

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

In the matter of)	
Promoting Diversification of Ownership in the Broadcasting Services)))))	MB Docket 07-294

To The Commission

**INITIAL COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS IN
RESPONSE TO THE THIRD FURTHER NOTICE OF PROPOSED RULEMAKING**

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Summary and Background

The Diversity and Competition Supporters (collectively “DCS”)¹ respectfully submit these Initial Comments in response to the Report and Order and Third Further Notice of Proposed Rulemaking² (“Broadcast Diversity Order”) which seeks comment on several proposals to modify the Commission’s rules and policies to encourage ownership diversity and new entry in broadcasting.

In 2007, DCS presented the Commission with 40 proposals and voluntary initiatives to cure minority under-representation in broadcast ownership.³ Twenty-nine of these proposals were ripe for review. In the Broadcast Diversity Order, the Commission adopted 13 of the proposals, set out 12 others for comment in this proceeding, and denied four proposals.⁴ DCS applauds the efforts to further address the paucity of minority media ownership.

¹ The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277 (and subsequent dockets). A list of its 31 members is found in the Appendix; they include the 29 members who participated in MB Docket 06-121 and two new members, the National Association of Black Owned Broadcasters (“NABOB”) and the Rainbow/PUSH Coalition. These Initial Comments and all subsequently filed supplements and reply comments pleadings reflect the institutional views of each of the Diversity and Competition Supporters, and are not intended to represent the individual views of each of the Diversity and Competition Supporters’ officers, directors and members.

² See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922 (released March 5, 2008) (“Broadcast Diversity Order”).

³ See Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed October 1, 2007) (“DCS Initial 2007 Comments”). Many of these proposals were originally submitted by DCS in 2003 during the Commission’s biennial (now quadrennial) regulatory review. See Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 2, 2003) (“DCS 2003 Comments”).

⁴ See Broadcast Diversity Order, 23 FCC Rcd at 5924-57 ¶¶10-101. DCS has sought reconsideration of the Commission’s decision to define an eligible entity as a small business (see also pp. 5-13 *infra*) and of the Commission’s denial of its proposal that the Commission relax its interpretation of the foreign ownership statute, 47 U.S.C. §310(b)(4). DCS Petition for Reconsideration, MB Docket No. 07-294 (filed June 16, 2008).

Nonetheless, DCS is gravely concerned about the Commission's adoption of a "small business" definition for eligible entities.⁵ DCS expressed this concern in earlier proceedings and continues to believe that such a definition is too dilute and will do little to improve the state of minority media ownership or further the Commission's goals in this regard.⁶ A socially and economically disadvantaged business ("SDB") definition for eligible entities would do far more to encourage minority media ownership. However, the Commission's statistical data and empirical research on media ownership are neither current nor accurate and therefore would not support a constitutionally sustainable SBD program.⁷ The Commission's modification of procedures related to Form 323 would improve the ownership database and provide the agency with solid, reliable data upon which to shape broadcast media policy.⁸

Adoption of the proposals set out in the Third Further Notice is critical to the advancement of minority ownership. We are witnessing the dawn of a new era in digital broadcasting through DTV and HD radio, which both hold tremendous opportunity for new entrants. The Commission should apply its share-time rules to digital FM and television broadcasting, allowing for access to spectrum and ownership opportunities for new entrants,

⁵ See Broadcast Diversity Order, 23 FCC Rcd at 5925-27 ¶¶6-9; see discussion at pp. 5-12 *infra*.

⁶ See Supplemental *Ex Parte* Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed November 20, 2007), at 38-39 ("DCS 2007 Supp. Comments").

⁷ As Commissioner Adelstein stated, "there is no accurate census of women- and minority-owned stations. As [FCC consultants] Professors Arie Beresteau and Paul B. Ellickson said, 'the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.'" Statement of Commissioner Jonathan S. Adelstein Concurring in Part and Dissenting in Part, Broadcast Diversity Order, 23 FCC Rcd at 5987.

⁸ See pp. 17-19 *infra*.

including minorities and women, and enabling current digital licensees to monetize unused spectrum.⁹

Advances in technology and spectrum management require that the Commission revisit its rules and policies to ensure that they do not hinder growth or market entry for small, minority, and women owned broadcasters. Thus, it is time for the agency to allow AM expanded band stations to be sold to small businesses rather than be forfeited, and permit terrestrial radio stations to move closer to their audiences.¹⁰ The Commission should also ensure that Class A low power television (“LPTV”) broadcasters who provide extensive community-based or multilingual programming to underserved communities are afforded carriage on local cable systems.¹¹

The Commission should also modify its structural rules to encourage market entry by minorities through an incubator program.¹² DCS believes that such a program would provide numerous opportunities to cultivate minority ownership, especially in larger markets where opportunities for new entry are limited. DCS also endorses the structural waiver proposals submitted by the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition, as well as proposals to examine the impact of the Commission’s rules on minority ownership and prevention of ownership fraud.¹³

The greatest single step the Commission can take to foster minority ownership would be to facilitate the ultimate migration of AM stations to FM service on spectrum presently used for

⁹ See pp. 13-16 infra.

¹⁰ See pp. 16-17 and 21-23 infra.

¹¹ See p. 23 infra.

¹² See pp. 19-21 infra.

¹³ See pp. 27-29 infra.

TV channels 5-6, immediately adjacent to the current FM band (the “Mullaney Plan”).¹⁴ MMTC estimates that this migration would triple the asset value of minority owned radio. Beyond that, the Mullaney Plan is the most significant proposal on the table to rescue the radio industry from its present downward financial and audience spiral. Beginning the process that would facilitate this Exodus of AM stations to the Promised Land of FM service should be the Commission’s highest broadcast regulatory priority.

* * * * *

¹⁴ See pp. 23-27 infra.

I. Definition of Socially and Economically Disadvantaged Businesses

The Commission seeks comment on whether it can or should expand its definition of eligible entities beyond the scope of the SBA definition of small business.¹⁵ The Commission also seeks comment on the DCS proposal to adopt a race-neutral SDB definition and on DCS' proposal regarding "Full File Review."¹⁶ DCS maintains that the Commission can and certainly should expand its definition of eligible entities beyond the scope of the SBA definition of small business.

A. The Commission Has the Statutory Authority To Improve the Definition of Eligible Entities

Under Section 257 of the Communications Act, the Commission has statutory authority to expand its definition of eligible entities in order to advance minority ownership.¹⁷ Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity."¹⁸ Section 257 was drafted to give the Commission jurisdiction over the preservation and promotion of minority broadcast ownership.¹⁹

¹⁵ See Broadcast Diversity Order, 23 FCC Rcd at 5950 ¶80.

¹⁶ Id. at ¶¶81, 85.

¹⁷ 47 U.S.C. §257 (2006).

¹⁸ 47 U.S.C. §257(b).

¹⁹ Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

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

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

The Commission's use of the SBA's small business definition runs counter to its statutory mandate under Section 257 to promote diversity.²⁰ Furthermore, it is unwise to dilute minority ownership at a time when the Commission, by its own admission, does not have accurate data on minority ownership.²¹

The small business definition is so dilute that it would have virtually no impact on minority ownership. For example (using Free Press' 2007 statistics, since the Commission has no reliable statistics of its own) minorities own 7.78% of commercial full power radio stations and only 8.5% of small business-owned commercial full power radio stations.²² This means that even in the implausible event that every commercial full power radio station owned by a large business were sold to a small business, minority ownership would increase less than one percentage point. Therefore, maintaining the small business definition will not materially advance the Commission's stated goals of increasing participation by those that "historically have not been well-represented in the broadcasting industry minority ownership,"²³ or addressing those "audiences that are currently underserved."²⁴

B. The Commission Has the Authority to Adopt a Race-Conscious Definition of SDBs, But May Not Do So At This Time

The Commission also seeks comment on adopting a race-conscious definition of socially and economically disadvantaged businesses ("SDBs").²⁵ The term "socially and economically

²⁰ 47 U.S.C. §257(b).

²¹ See Broadcast Diversity Order, 23 FCC Rcd at 5942 ¶53 ("we do recognize that our current data-collection efforts could be improved.")

²² See S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007) at 16 ("Off the Dial"); Broadcast Diversity Order, 23 FCC Rcd at 5927 ¶8.

²³ Broadcast Diversity Order, 23 FCC Rcd at 5924 ¶1.

²⁴ Id. at ¶7.

²⁵ Id. at ¶81.

disadvantaged business” (“SDB”) has its origin in the Small Business Act.²⁶ The Small Business Act defines “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities” and defines “economically disadvantaged individuals” as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”²⁷

In response to the Second Further NPRM,²⁸ DCS filed extensive comments demonstrating that the Commission may develop a constitutionally sustainable SDB definition that will remedy the effects of past discrimination and promote diversity.²⁹ While race-conscious government action is subject to strict scrutiny review and must be narrowly tailored to further a compelling government interest,³⁰ “[n]ot every decision influenced by race is equally objectionable.”³¹

²⁶ 15 U.S.C. §631 (2008).

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

²⁸ 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121 et al. (Second Further Notice of Proposed Rulemaking), 22 FCC Rcd 14215 (2007) (“Second Further NPRM”).

²⁹ See Reply Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed November 1, 2007) at 4-20 (“DCS 2007 Reply Comments”); see also DCS 2007 Supp. Comments at 28-31.

³⁰ See Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995) (“Adarand”). The Supreme Court has recognized compelling government interests in remedying the effects of past discrimination and promoting diversity in higher education. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, ___ U.S. ___, 127 S.Ct. 2738, 2752-53 (2007) (citations omitted) (hereinafter “Parents”).

³¹ Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (“Grutter”).

Before the Commission can pursue any race-conscious steps, it must consider race-neutral steps³² and develop a record that will satisfy strict scrutiny review.³³ The Commission recently began to pursue race-neutral remedies with the adoption of DCS' proposals in the Broadcast Diversity Order.³⁴ While the Commission requests "empirical data" to support a race-conscious SDB program,³⁵ as DCS stated in response to the Second Further NPRM, the Commission's data is stale³⁶ and the agency will need to collect current, accurate data to craft a constitutionally sustainable SDB program.

B. The Commission Should Implement Full File Review Until it is Able to Craft a Constitutionally Sound SDB Program

DCS initially proposed Full File Review in response to the Second Further NPRM.³⁷ The Commission seeks comment on the DCS proposal regarding Full File Review and poses a number of questions related to the proposal.³⁸

³² See Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) ("Croson"); see also Parents, 127 S.Ct. at 2792.

³³ In the context of government action designed to remedy its past discrimination, courts will analyze the government's evidence of actual discrimination, past or present. See Croson, 488 U.S. at 505 (stating that the history of school desegregation in Richmond did not point to discrimination in the local construction industry); see also Parents, 127 S.Ct. at 2752 (race-conscience government action, after past discrimination is remedied, may only continue if justified on another basis). Past discrimination by the Commission and by licensees is well documented. See, e.g. Southland Television, 10 RR 699, recon. denied, 20 FCC 159 (1955) ("Southland Television") (holding that because Louisiana's movie theater segregation law was not inconsistent with the Communications Act, a segregationist movie theater owner could hold a television license). Several other examples of how the Commission promoted segregation in broadcasting are provided in the DCS 2003 Comments at 22-23 ns. 38-40. However, the Commission's most recent studies on discrimination, published in 2000, are stale and will need to be refreshed with current data.

³⁴ See Broadcast Diversity Order.

³⁵ Broadcast Diversity Order, 23 FCC Rcd at 5950-51 ¶83.

³⁶ DCS 2007 Reply Comments at 14-16 (citing the Commission's outdated minority ownership database).

³⁷ See DCS 2007 Supp. Comments at 39-42.

Granting broadcast licenses to applicants who have overcome social and economic disadvantage is highly likely to result in greater diversity of broadcast information and viewpoints. In broadcasting, pursuit of the “diversity of media voices” is paramount³⁹ and race is

³⁸ Broadcast Diversity Order, 23 FCC Rcd at 5951-52 ¶¶84-85. The questions presented by the Commission for comment were:

Would the grant of broadcast licenses to applicants who have overcome social and economic disadvantages likely result in greater diversity of broadcast information and viewpoints? How should “full file review” be structured so that it is race-neutral and does not trigger strict scrutiny? Can the “full file review” framework applied and upheld in the context of university admissions be applied to the media industry in an effective manner to foster diversity of viewpoints without involving the Commission in content-based decisions that could raise First Amendment concerns? How should the Commission or an “independent, politically insulated professional entity” assess whether an applicant has overcome social and economic disadvantage and whether granting the application would increase diversity of viewpoints? How could the concept of “full file” review, which in the higher education context is used to compare candidates competing for a limited number of admissions slots, be applied in an administratively feasible manner to a situation where applicants will not be compared to each other (because mutually exclusive licenses applications are resolved through an auction) but applicants instead will be evaluated to see if they meet a specified standard? Should an applicant bear the burden of proving specifically that it would contribute to diversity of viewpoints as a result of having overcome these disadvantages? When the applicant is a company, which individuals would we evaluate to determine if the company meets the relevant standard under “full file review”? Would a determination by an independent board be advisory to the Commission? Would an affirmative determination qualify the entity as an eligible entity for all future transactions or for a specified period of time or would it have to seek a new determination for each transaction? How would “full file” review or a similar standard compare to an “eligible entity” or SDB standard in promoting viewpoint and/or ownership diversity? Should we substitute the “full file review” approach for the “eligible entity” approach until we can adopt an SDB standard or should we adopt it in lieu of an SDB standard?

Id.

³⁹ For decades, the Commission has acknowledged the importance of broadcast diversity. See, e.g., Statement of Policy on Minority Ownership Of Broadcasting Facilities, 68 FCC2d 979, 981 (1978) (“Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.”); Amendment of Section 73.3555 of the Commission’s Rules, the Broadcast Multiple Ownership Rules, 4 FCC Rcd 1723, 1724 ¶7 (1989) (“Although one of the structural purposes underlying our multiple ownership rules is to encourage diversity in the ownership of broadcast stations, we have encouraged ownership diversity as a means of promoting diversity of program sources and viewpoints, not as an end in itself”); 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd 13620, 13630 ¶30 (2003), aff’d in part and remanded in part, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (“[O]ur rules should encourage diverse ownership precisely because it is

one of many factors that may add to a broadcast licensee's life experiences and shape her perspectives, thereby enhancing diversity. The Full File Review framework can be applied to the media industry because the pursuit of the government's mission to obtain a diverse student body⁴⁰ is highly analogous to the FCC's mandate to pursue a diversity of voices.⁴¹ Just as "freedoms of speech and thought" associated with higher education "occupy a special niche in our constitutional tradition,"⁴² so too does the right of the people to have access to the exchange of words and ideas provided by a diverse group of broadcast licensees.⁴³ Just as the "robust exchange of ideas" is of paramount importance to a state university,⁴⁴ so too should it be of paramount importance for the FCC to encourage the exchange of robust and diverse viewpoints

likely to result in the expression of a wide range of diverse and antagonistic viewpoints." Courts have agreed and have upheld the Commission's authority to promote diversity. *See, e.g. FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) ("NCCB") (affirming the Commission's authority "to conclude that the maximum benefit to the public interest would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.") (internal quotations omitted); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1162 (D.C. Cir. 1992) (citing *NCCB* at 794-795, and discussing the Commission's broad authority "to determine where the public interest lies in the regulation of broadcasting to foster diversity"); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1042-43 (D.C. Cir. 2002) (agreeing with the Commission that "protecting diversity is a permissible policy" objective, and noting that "[i]n the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity") (citation omitted).

⁴⁰ *See, e.g. Grutter*, 539 U.S. at 330 (stating that the benefits of diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

⁴¹ *See* 47 U.S.C. §257(b) ("[T]he Commission shall seek to promote the policies and purposes of this chapter *favoring diversity of media voices*, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity") (emphasis added).

⁴² *Grutter*, 539 U.S. at 329.

⁴³ *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (discussing the people's "collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount").

⁴⁴ *Grutter*, 539 U.S. at 329 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

by providing licenses to a diverse group of applicants that have been socially disadvantaged. If the “diffusion of knowledge and opportunity through public institutions of higher learning must be accessible to all individuals regardless of race or ethnicity,”⁴⁵ then surely the diffusion of diverse ideas and viewpoints via broadcast spectrum owned by the people must be equally if not more important considering more people have access to broadcast media than to higher education.⁴⁶ Full File Review does not involve the Commission in reviewing a licensee’s broadcast content, and therefore it will not trigger First Amendment concerns.

The Supreme Court provided guidance on how a Full File Review program could be structured so that race is not the only factor the Commission would consider when reviewing an applicant’s file. In Grutter v. Bollinger,⁴⁷ Justice O’Conner stated that race may be considered a factor, as long as the applicant competes with other qualified applicants in a “flexible, non-mechanical” way that does not insulate *any* group, racial or otherwise, from competition.⁴⁸

The Commission asks how the agency or an “independent, politically insulated professional entity” would assess whether an applicant has overcome social and economic disadvantages.⁴⁹ A Full File Review program must have a goal statement and must ensure that Full File Review advances that goal. In addition, applicants must know the objective standard they are judged against. Clear standards for qualifications are vital, and should address, inter alia, the nature, extent, and remoteness in time of disadvantages the applicant has faced; the

⁴⁵ Id. at 331.

⁴⁶ Ownership and control of broadcast spectrum, a “natural resource,” rests with the people. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 173-74 (1973). The U.S. Census Bureau reported that in 2006, only 28% of adults 25 and older reported they were college graduates. See U.S. Census Bureau Press Release, Educational Attainment in the United States: 2006, available at <http://www.census.gov/Press-Release/www/releases/archives/education/009749.html>.

⁴⁷ 539 U.S. 306 (2003).

⁴⁸ Grutter, 539 U.S. at 334-335.

⁴⁹ Broadcast Diversity Order, 23 FCC Rcd at 5951 ¶85.

relative weight assigned to the existence of the disadvantage, or to the applicant's efforts to overcome the disadvantage. The standards and their administration should be reviewed periodically to ensure that the key underlying assumptions remain valid and that its administration has been efficient and effective in advancing Congress' and the Commission's objectives.

An applicant should be expected to describe her disadvantage and demonstrate her contribution to diversity of viewpoints. An applicant could describe her experience of discrimination based on gender, national origin, immigrant status, language, disability or age; her intention to meet unmet needs; or her tenacity and efforts to overcome discrimination or other disadvantages.

Finally, a pre-certification process is vital to Full File Review (or any other method of credentialing an eligible entity) because it would reduce uncertainty while transactions and applications are negotiated and financed, and would act as an incentive for investors, lenders, and sellers to work with eligible entities. A pre-certification would need to be renewed periodically, perhaps annually. To add integrity to the program and provide a deterrent to abuse, random audits of certified eligible entity qualifications would be desirable.⁵⁰

Although a Full File Review paradigm would be more dilute than a race-conscious SDB standard for promoting viewpoint and ownership diversity, Full File Review is preferable to the small business standard. It should be substituted for the small business standard until the Commission can adopt a constitutionally sustainable SDB program.

⁵⁰ Additional details of the potential operation of a Full File Review program can be found in the Interim Report of the Work of the Subcommittee on Eligible Entities, FCC Advisory Committee on Diversity for Communications in the Digital Age (July 28, 2008) at 4-7.

II. Share-Time Proposals

The Commission seeks comment on DCS' proposals relating to the agency's share time rule⁵¹ and bifurcation of analog channels.⁵² DCS incorporates its comments on these matters in response to the Second Further NPRM by reference,⁵³ and will describe its proposals for share-time for AM analog radio, FM HD radio, and DTV sub-channels.

The Commission's share-time rule originally authorized two separate licensees to create two separate "stations" that would share spectrum for certain portions of the day.⁵⁴ The share-time rule would not be used to permit non-SDBs to circumvent the Commission's ownership restrictions (an issue raised in the Broadcast Diversity Order).⁵⁵ Instead, the rule would enable separate licensees to use licensed spectrum in a more efficient manner, thereby allowing access to spectrum for new entrants, particularly SDBs.

A. Free Speech Radio on Analog AM Service

Free Speech radio would take advantage of Section 202(b)(2) of the Telecommunications Act, which allows for an exception to the local radio ownership rule when a new station is created.⁵⁶ Section 202(b)(2) of the 1996 Telecommunications Act gives the Commission authority 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) "if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio

⁵¹ 47 C.F.R. § 73.1715.

⁵² Broadcast Diversity Order, 23 FCC Rcd at 5952 ¶87.

⁵³ See DCS Initial 2007 Comments at 14-15 (Bifurcation of Channels for Share-Times with SDBs) and at 41-47 (Use of Share-Time Rule to Foster Ownership of DTV and FM Sub-channels); see also DCS 2007 Supp. Comments at 27.

⁵⁴ See 47 C.F.R. §73.1715, which authorizes commercial share-time operations with each entity sharing time denoted a "radio station."

⁵⁵ Broadcast Diversity Order, 23 FCC Rcd at 5952 ¶87.

⁵⁶ Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996).

broadcast stations in operation.” A new “radio broadcast station” is exactly what channel bifurcation creates, irrespective of its number of operating hours.⁵⁷

B. Digital Broadcasting: FM HD Radio Service and DTV Service

Advances in digital technology allow for new applications of the share-time rule. DCS takes this opportunity to reiterate that applicability of the share-time rule to FM HD radio and to DTV sub-channels⁵⁸ has profound advantages for current digital licensees and new entrants on at least five levels:

First, it would promote ownership diversity by making it possible for new entrants, particularly minorities and women, to broadcast on perhaps hundreds of new stations under a model regarded by financial institutions as ownership rather than leasing. Second, it would afford DTV and FM broadcasters an additional and entirely voluntary option for the use of their sub-channels – the option being to monetize the sub-channels with a share-time if (for example) they would prefer to receive cash for the asset rather than having to serve as a landlord for lessees or serve as a programmer if they do not have expertise in multi-channel programming. In this way, financially struggling licensees could secure a financial rescue. Third, by bringing new audiences and advertisers to over the air radio and television, these industries’ asset values would increase and they would become more competitive. Fourth, new multilingual and multicultural audiences could be served by over the air radio and television, thus accelerating consumer acceptance of DTV and HD radio receivers and programming. Fifth, by expanding diversity of

⁵⁷ See 47 C.F.R. §73.1715, which authorizes commercial share-time operations with each entity sharing time denoted a “radio station.”

⁵⁸ Although the Broadcast Diversity Order does not expressly seek comment on the application of the share-time rule to video as well as audio programming, the applicability of the share-time principle to video programming should be regarded as being within the scope of this docket. See NBMC v. FCC, 822 F.2d 277, 285 (2d Cir. 1985) (holding that a 1984 rulemaking notice seeking comment on the daytimer preference in comparative hearings for 600 Docket 80-90 FM stations was sufficient to alert interested parties that the Commission would also consider the applicability of this same daytimer preference for all new FM stations created in the future).

ownership and programming, it could someday become easier to justify additional relaxation of the local radio ownership rules.

To afford minorities a head start in accessing this spectrum, DCS proposes that the Commission initially limit the share-time rule assignment of a DTV sub-channel or HD channel to SDBs.⁵⁹ As a further incentive to promote minority ownership, a broadcaster that assigns to an SDB a DTV sub-channel or HD channel at a fraction of fair market value could be permitted to assign a second DTV sub-channel or HD channel at fair market value. DCS calculates that if just one in five, or 20%, of DTV or commercial FM broadcasters split off one channel each for sale under the share-time rule, we would experience a 61% increase in the number of minority owned stations.⁶⁰

DCS emphasizes that ownership is the goal of the digital share-time proposals, not a lease relationship. Financial institutions are much more likely to finance ownership than leases. A lease is extraordinarily difficult to finance because of often-unrecoverable sunk costs and the absence of collateral or its equivalent. In fact, in a 2007 MMTC survey of 13 firms in the business of providing broadcast financing, not one firm would consider financing an FM HD-2 or

⁵⁹ The Media Access Project (“MAP”) has fleshed out a proposal for DTV leasing that contemplates the creation of new Class S licenses for SDBs or Class A licensees, with must-carry rights and the same or great public interest obligations as other full power TV licensees. See “A Proposal for Diversifying Access to Digital TV Spectrum,” presented by Andrew Jay Schwartzman, President and CEO, Media Access Project, to the Federal Communications Commission’s *En Banc* Meeting at the Schomburg Center for Research in Black Culture, July 29, 2008. Although the details will need to be fleshed out, DCS enthusiastically approves of MAP’s proposal.

⁶⁰ Applying Free Press’ analysis, which concludes that there are 818 minority owned and 688 women owned commercial radio stations, we would experience a 61% increase in the number of minority owned commercial radio stations and a 73% increase in the number of women-owned commercial radio stations stations. See Off the Dial, *supra*, at 16.

HD-3 lease.⁶¹ It is therefore imperative that the Commission adopt proposals that encourage broadcast ownership for new entrants.

III. Retention on Air of AM Expanded Band Owners’ Stations if One of the Stations is Sold to an Eligible Entity

The Commission seeks comment on how to properly balance the competing goals of improving the technical viability of the AM service and promoting ownership diversity.⁶²

AM licensees operating in the Expanded Band and having another AM station paired with the Expanded Band station are required to forfeit one of these AM allotments for cancellation on the fifth anniversary of the date on which the Commission issued the Expanded Band authorization. In March 2006, eleven broadcasters and four public interest and civil rights organizations (the “Joint Petitioners”) petitioned the Commission to waive this requirement in order to allow the transfer of one of the stations to a recognized small business, or the station’s retention by the licensee if the licensee is a small business.⁶³ DCS submitted comments on these matters in response to the Second Further NPRM and incorporates them by reference.⁶⁴

DCS emphasizes that the primary benefit of this approach is that it would allow broadcasters to continue providing service to the public over existing AM stations, thereby furthering the Commission’s long-held belief that any loss of service is prima facie inconsistent

⁶¹ See DCS 2007 Supp. Comments at 27.

⁶² Broadcast Diversity Order, 23 FCC Rcd at 5953 ¶91.

⁶³ See DCS 2007 Initial Comments at 47 n. 164 (citing “Request for Waiver of Rules Requiring Return of AM Licenses,” MM Docket No. 87-267 (filed March 27, 2006) (“AM Expanded Band Petition”). The petitioners were eleven broadcast companies (including Clear Channel, Entercom, Multicultural and Starboard Media) and four public interest and civil rights organizations (MMTC, the Independent Spanish Broadcasters Association (ISBA), NABOB and the Office of Communication of the United Church of Christ, Inc.)

⁶⁴ See id. at 47-50.

with the public interest, unless such loss is outweighed by other public interest considerations.⁶⁵

AM broadcasters operating in the Expanded Band provide valuable programming over their original band stations, in recognition of the loyalty some listeners feel to their “old” AM stations and the inability of some listeners to receive Expanded Band broadcasts. In addition, numerous AM broadcasters have specifically targeted the programming on their original band stations to serve the needs of minorities and other niche audiences, in a way that was impractical before AM stations had a second outlet for serving the market. Further, allowing an AM authorization held by an Expanded Band licensee to be sold to a small business entity⁶⁶ would directly further the Commission’s goal of promoting diversity of ownership by encouraging station ownership by small businesses and minorities.⁶⁷

A thorough history and analysis is provided in the Comments of Joint Petitioners, being filed this date. DCS endorses the Joint Petitioners’ Comments and commends them to the Commission’s attention.

IV. Modifications to Form 323

The Commission seeks comment on a number of issues related to its collection of information on radio and television licensees.⁶⁸ As the Commission has acknowledged, its data

⁶⁵ See West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972); Coronado Communications Company, 8 FCC Rcd 159, 162 (Video Services Div. 1992) (citing Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1956)).

⁶⁶ Serendipitously, nine of the stations in question are minority owned or controlled. Thus, as to this AM Expanded Band proposal, DCS does not contest the use of a small business definition of eligible entity.

⁶⁷ Interestingly, one of the Commission’s original goals in creating the Expanded Band was to promote ownership diversity. See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 78 FCC2d 1235, 1256 (1980) (Commissioner Brown, concurring (discussing rule of diversity in the U.S. position at the 1979 WARC, resulting in the creation of the Expanded Band). Thus, a grant of this proposal would be consistent with the Commission’s original purposes when it developed the Expanded Band.

⁶⁸ Broadcast Diversity Order, 23 FCC Rcd at 5955 ¶¶95-96.

collection efforts could be improved.⁶⁹ A number of parties, including other government entities, have taken issue with the Commission's current database, which leaves much to be desired.⁷⁰ In response to the Second Further Notice, DCS expressed its dissatisfaction with the Commission's data collection on minority ownership,⁷¹ and DCS welcomes the opportunity to offer some solutions to the Commission's data collection dilemma.

No constitutional impediment prevents the Commission from collecting data on minority or female ownership.⁷² Any argument justifying that the Commission maintain the current system is heavily outweighed by the agency's need to collect, compile, and analyze current media ownership data so that it may craft sound policies. Expansion of the scope of parties required to file ownership reports will assist in enhancing the race, gender, and ethnicity data collection because more people identifying themselves as broadcast owners will be counted. Ownership data should be collected on an annual basis because the impact of rule changes often reflects the nearly immediate readings given them by lenders and investors.

⁶⁹ Id. at ¶53.

⁷⁰ See DCS Initial Comments at 30-31 (citing Free Press and FCC-sponsored studies that cite deficiencies in the Commission's data collection and reporting); see also "Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess," GAO-08-383 (released April 11, 2008) at 32, available at <http://www.gao.gov/new.items/d08383.pdf> (last visited July 28, 2008) (stating that "data weaknesses stemming from how the data are collected, verified, and stored limit the benefits of this effort. Further, more accurate and reliable data would allow FCC to better assess the impact of its rules and regulations and would enable the Congress to make more informed legislative decisions about issues such as whether to reinstate the tax certificate program").

⁷¹ See DCS Initial Comments at 30-31; see also DCS 2007 Reply Comments at 14-15.

⁷² See Parents, supra, 127 S.Ct. at 2792 (Justice Kennedy, concurring in part and concurring in the judgment) ("it is permissible to consider the racial makeup of schools"; school boards may draw "attendance zones with general recognition of the demographics of neighborhoods" and may engage in "tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race[.]")

The Commission should not adopt an entirely new form to more accurately collect information from licensees on race, gender, and ethnicity, but should revise and expand Form 323 to include a questionnaire administered to minority and women owners – to ensure that those identifying themselves as minority or women controlled are really what they claim to be.⁷³ Further, the Commission should take the opportunity presented by the filing of these annual reports (and the consequent construction of a valuable longitudinal research database) to ask two or three well-chosen questions that ask licensees to provide anecdotal evidence regarding the impact of Commission rules or market conditions on their ability to secure access to capital, access to spectrum and access to opportunity.

Finally, the Commission should conduct meaningful audits on a rolling basis to assess the accuracy of the information filed in the annual ownership report and assess forfeiture penalties for situations that amount to actual ownership abuse.

V. Structural Rule Waivers for Creating Incubator Programs

The Commission seeks comment on the creation of incubator programs,⁷⁴ a proposal the Commission initially issued for comment over fifteen years and six dockets ago.⁷⁵ An incubator program would allow a company to acquire more than the otherwise-allowable number of stations in a market if the company establishes a program that substantially promotes ownership by disadvantaged businesses. As envisioned by the Commission in 1992, incubator programs

⁷³ See Out of the Picture at 12 (identifying eight television stations reported as woman owned but actually controlled by men, and two television stations reported as minority owned but actually controlled by non-minorities).

⁷⁴ See DCS 2007 Initial Comments at 11-14; see also DSC 2007 Supp. Comments at 5-8.

⁷⁵ See Revision of Radio Rules and Policies, MM Docket 91-140 (Reconsideration), 7 FCC Rcd 6387, 6391-92 ¶¶22-25 (1992) (“Radio Rules – Reconsideration”).

could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance.⁷⁶

In its Initial Comments, DCS proposed additional steps that might qualify toward incubation credit, including the creation of a business planning center at a Historically Black College or University (“HBCU”) or Hispanic Serving Institution (“HIS”); new training programs, modeled after the NAB Foundation’s Broadcast Leadership Training (BLT) Program; a large, easily accessible line of credit that SDBs could draw upon in financing broadcast ventures; and financial investments in SDBs, including mentoring by senior professionals who wish to convey their knowledge and experience to subsequent generations.⁷⁷

In its Supplemental Comments, DCS modified its proposal to create a Trial Incubation Plan that narrows the scope of the proposal to the local radio ownership rule, 47 C.F.R. §73.3555(a) in large markets.⁷⁸ There are three advantages of a plan focused on large radio markets: (1) the risk of excessive consolidation in these markets is relatively slight because of the large number of radio voices in those markets; (2) the quality of entrepreneurs seeking to grow in large markets virtually ensures that proposed transactions will close; and (3) a large radio market presence is vital to the growth of several of the strongest minority broadcast companies, whose business plans are premised on building footholds in the largest markets and,

⁷⁶ The 1992 Commission’s formulation is still valid. See Radio Rules - Reconsideration, 7 FCC Rcd at 6391-92 ¶¶ 22, 24-25 (detailing how an incubator program might “be designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited broadcast business experience, and that have expressed an interest in station ownership” using creating mechanisms such as management or technical assistance; loan guarantees; direct financial assistance through loans or equity investment; training; and business planning assistance).

⁷⁷ DCS 2007 Initial Comments at 13.

⁷⁸ DCS 2007 Supp. Comments at 6-8. This includes both the local radio ownership caps and the AM/FM sub-caps, which limit the number of AM or FM stations an entity may own in a local market.

thereby, becoming truly national companies in audience reach, advertiser perception and program syndication potential.

Incubation would be deemed sufficient to justify the incubating party's purchase of an additional station when the steps to be taken by the incubating party will definitely bring into existence an SDB-owned station in the same service (AM or FM) in the same market or a market of approximately the same size (for example, a purchase in market 2 and incubation in markets 1, 2, or 3; a purchase in market 10 and incubation in any of markets 7-13; a purchase in market 15 and incubation in any of markets 10-20). To assure that the incubation is sufficient in impact, the two transactions would be contingent on one another so that the incubated transaction would close prior to or simultaneously with the incubating party's transaction. Additionally, the incubating party should make a substantial contribution to the success of the paired transaction – inter alia, selling the incubated party a station, guaranteeing the senior debt, or providing the mezzanine portion of the transaction. The Trial Incubation Plan would operate for two years, then it would either terminate or be renewed or expanded depending on a thorough analysis of its beneficial or adverse effects.

VI. Opening FM Spectrum for New Entrants

In its Initial 2007 Comments, DCS focused on three methods by which the Commission could open spectrum for new entrants.⁷⁹ DCS later revised its position to reflect the Diversity

⁷⁹ DCS 2007 Initial Comments at 22-23. The three methods were relaxing of the limit of four contingent FM applications for FM major modification proposals being considered under 47 C.F.R. §73.3517(a); repeal of the third adjacent FM contour rules found in 47 C.F.R. §73.215(a), or recommend to Congress that it be free to do so; and relaxing the community of license and transmitter site rules to replace the 80% community of license 70 dbu commercial FM coverage requirement (47 C.F.R. §73.315(a)) with the 50% coverage requirement applicable to noncommercial FM (47 C.F.R. §73.515), as well as authorizing radio stations to change their communities of license to any community within the same market (as “market” is defined in 47 C.F.R. §73.3555(a)).

Committee’s “Recommendation on Diversifying Ownership of Terrestrial Radio” which states that:

where permitted by the contour overlap and community of license coverage rules, and upon a satisfactory showing, the Commission would authorize full power AM or FM radio stations to change their communities of license to any community within the same market (as “radio market” is defined in 47 C.F.R. §73.3555(a)), provided that if the community of license being vacated (the “Original Community”) has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime (a “Local Service LPFM”), the licensee vacating the Original Community must underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community.⁸⁰

Among the greatest market entry barriers facing minorities is the Commission’s historically narrow interpretation of Section 307(b) that prevents minority broadcasters from moving their disproportionately inferior distant signals closer to the stations’ target audiences, which are often confined to central cities.⁸¹ The Commission’s current rules restrict diversity and localism by preventing larger metropolitan areas from having enough stations to serve the needs of each of their sizeable multicultural and multilingual communities. These rules have the effect of perpetuating, across generations, the present effects of past discrimination in broadcast licensing and ownership.⁸² The approach set forth by the Diversity Committee harmonizes three of the Commission’s core objectives: (1) preserving local service wherever possible; (2)

⁸⁰ See Letter from the Diversity and Competition Supporters, MB Docket No. 06-121 et al. (December 11, 2007) (citing FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendation on Diversifying Ownership of Terrestrial Radio (adopted December 10, 2007)).

⁸¹ 47 U.S.C. §307(b) (stating that “the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”)

⁸² See A. Bush and M. Martin, The FCC’s Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. 423, 439 (1996) (discussing the Commission’s failure to grant minorities radio and television licenses until 1956 and 1973, respectively, as well as the bias in favor of non-minorities in comparative hearing procedures); see also p. 8 n. 33 supra (discussing Southland Television).

promoting minority ownership; and (3) building the LPFM service. The Commission should consider this proposal immediately.

VII. Must-Carry for Certain Class A Television Stations

In its Supplemental Reply Comments, DCS endorsed the Community Broadcasters Association's proposal for the Commission to support cable must-carry legislation for Class A stations.⁸³ Class A low power television (LPTV) stations are required to originate local programming.⁸⁴ Approximately 15% of Class A stations are minority owned and many provide multicultural and multilingual service that is not available from full-power stations.⁸⁵

DCS takes this opportunity to refine its position on Class A must carry. DCS is mindful of the unintended consequences that blanket Class A must-carry would impose on cable systems that may have limited capacity. Many – perhaps most – Class A stations broadcast only minimal local programming and no multicultural or multilingual programming, and thus offer the public little in the way of diversity of viewpoints and information. As such, the public would be better served if the Commission would create and entitle to must-carry a new sub-class of Class A stations that are hyper-local or that provide extensive multicultural and (especially) multilingual service.

VIII. Reallocation of TV Channels 5 and 6 for FM Service

Among all of the proposals adopted or under consideration in this docket, this proposal, advanced in 2007 by Mullaney Engineering, Inc. (“Mullaney Plan”)⁸⁶ has the greatest potential to

⁸³ See DCS 2007 Supp. Comments at 10.

⁸⁴ See 47 U.S.C. §336(f)(2)(A)(i).

⁸⁵ See DCS 2007 Supp. Comments at 10 (citing and attaching, in Appendix D, the Declaration of Rosamaria Caballero, President, Caballero Television Texas LLC (November 12, 2007)).

⁸⁶ DCS 2007 Supp. Comments at 11 (citing Mullaney Engineering, Inc. Petition for Reconsideration and/or Comment, MM Docket No. 87-268, October 26, 2007).

deliver economic power to minority owned media. The proposal contemplates that most or all AM stations could be transformed into FM stations.⁸⁷ In the Broadcast Diversity Order, the Commission agreed that this proposal could produce tremendous opportunities for minorities.⁸⁸

AM suffers profound competitive disadvantages compared to FM: lower signal quality, higher interference, frequent need for directionalization, generally diminished nighttime service, higher engineering and maintenance costs, and the near-impossibility of multicast HD service. Thus, for a generation, a typical AM station has produced about 20% of the listenership and revenue of a comparable FM station. With radio revenues and especially AM station valuations plunging year after year, and with single-owner satellite service on the immediate horizon,⁸⁹ radio needs to be saved. The Mullaney Plan – an Exodus of AM to the Promised Land of FM – is simply the greatest proposal on the table anywhere to save radio.

And if a lifesaver is needed by anyone, it is needed now by minority owned radio.⁹⁰

Radio is the heritage, entry communications technology for entrepreneurs of color. In 2001,

⁸⁷ See Comments of the Broadcast Maximization Committee (filed in this docket this date) (“Broadcast Maximization Committee Comments”), Summary, p. i (“BMC proposes to (1) relocate the LPFM service to a portion of this spectrum space; (2) expand the NCE service into the adjacent portion of this band; and (3) provide for the conversion and migration of all AM stations into the remaining portion of the band over an extended period of time and with digital transmissions only. BMC has undertaken a daunting and ambitious task but believes it is achievable.”)

⁸⁸ See Broadcast Diversity Order, 23 FCC Rcd at 5956 ¶100.

⁸⁹ See “Commission Approves Transaction Between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions,” FCC Press Release, July 28, 2008.

⁹⁰ As the Broadcast Maximization Committee explains:

AM radio needs a huge boost to enable them to hang on during these especially difficult economic times. Although BMC’s conversion idea will take time, perhaps many years, to implement, the Commission’s active consideration of this proposal should provide the hope that many struggling stations need to survive. The prospect of a major improvement by this conversion proposal will help minority owners and small businesses convince financial sources that there is reason to invest in the AM service.

Broadcast Maximization Committee Comments at 9.

more than half of minority owned stations were AM stations, and a minority owned station was 43% more likely than a non-minority owned station to be an AM station; further, minority owned stations were 19% more likely than non-minorities to operate between 1410 and 1600 kHz.⁹¹ By MMTC's back-of-the-envelope calculation, the Mullaney Plan would roughly triple the asset value (and thus the capital access ability) of minority owned broadcasters.

To be sure, reallocation of TV channels 5 and 6 for FM service would have to await completion of the DTV transition. As such, the Commission should clarify that its March 6, 2008 announcement in the DTV Eighth Report and Order that it is rejecting the Mullaney Plan⁹² does not conflict with its position in the March 5, 2008 Broadcast Diversity Order that it is enthusiastic about and seeks comment on the Mullaney Plan.⁹³ The Commission should specifically confirm that after the DTV transition is complete, it could be possible to convert Channels 5 and 6 for FM service. The Commission should also begin the process of thinking through a number of issues that may result from the AM-FM migration. The Commission should open coordination discussions with the U.S. Navy and with the Commission's counterparts in the NARBA countries – Canada, Mexico, and the Bahamas. Further, to assess the number of AM band licensees that would prefer to migrate to the FM band, the Commission should undertake a

⁹¹ See FM Radio White Paper, FCC Advisory Committee on Diversity for Communications in the Digital Age, Subcommittee on New Technologies (June 11, 2004) at 3 (citing Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (MMTC, March, 2002)).

⁹² Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report And Order, 23 FCC Rcd 4220 ¶¶24-27 (released March 6, 2008) ("DTV Eight Report and Order") (denying petitions of Mullaney Engineering, Inc. and EME Communications to allocate Channels 5 and 6 to the FM service).

⁹³ Broadcast Diversity Order, 23 FCC Rcd at 5956 ¶100.

survey of AM broadcasters. The Commission should also perform engineering studies to determine how many FM stations Channels 5 and 6 could accommodate.⁹⁴

A considerable amount of time and planning will be necessary to smooth out issues that may arise during the migration.⁹⁵ To initiate the process of identifying and addressing critical issues and planning an effective transition, the Commission should use its powers under the

⁹⁴ Potential spectrum management and structural ownership regulatory issues that might be addressed include:

1. How to deal with I-A Clears that might prefer to stay on the AM band. There are 41 AM frequencies with at least one I-A Clear broadcasting on them. Each of these 41 frequencies has about 20 non-Class I-A stations operating on it.
2. How to address the Homeland Security Bureau's belief that skywave service has special value in EAS-triggering emergencies.
3. How to deal with AM licensees that might find it difficult or expensive to relocate to FM.
4. The capacity of Channels 5 and 6 to accommodate all AM stations, some LPFMs and noncommercial stations, and providing the U.S. Navy some, but not all of the AM band for sonar to better protect our ports.
5. An interim period of dual-facility operation while the public acquires new receivers.
6. Avoiding forced divestitures attendant to FM migrations that could trigger FM subcap issues.

One Mullaney Plan scenario with four components has been developed by MMTTC. First, AM radio service would continue, but only on the frequencies 540-1200 kHz. Rather than retaining the current configuration of 67 channels from 540-1200, 10 kHz apart, the new band would be reconfigured to have 34 channels, each on an even-numbered frequency (540, 560, 580, etc. to 1200) 20 kHz apart. In this way, the analog AM service would have less interference and enable the stations continuing to operate with AM service to broadcast HD2 and HD3 IBOC. Second, the I-A Clears, which operate on 22 of the even-numbered frequencies between 540 and 1200, could elect to remain where they are, or they could choose to migrate to FM where they would be given assignments of no less than an FM Class B or C-1. Third, the I-A Clears that operate on the odd-numbered frequencies between 540 and 1200, and on five frequencies above 1200, and that choose not to migrate to FM, could be accommodated as I-A Clears on some of the even-numbered frequencies between 540 and 1200 that either do not have a I-A Clear now, or will likely be vacated by I-A Clears that choose to migrate to FM. Fourth, the non-I-A Clear stations on the 22 even-numbered frequencies between 540 to 1200 kHz that now have I-A Clear service could stay where they are or migrate to FM. If they choose to gravitate to FM, their spectrum would be available for some other AMs that choose to remain in the AM band.

⁹⁵ Other issues the Commission should address are the length of time necessary to reassign LPTV licensees to other TV spectrum; when the AM-FM transition date will be; and how much time equipment manufacturers will need to get new receivers to the market.

Federal Advisory Committee Act⁹⁶ to appoint an advisory committee for the reallocation of TV Channels 5 and 6. The Commission created a similar advisory committee when it initiated the DTV transition.⁹⁷

This race-neutral proposal directly addresses the most common market entry barriers faced by minorities and new entrants – access to spectrum, access to capital, and access to opportunity. Moving AM stations to the FM band, and particularly moving the weaker and disproportionately minority owned stations to the FM band will allow for stronger, clearer signals, with HD channels and greater potential to reach a wider audience. Approval and implementation of the Mullaney Plan should be the Commission’s highest priority initiative to promote diversity.

IX. Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition

As expressed in its Supplemental Comments,⁹⁸ DCS supports the proposals of NABOB and the Rainbow/PUSH Coalition. DCS takes this opportunity to refresh the record as requested in the Broadcast Diversity Order.⁹⁹

A. Examine Major Rulemaking and Merger Applications to Discern the Potential Impact of the Proposed Rules or Transactions on Minority and Female Ownership

The Commission recently sought comment on the impact of media consolidation on minorities,¹⁰⁰ and in that spirit the Commission should include, in its deliberations in all major

⁹⁶ Pub. L. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. 2).

⁹⁷ See Formation of Advisory Committee on Advanced Television Service and Announcement of First Meeting, 52 Fed. Reg. 38523 (October 16, 1987) (establishing the Commission’s DTV Advisory Committee). A procedural history of the DTV Advisory Committee’s first decade of work can be found in Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 1280 n.1 (1997).

⁹⁸ See DCS 2007 Supp. Comments at 12-13.

⁹⁹ See Broadcast Diversity Order, 23 FCC Rcd at 5956-57 ¶101.

rulemaking proceedings, the impact of proposed rules on minority and female ownership.

Because policy is so often established in major merger proceedings, the Commission should also examine major transactions to discern their potential impact on minority and female ownership.¹⁰¹

To accomplish this, the Commission could incorporate a Minority/Female Impact Statement into its requests for comment and its decisions. A model for such an impact statement can be found in the Regulatory Flexibility Act statements that accompany the adoption of Commission rules of general applicability.¹⁰²

While an agency is permitted to adopt rules, otherwise justified, that have the unintended effect of burdening minority groups,¹⁰³ an agency is also permitted and encouraged to make itself aware of the impact of its policies on minorities.¹⁰⁴ Minority/Female Impact Statements would enable the Commission to make policy with better insight as to the potential effects on minority and female access to spectrum, access to capital, and access to opportunity. Almost everything the Commission does has a substantial impact on minority and female entrepreneurship, but that impact is often not recognized until years later. Minority/Female Impact Statements would address and very likely eliminate the unintended consequences of many rules that seek to

¹⁰⁰ See 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 06-121 (Further NPRM), 21 FCC Rcd 8834, 8837-38 ¶6 (2006).

¹⁰¹ See DCS 2007 Supp. Comments at 12. This proposal complements DCS Proposal #25 (Examination of How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings). See DCS 2007 Initial Comments at 29-30.

¹⁰² See, e.g. Broadcast Diversity Order, 23 FCC Rcd at 5958-59 ¶¶108-109; id. at Appendices B and C.

¹⁰³ See Washington v. Davis, 426 U.S. 229, 245 (1976) (“we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies ‘any person... equal protection of the laws’ simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.”)

¹⁰⁴ Parents, 127 S.Ct. at 2792.

otherwise promote diversity and expand broadcast ownership opportunities for minorities and women.

B. Decline to Grant Temporary Waivers of the Local Ownership Rules to Parties Proposing a Transaction that would Create Station Combinations Exceeding the Ownership Caps

As expressed in its Supplemental Comments, DCS endorses this proposal to the extent that it does not conflict with other proposals that are premised on trading an above-cap ownership opportunity for an SDB ownership opportunity.¹⁰⁵ The NABOB-Rainbow/PUSH bright line test ought to apply to transactions not involving a minority ownership initiative.

C. Treat Local Marketing Agreements as Attributable Interests

DCS supports this proposal as it will aid in preventing ownership abuse. It goes hand-in-hand with the Commission's recent adoption of "zero tolerance" policy for ownership fraud.¹⁰⁶

C. Allow Minorities to Own Station Combinations Equal to the Largest Combination in a Market to Counterbalance the Economic Impact of Grandfathered Holdings

DCS strongly endorses this proposal, which presents a creative means of advancing diversity while also counterbalancing the economic dominance of large grandfathered holdings.

¹⁰⁵ See, e.g. Section V herein, Structural Rule Waivers For Creating Incubator Programs, *supra* at pp. 19-21. In the spirit of addressing minority and female impact (see pp. 27-29 *supra*), the Commission should be careful not adopt otherwise benign proposals that unintentionally may hinder minority and female ownership.

¹⁰⁶ Broadcast Diversity Order, 23 FCC Rcd at 5940-41 ¶¶43-48.

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APPENDIX

THE DIVERSITY AND COMPETITION SUPPORTERS (DCS)

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