶¶33-68, JA3463-3473, the FCC sought comments on how to promote diversity and competition. MMTC presented five proposals in, inter alia: MMTC Reply Comments, MB Docket

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<sup>4/</sup> 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 (Report and Order and Notice of Proposed Rulemaking), 18 FCC Rcd 13620 (2003) ("R&O"), JA00376.

01–317 (filed May 8, 2002) (“MMTC Radio Ownership Reply Comments”) at 22–27, JA3463-3441; MMTC Comments at 82-101 and 123-41, JA4366-4385 and JA4405-4421; Reply Comments of Diversity and Competition Supporters, MB Docket 02-277 (filed February 3, 2003) (“MMTC Reply Comments”) at 17–24, JA4961-4968 and MMTC April 28, 2003 Ex Parte at 6-11, JA5245-5250. The FCC failed to note the existence of all five proposals.

### **Statement Of The Case**

MMTC subscribes to the Statements of Subject Matter and Appellate Jurisdiction in the Prometheus Main Brief.

### **Statement Of Facts**

MMTC subscribes to the Statement of Facts in the Prometheus Main Brief, and offers these additional facts.

#### **I. Broadcast Ownership By Disadvantaged Businesses, Including Those Owned By Minorities**

It is a settled tenet of communications policymaking that minority ownership is an important consideration in structural ownership rulemakings. MMTC Comments at 50-60, JA4344-4354.<sup>5/</sup> Members of racial minority groups

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<sup>5/</sup> In 1985, the FCC proclaimed that “our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.” Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 F.C.C.2d 74, 94 (1985). See also 1998 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 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998) (FCC “has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry.”)

control only 1.2% of the asset value of the broadcasting industry. See MMTC Comments at 17, JA4311. Minority broadcasters are often poorly capitalized. MMTC Comments at 32-33, JA4326-4327. Further, the FCC's former policies, such as licensing segregationists for two generations, exacerbated minority exclusion from broadcast ownership. Id. at 19-35, JA4313-4329.

Congress has repeatedly taken steps to ensure that the FCC is attentive to minority ownership,<sup>6/</sup> which it regards as “an important factor in diversifying the media of mass communications...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public”<sup>7/</sup> The Supreme

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<sup>6/</sup> In the Telecommunications Act of 1996 (“Telecommunications Act”), Congress (1) provided that the FCC shall “make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,” 47 U.S.C. §151 (1996) (underscored 1996 language amended original 1934 text); (2) required the FCC to undertake to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership or telecommunications services and information services,” 47 U.S.C. §257(a) (1996); and (3) provided that in designing a competitive bidding system for licenses, the FCC shall ensure that licenses are disseminated “among a wide variety of applicants, including... businesses owned by members of minority groups and women[.]” 47 U.S.C. §309(j)(3)(B) (1996). Congressional insistence since 1982 that the FCC promote minority broadcast ownership is detailed in the MMTC Comments at 56-59, JA4350-4353.

<sup>7/</sup> Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-265 (1982) at 26.

Court agrees.<sup>8/</sup>

The FCC has addressed minority ownership directly, through incentives to sell stations to minorities,<sup>9/</sup> and indirectly through equal employment opportunity (EEO) rules.<sup>10/</sup> Minority ownership assumed heightened importance in the Omnibus Proceeding due to fears that rapid consolidation -- unless counterbalanced by diversity initiatives and protections -- could force minority

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<sup>8/</sup> See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990) (“[e]vidence suggests that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.”) Research studies documenting that minority ownership significantly influences program decisions are collected in the MMTC Comments at 70-71, JA4364-4365 and MMTC Reply Comments at 9 n. 15.

<sup>9/</sup> E.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979, 983 (1978) (creating the Tax Certificate Policy, which allowed those selling stations to minorities to defer capital gains tax payments. In Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995), Congress repealed the policy. See MMTC Comments at 53-54 n. 96, JA4347-4348 (giving history of direct FCC efforts to promote minority ownership).

<sup>10/</sup> See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6306 ¶38 (1996) (“[e]mployment provides...experience that is valuable in attaining ownership positions”). The FCC has had broadcast EEO rules for most of the past 35 years; it recently adopted new rules in Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018 (2002) (reconsideration in part pending) (“2002 EEO Order”).

owners out of the industry.<sup>11/</sup>

The FCC has used race-conscious policies,<sup>12/</sup> as well as race-neutral policies such as the FSSR, to promote minority ownership.<sup>13/</sup> Presently, the FSSR is the only FCC policy aimed at fostering minority television acquisitions.

The FCC has repeatedly failed to keep its promises to consider new minority ownership policies. Minority ownership proposals gathered by the FCC in a 1992 structural rulemaking lay dormant for so long that they were rolled into the 1995 minority ownership rulemaking -- which also remains dormant.<sup>14/</sup>

A 1999 rulemaking proposal by Entravision Communications still awaits action.

See pp. 18-19 infra. Two 1999 proposals by MMTTC, which the FCC deferred for

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<sup>11/</sup> MMTTC Comments at 17-18, JA4311-4312 (minority television station ownership dropped from 33 to 20 between 1999, when local TV duopolies were permitted, and 2002; id. at 45, JA4339 (local radio consolidation authorized in 1992 “halted the growth of minority owned radio in its tracks for four years”); id. at 46-47, JA4340-4341 (the number of minority radio broadcasters decreased after further local ownership deregulation in 1996, and the number of minority-owned stations increased since 1996 only because two public-spirited companies voluntarily spun off stations to minorities).

<sup>12/</sup> E.g., the Tax Certificate Policy; see p. 6 n. 9 supra.

<sup>13/</sup> See p. 13 n. 24 infra (discussing FSSR). The constitutionality of the proposed initiatives is not before this Court, since no party raised constitutional objections to them and the FCC did not rule on their constitutionality.

<sup>14/</sup> See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket 94-149 (NPRM), 10 FCC Rcd 2788 n. 2 (1995) (“1995 Minority Ownership NPRM”) (incorporating proposals pending from Revision of Radio Rules and Policies (MO&O and Further NPRM), 7 FCC Rcd 6387, 6391 ¶21 (1992) (“1992 Radio Rules - Reconsideration”), modified, 9 FCC Rcd 7183 (1994)).

further study in 2001, remain pending and were not mentioned in the R&O. See pp. 21-25 infra.

The FCC has exhibited a pattern of ignoring rulemaking proposals aimed at advancing minority ownership.<sup>15/</sup> In a proceeding aimed at deciding who would colonize the AM “Expanded Band” (1605-1705 kHz), the FCC disregarded the extensive comments on minority ownership filed by the NAACP, LULAC and others, who the FCC did not even list in the decision’s Appendix as commenters. On reconsideration, when the commenters offered a more modest proposal, the FCC held that this new proposal “should have been submitted earlier as a comment” -- that is, as part of the same comments the FCC had disregarded.<sup>16/</sup> In the 1992 Cable Act implementation proceeding, 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.<sup>17/</sup> 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,

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<sup>15/</sup> The FCC’s procedural irregularities in addressing minority ownership over two generations are summarized in the MMTTC Comments at 19-35, JA4313–4329. See also Comments of MMTTC, MM Docket No. 01-317 (filed March 19, 2002) (“MMTTC Radio Ownership Comments”) at 71-104 (more thorough treatment).

<sup>16/</sup> See Technical Assignment Criteria for the AM Broadcast Service (R&O), 6 FCC Rcd 6273 (1991), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993).

<sup>17/</sup> Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (First R&O), 8 FCC Rcd 3359 (1993).

LULAC and others.<sup>18/</sup>

In a footnote in the R&O, the FCC said “we believe additional evidence is necessary, however, before we reach conclusions” on market entry barriers facing minorities, women and small businesses. 18 FCC Rcd at 13635 n. 70, JA0041. The FCC did not specify what evidence was missing. Five FCC research studies (the “Section 257 Studies”), released in 2000, thoroughly documented the extent, nature, causes and consequences of minority underinclusion in broadcast ownership.<sup>19/</sup> Although it placed twelve other studies in the record and sought comment on them, the FCC failed to include the Section 257 Studies in the record or seek comment on them.<sup>20/</sup> The R&O contains no evaluation of the Section 257

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<sup>18/</sup> Establishment and Regulation of New Digital Audio Radio Services, GEN Docket No. 90-357 (NPRM and Further NOI), 7 FCC Rcd 7776 (1992).

<sup>19/</sup> See MMTTC Comments at 29-32, JA4323-4326 (detailing findings); see p. 5 n. 6 and pp. 9-10 supra (discussing Section 257 and Section 257 Studies).

<sup>20/</sup> Two months before comments were due, MMTTC and the National Association of Black Owned Broadcasters (“NABOB”) asked the FCC to include the Section 257 Studies in the record and seek comment on them. MMTTC/ NABOB Motion for Extension of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record (October 9, 2002) at 1; MMTTC Ex Parte Letter, October 26, 2002, JA3668-3669; MMTTC/ NABOB Motion for Further Extension of Time (December 9, 2002) at 3. The FCC responded that the motion “remain[s] pending with the Commission and will be addressed separately.” Order, DA 02-2989 (Media Bureau, November 5, 2002) at 2 n. 6; JA3827; see also Order, DA 02-3575 (Media Bureau, December 23, 2002) at 3 n. 12, JA3865. Not until the FCC completed the Omnibus Proceeding did it rule that it would not put the five studies in the record or seek comment on them. See R&O, 18 FCC Rcd at 13635 n. 70, JA0052. Compare FCC Seeks Comment on Ownership Studies, MM Docket 02-277, 17 FCC Rcd 19140 (2002) (seeking comment upon, and placing in the record, twelve FCC-commissioned studies on subjects other than minority ownership).

Studies, despite the fact that they documented the extent, nature, causes and consequences of minority underinclusion in broadcast ownership, the FCC did not cite any of this evidence in the R&O. The R&O also lacks even a cursory mention of an historic May, 2003 public hearing on minority ownership,<sup>21/</sup> in which the Chairman and three commissioners participated.

The NPRM sought comment on whether and how to promote minority ownership, acknowledging that “the Commission has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses.”<sup>22/</sup> Similarly, in the R&O, the FCC confirmed that “[e]ncouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here.” 18 FCC Rcd at 13634 ¶46. Yet the R&O lacked any discussion of the potential impact of the FCC’s decisions to deregulate newspaper crossownership, radio/television

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<sup>21/</sup> See The Impact of Media Consolidation on Minority Representation and Ownership, Hearing Transcript, Wayne State University School of Law, Detroit, Michigan, Monday, May 19, 2003 - 12:00 PM, Presiding: Congressman John Conyers, Jr., filed May 29, 2003 in MB Docket 02-277. Commissioner Copps co-presided. Chairman Powell, and Commissioners Abernathy and Adelstein each provided videotaped statements for the hearing record.

<sup>22/</sup> NPRM at 18521 ¶50 (fn. omitted), JA3468. When it began the radio ownership proceeding, the FCC evidently forgot to mention minority ownership, an error corrected by an exchange of letters between MMTTC and the Chief of the Media Bureau. See Multiple Ownership of Radio Broadcast Stations in Local Markets (NPRM), 16 FCC Rcd 19861 (2001); MMTTC Radio Ownership Comments, Appx. 3. Yet minority ownership went unmentioned again in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Ninth Annual Report), 17 FCC Rcd 26901 (2002).

crossownership, television duopoly and “triopoly” and national television ownership on minority or disadvantaged business ownership.

In the R&O’s section on “Minority and Female Ownership Diversity,” the FCC rejected one proposal and postponed consideration of two others. 18 FCC Rcd at 13634-52 ¶¶46-52, JA0051-0054, discussed at 14-18 infra. The only step the FCC took to preserve minority ownership diversity was a radio-only policy that would be triggered by circumstances that apparently seldom arise. There is no clear indication that the policy will improve disadvantaged business ownership, minority ownership, or even ownership by those in the FCC’s chosen “small business” classification. See p. 15 n. 31 infra. The R&O did not mention five other proposals aimed at preserving minority and disadvantaged business ownership. See pp. 18-25 infra. Nor did the FCC mention any of five proposals, designed to promote diversity and competition generally, which would also have advanced minority and disadvantaged business ownership. See pp. 26-32 infra.

The FCC did not acknowledge that its 1999 deregulation of local television precipitated a dangerous drop in minority television ownership. See p. 7 n. 11 supra. Nor did it assess the potential consequences of its deregulatory plans on minority television ownership. Instead, the FCC’s only step with respect to minority ownership in television was to repeal the only rule created to protect minority ownership. See pp. 12-14 infra.

Commissioners Copps dissented, R&O, 18 FCC Rcd at 13970-71, JA0386–0387:

Although today's Order recognizes the importance of minority and female participation, we fail to conduct rigorous analysis of today's rules on minorities and women....solutions to this problem will be harder to come by if media conglomerates proceed now to lock up control of the scarce licenses to use the public's airwaves. That is why these problems need solutions now, not somewhere far down future's road.

Commissioner Adelstein also dissented, id. at 13997, JA0416:

We should have made sure we understood the full impact of consolidation on minority ownership, minority employment, issue coverage, and the portrayal of minorities before rushing ahead with massive new consolidation opportunities” (emphasis in original).

## **II. The Failing Stations Solicitation Rule**

In 1999, the FCC created the FSSR in response to concerns of MMTC, Black Entertainment Television (BET), the Commerce Department's National Telecommunications and Information Administration and others that television duopolies might undermine minority ownership.<sup>23/</sup> To ensure that qualified minority broadcasters and others had a fair chance to learn that certain financially troubled television stations (“failing,” “failed” or “unbuilt”) were for sale, the

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<sup>23/</sup> Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12936-37 ¶74 (1999) (“Television Duopoly Order”), recon. granted in part, 14 FCC Rcd 20571 (1999), further recon. granted in part, 16 FCC Rcd 1067 (2001) (“Television Duopoly Second Reconsideration Order”), reversed and remanded in part sub nom. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) (“Sinclair”), rehearing denied, 2002 U.S. App. LEXIS 16618 (D.C. Cir., August 12, 2002), rehearing en banc denied, 2002 U.S. App. LEXIS 16619 (D.C. Cir., August 12, 2002).

FCC provided that an applicant seeking to duopolize a failing, failed or unbuilt station:

will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid. We remain very concerned about the more general problem of the decline in minority broadcast ownership and possible mechanisms to increase minority and female ownership in broadcasting, but nonetheless believe our failed station waiver criteria serve the public interest. The Commission has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area.<sup>24/</sup>

The NPRM neither sought comment on the FSSR nor proposed its repeal.<sup>25/</sup> The two comments cited in the R&O addressed the FSSR only in a cursory way,<sup>26/</sup> and the record contains no evidence that the FSSR was either

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<sup>24/</sup> TV Duopoly Order, 14 FCC Rcd at 12936-37 ¶74 (fns. omitted). It is undisputed that the FSSR is race-neutral. Compare MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, 19 (D.C. Cir.), rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert denied, 534 U.S. 1113 (2002) (one option of the FCC's (then operative) EEO program, under which "licensees remain free...to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience" does not unconstitutionally pressure broadcasters to recruit women and minorities.)

<sup>25/</sup> The paragraphs in the NPRM that identify the local television rules under review and that seek comment on them do not mention the FSSR. NPRM, 17 FCC Rcd at 18527 ¶73, JA3474; id. at 18528-18535 ¶¶75-97, JA3475-3482.

<sup>26/</sup> R&O, 18 FCC Rcd at 13707 n. 479, JA0126, citing National Association of Broadcasters ("NAB") Comments at 80 n. 148 (JA4429) and Pappas Comments at 14-15. The NAB's discussion is contained in a short footnote, Pappas' discussion consists of a single conclusory sentence. Id. at 15.

harmful or ineffective.<sup>27/</sup> Nonetheless, in the R&O, the FCC repealed the FSSR:

for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.<sup>28/</sup>

### **III. Proposed Initiatives To Advance Minority And Disadvantaged Business Ownership**

MMTC presented eight proposals specifically aimed at advancing minority and disadvantaged business ownership.

#### **A. Structural Rule Waivers For Cluster Spinoffs**

The “Cluster Spinoff Proposal” contemplated that the seller of a grandfathered local radio station cluster would not have to break up the cluster if

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<sup>27/</sup> Although unaware that the FCC might be considering repeal of the FSSR, MMTC invoked the FSSR favorably while arguing for another transactional transparency policy, which would be aimed at nondiscrimination. See MMTC April 28, 2003 Ex Parte at 18-19, JA-5257-5258 (“even in a duopoly situation, the Commission has recognized that an out of market buyer might place more value on a standalone property than an in-market prospective duopolist”); id. at 19 n. 37, JA5258 (“an out of market buyer may plan to build synergies based on programming or based on regional operations. Those synergies might be just as attractive from a business standpoint as the synergies flowing from a duopoly.”) Thus, although the FCC failed to provide notice of the FSSR’s possible repeal, MMTC did remind the FCC of some of the reasons the FSSR remains valuable.

<sup>28/</sup> R&O, 18 FCC Rcd at 13708 ¶225, JA0127 (citing, in n. 490, NAB Comments at 80 n. 148, JA4429).

it were sold to a socially and economically disadvantaged business (“SDB”).<sup>29/</sup> The FCC adopted a provision for transferring a grandfathered cluster intact, but determined that small businesses, rather than SDBs, would constitute the class of eligible buyers. 18 FCC Rcd 13810-12 ¶¶488-490, JA0196-0197. The FCC offered a puzzling explanation for its decision, stating that SDB legislation introduced by Senator McCain<sup>30/</sup> “contemplates further definition of eligible purchasers by the Treasury Department after passage, we do not rely on its terms and therefore, set forth our criteria based on our judgment and the record of this proceeding.” R&O, 18 FCC Rcd at 13811 n. 1042, JA0230. It did not explain the relevance of the Treasury Department’s possible involvement, explain what “judgment” it exercised, or identify what information it relied upon that is in the “record of this proceeding.” The FCC does not know the number of small businesses eligible for the cluster spinoffs, or the proportion of disadvantaged or minority-owned firms in that group.<sup>31/</sup> It appears that the FCC’s cluster spinoff

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<sup>29/</sup> See MMTC Comments at 107-109, JA4391-4393. A “cluster” is more than one radio station commonly owned in the same radio market.

<sup>30/</sup> MMTC proposed that the FCC adopt the SDB definition found in S.267, the Telecommunications Ownership Diversity Act of 2003 (108th Cong).

<sup>31/</sup> Id., 18 FCC Rcd at 13913, Appx. G, Final Regulatory Flexibility Analysis, ¶12, JA0332 (finding that over 95% of commercial radio stations meet the SBA’s small business definition, but adding that “many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations are included. Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules” (fns. omitted).

tool will be seldom used in any event.<sup>32/</sup>

**B. Transactional Nondiscrimination**

Transactional discrimination remains a serious problem. MMTC Comments at 117-118, JA4401-4402; MMTC April 28, 2003 Ex Parte at 16, JA5255. A Transactional Nondiscrimination Rule would bar intentional discrimination on the basis of race or gender in the sale of a broadcast station.<sup>33/</sup> On its application to the FCC to transfer or assign a station, a seller would certify that it had not intentionally engaged in race or gender discrimination. MMTC Comments at 120, JA4404; see also id. at 119-20 n. 199, JA4403-4404 (a simple box-checked certification should suffice, given the sophistication of media brokers and counsel). The proposed rule would neither impair the confidentiality of broadcast transactions nor prohibit the use of non-racial, non-gender criteria to select potential buyers. See MMTC April 28, 2003 Ex Parte at 11-19, JA5250–5258. Not a single party opposed MMTC’s proposal.

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<sup>32/</sup> In his dissent, Commission Adelstein observed that “the transfer of entire grandfathered clusters to small entities is likely to prove a rare occurrence. As such, it will do little to offset the damage to new entrants created by today’s Order as a whole.” R&O, 18 FCC Rcd at 13996, JA0415.

<sup>33/</sup> MMTC Comments at 115-20, JA4399-4404. A primary purpose of the rule would be to put an end to pretextual and stereotypical excuses not to solicit or consider qualified minority potential purchasers, e.g., the belief that “minorities are only qualified for, or only interested in, urban or Spanish stations[.]” MMTC April 28, 2003 Ex Parte at 18, JA5257.

The FCC did not deny that transactional discrimination is a serious problem. Nonetheless, the FCC did not adopt MMTC's proposal, holding:

While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.<sup>34/</sup>

The FCC neither defined “efficacy,” nor explained how additional potential buyers could have adverse “effects on the value and alienability” of an asset.

**C. Structural Rule Waivers For Selling Stations To Disadvantaged Businesses**

In its Initial Comments, MMTC stated:

With the possible exception of lack of access to capital, the unavailability of quality stations to buy is the single greatest barrier to the growth of minority owned broadcast companies. Therefore, the single most important incentive the Commission could create is one that would allow a company to conclude an otherwise-premature transaction if it sells stations to socially and economically disadvantaged businesses.<sup>35/</sup>

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<sup>34/</sup> R&O, 18 FCC Rcd at 13637 ¶52, JA0054 (emphasis supplied). The Advisory Committee on Diversity in the Digital Age (“Diversity Committee”) was formed on September 29, 2003.

<sup>35/</sup> MMTC Comments at 103, JA4387.

The FCC did not adopt this “Station Sale Waivers” proposal. Instead, the FCC promised to include the proposal in a subsequent NPRM.<sup>36/</sup> No such NPRM has issued, however.<sup>37/</sup>

**D. Tolling Buildout Deadlines For Selling Expiring Construction Permits To Disadvantaged Businesses**

In a still-pending 1999 petition for rulemaking, Entravision Holdings LLC (“Entravision”) offered the “Buildout Deadlines Proposal.” Entravision asked the FCC to allow holders of expiring construction permits to sell them to minority-controlled entities, or entities agreeing to serve the programming needs of minority or foreign language groups for at least 80% of their operating time.<sup>38/</sup> MMTC supported Entravision’s plan, as it:

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<sup>36/</sup> R&O, 18 FCC Rcd at 13636 ¶50 and n. 78, JA0053-0054 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)). The FCC also specified that twelve informal suggestions of MMTC will be incorporated in the subsequent NPRM. However, these were nonregulatory in nature and beyond the FCC’s powers; and MMTC did not direct them to the FCC. See “Twelve Minority Ownership Solutions,” in MMTC, “Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting,” U.S. Department of Commerce, November 6, 2002 (cited in the R&O, 18 FCC Rcd at 13636 ¶49 and n. 76, JA0053).

<sup>37/</sup> Compare R&O, 18 FCC Rcd at 13870-13873 ¶¶657-70, JA0256-0269 (issuing further NPRM on radio market definitions). See pp. 7-10 supra (describing FCC’s failure to address minority ownership in rulemakings).

<sup>38/</sup> See Petition for Rulemaking, Amendment of Section 73.3598 of the Commission’s Rules -- Entravision Holdings LLC, RM-9567 (filed March 10, 1999). Congress authorized the FCC to establish a time limit for building out construction permits. 47 U.S.C. §319(a), (b) (1992). The time limit is three years unless tolled. 47 C.F.R. §73.3598 (2000).

would be a far superior market mechanism for disposing of expiring permits than the current plan for automatic expiration. The proposal allows the FCC to quickly and efficiently place an expiring permit in the hands of those who the FCC has found are likely to promote diversity right now.<sup>39/</sup>

MMTC also noted that Entravision's plan would rescue the investments of permittees who had tried in good faith to build out their facilities, enhance the likelihood that the public would rapidly receive service, and relieve the FCC of the burden of putting the allotment out for bids again. MMTC Comments at 113–14, JA4397-4398.

The R&O contains no mention of the Buildout Deadlines Proposal.

#### **E. Structural Rule Waivers For Creating Incubator Programs**

The Incubator Proposal, advanced by the FCC itself in 1992 and 1995 and still pending,<sup>40/</sup> would allow a company to acquire more its allowed number of stations in a market if it establishes a program that substantially promotes ownership by disadvantaged businesses. MMTC Comments at 103-104, JA4387-4388. A disadvantaged business could receive management or technical

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<sup>39/</sup> MMTC Comments at 113, JA4397. MMTC also suggested that to ensure its constitutionality, SDBs should be the eligible class. Id. at 112-15, JA4396–4399.

<sup>40/</sup> See 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6391 ¶21 (“encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance.”) See id., 7 FCC Rcd at 6391-92 ¶¶22-25 for a full discussion of the Incubator Proposal. The Incubator Proposal was put out for comment again in the 1995 Minority Ownership NPRM, 10 FCC Rcd at 2791-94 ¶¶15-24.

assistance, loan guarantees, direct financial assistance through loans or equity investment, training, or business planning assistance. Id. at 104, JA4388.

The R&O did not mention the existence of the Incubator Proposal.

**F. Bifurcation Of Channels For Share-Times  
With Disadvantaged Businesses**

In the radio ownership proceeding, MMTC proposed the creation of a new class of “Free Speech Stations.”<sup>41/</sup> These stations would have at least twenty non–nighttime hours of airtime per week. MMTC Comments at 106, JA4390. They would be independently owned by small disadvantaged businesses, and would be primarily devoted to nonentertainment programming. Id. A Free Speech Station would share time on the same channel with an “Entertainment Station,” whose programming would be largely deregulated. Id. A cluster owner that bifurcates the time on an AM or FM channel to accommodate both a Free Speech Station and an Entertainment Station would be permitted to buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act, which allows for an exception to the local radio ownership limits when a new station is created. MMTC Comments at 106,

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<sup>41/</sup> See MMTC Comments at 106-107, JA4390-4391. Owing to its length, the proposal was omitted from the JA; it can be found in the MMTC Radio Ownership Comments at 111-73.

JA4390.<sup>42/</sup> That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. Thus, a cluster could grow beyond the otherwise-applicable FCC local ownership limits, up to the higher limits allowed by antitrust law. Id. MMTC advanced this “Share-Time Proposal” as a means by which “the number of sources and viewpoints available to the public would grow exponentially, and minority ownership would get a much-needed boost.” Id.

The R&O contains no mention of the Share-Time Proposal.

**G. Structural Rule Waivers For Financing Construction Of A Disadvantaged Business’ Unbuilt Station**

In 1999, the FCC issued the Television Duopoly Order, which authorized certain local commercial television duopolies. 14 FCC Rcd at 12929-43 ¶¶54-91. The concurrently-issued Attribution Order revised the rules governing the type and magnitude of a company’s interest in a broadcast station that would be attributed to the company in determining its compliance with the ownership rules.

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<sup>42/</sup> Section 202(b)(2) of the Telecommunications Act authorizes the FCC to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a)(2) (1996) “if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation.” Channel bifurcation gives rise to an increase in the number of stations, since each station in a share-time is a “radio station” under 47 C.F.R. §73.1715 (1982) (authorizing commercial share-times). Seven years ago, the FCC promised to conduct a proceeding to implement Section 202(b)(2). Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership (Order), 11 FCC Rcd 12368, 12370 n. 2 (1996) (“[t]he implementation of [Section 202(b)(2)] will be addressed in a Subsequent Notice of Proposed Rulemaking.”) No such proceeding has commenced.

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (R&O), 14 FCC Rcd 12559 (1999) (“Attribution Order”), recon. granted in part, 16 FCC Rcd 1097 (2001) (“Attribution Reconsideration Order”). One outcome of the attribution proceeding was the EDP Rule, under which the ownership of a station is attributed to a company holding in excess of 33% of the sum of the equity plus the debt (the “Equity Debt Plus” or “EDP”) in the station. 14 FCC Rcd at 12573-91 ¶¶26-65. In a petition for reconsideration of the Television Duopoly Order, MMTC offered its “Unbuilt Stations Financing Proposal”:

SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.

To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.<sup>43/</sup>

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<sup>43/</sup> MMTC Petition for Reconsideration in MM Docket 91-221 (Local Television Ownership) (filed October 18, 1999) at 17–18, quoted in MMTC Comments at 109-110, JA4393-4394. The proposal also contemplated that the holder of the EDP interest should have “a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations” so as to provide the holder of the EDP interest with “the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB’s unbuilt permit will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.” Id.

On December 12, 2000, while this proposal was pending, the FCC released the Section 257 Studies, which documented the extent and causes of minority underrepresentation in ownership. See pp. 9-10 supra. Soon thereafter, on January 19, 2001, the FCC deferred action on MMTC's Unbuilt Stations Financing Proposal because:

While we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.<sup>44/</sup>

In the Omnibus Proceeding, MMTC again offered the Unbuilt Stations Financing Proposal, noting that it "is ripe for review now." MMTC Comments at 110 n. 188, JA4394.

The R&O contains no mention of the Unbuilt Stations Financing Proposal.

**H. Grandfathering Of Nonattribution Of "Equity/Debt Plus" Interests In Stations Owned By Disadvantaged Businesses**

In the Attribution Proceeding, MMTC offered its "Nonattribution Grandfathering Proposal." The nonattributable nature of EDP Interests in SDBs would be grandfathered, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider. MMTC contended that the newly-adopted EDP rules would have the unintended consequence of discouraging broadcasters from providing an EDP interest to any

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<sup>44/</sup> Television Duopoly Second Reconsideration Order, 16 FCC Rcd at 1078 ¶33; id. at 1078-79 n. 69 (citing the Section 257 Studies).

SDB.<sup>45/</sup> MMTC explained that potential EDP providers, which are among the nation's largest broadcasters:

usually find it disadvantageous to hold small, potentially attributable interests in markets not critical to their growth strategies....In positioning itself for future acquisitions, a broadcaster will not want to laden its portfolio with [attribution] time bombs that would make its bid for an acquisition target noncompetitive with the bids of other companies.

An EDP Interest in an SDB would be an exceptionally volatile attribution time bomb. This EDP Interest could become attributable if the acquisition target owns another station in the SDB's market....The opportunity costs of a foregone merger, or the merger's higher transactional costs if undertaken, would likely far exceed the profit potential of any EDP Interest in any SDB. Realizing this, most large broadcasters would probably not go to the trouble of providing EDP Interests to SDBs.

The nonstrategic nature of EDP Interests in SDBs helps explain why these interests are relatively rare even now. Converting them into attribution time bombs could wipe them out entirely, rendering a potentially valuable source of debt and equity unavailable to SDBs. This is the opposite of the small business investment climate the Commission wants to foster.<sup>46/</sup>

To avoid discouraging the holding of EDP interests in SDBs, MMTC urged the FCC to grandfather these interests where four conditions are met:

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<sup>45/</sup> MMTC Petition for Partial Reconsideration and Clarification, MM Docket No. 94-150 (Ownership Attribution) (filed October 18, 1999) ("Attribution Petition for Reconsideration") at 2. See also MMTC Comments at 110-12, JA4394-4396.

<sup>46/</sup> Attribution Petition for Reconsideration at 1-2; MMTC Comments at 111, JA4395.

1. the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an “Unrelated Transaction”);
2. the Unrelated Transaction occurs at least a year after the EDP relationship was formed;
3. the Unrelated Transaction would otherwise cause the EDP Provider’s EDP Interest in the SDB to become attributable; and
4. the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB.<sup>47/</sup>

The FCC released the Section 257 Studies on December 12, 2000. See pp. 9-10 supra. On January 19, 2001, the FCC stated that “[w]hen the results of [the Section 257 Studies] have been evaluated, we may initiate future proceedings in this area, as warranted.” Attribution Reconsideration Order, 16 FCC Rcd at 1109-10 ¶24.

In the Omnibus Proceeding, MMTC resubmitted the Nonattribution Grandfathering Proposal, noting that it was ripe for review. MMTC Comments at 110-12, JA4394-4396.

The R&O did not mention the Nonattribution Grandfathering Proposal.

#### **IV. Proposed Initiatives To Advance Ownership Diversity And Competition Generally**

MMTC offered five proposals to promote diversity and competition -- the primary goals of the Omnibus Proceeding. NPRM, 17 FCC Rcd at 18516-26 ¶¶33–68, JA3463-3473 (soliciting comments on diversity and competition).

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<sup>47/</sup> Attribution Petition for Reconsideration at 3; MMTC Comments at 112, JA4396.

**A. Mathematical Touchstones For Diversity**

In the Radio Ownership Proceeding, MMTC offered a “Tipping Point Formula,” which establishes a method of preserving independent owners in local radio markets.<sup>48/</sup> Further, in the Omnibus Proceeding, MMTC offered a “Source Diversity Formula” to measure the utility expresses consumers derive from increases in source diversity.<sup>49/</sup>

In the R&O, the FCC acknowledged that there is pressure on small broadcasters to sell out to large ones,<sup>50/</sup> but mentioned neither the Tipping Point

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<sup>48/</sup> MMTC Radio Ownership Reply Comments at 22-27, JA3463-3441. This formula was based on the premise that an independent radio owner needs a determinable revenue stream to stay afloat and serve the public. The formula determines the “tipping point” in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of the cluster owners exceed the tipping point, the independents cannot survive. Id. at 23, JA3437.

<sup>49/</sup> See MMTC Reply Comments at 17-24, JA4961-4968, and MMTC April 28, 2003 Ex Parte at 6-7 and n. 15, JA5245-5246. The Source Diversity Formula presumes that consumer utility increases with access to additional sources, with diminishing returns to scale. See MMTC Reply Comments at 20, JA4964. MMTC pointed out that neither its formula, nor any other formula that measures diversity, could be applied before it is field-tested. MMTC April 28, 2003 Ex Parte at 6, JA5245.

<sup>50/</sup> R&O, 18 FCC Rcd at 13736 ¶299, JA0155, noting that “[s]everal commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to ‘sell out’ to group owners...in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups” (citing, inter alia, MMTC Radio Ownership Comments at 23-24, 45).

Formula nor the Source Diversity Formula.<sup>51/</sup>

**B. Zero Tolerance For Ownership Rule Abuse**

MMTC asked the FCC to adopt a Zero Tolerance Policy to address the ongoing abuse of the ownership rules:<sup>52/</sup>

the Commission must come to terms with ownership fraud. When a company can conceal its de facto control of another company, and thereby operate the way a company would operate if it owned more stations than are permissible, honest companies inevitably will pressure the Commission to raise the ownership rules even further so they can legally own the same combinations of properties that their dishonest competitor surreptitiously “owns.”<sup>53/</sup>

The R&O is silent about the consequences of possible abuse of its new regulations, and contains no mention of the Zero Tolerance proposal.

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<sup>51/</sup> The FCC’s failure to consider the Tipping Point Formula or the Source Diversity Formula are discussed in the Prometheus Main Brief.

<sup>52/</sup> See MMTC Comments at 125, ns. 208, 209, JA4407 (citing authorities). See also Edwin Edwards, Sr., 16 FCC Rcd 22236, 22262 (2001) (Statement of Commissioner Michael Copps, Dissenting in Part and Approving in Part), aff’d sub nom. Rainbow/PUSH Coalition v. FCC, 330 F.3d 539 (D.C. Cir.), rehearing denied, 2003 U.S. App. LEXIS 11487 (D.C. Cir. 2003) (contending that the manner in which a large television group owner operates stations under Local Marketing Agreements (“LMAs”) with a company closely related to itself have “stretched the limits of the FCC’s local television ownership rules” such that “[e]ach transaction moves the line to which all of our licenses are subject. And this decision moves it further still.”)

<sup>53/</sup> MMTC Comments at 123-24, JA4405-4406; see also id. at 125-27, JA4407-4409.

### **C. Opening FM Spectrum For New Entrants**

The FCC has traditionally sought to maximize the use of the radiofrequency spectrum.<sup>54/</sup> Consequently MMTC proposed the creation of new facilities as an antidote to consolidation, noting that “if there were far greater opportunities to start new stations, it would be much easier to justify greater consolidation of existing ones.”<sup>55/</sup>

MMTC asked the FCC to adopt three Spectrum Expansion Proposals: (1) creation of two new classes of FM stations suitable for serving small communities; (2) performance of an engineering search of the FM spectrum to identify new drop-in opportunities; and (3) substitution of FM station classes with interference-based criteria. MMTC Comments at 128-41, JA4410-4423.

The R&O contains no mention of the Spectrum Expansion Proposals.

### **D. Staged Implementation Of Deregulation**

Compulsory divestitures are disfavored.<sup>56/</sup> Thus, re-regulation is next to impossible even if deregulation proves harmful -- a problem Commissioner Copps

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<sup>54/</sup> See, e.g., Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 ¶¶9, 12 (November 3, 1980) (“any potential loss experienced [by incumbents from new competitors] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable” (fn. omitted)).

<sup>55/</sup> MMTC Comments at 128, JA4410. Similar proposals directed at AM and television would have been impractical. Id. at 129 n. 215, JA4411.

<sup>56/</sup> See, e.g. R&O, 18 FCC Rcd at 13808 ¶484, JA0227 (compulsory divestitures “would unfairly penalize parties who bought stations in good faith in accordance with the Commission’s rules.”)

characterized as “[putting] the genie back in the bottle then.” NPRM, 17 FCC Rcd at 18567, JA3520.

To avoid this dilemma, MMTC urged the FCC to implement any new rules gradually in five two-year stages. In even-numbered years, the FCC would measure diversity, competition, localism and minority ownership. If any of these measurements showed ill health, the FCC would take corrective steps in the odd-numbered years. If a subsequent even-year measurement showed continued ill health, the FCC would be able to stop deregulation until market conditions improved.<sup>57/</sup> MMTC demonstrated that this “Staged Implementation Plan” complies with Section 202(h) of the Telecommunications Act.<sup>58/</sup> MMTC presented several advantages of the plan:

First, it “would ensure that the Commission can avoid causing irreversible damage if a deregulatory step proves to be a mistake.” MMTC Comments at 90, JA4374.

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<sup>57/</sup> MMTC Comments at 84-90, JA4368-4374. Paxson Communications Corp. (“Paxson”) offered a similar proposal. Paxson Comments at 6-14. See id. at 14 (“the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission’s flexibility to exercise some control if increasing consolidation begins to have ill effects.”)

<sup>58/</sup> The Telecommunications Act of 1996, Section 202(h), codified at 47 U.S.C. §161 (1996), requires that if a structural rule is found “no longer necessary in the public interest as a result of meaningful economic competition between providers of such service” the FCC must “eliminate or modify” the rule. MMTC asserted that staged implementation would be a means of “modifying” the rule. See MMTC Comments at 99-101, JA4383-4385; MMTC Reply Comments at 29-32. Further, staged implementation would be a rule in its own right, subject to elimination or modification through biennial Section 202(h) review. See MMTC Reply Comments at 31.

Second, it “would avoid market disruptions that are often caused by very dramatic and sudden deregulation.” Id. at 92, JA4376.

Third, it “would enable those lacking quick access to capital -- particularly minorities -- to have sufficient time to reconfigure themselves, revise their business plans, raise new capital, and find stations to purchase, thereby remaining competitive in the new regulatory environment.” Id. at 93, JA4377.

Fourth, it “would provide a logical template for the implementation of incentive programs whose impact would benefit minority ownership.” Id. For example, firms wishing to undertake a transaction prior to implementation of a phase of deregulation could make divestiture or incubator pledges (the “Qualifying Activities”) and earn approval of the transaction years before it would otherwise be approvable. Id. at 93-96, JA4377-4380.

Fifth, it “would enable the Commission to cast off its controversial, byzantine ownership waiver jurisprudence in favor of a new procedure that ensures objectivity and avoids, to the extent humanly possible, the appearance of inconsistent results.” Id. at 93, JA4377. Ownership combinations could form earlier than otherwise permissible if the buyer undertook Qualifying Activities. In this way, “adoption of a Staged Implementation Plan would enable the Commission to achieve a much-desired regulatory goal that has eluded it for decades: doing away with broadcast ownership waivers entirely.” Id. at 97, JA4381.

The R&O contains no mention of staged implementation. In his dissent, Commissioner Adelstein offered that “[g]iven the potential harms in overhauling

these longstanding rules in such a dramatic fashion, I advocate an incremental approach that will show the public at each step how it will benefit.”<sup>59/</sup>

**E. Market-Based Diversity Credits  
As An Alternative To Voice Tests**

The Omnibus Proceeding was undertaken partly because the FCC had difficulty crafting voice tests. Sinclair, 284 F.3d at 162. As an alternative to voice tests, MMTC offered a system of market-based “Diversity Credits.” The FCC would give a quantity of Diversity Credits to SDBs, commensurate with the extent of their disadvantages. Diversity Credits would also be given to sellers at the closings of transactions that would result in greater structural diversity. If a transaction would add to concentration, the buyer would return a number of Diversity Credits to the FCC. If a company needed more Diversity Credits, the company could buy them in the private market from SDBs, thereby providing SDBs with much-needed capital.<sup>60/</sup>

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<sup>59/</sup> R&O, 18 FCC Rcd at 14012, JA0397; see also id. at 14012 n. 79, JA0397, citing Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 316 (7th Cir. 1994) (“caution in overturning a regulatory system that has been in place for many years strikes us as an adequate reason for an agency's deciding to continue the system in limited form for a brief period before decreeing total deregulation. Phased deregulation is common, practical, and sensible. Involving as it does judgmental considerations that are difficult to quantify, it is unlikely to flunk judicial review.”)

<sup>60/</sup> See MMTC Reply Comments at 34-38, JA4969-4973; MMTC April 28, 2003 Ex Parte at 8-10, JA5247-5249. Minority broadcasters’ inadequate access to capital is discussed in the MMTC Comments at 32-33, JA4326-4327.

A similar paradigm, used by the EPA with promising results, has replaced much command-and-control environmental regulation with incentives.<sup>61/</sup>

MMTC identified six advantages of Diversity Credits over voice tests:

(1) Diversity Credits would incentivize diversity; (2) Diversity Credits would disincentivize consolidation; (3) Diversity Credits would make the beneficiaries of consolidation partly responsible for the cost of remedying some of consolidation's ill effects; (4) Diversity Credits would provide access to capital to SDBs; (5) Diversity Credits would capture the measure of diversity more precisely than subjective, imprecise voice tests; and (6) because they are market-based, Diversity Credits would be easier for the FCC to administer than voice tests. MMTC Reply Comments at 36-37, JA4971-4972 and MMTC April 28, 2003 Ex Parte at 8-10, JA5247-5249.

The R&O contains no mention of the Diversity Credits proposal.

### **Statement Of Related Cases And Proceedings**

MMTC subscribes to the Statement of Related Cases and Proceeding in the Prometheus Main Brief. Further, on September 4, 2003, MMTC filed a Petition for Reconsideration of the R&O, raising the issues also raised herein as well as certain matters as to which the FCC has not yet had a full opportunity to pass. The FCC did not moved to hold this case in abeyance to enable it to rule on reconsideration petitions.

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<sup>61/</sup> See MMTC April 28, 2003 Ex Parte at 8 n. 16, JA5247, citing, inter alia, Robert N. Stavins, "Market-Based Environmental Policies," in Public Policies for Environmental Protection (1998), and Cass Sunstein, "Television and the Public Interest," 88 Calif. L. Rev. 499 (2000) (explaining how the environmental market-based paradigm could be applied to television programming).

### **Summary Of Argument**

The issues and proposals ignored by the FCC each relate to subjects -- diversity, competition, and minority ownership -- that Congress and the FCC have each long recognized as highly important in structural rulemakings. Ignoring congressional commands and its own precedents, the FCC failed to assess the potential impact of its new rules on minority and SDB ownership. With not a hint of notice, it repealed the only rule aiding minority ownership in television, without so much as an acknowledgment of the rule's purpose. It rejected one, postponed two, and failed even to mention the existence of ten proposals that would have advanced minority and SDB ownership specifically or diversity and competition generally. It failed to ban race discrimination in broadcast transactions because it wondered whether a rule that would bring more minorities into the marketplace might reduce sale prices or impair stations' alienability. It even ignored proposals to ease the transition to deregulation through staged implementation, and to replace its error-prone voice tests -- whose flaws helped give rise to this case -- with a system of market-based diversity credits.

Even if one of these errors were harmless, their cumulative impact was not. They are so numerous and extreme that they deprive the R&O of any credibility.

If the new rules take effect, the most desirable properties will be locked up through vertical and horizontal consolidation. To avoid this, the Court should vacate the FCC's repeal of the FSSR, leave its stay in place until the FCC has ruled on each of the proposals submitted by MMTC, direct the FCC to file regular reports with the Court on its progress, and appoint a Special Master to supervise the FCC's implementation of the Court's instructions.

## Argument

### **I. When It Repealed the Failing Station Solicitation Rule, The FCC Provided No Notice, Ignored Congressional Direction, Failed To Mention The Reason The Rule Was Created, Acted With No Record Evidence, And Offered Only An Irrational Reason For Its Action**

#### **A. Standard Of Review**

The FCC's failure to afford notice that it was considering repeal of the FSSR is reviewable under 5 U.S.C. §553(b) (1966), which requires an agency to provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved."

Several of the FCC's errors and omissions are reviewable under 5 U.S.C. §706(2) (1966), which holds that the Court must hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or "without observance of procedure required by law." This standard governs (1) the FCC's failure to consider the factor that led it to adopt the FSSR just four years ago, *i.e.*, preserving minority ownership; (2) the sufficiency of the FCC's determination that the FSSR is "necessary in the public interest" under 47 U.S.C. §161; (3) the FCC's failure to act on record evidence, and (4) the FCC's presentation of only an illogical reason for its action.

#### **B. Discussion**

##### **1. The FCC Gave No Notice That It Was Reviewing The FSSR**

While an agency need not set out in an NPRM the full text of its proposals, it must provide some indication of its direction. In particular, an agency must provide notice "sufficient to fairly apprise interested parties of all significant

subjects and issues involved.” American Iron and Steel Institute v. EPA, 568 F.2d 284, 291 (3d Cir. 1977) (quoting Senate Rpt. No. 752, 79th Cong. 1st Sess., at 16 (1945); see also Wagner Electric Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972) (where the NPRM referred only to failure rates of signals and flashers, but final rule also downgraded these devices’ performance criteria and durability standards, the agency’s notice was inadequate; further, the absence of comments from consumer groups on the durability standard “may well be because the notice of proposed rulemaking never advised of [the contested] subject or issue.”))

The question of whether the FCC gave adequate notice that it would review and might repeal the FSSR is not close, since the NPRM contains not a word about the FSSR. See p. 13 n. 25 supra.<sup>62/</sup> Agency action will be invalidated where the NPRM “contains nothing, not the merest hint,” that the agency was considering a change in the rule. Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

Further, the NPRM emphasized the continuing importance of minority ownership. 17 FCC Rcd at 18521 ¶50, JA3468. Thus, the public had no reason to suspect that the FCC was changing course and considering repeal of the only rule protecting minority television ownership.

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<sup>62/</sup> The R&O noted that two parties opposed the FSSR. 18 FCC Rcd at 13707 n. 479, JA0126. Notice cannot be bootstrapped from a comment, however. See, e.g., AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985).

## 2. Repeal Of The FSSR Was Arbitrary And Capricious

The Supreme Court has explained that “[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfgs Ass’n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1982) (“State Farm”).<sup>63/</sup> In repealing the FSSR, the agency committed all four of these errors.

First, the FCC failed even to mention the very “aspect of the problem -- preserving minority ownership -- that had given rise to FSSR just four years earlier. TV Duopoly Order, 14 FCC Rcd at 12935-37 ¶74. By ignoring this issue and repealing the rule, the FCC changed course without supplying “a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 921 (1971); see also Committee for Community Access v. FCC, 737 F.2d 74, 77 (D.C. Cir. 1984) (FCC “cannot silently depart from previous policies or ignore precedent[.]”) Further, by ignoring the most important factor, the FCC failed to determine whether the rule was “necessary in the public interest” under 47 U.S.C. §161.

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<sup>63/</sup> Further, an agency repealing a rule “is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” Id. at 41-42 (quotations omitted).

Second, the FCC failed to act in accordance with Congress' instructions that it undertake to make the radiofrequency spectrum available "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex," 47 U.S.C. §151, and Congress' instruction that the FCC undertake to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership or telecommunications services and information services," 47 U.S.C. §257(a). Repealing the only rule that served these purposes in the television industry was hardly responsive to Congress' commands.

Third, the FCC "offered an explanation that runs counter to the evidence before the agency," State Farm, 463 U.S. at 43. The record showed that that minority television ownership needs protection more than ever. In the three years after the FCC's 1999 action deregulating local television ownership, minority television ownership dropped from 33 stations to 20. See p. 7 n. 11 supra. Nor does the record contain evidence that transparency in broadcast transactions is undesirable; indeed, in another section of the R&O, the FCC found to the contrary.<sup>64/</sup> Further, the two comments cited by the FCC contained no evidence that the burden to broadcasters of marketing stations widely had suddenly become any greater now than it was in 1999 -- much less so great that this burden should overcome the need to preserve minority ownership. See NAB Comments at 80 n. 148, JA4429, cited in the R&O, 18 FCC Rcd at 13708 ¶225, JA0127.

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<sup>64/</sup> The FCC saw "merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities." 18 FCC Rcd at 13637 ¶52, JA0054 (discussing proposal to ban on transactional discrimination).

Fourth, the FCC's explanation was irrational. The FCC acknowledged that "absent unusual circumstances," market forces will result in the creation of duopolies through sales of weak stations to in-market competitors. 18 FCC Rcd at 13707 ¶225, JA0127. From this alone, the FCC concluded that the only counterbalance to these market forces was no longer needed. It is illogical to jump straight from the premise "A usually causes B, unless counterbalanced by C" to the conclusion "we must dispense with C."

Almost no rule is immune from repeal. However, when repealing important public interest protections, an agency owes the public "reasonable candor. If it provides that, the affected citizens at least know that the government has faced up to the meaning of its choice." Consumer Alert v. NHTSA, 956 F.2d 321, 327 (D.C. Cir. 1992). Here, the FCC acted in the least candid way possible. It repealed the FSSR without notice, without observance of congressional intent, without an acknowledgment of the reason the rule was created, without evidence and without logic. All this adds no luster of credibility to the FCC's decisions to reject three and ignore ten proposals to advance minority and SDB ownership, diversity and competition, as discussed below.

## **II. The FCC Disregarded Or Failed To Perform A Meaningful Analysis Of Eight Proposals Aimed At Preserving Broadcast Ownership By Disadvantaged And Minority Businesses, And Disregarded Five Proposals Aimed At Fostering Diversity And Competition Generally**

### **A. Standard Of Review**

Review of the FCC's rejection of Cluster Spinoff proposal, and its unexplained choice of an alternative about whose consequences it knew nothing, is governed by the arbitrary and capricious standard in 5 U.S.C. §706(2). That

standard also governs the FCC's imposition of irrational conditions precedent to its consideration of a Transactional Nondiscrimination Rule.

The FCC's postponement of the Transactional Nondiscrimination and Station Sale Waivers proposals, and its failure to consider ten other proposals, are reviewable under 5 U.S.C. §555(e) (1966), which requires that an agency give "[p]rompt notice...of the denial in whole or in part of a...request of an interested person made in connection with any agency proceedings...the notice shall be accompanied by a brief statement of the grounds for denial."

The FCC's failure to examine the potential effect on minority and SDB ownership of the seismic changes in ownership structure likely to flow from its new rules, and its failure to meaningfully consider any proposals aimed at counterbalancing those effects, are reviewable under 5 U.S.C. §553(c) (1966), which requires agencies to consider the "relevant matter presented" and "incorporate in the rules adopted a concise general statement of their basis and purpose," and under the "arbitrary and capricious" standard in 5 U.S.C. §706(2).

The FCC's delay of review of two proposals and its failure to mention ten others is governed by 5 U.S.C. §706(1) (1966), under which a reviewing Court shall "compel agency action unlawfully withheld or unreasonably delayed."

## **B. Discussion**

### **1. The FCC's Rejection Of The Cluster Spinoff Proposal Was Arbitrary And Capricious**

Expert agencies usually are afforded deference when they choose between their preferred means to address an objective and an alternative proposed by a commenting party. DirecTV v. FCC, 110 F.3d 816 (D.C. Cir. 1997) illustrates

how agencies are supposed to handle alternatives proposed by commenters. In 1995, five satellite permittees submitted a proposal to aggregate their existing channels with certain other channels to achieve a new allocation formula. Id. at 821. Other parties, including DirecTV, submitted different channel reallocation proposals. Id. On review, the D.C. Circuit affirmed the FCC's choice of its own approach, award of the spectrum by auction. The court found that the FCC had addressed the commenters' proposals adequately. The FCC found that its preferred approach, award of the spectrum by auction, would be preferable to the proposals since it would obviate the need for reaggregation, allow the winners to avoid engaging in "several rounds of administrative processing" and promote the rapid development of DBS services. Id. at 827. On the other hand, the FCC examined the commenters' alternatives, finding them to be time consuming and further complicated by the time required for FCC consideration and approval of the resulting transactions. Id. This thoughtful examination of the alternatives satisfied the arbitrary and capricious standard.

The FCC's rejection of MMTC Cluster Spinoff Proposal contains none of the attributes that characterized its approach in DirecTV. The FCC rejected MMTC's proposal for cluster spinoffs to SDBs because the definition of SDBs advocated by MMTC would have required coordination with the Treasury Department. 18 FCC Rcd at 13811 n. 1042, JA0230. The FCC did not explain why the FCC would find it disagreeable to coordinate with a cabinet department.

Instead of a program aimed at SDBs, the FCC chose a program aimed at small businesses. The only basis the FCC offered was "our judgment and the

record of this proceeding.” Id. That is a model of opaque reasoning. The record was silent on how many small businesses would qualify, or even how many of them were minority owned. 18 FCC Rcd at 13913, Appx. G, Final Regulatory Flexibility Analysis, ¶12, JA0332 (perhaps as many as 95% of all commercial radio broadcasters might qualify). Thus, the FCC’s decision to adopt the small business category “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” State Farm, 463 U.S. at 43.

A lot was at stake. The cluster sales option, limited just to radio and of extremely limited applicability and unknown impact, was the only step the FCC said was intended to promote minority ownership. On the other hand, as shown infra, the FCC failed to assess its proposed new rules for their impact on minority and SDB ownership, repealed its only policy aimed at protecting minority and SDB television ownership, and ignored ten other proposals that would have served this objective.

**2. The FCC’s Imposition Of Irrational Conditions  
Precedent To Its Consideration Of A Transactional  
Nondiscrimination Rule Was Arbitrary And Capricious**

The R&O contains rules which, in the aggregate, are alleged likely to cause widespread and irreversible harm from consolidation. See Prometheus Radio Project v. FCC (Order), #E-59, 3d Cir., September 3, 2003 (per curiam) at 2 (granting stay). Unprecedented dealmaking will occur with no protection against discrimination, notwithstanding Congress’ non-self-executing 1996 command that the FCC undertake to make the spectrum available “so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. §151.

MMTC handed the FCC what was, conceptually, the least intrusive possible means of ensuring nondiscrimination: (1) declare that it is against the law; and (2) require broadcast stations sellers to check a box to certify that they did not intentionally discriminate. MMTC Comments at 120, JA4404. MMTC showed that discrimination was a serious problem. MMTC Comments at 117-118, JA4401-4402; MMTC April 28, 2003 Ex Parte at 16, JA5255. The FCC did not disagree. The proposal was unopposed -- a rarity for a civil rights initiative.

In postponing consideration of MMTC's proposal, the FCC imposed three vague and irrational preconditions to further review.

First, an advisory committee must consider the rule's "efficacy," 18 FCC Rcd at 13637 ¶52, JA0054. The FCC did not define that term.

Second, the advisory committee must consider any potential "direct or inadvertent effects on the value and alienability of broadcast licenses." Id. Elsewhere in the R&O the FCC exhibited dazzling econometric skills, but on this question of civil rights the FCC failed to grasp that more buyers mean higher prices.<sup>65/</sup> Further, the FCC failed to recognize that its own alienability policy

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<sup>65/</sup> Notwithstanding the predictions of segregationists, nondiscrimination in the sale of housing does not reduce property values. See Douglas S. Massey & Nancy Denton, American Apartheid, Segregation and the Making of the Underclass (1993) at 95 (while many Whites believe property values fall once African Americans integrate a neighborhood, "evidence suggests the opposite, at least during the transition process.")

militates in favor of a transactional nondiscrimination policy.<sup>66/</sup> There is not a hint of evidence that nonminority broadcasters might elect not to alienate their stations if they had to consider qualified minority buyers.

The FCC's three conditions precedent to further agency review are so onerous and illogical that they are tantamount to rejection of the transactional nondiscrimination proposal. When it imposed these preconditions on its review of this simple, unopposed matter of principle, the FCC forgot (1) congressional intent, (2) the first law of economics, (3) its own alienability policy, (4) recent American civil rights history, and (5) Section 702(2) of the APA.

**3. In Postponing Action Or Ignoring Twelve Of MMTC's Proposals, The FCC Acted Arbitrarily And Capriciously, Failed To Consider Relevant Matter, Failed To Incorporate A Concise Statement Of Basis And Purpose, And Failed To State The Grounds For Its Actions**

While agencies have some leeway to eschew unviable, unclear, or insubstantial alternatives, they cannot brush aside substantial proposals from rulemaking commenters. For example, in City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C. Cir. 1987) ("Brookings"), the Court remanded the FCC's decision to modify the methods for reimbursing local telephone companies for interstate service costs where the FCC failed to consider alternatives that were outlined in rulemaking comments. These proposals

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<sup>66/</sup> The FCC frowns on arrangements under which regulatees impose upon themselves irrational limitations on the scope of the eligible class of purchasers of their facilities. See, e.g., Applications of Advanced Mobile Phone Service, Inc., 53 Rad. Reg.2d (P&F) 1127 (1983) (voiding partnership agreement's restriction against alienation to non-wireline carriers). A nondiscrimination rule would preclude the most irrational of these regulatee-imposed limitations.

included “a full-scale cost study of a scientifically selected group of average schedule companies,” using surrogate companies as cost models for average schedule companies, and reimbursing costs on an “access line” basis. Id. at 1169. These proposals represented different mathematical approaches, sufficiently obvious to warrant attention, and not unfamiliar to the FCC. Id. Consequently, the proposals were “sufficiently detailed and of ample significance to merit the Commission’s consideration.” Id. In Brookings, the court found that that the FCC had “breached [its] duty in failing to consider the proposed alternatives, particularly in light of the fact that the choice it embraced suffered from “noteworthy flaws.” Id.

As in Brookings, the FCC’s failure to address or properly consider the Transactional Nondiscrimination proposal constitutes breach of duty. Similarly, the FCC did not have a valid basis for failing to address the Station Sale Waivers proposal. Instead, the FCC stated only that the proposal would be included in a subsequent NPRM in which it would take up unspecified constitutional issues. 18 FCC Rcd at 13636 ¶540 and n. 78, JA0053-0054. Yet although the R&O also contains an NPRM on another subject, the R&O contains no NPRM on minority ownership. Months later, no such NPRM has been issued. If history is any guide, there is little likelihood that the FCC will ever rule on the Station Sale Waivers Proposal. See pp. 7-10 supra (describing FCC’s trail of broken rulemaking promises and disregarded rulemaking proposals addressing minority ownership). Thus, the FCC’s postponement of review of the Station Sale Waivers proposal is tantamount to rejection of the proposal. See also pp. 47-48 infra (discussing unreasonable delay in violation of Section 706(1) of the APA).

The FCC simply ignored ten other proposals. These proposals were sufficiently detailed and of ample significance to warrant their review. Many were based on full-scale, scientific studies documenting problems that were obvious to the FCC. The subject matters of these proposals -- promoting race and gender diversity, and promoting diversity and competition generally -- were unquestionably important and were squarely within the scope of the issues the FCC deemed important to the proceeding.<sup>67/</sup> One of these proposals, Staged Implementation, was independently proposed by a commenter with views often divergent from MMTC. See p. 29 n. 57 supra. In short, each proposal easily met the legal standard of sufficiency to merit consideration:

The Buildout Deadlines Proposal, pending for four years, would promote diversity and competition by accelerating new service to the public, and relieve the FCC of the task of reissuing spectrum captured from unsuccessful permittees.

The Incubator Proposal, pending since 1992 and put out for comment by two unanimous former commissions, would engage successful companies in helping small companies survive.

The Share-Time Proposal would allow the FCC to fulfill its 1996 promise to hold a rulemaking proceeding to implement Section 202(b)(2) of the Telecommunications Act. In exchange for helping smaller companies succeed,

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<sup>67/</sup> See NPRM, 17 FCC Rcd at 18521 ¶50, JA3468 (minority ownership); id. at 18516-26 ¶¶33-68, JA3463-3473 (diversity and competition). The proposals followed many different approaches. Of MMTC's thirteen proposals, nine involved SDBs in some way, and four did not. Nine are deregulatory. Three (Mathematical Touchstones for Diversity, Zero Tolerance and Staged Implementation) are neither regulatory nor deregulatory, and one (Transactional Discrimination) would add a new regulation.

the Share Time Proposal would give large companies the reward they covet the most: an expansion of the number of radio stations they can own in a market.

The Unbuilt Stations Financing Proposal and the Nonattribution Grandfathering Proposal also contemplate incentives for large companies to help smaller ones. The 2001 Commission promised to revisit these proposals after reviewing the Section 257 Studies; those studies are long overripe for evaluation.

The Tipping Point Formula and the Source Diversity Formula are directly germane to the R&O's signature enterprise: a mathematical formula that measures diversity.

The Zero Tolerance Policy responds to the unseemly tendency of some companies to circumvent the structural rules for financial gain. When the regulatory line is being moved, nothing could be more relevant than ensuring that the new line is not also crossed.

The Spectrum Expansion Proposals draw from a long FCC tradition of expanding the availability of the spectrum resource to newcomers as a counterbalance for deregulation of ownership for incumbents.

Staged Implementation addresses the schedule and speed of implementation of the rules, factors that could not be more relevant to any rulemaking. It responds directly to the irreversibility of erroneous consolidation. Without staged implementation, the FCC will embark on a "failsafe" mission during which deregulation cannot be stopped no matter how harmful it proves to be. That harm will fall most heavily on small businesses, which cannot turn on a dime and adjust to a hostile new regulatory environment. Further, MMTC's Staged Implementation Plan included a feature that would advance minority ownership,

and it carried the seed of an replacement for the FCC's byzantine use of waivers when companies inevitably bump up against otherwise bright-line rules.

Diversity Credits, with the potential to replace voice tests, was the least worthy of being overlooked. Diversity Credits are based on a concept used successfully by a sister agency, the EPA. To appreciate the relevance of Diversity Credits, consider that this proceeding was held in large part because the FCC had difficulty crafting and justifying voice tests.

By failing to address these proposals, the FCC breached its duty to consider valid alternatives and proposals.

**4. In Postponing Action Or Ignoring Twelve Of MMTC's Proposals, The FCC Breached Its Duty To Decide Issues Within A Reasonable Time**

The FCC "unlawfully withheld or unreasonably delayed" action on MMTC's proposals, in violation of Section 706(1) of the APA. Although an agency has discretion to set its own docket, "there comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all, and the result is a denial of justice." Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975) (quoting intervenor MCI). "Delay in resolution of administrative proceedings can also deprive regulated entities, their competitors, or the public of its rights and economic opportunities, without due process that the Constitution requires." MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980) ("MCI") (applying a "rule of reason," FCC ratemaking might reasonably take a year or two, but certainly not several years, as "complex regulation must still be credible regulation.") Here, the FCC has acknowledged that minority ownership, diversity

and competition are serious problems; it has solicited comments and commissioned studies and then failed to act on them;<sup>68/</sup> and it has ignored most of the responsive proposals -- four of which have been pending for years.<sup>69/</sup>

The R&O contains no indication that the FCC will ever rule on any of MMTC's proposals. This constitutes a clear violation of Section 706(1).

### **Conclusion**

In a complex proceeding, it might seem reasonable to excuse an agency's mistakes and omissions. The R&O is thick and its subject is important -- with profound long term influence on the texture of our democracy. That makes procedural regularity even more critical than in a routine matter.

Ignoring congressional commands and its own precedents, the FCC failed to assess the potential impact of its new rules on minority and SDB ownership. Further, without notice, it repealed the only rule aiding minority ownership in television, without so much as an acknowledgment of the rule's purpose. It rejected one, postponed two, and ignored ten proposals that would have advanced minority and SDB ownership specifically or diversity and competition generally.

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<sup>68/</sup> In PCHRG v. Chao, 314 F.3d 143 (D.C. Cir. 2002), the FCC delayed review of a scientific proposal pending conclusion of an epidemiological study. Two years later, OSHA had not yet evaluated the study. The court found that OSHA "could not now use it as the justification for further inaction." Id. at 155.

<sup>69/</sup> The Incubator Proposal has been pending for eleven years, and the Buildout Deadlines Proposal, the Unbuilt Stations Financing Proposal and the Nonattribution Grandfathering Proposal have each been pending for four years. See pp. 18-23 supra.

These mistakes were so numerous that “[l]ooking at the cumulative effect of the errors” the Court can conclude that “there are not harmless” irrespective of “whether any one of the errors standing alone would be sufficient to justify reversal.” U.S. v. Riddle, 103 F.3d 423, 435 (5th Cir.), rehearing denied, 1997 U.S. App. LEXIS 13618 (5th Cir. 1997).

In the briefs they are filing today, great corporations will complain -- sometimes correctly -- that the FCC gave irrational reasons for rejecting their proposals. At least the FCC ruled on their proposals. These corporations would be furious if the FCC had ignored their proposals. Not for one minute would they tolerate being on the receiving end of a continuing pattern of broken promises to address important issues.

The FCC’s latest treatment of minority and SDB ownership issues, as well as proposals to generally advance diversity and competition, are only the latest and gravest examples of how the FCC abuses its discretion in the profoundly critical area of civil rights. See pp. 7-10 supra. This is a pattern, not an aberration. Only this Court can put a stop to it.

A remand is not a sufficient remedy. If the new rules take effect, the most desirable properties will be locked up through vertical and horizontal consolidation. That would deprive minority broadcasters of a fair opportunity to compete, and would deprive America’s media consumers of an opportunity to hear their unfiltered -- and non-monolithic -- views.

Consequently, the Court should hold that the FCC's serial misbehaviors on civil rights invalidate the entire R&O. The Court should vacate the FCC's repeal of the FSSR, leave the stay of the new rules in place until the FCC has ruled on each of the proposals submitted by MMTC, and direct the FCC to file regular reports with the Court on its progress. As in MCI, 627 F.2d at 345, the Court should direct the FCC to recommend in 30 days a reasonable schedule for a determination of the merits of MMTC's proposals. Finally, in connection with this and any other issues remanded to the FCC in this complex matter, the Court should appoint a Special Master to supervise the FCC's implementation of the Court's instructions.

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**Certificate Of Compliance With Rule 32(a)**

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,880 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 20, 2003

**Certification of Bar Membership**

I, David Honig, counsel of record, respectfully certify that on September 5, 2003 I was admitted to the bar of United States Court of Appeals for the Third Circuit.

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David Honig

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2003, I caused two copies of the foregoing "Brief of Intervenors American Hispanic Owned Radio Association et al." to be served by hand or by overnight courier upon the following parties:

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