

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

In the Matter of	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	
	)	
2006 Quadrennial Regulatory Review – Review of the	)	MB Docket No. 06-121
Commission’s Broadcast Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	
2002 Biennial Regulatory Review – Review of the	)	MB Docket No. 02-277
Commission’s Broadcast Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio	)	MM Docket No. 01-317
Broadcast Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build on	)	MB Docket No. 04-228
Earlier Studies	)	

**PETITION FOR PARTIAL RECONSIDERATION**

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The Diversity and Competition Supporters (“DCS”),<sup>1</sup> pursuant to 47 U.S.C. §405(a) and 47 C.F.R. §1.429, respectfully petition for partial reconsideration of the Report and Order and Third Further Notice of Proposed Rulemaking (“Diversity Order”).<sup>2</sup>

### **Summary And Background**

In the Diversity Order, the Commission laudably adopted several initiatives that will advance minority and women ownership. These initiatives are certainly helpful.<sup>3</sup> It’s especially noteworthy that the Commission did not repeat its common mistake of summarily rejecting worthwhile minority ownership proposals on the theory that it prefers, instead, to wait see if a handful of other, modest initiatives will somehow succeed.<sup>4</sup>

Notwithstanding the many farsighted decisions elsewhere in the Diversity Order, the Commission did commit two very substantial errors. First, after twelve years of inaction, it has still failed to adopt a workable “eligible entity” definition of the class of beneficiaries of minority ownership initiatives. Second, it summarily rejected foreign ownership reform – the initiative more likely than any other to help minorities obtain access to a great deal of capital.

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<sup>1</sup> The 29 organizations comprising the Diversity and Competition Supporters are set out in the Appendix to DCS’ Initial Comments in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 et al. (October 1, 2007) (“DCS Initial Comments”).

<sup>2</sup> Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294 et al., 23 FCC Rcd 5922 (released March 5, 2008) (“Diversity Order”). The Diversity Order was published at 73 Fed. Reg. 28361 (May 16, 2008). Thus, this Petition is timely filed.

<sup>3</sup> See MMTC, “An Extraordinary Day for Minorities in Broadcasting,” Press Release, March 5, 2008 (“In a unanimous 70-page order, the FCC adopted 13 minority ownership proposals and put another 12 proposals out for public comment. The FCC served the public interest by banning discrimination in broadcast advertising and transactions, revising the ownership attribution rules to restore the seller paper market, heightening protections against ownership fraud, and authorizing several incentive programs to encourage the sale of stations to minorities.”)

<sup>4</sup> See, e.g., Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules (Report and Order), 102 FCC2d 548, 558 (1985), recon denied, 4 FCC Rcd 5218 (1989) (repealing the use of minority ownership as one of the criteria for new service on the domestic Class I-A clear channels after the rule had spawned all of three new minority owned stations).

Eligible Entity Definition: Unfortunately, three of the initiatives adopted by the Commission, and three of the initiatives put out for comment, will contribute nothing to advancing minority and women ownership unless the Commission improves its definition of an eligible entity. If the Commission’s definition of an eligible entity as a “small business” is sustained, minorities and women will remain barely represented in television and radio ownership for years to come.

Foreign Ownership Reform: Of the 29 DCS proposals ripe for review in the Diversity Order, the proposal whose adoption would most immediately and substantially deliver minorities greater access to capital was foreign ownership relaxation. Section 310(b)(4) of the Communications Act of 1934 (“the Act”) prevents a broadcast licensee from having more than 25% of its capital stock owned or voted by foreigners “if the Commission finds that the public interest will be served by the refusal or revocation of such license.”<sup>5</sup> Unfortunately, the Commission denied DCS’ deregulatory proposal without giving a specific substantive reason. Its procedural justification – the need for a rulemaking proceeding – is puzzling since, by definition, a rulemaking proceeding is sought in every petition for rulemaking. Ironically, implementation of DCS’ proposal actually would require no rulemaking proceeding.

**I. The Commission Should Reconsider Its Decision To Define An Eligible Entity As A “Small Business”**

The Commission’s decision to define an eligible entity as a “small business” is inconsistent with statutory mandates, arbitrary and capricious, and unsupported by substantial evidence in the record as required by the Administrative Procedure Act (“APA”).<sup>6</sup>

The eligible entity issue is hardly a new one. In response to the 1995 Adarand decision applying strict scrutiny to federal race-conscious contracting programs,<sup>7</sup> and taking into account

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<sup>5</sup> 47 U.S.C. §310(b)(4).

<sup>6</sup> 47 U.S.C. §§706(A), (E).

Congress' 1996 adoption of a mandate for the Commission to reduce market entry barriers,<sup>8</sup> the Commission began to craft a constitutionally sustainable eligible entity definition. As a result, in 2000 the Commission published five studies that justified a race-conscious definition under strict scrutiny.<sup>9</sup> The Commission then dropped the ball, declining in the 2002 Biennial Review Order<sup>10</sup>

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<sup>7</sup> Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

<sup>8</sup> 47 U.S.C. §257 (1996). 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). Even before 1996, Congress had provided, in Section 309(j) of the Act, for a system of telecommunications auctions that would "promote economic opportunity and competition" and stated that the Commission could achieve this goal by "disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women." Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993); see also H.R. Rep. 103-111, at 254, 1993 U.S.C.A.A.N. 378, 581 (May 25, 1993). See also Communications Amendments Act of 1982 – National Telecommunications and Information Administration, Pub. L. No. 97-279, H.R. Conf. Rep. 97-765 (1982) at 26 ("an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...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>9</sup> See Staff Executive Summary, Market Entry Barriers Studies (December 12, 2000), describing the five studies performed in response to 47 U.S.C. §257 (the "Section 257 Studies"). Ironically, the Commission felt that the Section 257 Studies were important enough to be used as a reason to deny minority ownership proposals. Just one year later, the Commission declined to consider the Minority Media and Telecommunications Council's proposals in the television local ownership proceeding because the Commission had not yet evaluated the Section 257 Studies. See Review of the Commission's Rules Governing Television Broadcasting (MO&O on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) ("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>10</sup> See 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, Report and Order, MM Docket No. 02-277, 18 FCC Rcd 13620 (2003) ("2002 Biennial Review Order").

to adopt a definition of a socially and economically disadvantaged business (“SDB”). Instead, the Commission opted for a small business definition.<sup>11</sup>

On review in Prometheus, the Third Circuit let the Commission’s decision to use a small business decision stand, but the Court added that “[w]e anticipate, however, that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission’s diversity objectives.”<sup>12</sup> Shortly thereafter, the Commission issued a Notice of Inquiry in the Section 257 docket, soliciting additional evidence on the SDB definition.<sup>13</sup> Then three more years passed with nothing done to develop the “stable definition of SDBs” the Prometheus Court expected the Commission to develop.<sup>14</sup> Meantime, some of the Section 257 Studies probably became stale.<sup>15</sup>

The Commission did not help matters when, on June 21, 2006, it adopted a Further Notice of Proposed Rulemaking<sup>16</sup> that omitted the necessary reference to Section 257<sup>17</sup> and also

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<sup>11</sup> See id. at 13632.

<sup>12</sup> Prometheus Radio Project, et al. v. FCC, 373 F.3d 372, 428 n. 70 (3rd Cir. 2004), cert. denied, 125 S.Ct. 2902 (2005) (“Prometheus”).

<sup>13</sup> Mass Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies, MB Docket No. 04-228 (Public Notice and Notice of Inquiry), 19 FCC Rcd 10491 (2004).

<sup>14</sup> Prometheus, 373 F.3d at 428 n. 70.

<sup>15</sup> See Diversity Order, Statement of Commissioner Jonathan S. Adelstein (concurring in part, dissenting in part), 23 FCC Rcd at 5986 (“After years of inaction, the studies from 2000 are now too stale to serve as a basis upon which the Commission can develop specific regulatory action to promote women and minority ownership.”) Although the Section 257 Studies were the only significant step taken from 2000 to 2003 to implement Section 257, the Commission’s 2003 Triennial Report to Congress on Section 257 (required by 47 U.S.C. §257(c)) contained not a word about the Section 257 Studies. See Section 257 Third Report to Congress, 19 FCC Rcd 3034 (2004).

<sup>16</sup> 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, Further Notice of Proposed Rulemaking, MB Docket No. 06-121 et al., 21 FCC Rcd 8834 (2006) (“Further NPRM”).

failed to seek comment on definition of an SDB.<sup>18</sup> Then, on August 1, 2007 – thirteen months after the Commission began the Prometheus remand process – the Commission adopted the Second Further NPRM, which corrected the errors in the Further NPRM and inquired into the Commission’s “statutory authority to facilitate the licensing of spectrum-based services to a diversity of entities, including businesses owned by minority groups and women.”<sup>19</sup>

Nonetheless, on December 18, 2007, in the Diversity Order, the Commission adopted the very same ineffective eligible entity definition – small businesses as defined by SBA standards by industry grouping based on revenue – that it had been working with since Adarand.<sup>20</sup>

The linchpin of any serious effort to advance minority and women ownership is an eligible entity definition that is not so dilute as to be ineffectual. Developing a meaningful definition requires accurate and complete minority and women ownership data, and the Commission doesn’t have that.<sup>21</sup> In the Diversity Order, the Commission accepted Free Press’ finding that 7.78% of commercial stations are minority owned,<sup>22</sup> and the Commission also maintained that 8.5% of small business owned commercial radio stations are minority owned.<sup>23</sup> DCS has no idea where that 8.5% number comes from. The Commission’s staff arrived at the

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<sup>17</sup> If a notice of proposed rulemaking omits a statutory basis for a proposed rule, the agency cannot rely on that basis when it adopts the rule. See, e.g., Global Van Lines v. ICC, 714 F.2d 1290, 1297-99 (5<sup>th</sup> Cir. 1983).

<sup>18</sup> Id. The Further NPRM also failed to identify and describe DCS’ proposals – a stunning omission in light of the Prometheus court’s very rare remand on the grounds that the Commission, in its 2002 Biennial Review Order, had also failed to consider DCS’ proposals. See Prometheus, 373 F.3d at 421 n. 59 and at 435 n. 82.

<sup>19</sup> 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, Second Further Notice of Proposed Rule Making, MB Docket No. 06-121 et al., 22 FCC Rcd 14215, 14221 ¶16 (2007) (“Second Further NPRM”).

<sup>20</sup> See Diversity Order, 23 FCC Rcd at 5925-27 ¶¶6-9.

<sup>21</sup> The inaccuracy and staleness of the Commission’s database on minority broadcast ownership are well established. See U.S. Government Accountability Office, Telecommunications: Preliminary Information on Media Ownership, December 14, 2007, p. 6 available at [http://markey.house.gov/docs/telecomm/gao\\_media\\_ownership.pdf](http://markey.house.gov/docs/telecomm/gao_media_ownership.pdf).

<sup>22</sup> See Diversity Order, 23 FCC Rcd at 5926 ¶8.

<sup>23</sup> Id. at 5927 ¶8.

8.5% statistic well after the comment period had closed, just days before the Commission voted on the Diversity Order,<sup>24</sup> and it did so with no public notice, no opportunity for comment, no intelligible explanation of how the number was derived, and no publication of the underlying research with which it derived this key statistic. That is impermissible.<sup>25</sup>

To conclude that the small business definition would not actually be regressive, the Commission relied on nothing more than the bare fact that 8.5% is greater than 7.78%.<sup>26</sup> Yet even accepting for the sake of argument the validity of the Commission's 11<sup>th</sup> hour statistic, it does not follow that the small business definition would materially advance minority radio ownership. After all, the industry could only bridge even the 0.72 percentage point difference between 7.78% and 8.5% if two very unlikely events were to occur: (1) every radio station owned by a large business would have to be sold to a small business, and (2) minority owned small businesses somehow were able to purchase the same proportion of these stations that non-minority owned small businesses could purchase.<sup>27</sup>

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<sup>24</sup> Compare DCS Ex Parte Letter, MB Docket 06-121 et al., November 12, 2007 (addressing the then-extant statistical issue in response to questions from commissioners) with the Diversity Order, 23 FCC Rcd at 5927 ¶8 (referring to unspecified December 1, 2007 BIA data; the Diversity Order was adopted on December 18, 2007).

<sup>25</sup> See, e.g. NBMC v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1987) (holding that the Commission's nondisclosure of technical studies the agency relied upon when terminating a minority ownership initiative "prevented petitioners and perhaps others from making relevant comments.") In the Diversity Order, the Commission commits exactly the same error. The Commission states: "Analyzing BIA figures as of December 1, 2007, we find that 4,532 of the 11,475 commercial radio stations are owned by entities with annual revenues clearly in excess of \$6.5 million....Using Free Press data, we find that at least 8.5 percent... of commercial radio stations owned by SBA-defined small businesses are minority owned" (fn. omitted). Id. at 5927 ¶8. How did the Commission go about "analyzing BIA figures" and "using Free Press Data"? And what "BIA figures and "Free Press data" did the Commission use?

<sup>26</sup> Diversity Order, 23 FCC Rcd at 5927 ¶8.

<sup>27</sup> These events would never occur. First, it is inconceivable that all, or even most of the stations owned by large businesses will be sold in the foreseeable future, or that these stations would be sold only or even primarily to small businesses rather than to other large, better financed businesses. Second, if 80 years of transactional history is any guide, it is even more inconceivable that minority owned small businesses, given their lack of access to capital, would



The impact of permanent adoption of this deeply flawed eligible entity definition would be considerable. Three of the proposals the Commission has already adopted,<sup>28</sup> and three of the proposals it is considering in the Third FNPRM<sup>29</sup> are dependent on this definition as opposed to an SDB or other less dilute definition. Although the Commission has left the door open to consideration of a more reasonable definition,<sup>30</sup> it has expressed its intention to begin to apply the flawed definition, and it has not set a timetable for changing it.<sup>31</sup> Thus, inevitably, many small businesses will develop business plans based on the flawed definition. If the Commission later narrows the definition in a way that excludes these businesses and includes others, the excluded businesses could object that the narrowed definition is inequitable because they had no notice that the definition was not intended to be permanent. To be sure, these businesses would have no legally cognizable or vested rights inherent in the small business definition. Nonetheless, in the interest of equity, the Commission ought to go the extra mile to avoid creating the misimpression that the small business definition is intended to be permanent and can be relied upon in business planning.

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somehow be able to purchase the same proportion of stations that non-minority owned small businesses would be able to purchase.

<sup>28</sup> The three affected proposals that have already been adopted are revisions of rules regarding construction permit deadlines (id. at 5928-31 ¶¶10-16), duopoly priority for companies that finance or incubate an eligible entity (id. at 5943 ¶56) and extension of divestiture deadlines in certain mergers (id. at 5943 ¶¶57-60). Although the proposals to modify the attribution rule (id. at 5931-37 ¶¶17-34) and to modify the distress sale policy (id. at 5937-39 ¶¶35-39) each use a small business definition, the inclusion of non-minority small businesses in these proposals does little or nothing to diminish the proposals' usefulness to minorities and women.

<sup>29</sup> The three affected proposals put out for rulemaking in the Diversity Order are share-time proposals (id. at 5952 ¶87), structural rule waivers for creating incubator programs (id. at 5955 ¶97) and allowing minorities to own stations combinations equal to the largest combination in a market (id. at 5957 ¶101). The AM expanded band station retention proposal (id. at 5952 ¶¶88-92) and the proposal for opening FM spectrum to new entrants (id. at 5956 ¶98) each use a small business definition, but the inclusion of non-minority small businesses in these proposals does little or nothing to diminish the proposals' usefulness to minorities and women.

<sup>30</sup> Diversity Order, 23 FCC Rcd at 5950-52 ¶¶80-86.

<sup>31</sup> Id. at 5927 ¶9.

Over the past several months, DCS gave considerable thought to seeking a stay of those portions of the Diversity Order that rely on the flawed definition. Yet a stay would impose its own inequities. Small business owners – minority and non-minority – have been waiting for years the relief granted in several sections of the Diversity Order. In many instances, proposed transactions have been negotiated, and applications are being prepared in anticipation of the July 15 effective date of the new rules. It would be unseemly to stand in the way of these transactions and applications.

As it happens, the Commission’s Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”) has impaneled a subcommittee, the Eligible Entities Subcommittee, which is interviewing subject matter experts on constitutional law, educational admissions policy and Commission operations. Through this process, the Subcommittee is undertaking to arrive at a new eligible entity definition that would withstand constitutional scrutiny and that would be much less dilute than the small business definition.<sup>32</sup> The Diversity Committee will probably be in a position to report out a proposed new definition in the third or fourth quarter of 2008.

The Diversity Committee’s efforts create an opportunity for the Commission to afford narrow, equitable but effective relief on reconsideration. In particular, DCS asks that the Commission reconsider and modify the Diversity Order as follows: first, the Commission should expressly state that it recognizes that the small business definition would not be likely to advance minority and women ownership, and therefore it is an interim measure only and should not be taken as conferring any vestedness or entitlement, nor should the approval of applications using the small business definition have precedential effect insofar as they rely on the definition.

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<sup>32</sup> The undersigned lead counsel is grateful for the privilege of chairing this subcommittee.

Second, the Commission should manifest that it will undertake – as expeditiously as possible<sup>33</sup> – to arrive at a new, constitutionally sustainable definition that would be much more likely than the small business definition to advance the minority and women ownership objectives of Sections 257 and 309(j) of the Act.

## **II. The Commission Should Reconsider Its Refusal To Consider A Relaxation Of Its Administration Of The Broadcast Foreign Ownership Statute**

Congress has authorized the Commission to allow foreign entities to hold a greater than 25% non-controlling investment in broadcast licensees.<sup>34</sup> In 2004, the Diversity Committee offered a proposal for public interest waivers of the 25% limit, as contemplated by the statute itself.<sup>35</sup> On October 1, 2007, DCS submitted comments embracing this proposal.<sup>36</sup>

The Diversity Committee concluded that its proposal would have the “practical effect of providing access to a great deal of capital for socially and economically disadvantaged entrepreneurs (SDBs).”<sup>37</sup> DCS added that a deregulatory interpretation of Section 310(b)(4) would have an immediate impact on the ability of minority broadcasters to draw on overseas capital, which would ease the severe limitations on access to domestic capital faced by minority broadcasters.<sup>38</sup> DCS further explained that the circumstances that originally motivated the Commission to refuse to consider relaxation of its foreign ownership policy are no longer

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<sup>33</sup> Expedition has not been the Commission’s watchword when it comes to developing a constitutionally sustainable definition of an eligible entity. See pp. 2-5 supra; see also Diversity Order, Statement of Commissioner Michael J. Copps (concurring in part, dissenting in part), 23 FCC Rcd at 5979, 5983 (“The fact that we don’t even know how many minority and female owners there are is indicative of how low this issue is on the FCC’s list of priorities.”)

<sup>34</sup> 47 U.S.C. §310(b)(4).

<sup>35</sup> See Advisory Committee on Diversity, Recommendation on Adoption of a Declaratory Ruling on Section 310(b)(4) Waivers, December 10, 2004, available at <http://www.fcc.gov/DiversityFAC/recommendations.html> (last visited June 11, 2008) (“Foreign Ownership Recommendation”).

<sup>36</sup> See DCS Initial Comments at 37-39.

<sup>37</sup> Id.

<sup>38</sup> Id. at 39.

extant,<sup>39</sup> and DCS pointed out that the Commission has relaxed its foreign investment policies in other industries without causing any harm.<sup>40</sup>

A coalition of four Hispanic owned radio broadcast companies enthusiastically supported DCS' proposal. They stated:

Relaxing the Section 310(b)(4) foreign ownership restrictions would open a new source of financing opportunities for SDBs who may be facing difficulty raising capital using traditional funding mechanisms. This proposal is particularly important to Spanish Broadcasters because capital is often more easily available to them from sources in Mexico, Central America and South America, than from domestic sources. Further, Spanish Broadcasters' ability to expand their footprints into Spanish speaking countries is inhibited by some of those countries' reluctance to relax their foreign investment laws unless relaxation of Section 310(b)(4) restrictions is undertaken reciprocally and concurrently.<sup>41</sup>

It does not appear that any party filed opposing comments.

Here is the Commission's entire discussion of DCS' proposal:

DCS proposes that the Commission consider relaxing restrictions on foreign ownership to permit non-controlling foreign investment where such investment would help eliminate a barrier to access to capital for domestic, minority-owned broadcasters. We decline to adopt this proposal. DCS does not explain why the Commission's concerns about foreign ownership of broadcast interests generally would not apply in this context. At a minimum, the Commission would be required to undertake a significant rulemaking proceeding to examine this issue in greater depth. We are not convinced, on the basis of the record before us, that taking the extraordinary step of relaxing our foreign ownership rules would advance our interest in promoting diversification among broadcast licensees, including women and minorities [fn. omitted].<sup>42</sup>

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<sup>39</sup> Id. at 38-39.

<sup>40</sup> Id. at 38-39 (citing Foreign Ownership of Cable Systems, 77 FCC2d 73, 80-81 (1980) (refusing to place foreign ownership restrictions on cable operators)).

<sup>41</sup> Reply Comments of Spanish Language Broadcast Companies (Bustos Media Holdings, Norsan Group, Spanish Broadcasting System, Inc. and ZGS Communications), MB Docket No. 06-121 et al., November 1, 2007, at 5.

<sup>42</sup> Diversity Order, 23 FCC Rcd at 5949 ¶77.

Each of the Commission's three grounds for denial set out above is irrational, unsatisfactory, and unjustified.<sup>43</sup>

First, in stating that DCS failed to explain why “the Commission’s concerns about foreign ownership of broadcast interests generally would not apply in this context”<sup>44</sup> the Commission made two mistakes: it did not identify any specific “concerns,” and it failed to address consider that the desirability of expanding access to capital for minority broadcasters may far outweigh other concerns. In the Diversity Order, the Commission acknowledged the importance of expanding access to capital for minority broadcasters,<sup>45</sup> a factor at least equivalent in weight to the factor of avoiding a retroactive corporate restructuring that the Commission found sufficient in 1995 to justify a waiver of its broadcast foreign ownership policy.<sup>46</sup> Further, in the Second Further NPRM, the Commission expressed no specific concerns about the foreign ownership proposal. Therefore the Commission’s explanation that DCS did not address the agency’s concerns is unsatisfactory.

Second, the Commission justified its denial of the proposal by asserting that it “would be required to undertake a significant rulemaking proceeding to examine this issue in greater

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<sup>43</sup> The governing law is well known. Except when self-explanatory, an agency must give grounds for denial of a petition for rulemaking. 47 U.S.C. §555(e) and 47 C.F.R. §1.407. Further, when denying a petition for rulemaking, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1980) (“State Farm”), citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962); see also Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1084 (D.C. Cir. 1996). If the agency fails to consider important aspects of the problem or offers an explanation that runs counter to the evidence before the agency, its decision will be considered arbitrary and capricious. See State Farm, 463 U.S. at 458.

<sup>44</sup> Diversity Order, 23 FCC Rcd at 5949 ¶77.

<sup>45</sup> See Diversity Order, 23 FCC Rcd at 5937 ¶34 (there is “sufficient evidence in the record to show that difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry.”)

<sup>46</sup> See Fox Television Stations, Inc., 11 FCC Rcd 5714 (1995), recon. denied, 11 FCC Rcd 7773 (1996) (“Fox Television”).

depth.”<sup>47</sup> That is not a rational reason to deny a petition for rulemaking, since most petitions for rulemaking contemplate a rulemaking proceeding.<sup>48</sup> Ironically, relaxation of the Commission’s foreign ownership policy would not require a rulemaking proceeding at all, but merely a “Declaratory Ruling, using such public comment procedures as [the Commission] feels necessary or appropriate.”<sup>49</sup> Indeed, the leading recent broadcast foreign ownership case was an adjudication in which Commission waived its policy without the benefit of rulemaking or even a notice of inquiry.<sup>50</sup>

Third, the Commission stated that it was not convinced, “on the basis of the record,” that the “extraordinary step of relaxing our foreign ownership rules would advance our interest in promoting diversification among broadcast licensees, including women and minorities.”<sup>51</sup> Invocation of a subjective adjective like “extraordinary” is no substitute for rational decisionmaking, and in this instance the Commission provides no explanation of why relaxation of the foreign ownership policy would be “extraordinary.”<sup>52</sup> Furthermore, contrary to the Commission’s characterization, the record shows that relaxation of the policy would significantly open the door to new capital for broadcasters, particularly minority broadcasters, who find it extraordinarily difficult to secure capital in the domestic financial market. Thus, the Commission’s rejection of this proposal frustrates a key purpose of Section 257 – eliminating entry barriers facing for minority businesses.

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<sup>47</sup> Diversity Order, 23 FCC Rcd at 5949 ¶¶77.

<sup>48</sup> See 47 C.F.R. §1.407. Indeed, the Diversity Order itself initiated a further rulemaking proceeding to consider twelve other proposals. Id. at 5950-57 ¶¶80-101.

<sup>49</sup> See DCS Initial Comments at 38 (quoting the Diversity Committee’s Foreign Ownership Recommendation).

<sup>50</sup> See Fox Television, supra.

<sup>51</sup> Diversity Order, 23 FCC Rcd at 5949 ¶¶77.

<sup>52</sup> To be sure, waivers have been infrequent, but that is true of many policies, great and small. In DCS’ experience, no one ever applies for a broadcast foreign ownership waiver because one must first secure the financing. With the Commission seemingly so unwilling to relax its policy, it would be foolish for an entrepreneur to invest sunk costs in a transaction the Commission appears all but certain to reject.

## **Conclusion**

DCS respectfully requests that the Commission reconsider its decision in the Diversity Order to define an “eligible entity” as a “small business.” Specifically, it should state that it recognizes that the small business definition would not be likely to advance minority and women ownership, and therefore it is an interim measure only and should not be taken as conferring any vestedness or entitlement, nor should the approval of applications using the small business definition have precedential effect insofar as they rely on the definition. Further, the Commission should manifest that it will undertake expeditiously to arrive at a new, constitutionally sustainable definition that would be, much more likely than the small business definition to advance the minority and women ownership objectives of Sections 257 and 309(j) of the Act.

Finally, DCS respectfully requests the Commission to issue a Declaratory Ruling modifying Section 310(b)(4) of the Act as contemplated in the Diversity Committee’s foreign ownership proposal, using such public comment procedures as it deems necessary or appropriate.

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