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

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

To the Commission

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

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* Proposal numbers 1-34 refer to the order in which the proposals appear in 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 (Second Further Notice of Proposed Rulemaking), FCC 07-136 (released July 24, 2006) ("Second Further NPRM"), Appendix A. Proposals numbered 35-40 were developed after the Commission issued the Second Further NPRM.

Summary and Background

In response to the Second Further NPRM,[1] the 29 Diversity and Competition Supporters (collectively "DCS")[2] respectfully provide in these Initial Comments a road map for the solution to America's extraordinary minority and women[3] broadcast ownership dilemma.[4] DCS sets forth 38 proposals,[5] including:

- twenty-eight proposals the Commission could adopt now
- two proposals the Commission could adopt after further study, and
- eight voluntary initiatives the industry could put into effect now.

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[1] 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), FCC 07-136 (released August 1, 2007) ("Second Further NPRM"). The Second Further NPRM responds to DCS' August 23, 2006 "Motion for the Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice," MB Docket 06-121 ("DCS 2006 Motion") by creating a comment track on minority ownership.

[2] The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277. A list of its 29 members is found in the Appendix. 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. The analysis of proposals contained in these Comments was made possible by the hundreds of hours of volunteer time donated over the past year by dozens of broadcasters, bankers, media brokers, and civil rights leaders serving on MMTC's Policy Committee, Broadcast Ownership Task Force, EDP Task Force and Section 310(b)(4) Task Force.

[3] Women should be included in the definition of a socially and economically disadvantaged business (SDB), and the proposals herein that are designed with minority ownership in mind can and should also be extended to women.

[4] Drawing on the FCC's database, Free Press has found that only 3.1% of commercial full power television stations are minority owned and only 4.4% of commercial full power television stations are owned by women; these statistics exclude eight stations that are not under the de facto control of women and two that are not under the de facto control of minorities. S. Derek Turner and Mark Cooper, Out of the Picture: Minority and Female TV Station Ownership in the United States, Free Press (September 2006) ("Out of the Picture"), p. 12. Without excluding stations de facto controlled by nonminorities and men respectively, Free Press has also found that only 7.7% of commercial full power radio stations are minority owned and only 6.0% of commercial full power radio stations are owned by women. S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007) ("Off the Dial"). Since minorities and women are less likely to own large, powerful stations in large markets, the percentages of industry asset value held by minorities and women fall well below the Free Press statistics on the percentages of the number of stations on the air held by minorities and women.

[5] The Second Further NPRM, Appendix A, references 34 proposals. In these Initial Comments, DCS discusses 32 of those 34 proposals (excluding Proposal #11 (JOAs), which has been rendered moot by the evolution of shared services agreements, and Proposal #27 (Clearinghouse of stations for sale), which further analysis indicates would be ineffective). An additional six proposals (numbered 35-40 for ease of reference) are also included here. Thus these Initial Comments address a total of 38 proposals.

These Initial Comments are intended to serve as a ready reference for the numerous parties that have expressed their interest in endorsing some of the proposals offered by DCS and by the Commission's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee").[6]

In addition, so that DCS can respond fully to the Second Further NPRM's requests for comment on the Failing Station Solicitation Rule ("FSSR") and on statutory and constitutional issues,[7] MMTC has spent the past two months developing the testimony of over 20 minority broadcasters and surveying two dozen financial institutions. DCS will seek leave to file this evidence and present constitutional and statutory arguments in supplemental comments.

Today it is almost universally agreed that curing the acute minority under-representation in broadcast ownership would do much to promote competition and diversity of viewpoints.[8] Since the market entry barriers that still inhibit minority broadcast entry and growth are numerous and powerful,[9] the Commission will need to deploy an equally numerous and powerful set of tools with which to correct the problem. With few exceptions,[10] the Commission has taken only sporadic, uncoordinated and sometimes token steps to advance minority ownership. That

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[6] The Diversity Committee is a 21-member expert body, chartered in 2003. Its Charter provides that the Diversity Committee will focus on "Financial issues, such as access to capital; Transactional transparency and related outreach; Career Advancement; [and] The impact of new and emerging technologies…on diversity issues." See Charter, Advisory Committee on Diversity for Communications in the Digital Age, §B (2003).

[7] See Second Further NPRM at 6-7 ¶¶13-16.

[8] See Initial Comments of Diversity and Competition Supporters, MB Docket 02-277 (filed January 2, 2003) ("DCS 2003 Comments"), pp. 61-65 (discussing how minority ownership promotes competition); id., pp. 66-71 (discussing how minority ownership promotes diversity of viewpoints).

[9] See DCS 2003 Comments, pp. 19-60 (detailing the extent, numerosity and pervasiveness of market entry barriers facing minority broadcasters).

[10] The best example of a comprehensive effort to address minority ownership is the Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978) ("1978 Policy Statement"), in which the Commission adopted the tax certificate and distress sale policies and authorized expedited processing of minorities' applications to secure licenses. Developed under Chairman Wiley and approved under Chairman Ferris, these policies were genuine and substantial attempts to cure the gross under-inclusion of minorities in broadcast ownership. Recognizing that much more needed to be done to advance minority ownership, the 1978 Policy Statement emphasized that the Commission "welcome[d] petitions for rulemaking or other submissions from concerned parties as to other actions we might take to reach our objectives." Id. at 984.

approach never works. Although the limited scope of an individual proposal is no reason to reject it,[11] history demonstrates that neither the minority ownership problem,[12] nor any other complex media or telecom problem,[13] nor indeed any truly endemic social problem[14] will ever be solved entirely by a few token and unexceptional steps.

Thus, when it reviews the proposals discussed here, the Commission should examine all of them holistically, and adopt a thorough, comprehensive package of initiatives that collectively would be sufficient, with breathtaking rather than "deliberate" speed,[15] to fully address each category of market entry barriers that cause minority exclusion: access to spectrum, access to capital, and access to opportunity.

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[11] Every little contribution helps. An initiative that opens the door to ownership for only five minority broadcasters won't move the national statistical needle very far, but to those five broadcasters who have tried without success to kick in the door, the initiative could mean everything in the world.

[12] See Initial Comments of the Diversity and Competition Supporters, MB Docket 06-121 (filed October 23, 2006), pp. 6-7.

[13] Certainly the Commission would never address emergency communications, the DTV conversion or multichannel video by choosing solutions based on their lack of numerosity rather than on their collective ability to solve the underlying problem. On emergency communications, see Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (NPRM), 21 FCC Rcd 7210, 7321-22 ¶6 (2006) (seeking comment on, inter alia, "(1) pre-positioning the communications industry and the government for disasters in order to achieve greater network reliability and resiliency; (2) improving recovery coordination to address existing shortcomings and to maximize the use of existing resources; (3) improving the operability and interoperability of public safety and 911 communications in times of crisis; and (4) improving communication of emergency information to the public" (fn. omitted)). On the DTV conversion, see Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television (NPRM), 19 FCC Rcd 18279, 18287-18357 ¶¶22-179 (2004) (seeking comment on, inter alia, channel elections, allotment changes, border interference, channel replication, analog channel surrender dates, and dozens of related issues). On multichannel video, see Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (NPRM), 20 FCC Rcd 18581, 18588-92 ¶¶12-24 (2005) (seeking comment on dozens of issues, including the impact of state and local franchising on competition and consumer welfare, the reasonableness of local franchise conditions, the Commission's remedial authority if a local agency delays the grant of a competitive franchise, and the potential of buildout requirements to serve as barriers to entry).

[14] See, e.g. Green v. County School Board of New Kent County, 391 U.S. 430, 436 (1968) ("Green") (requiring district courts supervising school desegregation cases to examine "every facet of the school operations - faculty, staff, transportation, extracurricular activities and facilities.")

[15] See Brown v. Board of Education, 349 U.S. 294, 301 (1955) ("Brown II") (remanding school desegregation cases "to the District Courts to take such proceedings and enter such order and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.") Thereafter virtually no desegregation occurred until the Supreme Court lost patience with "all deliberate speed" and handed down Green.

In developing this package of initiatives, the Commission should proceed as Congress expects[16] by focusing on the steps it can take to do its share of the work of curing this cancer on the broadcasting industry. Certainly the Commission should encourage industry leaders to pursue voluntary initiatives, but the Commission should also recognize that voluntarily initiatives cannot possibly address any access to spectrum needs,[17] most access to capital needs,[18] and many of the access to opportunity needs.[19] While the charitable record of the industry is substantial, it pales in comparison to the massive breadth and depth of the civil rights problem that demands a cure.

Finally, the Commission should not adopt a package of initiatives and then turn around and also adopt structural deregulatory rules whose impact would wipe out any gains the minority ownership package could deliver.[20] Instead, the Commission should first ensure that its package of minority ownership initiatives is working well. Only then should consider whether any forms

[16] See 47 U.S.C. §257(a), (b) (1996) (requiring the Commission to complete a proceeding on "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services" in which it "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity); 47 U.S.C. §257(c) (1996) (providing for triennial reports on the Commission's efforts to lift market entry barriers).

[17] The Commission has exclusive jurisdiction over the management of the radiofrequency spectrum. 47 U.S.C. §§151 and 303. There are no squatters rights. 47 U.S.C. §304.

[18] Most of the value of a broadcast station is reflected in the right to broadcast. The Commission has immense power to grant and deny licenses, to add or subtract from the value to broadcast assets and affect creditworthiness of broadcast companies.

[19] For example, while voluntary efforts certainly helped rid the nation of employment discrimination, not until the adoption of the 1964 Civil Rights Act did barriers to equal employment begin to lift. Now that the Commission's EEO rules have been weakened and are seldom enforced, minority employment in radio journalism has collapsed in what can only be characterized as a purge. In 2006, the Radio/Television News Directors Association (RTNDA) found that minority employment in radio journalism declined from 14.8% to 6.4% between 1995 and 2006. "Year of Extremes," Radio/Television News Directors Association Communicator, July/August, 2006, pp. 24, 25. This year's RTNDA report placed minority employment in radio journalism even lower – 6.2%. "Women and Minorities in the Newsroom," Radio/Television News Directors Association Communicator, July/August, 2007, pp. 20, 21. Examining RTNDA's 2006 statistic of 6.4%, MMTC calculated that when minority employment at minority owned and Spanish language stations are factored out, the number of minorities working in English language, non-minority owned radio journalism is statistically zero – about where it was in 1950. Thus voluntary self-regulation of EEO before 1969 was a failure, and voluntary self-regulation of EEO after 2000 has been an even worse failure.

of structural deregulation could be adopted[21] without disrupting what should be the Commission's number one priority: lifting all of the market entry barriers that prevent one-third of America's citizenry from full enjoyment of the nation's most influential industries.

The problem of minority exclusion from broadcast ownership is the most critical subject to be addressed in this docket. No stone should be left unturned, no proposal tabled, and no dialogue cut short until the Commission solves this problem.

I. Twenty-Eight Substantive Initiatives The Commission Could Adopt Now

Proposal #1: Equal Transactional Opportunity: Barring Discrimination On The Basis Of Race Or Gender In Broadcast Transactions[22]

First offered in 1994 and endorsed by the Diversity Committee in 2004,[23] this proposal would ban race and gender discrimination in the sale of broadcast stations, consistent with 47 U.S.C. §151.[24] DCS' broadcast transactional nondiscrimination proposal appears to have been the first unopposed request for any federal nondiscrimination rule.

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[20] See DCS 2003 Comments, pp. 35-60 (discussing the adverse impact on minority ownership of some proposed steps toward consolidation).

[21] DCS has been careful to note the difference between troubling forms of deregulation and virulent forms. See DCS 2003 Comments, p. 42 (while "crossownership should not be allowed to proceed unless there is very close and continuing supervision of its impact on diversity, competition and minority ownership" DCS acknowledged that "[t]elevision/radio crossownership, and newspaper/broadcast crossownership have less potential for reducing local voices than does television duopoly.") Indeed, all but two of DCS' proposals described herein are deregulatory. The two exceptions are morally compelling: Proposal #1, which seeks a rule banning race and gender discrimination in broadcast transactions, and Proposal #22, which seeks a rule banning racially discriminatory "no urban/no Spanish" advertising dictates.

[22] Proposal #1 can be found in the DCS 2003 Comments, pp. 115-120, and in the MMTC Letter to Hon. Michael Powell, MM Docket No. 02-277 (April 28, 2003) ("MMTC April 28, 2003 Letter"), pp. 11-19.

[23] Diversity Committee, Transactional Transparency Recommendations, May 14, 2004, p. 4; see also White Paper on Equal Transactional Opportunity, April 29, 2004.

[24] DCS' proposed rule is modeled after the relevant section of the 1968 Fair Housing Act (42 U.S.C. §3804) and the nondiscrimination section of the broadcast EEO Rule (47 C.F.R. §73.2080(a)). It would read:

> 47 C.F.R. §73.2100 (proposed): Equal Transactional Opportunity. Equal opportunity with respect to the offering for sale of broadcast stations, and the entertaining of offers to purchase broadcast stations, shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part) to all qualified persons or entities, and no qualified person or entity shall be discriminated against with respect to the offering for sale or the entertaining of offers to purchase such stations because of race, color, religion, national origin, or sex.

MMTC April 28, 2003 Letter, p. 13.

The proposal contemplates that a seller could not indulge invidious race or gender stereotypes or outright prejudice in deciding which qualified buyers to solicit and consider.[25] Enforcement would be straightforward: proposed assignors or transferors would simply check a box on a Form 314 or Form 315.[26] Pro-active recruitment and training of minority and women purchasers certainly would be consistent with this proposed rule,[27] although the rule would not require such recruitment.[28] The customary and vital protections of confidentiality, present in all broadcast transactions, would still be observed in all instances. A Report and Order adopting the proposed rule could provide guidance on specifically prohibited or permitted practices.[29]

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[25] See MMTC April 28, 2003 Letter, p. 18 (citing, as examples of pretextual and stereotypical excuses not to solicit or consider qualified minority potential purchasers, the belief that "minorities are only qualified for, or only interested in, urban or Spanish stations" and that "minority and woman-owned companies might not observe transactional confidentiality and that they are unqualified to close a transaction.")

[26] See DCS 2003 Comments, pp. 119-120 and n. 199 (certification is sufficient, given the sophistication of media brokers and counsel).

[27] Broad recruitment and training efforts that reach out to all qualified applicants, including minorities and women, are not discriminatory. See MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, 19, rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied, 534 U.S. 1113 (2002).

[28] Recruitment is appropriate when stations are being sold in a private auction process for which buyers are solicited. However, such a process is inappropriate in many transactional scenarios not involving discrimination. One example would be where a licensee, whose station was not being marketed for sale, receives a bona fide unsolicited offer for consideration well in excess of the licensee's perception of its station's value.

[29] DCS provided four examples of practices that should be prohibited under a transactional nondiscrimination rule:

1. A broadcaster decides, deliberately, not to consider offers from anyone because of race or gender.
2. A broadcaster decides, deliberately, to solicit offers from a wide variety of potential buyers, but actually constructs a solicitation list that excludes, because of their race or gender, minorities and women who the broadcaster knows are at least as qualified as the others on its list.
3. A broadcaster selling an AOR or C&W station decides, deliberately, to exclude minorities from his solicitation list because, in his opinion, minorities are only qualified for, or only interested in, urban or Spanish stations.
4. A broadcaster decides, deliberately, to exclude minorities and women from his solicitation list. Ostensibly the reason is not race or gender; instead, he says, he wishes to limit the number of bidders to a manageable number, which just happens to be the number of nonminority male broadcasters on his solicitation list. He has indulged the stereotypes that minority and woman-owned companies might not observe transactional confidentiality and that they are unqualified to close a transaction.

MMTC April 28, 2003 Letter, pp. 17-18.

Finally, legitimate nonracial, non-gender selection criteria could still be used to choose where to solicit potential buyers and where to draw the line between serious and non-serious prospects.[30]

By promoting access to opportunity, a nondiscrimination rule would also promote access to capital. In deciding which of several entrepreneurs to finance, lenders and investors often must choose between closely comparable entrepreneurs. If one entrepreneur is going to be deprived of knowledge of even 1% of the acquisition opportunities, a prudent investor or lender will back her otherwise fungible competitor.[31] Thus, a nondiscrimination rule would offer considerable comfort to investors and capital providers, making them more secure that minorities and women would not be kept unaware of potential deals.

Above all, this proposal asks the Commission to express its core values in a tangible way.[32] Discrimination simply has no place in the industry most vital to democracy.

Proposal #2: Transfer Restriction of Grandfathered Clusters To SDBs[33]

This proposal, first offered in 2003, would permit the seller of a grandfathered cluster to sell the cluster intact with the grandfathering intact if the cluster were sold to an SDB. In the 2002 Biennial Review, the Commission adopted a provision for the transfer intact of a

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[30] See id., p. 17. Examples of acceptable criteria could include, inter alia, company size (i.e. for stock deals), geography, format specialization (as an affirmative factor for including a company in a solicitation list, but not as a stereotype to exclude a company from a solicitation list), financial qualifications, and ability to close the transaction.

[31] Thus the Commission need not delay consideration of this proposal because it does not know the extent to which discrimination infects the broadcast transactional process. Anecdotal evidence received by MMTC in a decade of operation of its media brokerage indicates that discrimination, while less prevalent than in the past, still occurs. The full extent of such discrimination is unknowable since discriminators do not announce their intentions and the station sale process is unavoidably confidential. Even if transactional discrimination were very rare (which is doubtful), a nondiscrimination rule would be justified because the individual who is burdened by discrimination has been grievously harmed.

[32] The expression of values inherent in any nondiscrimination rule renders irrelevant the question of whether 2% or 20% of transactions are infected by discrimination. Public accommodations discrimination, broadcast obscenity and prior restraints on speech are rare, but no one would seriously recommend repealing or eschewing protections against these offenses.

[33] Proposal #2 can be found in the record in the DCS 2003 Comments, pp. 107-09.

grandfathered cluster, but decided that small businesses, rather than SDBs, would constitute the class of eligible buyers.[34]

Since the Commission adopted this rule, no transactions using it have closed. As Commissioner Adelstein predicted,[35] it is almost always easier for the seller of a cluster to place a noncompliant station with the owner of another cluster in the same market than to sell the entire cluster intact to a small business.[36] Thus, MMTC has proposed a modification of the rule (see Proposal 35 infra) that would extend the grandfathering for a year if the cluster or noncompliant station(s) are sold to a small business.

Whether the Commission adopts the modification or leaves the rule intact, it should undertake to define the class of eligible buyers as SDBs if that is constitutionally permissible. In 2003, MMTC's researcher, Kofi Ofori, examined the television and radio markets and concluded that 88% of radio broadcasters would qualify as small businesses under the SBA's small business

[34] DCS seeks to develop an SDB definition that would be appropriate for broadcasting and be constitutionally sound. SDBs are a subset of small businesses. Like other small businesses, they are economically disadvantaged; but unlike other small businesses, they are also socially disadvantaged. Their social disadvantage stems from individualized factors or from their membership in a class (such as a racial group in a particular industry) for which discrimination has inhibited entry and financing. An SDB definition is desirable because it would be less dilute in its impact on minorities by omitting, for example, the children of millionaires who, as new entrants, can qualify as small businesses although they have never been disadvantaged. DCS will develop this issue in supplemental comments.

[35] 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, MB Docket 02-277 et al. (Report and Order), 18 FCC Rcd 13620, 13996-97 (2003) (Commissioner Jonathan Adelstein, dissenting) (subsequent history omitted) ("2002 Biennial Report") ("the transfer of entire grandfathered clusters to small entities is likely to prove a rare occurrence….The marginal value of this exception is underscored by the difficulty small businesses will encounter in raising capital needed to buy expensive, large clusters….This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spun-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool and raise the market price. Such spin-offs before a sale are especially likely considering most grandfathered clusters are only one or two stations over the limit and are therefore easy to bring into compliance. Those spin-offs may in fact be much more affordable to small businesses than the entire cluster. So minorities and women potentially would have benefited more if we had required clusters to be broken up rather than allowing transfers as a group.")

[36] The rarity with which a policy is used is no reason to repeal or decline to improve a policy, however. The Commission should leave no stone unturned in finding ways to promote minority ownership.

definition, and only about 4.5% of those small businesses would be minority owned.[37] Since a "small business" definition would be very dilute indeed in its impact on minority ownership, the Commission should apply an SDB definition instead if at all possible.

Proposal #3: Structural Rule Waiver For Selling A Station To An SDB, Where The Sale To The SDB Is Ancillary To A Transaction That Otherwise Would Be Barred By An Ownership Rule[38]

This proposal was first offered in 1995, and was presented in a slightly different form by NTIA in 1977. In 2004, the Diversity Committee endorsed this proposal.[39] The proposal contemplates that a company contemplating a transaction that would otherwise be barred by an ownership rule would be permitted to complete the transaction if it sells stations to SDBs.

The proposal is linked to Proposal #13 infra, which calls for staged implementation. Under staged implementation, ownership limits would be relaxed over time while the Commission monitors localism, diversity, competition and minority ownership to be sure that deregulation has not caused irreparable harm. Thus, if the Commission adopts a staged implementation plan, a transaction not permissible today would probably become permissible in a few years. Under Proposal #3, a company selling a station to an SDB could have its transaction evaluated under the more liberal rules that would otherwise not take effect until years later in the staged implementation process.

Proposal #4: Tolling Buildout Deadlines For Selling Expiring Construction Permits To SDBs[40]

This proposal was first offered in 1998 in a petition for rulemaking submitted by Entravision Holdings LLC.[41] In 2004, the Diversity Committee endorsed the proposal.[42]

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[37] See Statement of Kofi Ofori, §2 (September 3, 2003) ("Ofori 2003 Statement"), appended as Annex 2 to the Diversity and Competition Supporters' Petition for Reconsideration in Docket 02-277 (filed September 4, 2003).

[38] Proposal #3 can be found in the record in the DCS 2003 Comments, p. 103.

[39] See Diversity Committee, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also White Paper on Incentive-Based Regulations, May 23, 2004, pp. 5-6.

Entravision's 1998 petition for rulemaking sought to revise the construction permit expiration standard established pursuant to 47 U.S.C. §§319(a)-(b) and implemented in 47 C.F.R. §73.3598. Entravision proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign language groups for at least 80% of their operating time. DCS' proposal would modify Entravision's concept to make it applicable to groups defined by disadvantage as opposed to groups defined by race or language.

The Entravision concept presents a far superior mechanism for disposing of expiring permits than the current, cumbersome system of automatic construction permit expiration and re-auctioning. Entravision's concept would allow the Commission to quickly and efficiently place an expiring permit in the hands of the very entrepreneurs who the Commission has found to be likely to promote diversity right now. Allowing SDBs to build out these permits is far preferable to allowing the permits to expire, for four reasons:

First, affording SDBs a chance to build out the permits would promote diversity. For SDBs, the process of applying for a new construction permit is even more risky and time consuming than taking on a partially completed project with an outstanding permit. Moreover, even unsuccessful construction permit applicants must encumber their capital for significant periods of time in order to preserve their financial qualifications to hold the permit. Completing construction on an existing permit would significantly reduce some of the start-up costs and risks that present the most significant barriers to minority entry.

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[40] Proposal #4 can be found in the record in the DCS 2003 Comments pp. 112-115.

[41] See Petition for Rulemaking of Entravision Holdings LLC, RM-9567 (filed March 10, 1998).

[42] Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also White Paper on Incentive-Based Regulations, May 23, 2004, pp. 9-10.

Second, allowing permittees to sell expiring permits to SDBs would give the permittees a well-deserved rescue. A permittee who honestly tried but failed to build out her permit is hardly a profiteer or a trafficker. It is often inequitable to leave such a permittee with nothing after she has invested heavily, in good faith, in obtaining the permit and beginning construction.

Third, the acquisition of an expiring permit by SDBs would enhance the likelihood that the public will receive service on an expedited basis. When a permit is unbuilt, the public in the proposed station's service area receives only silence on the frequency. Furthermore, the FM and TV separation criteria include an obligation to protect unbuilt facilities as though they were on the air, thereby preventing the expansion of service on the same or adjacent channels in other communities. If the permit were turned in and reissued, additional time would be wasted without any new service to the public. Moreover, a new permittee would face barriers to success even greater than those faced by the original unsuccessful permittee, because the new permittee would have to pay an auction price for the spectrum space and then defend herself against petitions to deny from unsuccessful bidders in the auction.

Fourth, allowing SDBs to buy expiring permits would relieve the Commission of the time and expense of putting the allotment out for bids again.

These considerations make the Entravision concept particularly attractive. The concept represents the most efficient and cost-effective option for all parties involved -- the permittee, the Commission, the public, and socially and economically disadvantaged entrepreneurs.

Proposal #5: Structural Rule Waivers For Creating Incubator Programs[43]

This proposal originated with the National Association of Black Owned Broadcasters (NABOB), which offered it in 1992 through Chairman Sikes' Minority Ownership Task Force.

[43] Proposal #5 can be found in the record in the DCS 2003 Comments, pp. 104-105.

Despite its endorsement by all five commissioners in 1992,[44] by a new set of five commissioners in 1995[45] and by the Diversity Committee in 2004,[46] and despite the absence of any opposition to the proposal, the Commission has yet to act on the proposal. It has actually been pending before the Commission for fifteen years in five consecutive dockets.[47]

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 could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance. The 1992 Commission's formulation is still valid:[48]

> [Our proposal] would permit a group owner to own or have a controlling interest in some number of stations beyond the otherwise applicable national limits if it establishes and successfully implements a broadcast ownership "incubator" program designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio field. Such a program would work as follows. A group owner would be permitted to acquire an attributable interest (including a controlling interest) in stations above the otherwise applicable ownership limit upon a prior demonstration that it has in place a small business investment incentives program involving a meaningful and ongoing commitment to increasing pluralism in radio station ownership and stimulating

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

[45] See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities MM Docket No. 94-149 (NPRM), 10 FCC Rcd 2788, 2791-94 ¶¶15-24 (1995) ("1995 Minority Ownership NPRM").

[46] Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also White Paper on Incentive-Based Regulations, May 23, 2004, pp. 6-7.

[47] After being put out for comment in 1992 in Radio Rules – Reconsideration, the incubator proposal was rolled into a minority ownership docket. 1995 Minority Ownership NPRM, 10 FCC Rcd at 2791-94 ¶¶15-24. That docket lay fallow for seven years, and in 2002 it was quietly terminated in a ministerial order. Termination of Stale or Moot Docketed Proceedings (Order), 17 FCC Rcd 1199, 1205 (2002). Meantime, the incubator proposal was being considered in yet another docket, which focused entirely on radio ownership. Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket 01-317 (NPRM), 16 FCC Rcd 19861 (2001) (which did not even mention minority ownership, but since proposal fell within the scope of the proceeding it was filed in the docket by MMTC). A year later, Docket 01-317 was rolled into yet another proceeding, the 2002 Biennial Review. Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NPRM), 17 FCC Rcd 18503, 18506 ¶7 (2002) ("2002 Biennial NPRM"). Now it is being taken up for a fifth time in the instant docket. Perhaps this sets a record for an agency's inaction on a significant, noncontroversial and unopposed proposal.

[48] Radio Rules - Reconsideration, 7 FCC Rcd at 6391-92 ¶¶ 22, 24-25.

investment in the radio industry. Such programs would 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....

Without attempting to limit additional creative mechanisms that may be developed, some general guidelines and examples of qualifying programs can be provided. For example, a group owner might create an SBA-like program which offers to eligible participants:

1. Management or technical assistance

2. Loan guarantees

3. Direct financial assistance through loans or equity investment

4. Training

5. Business planning assistance.

Alternatively, a group owner could enter into a joint venture with an established Small Business or Minority Enterprise Small Business Investment Company (SBIC or MESBIC) to accomplish the intended objective....We also might consider an administrative relationship between the stations' owners. Properly structured, such an arrangement might provide a greater incentive for investment in the operations of hitherto untested owners as well as allow these owners to enjoy some of the administrative efficiencies associated with group ownership.

DCS has suggested additional steps that might qualify toward incubation credit, including:[49]

1. the creation of a business planning center, affiliated with an HBCU, that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing and pursue acquisitions

2. new training programs, modeled after as the NAB Foundation's Broadcast Leadership Training (BLT) Program, to help minorities and women, already experienced in broadcast management, learn the skills required for ownership

3. a large, easily accessible line of credit that SDBs could draw upon in financing broadcast ventures; one option would be for a broadcast company to assemble such a line of credit with a syndicate of minority banks

4. financial investments in SDBs, or funds that support SDBs, with the investments structured to include mentoring by senior executives and professionals who wish to convey their knowledge and experience to subsequent generations.

[49] See DCS 2003 Comments, p. 105.

The key to the effectiveness and integrity of an incubation program is that it would include concrete, definitive, and verifiable commitments of "sufficient magnitude and permanence" to justify a waiver.[50]

Proposal #6: Bifurcation Of Channels For Share-Times With SDBs[51]

Under this proposal, first offered in 2002 and endorsed by the Diversity Committee in 2004,[52] the Commission would authorize a new class of radio stations designed "Free Speech Stations." They would be independently owned by SDBs, have at least 20 non-nighttime hours per week of airtime, and be primarily devoted to non-entertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station." A cluster owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act, which allows for an exception to the local radio ownership rule when a new station is created.[53] That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a cluster could grow steadily up to the limits allowed by antitrust law. The legal underpinning and operational

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[50] Id.

[51] Proposal #6 can be found in the record in the Comments of MMTC in MB Docket 01-317 (Radio Ownership), filed March 19, 2002) ("MMTC 2002 Comments"), pp. 111-173; Reply Comments of MMTC in MB Docket 01-317 (Radio Ownership), filed May 8, 2002) ("MMTC 2002 Reply Comments"), pp. 6-10; and in the DCS 2003 Comments, pp. 106-107.

[52] Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also White Paper on Incentive-Based Regulations, May 23, 2004, pp. 7-8.

[53] 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 broadcast stations in operation." A new "radio broadcast station" is exactly what channel bifurcation creates, irrespective of its number of operating hours. See 47 C.F.R. §73.1715, which authorizes commercial share-time operations with each entity sharing time denoted a "radio station." Since Section 202(b)(2) is not self-executing, the Commission recognized that it needed to conduct a rulemaking proceeding to implement the provision. See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) (Order), 11 FCC Rcd 12368, 12370 n. 2 (1996) (promising that "[t]he implementation of this particular provision will be addressed in a subsequent Notice of Proposed Rulemaking.") No such proceeding was ever initiated however. Consequently, this docket can serve as the proceeding the Commission promised to undertake in order to implement Section 202(b)(2).

elements of the proposal are set out in considerable detail in MMTC's Comments in the 2002 Radio Ownership proceeding.[54]

The desirability of this proposal stems from the fact that it directly ties the creation of a new radio station to the expansion of an existing cluster: thus, it is a classic "win-win" in which the creation of a viable new independent, diverse voice in a market would be a condition precedent to additional consolidation in the same market.

Reasonable people can disagree about what would constitute a sufficient opportunity for a new voice sufficient to justify additional consolidation. DCS' initial views on this subject are not locked in stone. Putting this proposal out for public comment would enable the Commission to determine the optimally tailored degree of equivalence between diversity and consolidation in a same-market context, and to discern whether this share-time paradigm is attractive enough to generate applications from interested parties.

Proposal #7: Structural Rule Waivers For Financing Construction Of An SDB's Unbuilt Station[55]

Under this proposal, first offered by MMTC in 1999, a broadcaster financing construction of an SDB's unbuilt station would receive two benefits: (1) the broadcaster's noncontrolling EDP interest in the SDB would be deemed nonattributable, and (2) the broadcaster providing the financing would be reserved a place in line to subsequently duopolize or crossown another same-market station. This reserved place in the queue has significant value in markets where only a limited number of new combinations can be created under the local ownership rules.

[54] MMTC 2002 Comments, pp. 111-173.

[55] Proposal #7 can be found in the record in the DCS 2003 Comments, pp. 109-110.

As originally offered by MMTC, the proposal contemplated that:[56]

> when a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest (the "EDP Provider") should be reserved a place in line to subsequently duopolize or crossown another same-market station.
>
> SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.
>
> SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.
>
> To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.
>
> When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB's unbuilt permit will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.

This EDP interest's nonattribution, coupled with a vested right to grow in the market, should powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity.

In 2001, the Commission rejected this proposal because it had not yet had an opportunity to review five studies on market entry barriers that it had completed in 2000 (the "Section 257

[56] See MMTC, Petition for Partial Reconsideration and Clarification, MM Docket No. 91-1221 (filed October 18, 1999) ("MMTC Television Ownership Reconsideration Petition"), pp. 17-18.

Studies").[57] Since the Section 257 Studies are being reviewed as part of this proceeding,[58] this proposal is ripe for consideration.

Proposal #8: Nonattribution Of EDP Interests In SDBs[59]

Experience has shown that the EDP Rule has had the unintended effect of too severely restricting small business financing, especially in the form of seller paper that so often is vital to new entrants' ability to close a transaction. An early version of this proposal, offered in 1999 and endorsed by the Diversity Committee in 2004,[60] contemplated that the nonattributable nature of EDP Interests in SDBs would be grandfathered, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider.[61]

This spring, MMTC convened an EDP Task Force, composed of subject matter experts, to refine this concept by drafting a proposed revision to the EDP Rule. The Task Force sought to craft a rule that would permit broadcasters to provide those forms of financing for a small business without materially conflicting with the purpose of the EDP Rule.[62] As a result of its deliberations, the Task Force recommended that the current EDP restriction of 33% be relaxed to

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[57] See Review of the Commission's Rules Governing Television Broadcasting (Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (fn. omitted), reversed in part on other grounds sub nom. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), rehearing denied (August 12, 2002) ("[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.")

[58] See Second Further NPRM at 5 ¶9.

[59] An earlier version of Proposal #8 can be found in the record in the DCS 2003 Comments, pp. 110-112.

[60] Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also White Paper on Incentive-Based Regulations, May 23, 2004, pp. 8-9.

[61] DCS originally contemplated that financing of an SDB at levels in excess of EDP would be permissible where (1) the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction"); (2) the Unrelated Transaction occurs at least a year after the EDP relationship was formed; (3) the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and (4) the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB. See DCS 2003 Comments, pp. 110-112.

[62] The Task Force members are Richard Bodorff, Steven Lerman, Jane Mago, Vincent Pepper, Eve Reed, Julian Shepard, Gregg Skall, Jerianne Timmerman, and S. Jenell Trigg, Esqs., whose service is warmly appreciated.

EDP of up to 50% in a small business, or 80% for nonconvertible debt. Its recommendation is expressed in the following proposed restatement of 47 C.F.R. §73.3555, NOTE 2(i):[63]

> (i) Notwithstanding paragraphs (e) and (f) of this NOTE, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:
>
> (1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet provided, however, that the equity and debt may exceed 33 percent in either of the following circumstances to enable a small business, as defined under the U.S. Small Business Administration's small business size standards set forth in 13 C.F.R. §121.201, to acquire a broadcast station:
>
> i. The combined equity and debt of the interest holder described in section (2) below must be less than 50 percent, or
>
> ii. Where there is no equity, the debt may not exceed 80% of the asset value of the station being acquired, provided that the lender does not hold an equity interest in the licensee or any related person, does not hold an option or other right to acquire an equity interest in the future and has not received a promise of such a right, unless such combined interest has been granted subject to an appropriate waiver as provided at Section 1.3 of the Commission's Rules
>
> and
>
> (2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or
>
> (ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-media limit that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

[63] Recommendation of the MMTC EDP Task Force to Revise 47 C.F.R. §73.3555, NOTE 2(i), February 12, 2007.

If adopted, this proposal would authorize much more substantial levels of seller paper and other broadcaster financing of small businesses without adding any material risk of abuse. This is among the easiest and most important steps the Commission could take to expand access to capital for minority and women broadcasters.

Proposal #10: Zero Tolerance For Ownership Rule Abuse[64]

First offered in 2003, this proposal would apply to ownership fraud the "zero tolerance" the Commission announced in 2000 that it would apply to employment discrimination.[65]

The primary reason Congress has not restored the urgently needed Tax Certificate Policy[66] is that its members lack confidence in the Commission's willingness to police its ownership rules. Members of Congress are understandably hesitant to vote for a new program to benefit disadvantaged businesses, only to risk the program's exploitation by front artists.[67]

Structural abuse goes to the heart of the Commission's mandate to protect the public interest.[68] Today structural abuse is endemic due to limited enforcement resources and efforts,[69]

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[64] Proposal #10 can be found in the record in the DCS 2003 Comments, pp. 123-127.

[65] See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets 98-204 et al. (Report and Order), 15 FCC Rcd 2329, 2362 ¶72 (2000), reversed in part on other grounds sub nom. MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, 19, rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied, 534 U.S. 1113 (2002) (incorporating "several aspects of MMTC's proposed zero tolerance policy into the rules and policies we are adopting in this proceeding" including (1) a willingness to consider non-final discrimination allegations "if there are well-supported allegations of discrimination made by a large number of individuals against one broadcast station or cable unit, or allegations of discrimination that shock the conscience or are particularly egregious" and (2) potentially considering, as evidence of discrimination, the fact that "a broadcaster or cable entity engages in a pattern of deliberate and systematic violations of the EEO program requirements and such practices have the effect of denying women and minorities access to job opportunities.")

[66] See Proposal #24 infra.

[67] See discussion in DCS 2003 Comments, p. 124.

[68] The late Norman Blumenthal, as a Member of the Review Board, provided this spot-on characterization:

> the Commission's application processes are currently plagued with fraudulent applications wherein the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail....Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the very lowest echelon.

the ease of concealing abuse, and the high financial rewards for rulebreaking.[70] Structural rule relaxation would be easier to accept if the Commission holds the line on abuse through a Zero Tolerance Policy focused on clear standards, pro-active investigations, evidentiary hearings, and strict penalties for rule violations.

At a time when public interest organizations quite properly express fears of the adverse consequences of unabated ownership consolidation, the Commission simply must come to terms with ownership fraud. When a company can exploit the ownership rules by concealing its de facto control of another company, honest companies inevitably will pressure the Commission to

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Religious Broadcasting Network, 3 FCC Rcd 4085, 4088 ¶8 (Rev. Bd. 1988). See also Carta Corporation, 5 FCC Rcd 3696, 3701-72 ¶15 (Rev. Bd. 1990) (collecting cases to make the point that "the Commission has been confronted with a large volume of applications that disingenuously depict a two-tier ownership structure so as to exploit artificially the Commission's comparative structure[.]")

[69] Indeed virtually no ownership abuse is identified as a result of investigations initiated by the Commission. Instead, facts volunteered by whistleblowers or public interest groups trigger essentially all fraud investigations. Among recent cases, see, e.g., Pendleton C. Waugh, 22 FCC Rcd 13363 (2007) (where Enforcement Bureau received information alleging that licensees, some of whom were convicted felons failed to disclose a real-party-in-interest and misrepresented material facts to the Commission); Benjamin L. Stratemeyer, 21 FCC Rcd 11715 (2006) (where petitioner alleged that licensee, who worked for a broadcasting company, provided false certification regarding new entrant bidding credit and financially qualifications, and that the real party in interest was an unspecified third party, possibly the licensee's employer); Terry Keith Hammond, 21 FCC Rcd 10267 (2006) (where a complaint to the Enforcement Bureau alleged that licensee failed to report a felony conviction in his renewal application, raising false certification, misrepresentation or lack of candor issues, and violated the Commission's rules with respect to station operation); Jerrold Miller, 21 FCC Rcd 2200 (2006) (where petitioner alleged licensee violated Commission rules by not assigning paired AM stations together and alleged an attributable interest and unauthorized transfer of control of as a result of licensee's lease of the station from the former licensees); Sweetwater Broadcasting Company, 20 FCC Rcd 13034 (2005) (where petitioner alleged that licensee intentionally misrepresented facts and lacked candor concerning a stock purchase agreement that was not timely filed with the Commission and that licensee's parent company had de facto control of the licensee); Post Company, 20 FCC Rcd 12428 (2005) (where petitioner alleged a real party-in-interest violation involving the father of the licensee's principals who was the single majority shareholder of a separate communications company with an attributable interest in licensee, and alleged that licensee made falsely certifications as to its financial qualifications); John Garziglia, 20 FCC Rcd 12105 (2005) (where petitioner alleged that the ownership report filed by licensee was inaccurate and concealed an unauthorized transfer of control, thereby misrepresenting facts to the Commission); Ronald Brasher, 19 FCC Rcd 18462 (2004) (where a petition was filed alleging that licensees, all family members or co-workers, misrepresented the real parties-in-interest by using pseudonyms and names of deceased relatives to apply for Commission licenses in an effort to evade limitations imposed by the Commission's rules on the number of applications that they could file in their own names), and Fant Broadcasting Company of Nebraska, 19 FCC Rcd 8229 (2004) (where a petition alleged violations of an unauthorized transfer of control where licensee sold substantially all of its station assets, in combination with a time brokerage agreement or local marketing agreement, prior to receiving Commission consent, thereby raising issues related to the real-party-in interest).

[70] To get away with fraud, a wrongdoer need only be careful enough to conceal its misconduct, or find ways to coerce potential whistleblowers in a white-collar version of "Stop Snitching." A common tactic is to require potential whistleblowers to sign a nondisclosure (gag) agreement as a precondition to receiving severance pay or securing favorable evaluations for prospective future employers.

relax the ownership caps even further so they can legally own the same combinations of properties that their dishonest competitor surreptitiously "owns." The courts, too, are skeptical of "strange and unnatural" ownership structures[71] and won't hesitate to require strict enforcement[72] or strike down rules promoting diversity or localism where the rules' value had been undermined by weak enforcement.[73]

Nobody but the Commission can solve this problem. Licensees, operating in a close-knit industry and needing to avoid discretionary spending, seldom can muster the time, effort, resources or long-term motivation to take on a fellow broadcaster. Citizen groups seldom possess the inside information required to make out an abuse case, and whistleblowers can risk their careers if they're labeled as troublemakers.

Fortunately, the Commission has a wide array of tools that would enable it to put an end to ownership abuse. It has the power to require the production of documents,[74] conduct depositions,[75] call in renewal applications early,[76] hold hearings,[77] deny applications[78] and revoke licenses.[79]

A Zero Tolerance Policy should have these five elements:

1. Random audits, which have the advantage of serving as a general deterrent while

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[71] Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992) ("Bechtel I").

[72] See, e.g., Astroline Communications Co. v. FCC, 857 F.2d 1556, 1567 (D.C. Cir. 1988) (subsequent history omitted) (requiring a hearing where the evidence suggested that a radio and television station in the same market were de facto controlled by the same party).

[73] See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II") (invalidating the Commission's policy of affording comparative hearing credit to applicants who propose to move to a community and thus offer localism-promoting "integration of ownership and management" where such promises to relocate were at times almost laughably unbelieveable).

[74] 47 U.S.C. §§154(i) and 405.

[75] Id.

[76] Id.; see, e.g., Leflore Broadcasting Co., 36 FCC2d 101 (1972).

[77] 47 U.S.C. §309(e).

[78] 47 U.S.C. §309(k)(2).

[79] 47 U.S.C. §312(a).

providing confidence that improper considerations did not cause or prevent the initiation of an investigation.

2. Whistleblower protection, including confidentiality and assistance in securing alternate employment.

3. Powerful discovery tools – in particular, depositions instead of the ineffectual approach of writing the licensee or applicant a letter to which it can respond at its leisure.

4. Reaffirmation of the often-forgotten principle that applicants' representations to the Commission must be complete and correct in every respect, without even the appearance of evasiveness.[80]

5. A fast track. Delay serves the economic interests of a guilty respondent, and it also creates a cloud over an honest and wrongly accused respondent. Thus, the Commission should move from allegation to hearing or non-hearing resolution within 90 days.

Proposal #12: Opening FM Spectrum For New Entrants[81]

Proposals to open FM spectrum for new entrants have been before the Commission since 2003, and eight proposals have received support from the Diversity Committee.[82] Herein we focus on three specific methods by which the Commission could broaden access to spectrum:

First, the Commission should relax the limit of four (4) contingent FM applications for FM major modification proposals being considered under 47 C.F.R. §73.3517(a). The

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[80] See RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) (holding that as a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth" [citing the Commission's brief in the case] and license applicants "may not indulge in common-law pleading strategies of their own devise….[u]nlike a private party haled into court...RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest.")

[81] Proposal #12 can be found in the record in the DCS 2003 Comments, pp. 128-141 and in the MMTC April 28, 2003 Letter, pp. 10-11; see also Petition for Reconsideration of Diversity and Competition Supporters, MB Docket 02-277 (filed September 4, 2003), pp. 36-44.

[82] Advisory Committee on Diversity, Recommendation on Diversifying Ownership in the Commercial FM Radio Band, October 4, 2004, as amplified by the Recommendations of the Subcommittee on New Technologies, June 11, 2004 (containing eight recommendations).

Commission recently declined to grant this relief.[83] Industry and public interest organizations have sought reconsideration.[84]

Second, the Commission should repeal 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. A closely related matter, involving the portion of the FM third adjacent rules that impact LPFM, is pending in Congress.[85]

Third, the Commission should relax the community of license and transmitter site rules in two respects:

a. The Commission should 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). The Diversity Committee saw no reason why commercial stations should be required to put stronger signals over their communities of license than the signals of noncommercial stations.

b. Where otherwise permitted by the contour overlap and community of license coverage rules, the Commission should authorize 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)).

DCS urges the Commission to relax the FM rules identified above to the maximum extent permitted by Section 307(b) of the Communications Act. These rules undermine diversity and localism in three ways:

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83 Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, MB Docket 05-210 et al. (Report and Order), 21 FCC Rcd 14212, 14225-26 ¶¶22-25 (2006).

84 See, inter alia, American Media Services, LLC, Mattox Broadcasting, Inc. and MMTC, Petition for Partial Reconsideration, Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcasting Services, MB Docket 05-210 (filed January 19, 2007).

85 H.R. 2802 and S. 1675 (each named the Local Community Radio Act of 2007) would require the Commission to modify its rules to eliminate third-adjacent minimum distance separation requirements between (1) low-power FM stations and (2) full-service FM stations, FM translator stations, and FM booster stations.

First, these rules artificially prevent large cities from having the number of local stations required to serve the cities' growing and more diverse populations. With more signals come more niche program offerings -- exactly what these diverse communities need. Thus, the relative paucity of full coverage big-city signals imposed by the community of license and transmitter site rules inhibits diversity.

Second, these rules deprive local communities of truly local service. High powered exurban stations seldom if ever "serve" the towns that technically serve as their communities of license. Instead, they aim at nearby large markets, where they are often not fully competitive because they lack full market coverage.

Third, these rules result in inferior service to minorities, who typically are confined by segregation and wealth disparities to central cities. Minority owned FM stations are disproportionately licensed to the suburbs -- a consequence of nonminorities' 50-year first-mover advantage in securing the more attractive center city allotments.[86]

Above all, permitting stations to relocate closer to their audiences would add considerably to the asset values of minority owned stations. Broadcasters with higher asset values enjoy access to capital on better terms: they are regarded as more creditworthy, they have stronger borrowing power, and they attract investors.

Proposal #13: Staged Implementation Of Deregulation, Coupled With A Negotiated Rulemaking[87]

Offered by DCS in 2003, this proposal contemplates that if the Commission decides to implement deregulation of structural ownership rules, it do so in stages, measuring the impact of

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[86] The history of how minorities came to be burdened with inferior FM facilities, and how the Commission failed repeatedly to remedy this disparate treatment, is set out in the MMTC 2002 Comments, pp. 93-99.

[87] Proposal #13 can be found in the record in the DCS 2003 Comments, pp. 84-101 and 145-147 and in the Reply Comments of Diversity and Competition Supporters, MB Docket 02-277 (filed February 2, 2003), ("DCS 2003 Reply Comments"), pp. 25-32.

deregulation while it is underway, and implementing mid-course corrections when needed to protect diversity, competition, localism and minority ownership.

DCS proposed that the Commission could implement its new ownership rules over a ten-year period in five two-year stages. In even numbered years, the Commission would use quantitative tests and anecdotal evidence[88] to evaluate diversity, competition, localism and minority ownership. If these tests showed ill health on any of these four factors, the Commission would take corrective steps in the odd-numbered years. If a subsequent even-year measurement showed continued ill health, the Commission could apply the brakes until market conditions change. Paxson Communications offered a similar proposal.[89]

The coefficients of a staged implementation plan would be worked out in a negotiated rulemaking involving representatives of all of the stakeholders in the proceeding. Because the plan would provide a steady and objectively-determined path enabling parties to adjust to deregulation, the Commission could largely or entirely phase out its archaic and unpredictable reliance on waivers to set de facto structural ownership policy.

Gradual implementation of new federal policies has often been used successfully to give stakeholders a fair opportunity to adjust to changing regulatory and economic environments.[90] In that spirit, DCS maintained that a staged implementation plan would "satisfy most of the objectives of all parties, avoid market disruptions, promote minority ownership, and ultimately

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[88] To minimize the possibility of subjective or inconsistent results, the Commission would state, in advance, the weight it would give to anecdotal evidence, and provide illustrations of the kinds of anecdotal facts that would cause it to override statistical findings. These illustrations could be written into the rules as Notes to 47 C.F.R. §73.3555. See DCS 2003 Comments, p. 87.

[89] See Comments of Paxson Communications Corporation in MB Docket 02-277 (filed January 3, 2003), pp. 6-14.

[90] See, e.g., Fair Labor Standards Act (FLSA), 29 C.F.R., Chapter V (as amended in 2007) (establishing minimum wage standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments, with covered nonexempt workers being entitled to minimum wages of not less than $5.85 per hour effective July 24, 2007, $6.55 per hour effective July 24, 2008, and $7.25 per hour effective July 24, 2009); Clear Air Act, 42 U.S.C. §§7401 et seq. (1970) (setting maximum pollution standards coupled with directing the states to develop state implementation plans applicable to appropriate industrial sources in the state).

provide the public with both the efficiency and variety that flow from consolidated operations and the diversity and competition that flow from independent operations."[91] Above all, staged implementation would directly address the strongest criticism of deregulation – its irreversibility, such that if deregulation should prove to be a mistake, "how do we put the genie back in the bottle?"[92]

Proposal #22: Nondiscrimination Provisions In Advertising Sales Contracts, Designed To Expressly Avoid Such Practices As "No Urban/ No Spanish" Dictates[93]

Since 1984, when it held an en banc hearing on the subject, the Commission has been aware of the insidious practice of certain advertisers, rep firms and ad agencies of imposing written or unwritten "no urban/no Spanish" dictates.[94] Typically these dictates are intended to minimize the proportion of African American or Hispanic customers patronizing an advertiser's venue (e.g. a car dealership, nightclub or housing development), or they presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service (e.g. jewelry, specialty foods, or airline travel). Sometimes these dictates give effect to the prejudices

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[91] DCS 2003 Comments, p. 101.

[92] See 2002 Biennial NPRM, 17 FCC Rcd at 18567 (Commissioner Michael J. Copps, concurring) ("Because the stakes here are so incredibly high, it is far more important that we get this done right than that we get it done quickly…. Suppose for a moment that the Commission decides to remove or significantly change current limits on media ownership--and suppose our decision turns out to be a mistake. How do we put the genie back in the bottle then? No way.")

[93] Proposal #22 can be found in Twelve Solutions.

[94] This practice was copiously documented by Kofi Ofori in "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999). Ofori's study, which was sponsored by the Commission, examines discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters. Its central finding is that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn. Anecdotal data collected in the study suggested that, in some instances, the media buying process is influenced by stereotypical perceptions of minorities, presumptions about minority disposable income, a desire to control product image and unfounded fears of pilferage. The study identifies two particularly egregious practices: "no urban/Hispanic dictates" (an advertiser's instructions to its agency to refuse to buy airtime on stations with Black or Spanish formats) and "minority discounts" (an advertiser's refusal to pay as much to reach minority audiences as it would pay to reach White audiences, other factors being equal). A followup regression analysis (not sponsored by the Commission), "Minority Targeted Programming: An Examination Of Its Effect On Radio Station Advertising Performance" (January, 2001) found that advertisers paid less for time on stations owned by minorities

of advertisers; more commonly, these dictates infect the advertising marketplace with advertisers' generally incorrect readings of their nonminority customers' prejudices.[95] In this way, these dictates distort the marketplace by driving down minority owned and programmed stations' power ratios because of the race of members of the stations' audiences. Certainly this behavior frustrates the Commission's diversity policy objectives.

There is a partial regulatory solution: broadcasters would certify on their license renewal applications that their advertising sales contracts, and the contracts of the rep firms they engage to place secure national and regional advertising, include a nondiscrimination clause.[96] Such a provision would confirm that the broadcast licensee is not a party to a scheme to restrict advertising on the basis of the race of consumers of the advertising.

Seldom is a certification on a license renewal application made lightly. Therefore, broadcasters would monitor advertisers' compliance with the nondiscrimination provisions of advertising contracts just as carefully as broadcasters monitor advertisers' compliance with the other provisions of advertising contracts. Consequently, a nondiscrimination clause in advertising contracts would be largely self-enforcing. Through prophylactic impact, this nondiscrimination clause would substantially reduce the impact of racial prejudice in advertising sales.

(especially standalone stations), stations having minority formats, and stations targeted to young audiences. These factors appeared to be a proxy for "no urban/Hispanic dictates" and "minority discounts."

[95] Customer preference discrimination is unlawful. See Diaz v. Pan American World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (rejecting the airline's defense that its females-only hiring policy for "stewardesses" was justified by male passengers' preference to served by women); cf. Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) (upholding trial judge's finding that a Black-formatted radio station discriminated against a White announcer notwithstanding his "mastery of the voice and idiom" of Black radio).

[96] It is axiomatic that the Commission has jurisdiction over a broadcaster for its actions and omissions arising from contractual relationships with unregulated third parties. For example, a broadcaster will not escape liability for failing to light its tower because it relied on a contract engineer, or for an employment search firm that inferred from the absence of a nondiscrimination provision in its contract with a broadcaster that it could refer only job applicants of one race or gender**.** See, e.g., Brasfield & Gorrie, LLC, 21 FCC Rcd 9726, 9728 ¶8 (2007) ("[T]he action by a third party contractor in installing the unauthorized frequency which resulted in the violation does not excuse the licensee from forfeiture liability.")

The impact of this proposal could be quite substantial. The radio industry generates annual gross revenues in excess of $18 billion.[97] The majority of minority owned stations are programmed for minority audiences; thus, if we very conservatively assume that minority owned and programmed stations draw just 2% of the industry's gross revenues, even a mere 5% increase in advertising revenue for minority owned and programmed broadcasters would translate to $18,000,000 in additional revenue.

Proposal #24: Advocacy Of Tax Deferral Legislation Designed, To The Extent Possible, To Foster Minority Ownership[98]

Since the Tax Certificate Policy was repealed in 1995,[99] the Commission has recommended to Congress that the policy be reinstated. Originally proposed in 1977 by Chairman Wiley's Minority Ownership Task Force, then adopted in the Ferris administration in 1978,[100] the Tax Certificate Policy enabled a seller to defer capital gains taxes on the sale of a media property to a minority controlled firm. The policy was by far the greatest promoter of minority ownership opportunities; MMTC had estimates that it was been largely responsible for quintupling the number of minority owned stations from 60 to over 300 between 1978 and 1995.

In the 110th Congress, two bills are before the House Ways and Means Committee: H.R. 600, introduced by Congressman Rush, and H.R. 3003, introduced by Congressman Rangel. These bills focused on SDBs or small businesses rather than exclusively on minorities;[101] they

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[97] BIAfn Radio Yearbook (2007), p. v (providing BIA's estimate of 2006 gross radio advertising revenues).

[98] Proposal #24 can be found in MMTC, Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002, Tab 10, Twelve Minority Ownership Solutions ("Twelve Solutions"). Twelve Solutions is a one-page summary that lists proposals generally not falling within the Commission's regulatory jurisdiction.

[99] Deduction for Health Insurance Costs of Self-Employment Individuals, Pub. L. No. 104-78, §2, 109 Stat. 93, 93-94 (1995).

[100] See 1978 Policy Statement, 68 FCC2d at 983.

[101] H.R. 600 contemplates that the Treasury Department would conduct a rulemaking proceeding to determine whether, under strict scrutiny, minority groups in certain industries are disadvantaged and thus could be treated as a class of SDBs eligible to deliver tax certificates to sellers if race consciousness proves necessary to remedy the present effects of past discrimination. Since H.R. 600 does not preordain the results of this rulemaking proceeding,

would extend the policy to telecommunications, and they contain deal size caps to reduce the potential impact on the Treasury.

The Tax Certificate Policy has always enjoyed broad support,[102] and today virtually all of the major broadcast companies, public interest and civil rights organizations favor its restoration.[103]

To be sure, tax certificate restoration is hardly a cure-all for the dearth of minority ownership. The policy would only be useful where an asset has a very low tax basis and no other means of deferring or avoiding taxes (such as structuring an acquisition as a stock transaction) is available. Further, a new policy would surely be applied in a manner far more dilute in impact that the original policy.[104] Nonetheless, restoration of the policy is an absolutely essential element of comprehensive program to cure the paucity of minority ownership.

Proposal #25: Examination Of How To Promote Minority Ownership As An Integral Part Of All FCC General Media Rulemaking Proceedings[105]

Originally proposed in 1973 by Citizens Communications Center and advocated by NABOB for over a generation, this proposal would incorporate a Minority Impact Statement into all general mass media rulemaking proceedings except individual FM or TV allotment

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it can fairly be characterized as a race neutral bill that could be applied under race-consciousness if an administrative record justifies that approach. H.R. 3003 is purely a small business bill; thus, it avoids equal protection review but would be considerably more dilute in its impact.

[102] See 1978 Policy Statement, 68 FCC2d at 984, in which the Commission noted with favor the support for the tax certificate and distress sale policies by, inter alia, the American Broadcasting Companies, General Electric Broadcasting Company, the Congressional Black Caucus and the National Association of Broadcasters.

[103] See, e.g., Letter of David K. Rehr, President, National Association of Broadcasters, to Hon. Charles B. Rangel, Chairman, Committee on Ways and Means, U.S. House of Representatives, July 13, 2007 (urging the Committee "to hold a hearing to explore ways to increase diversity and the representation of minority groups and women in the communications industry. We have been concerned for some time that various barriers to entry have discouraged participation by such groups. We believe the time is ripe for Congress to take action, in particular by providing tax incentives to those selling broadcast stations to members of minority groups and women.")

[104] See Ofori 2003 Statement (concluding that 88% of radio broadcasters would qualify as small businesses under the SBA's small business definition, and only about 4.5% of those small businesses would be minority owned). Thus a "small business" definition would be very dilute indeed in its impact on minority ownership.

[105] Proposal #25 can be found in Twelve Solutions.

proceedings. In particular, an NOI or NPRM would include a request for comment on how the proposed rules could favorably or adversely impact minority entrepreneurship.

Minority Impact Statements would enable the Commission to make policy with its eyes open. Almost everything the Commission does has a substantial impact on minority entrepreneurship. Yet that impact is often not recognized until years later.

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.[106]

While an agency is permitted to adopt rules, otherwise justified, that have the unintended effect of burdening minority groups,[107] an agency is also permitted and encouraged to make itself aware of the impact of its policies on minorities.[108]

In seeking comment on the impact of media consolidation on minorities,[109] the Commission has set a good example. It should extend this example to all general rulemaking notices.

Proposal #26: Ongoing Longitudinal Research On Minority And Women Ownership Trends[110]

An agency cannot develop rules without basic information, and regrettably the Commission's minority and women ownership database leaves much to be desired. Free Press[111]

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[106] See Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§601-612 (2006)).

[107] 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.")

[108] Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Parents").

[109] 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) (urging commenters to "explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses.")

[110] Proposal #26 can be found in Twelve Solutions.

and the Commission's minority ownership researchers[112] agree that the Commission's minority and women ownership database is an embarrassment.

No constitutional impediment prevents the Commission from collecting data on minority or woman ownership.[113]

In 1995, MMTC and others proposed systematic minority and women ownership data collection, and the Commission began collecting this data in 1998.[114] The Commission performs a semi-annual census of minority and women broadcast ownership, but it should be issuing its reports annually because the impact of rule changes often reflects the nearly immediate readings given them by lenders and investors. Further, the Commission's minority and women ownership census ought to be expanded to include a questionnaire administered to minority and women owners – to ensure that those identifying themselves as minority or women controlled really what they claim to be,[115] and to provide the Commission with real-time feedback on the impact of Commission rules and policies on minority and women broadcasters' access to capital, spectrum and opportunity and on minority and women broadcasters' ability to serve the public.

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[111] See Off the Dial, pp. 12-14 (identifying several serious deficiencies in the FCC's data collection and reporting).

[112] See Arie Beresteanu and Paul B. Ellickson, "Minority and Female Ownership in Media Enterprises" (released July 31, 2007), p. 3.

[113] 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[.]")

[114] 1998 Biennial Regulatory Review Streamlining of Mass Media Applications, Rules, and Processes Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Dockets 98-43 and 94-149 (Report and Order), 13 FCC Rcd 23056, 23095-99 ¶96-105 (1998).

[115] See Out of the Picture, p. 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 nonminorities).

Proposal #28: Extension Of The Community Reinvestment Act (CRA) To Encourage Financial Institutions To Provide Debt Financing To Broadcasters[116]

In 2004, the Diversity Committee recommended that the Commission work with the Treasury Department to expand the application of the CRA credit[117] to encourage financial institutions to place capital in private equity funds led by minority and women entrepreneurs, or in funds that invest in communities of color:[118]

> Increasing the pool of private equity is critical to increasing participation by women and minority entrepreneurs in both licensed and non-licensed spectrum opportunities. Currently, financial institutions that place funds in SBIC licensed private equity funds receive a Community Reinvestment Act credit.
>
> The [Committee] proposes that the FCC work with the U.S. Treasury Department to expand the application of the Community Reinvestment Act Credit to encourage financial institutions to place capital in private equity funds led by women and minority entrepreneurs, or in funds that invest in communities of color. In addition, the [Committee] proposes that a similar incentive mechanism be explored with the appropriate regulatory agencies to encourage pension funds, insurance companies and other financial institutions to place monies with such equity funds.

[116] Proposal #28 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, p. 15.

[117] The CRA was established to provide financial assistance to existing small businesses. Banks earn CRA credit based on the extent of their loans to small businesses in their communities. Each year, banks must report on the loans they have made to small businesses. CRA credit is determined by how well a bank has invested in small businesses in its community. Minority and women broadcasters, who may not fit the CRA criterion of not more than $100 million dollars in gross annual revenue, may still take advantage of CRA based on two exceptions: 1) the SBA's Development Company Program, and 2) the SBA's Small Investment Company Program. Under these two SBA programs, bank lending to minority and women broadcasters are considered as CRA-qualified investments for which banks will receive CRA credit. With both the SBA's Development Company Program and the Investment Company Program, a business can have gross revenue of more than $100 million if the loan amount from the bank is under $100 million. The purpose of these exceptions to the CRA is to foster economic development among community businesses and industries that traditionally would not be considered as small businesses for the purposes of CRA, but are comparatively considered small businesses within their respective industries. Telephone interview with Karen Tucker, National Bank Examiner, U.S. Comptroller of the Currency, September 14, 2007.

[118] Id.

Proposal #29: Encourage More Local And Regional Banks To Participate In SBA Guaranteed Loan Programs For Broadcast And Telecom Ventures[119]

In 2004, the Diversity Committee recommended that the Commission and the SBA expand their outreach to banks to encourage them to participate in the SBA's 7(a) or 504 programs:[120]

> During the past two years, a number of financial institutions that provided debt financing for broadcast opportunities have left the marketplace.
>
> While the [Committee's] findings are based on limited interviews, the biggest problem is that the availability of loans in the $1 million to $10 million range is very thin. One of the reasons is that lenders in smaller media and communications transactions must frequently loan against asset value rather than cash flow. Most small deals involve the acquisition of stations or the building of new stations with little or no cash flow. In addition, smaller communications companies and start-ups frequently have limitations in their management teams and they frequently seek to finance broadcast facilities with signal strength limitations because the more powerful stations have been taken by larger group owners. This limits lenders to the very large deals. With consolidation, those deals are hard to come by, so many lenders specializing in this area sold their portfolios and pulled out. No national banking institutions have moved in to fill the gap.
> The [Committee] recommend[s] to the FCC that it work with the U.S. Treasury Department to extend the application of the Community Reinvestment Act to encourage more financial institutions to provide debt financing to broadcast investments.
>
> Further, the [Committee] proposes that the FCC work closely with the SBA to educate and encourage more local and regional banks (which have not been heavily involved in broadcasting or telecom industry lending), to make such loans through the 7(a) program and/or the 504 program….

Although most small entrepreneurs look to local banks for first-deal financing, few local banks have expertise in media and telecom lending. Banks require special expertise when lending on cash flow and against a revocable license rather than against hard-asset collateral, especially in the absence of a reversionary interest in the intangible asset. The necessary banking

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[119] Proposal #29 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 16.

[120] Id.

expertise could be conferred through systematic outreach to banks. Modifications of the SBA's 7(a) and 504 programs to facilitate broadcaster participation might also be desirable.[121]

Proposal #30: Establishment Of A Fund Of Funds[122]

In 2004, the Diversity Committee proposed that the Commission initiate discussions with the major pension funds to encourage the establishment of a Fund of Funds.[123] The Fund of Funds would place capital with minority focused private equity funds such as those belonging to the National Association of Investment Companies (NAIC), which are led by minority management and which invest in opportunities led by women and minority entrepreneurs and/or in opportunities in underserved markets:[124]

> The National Association of Investment Companies ("NAIC") is a trade association of private equity funds led by minority management, and who invest in opportunities led by women and minority entrepreneurs and/or in opportunities in underserved markets. Currently, NAIC member funds manage over $5 billion. While this is an impressive

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[121] Many minority banks shun the SBA's 7(a) programs because they see the program as over-regulating the bank's financial transactions and failing to guarantee enough of the loan amount. The SBA only guarantees 85% of the loan up to $2 million, but broadcast station purchases are generally more than $2 million. This causes minority bankers to be skeptical about using this program for minority/women broadcast lending. It might be desirable to create a new program that is similar to the SBA's 7(a) program that would guarantee up to 85% of the broadcast license value. The SBA's 504 program, covering long-term fixed assets, only allows for facility build-out that is within or appurtenant to the broadcast station's main building (i.e., equipment and extension of the building). The 504 program should include the tower site, which, while usually not appurtenant to the broadcast station's main building, is one of the most important underlying physical facility considerations. The broadcast tower site requires regular maintenance in order for other broadcast operations to be successfully carried out, but the current 504 program does not take these facts into consideration. Telephone interview with C. Earl Peek, Assistant Vice President, Industrial Bank, N.A., a minority owned bank in Washington, D.C., September 21, 2007.

[122] Proposal #30 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 16-17.

[123] In August and September 2007, MMTC researched the four largest U.S. pension funds: California Public Employees Retirement System, California State Teachers' Retirement System, New York State and Local Retirement System, and New York State Teacher's Retirement System. These funds' records of outreach to minority and women entrepreneurs are mixed. California Public Employees Retirement System (CalPERS) has recently approved an investment action plan to expand opportunities through investment in emerging markets and emerging managers; the plan includes establishing a pool of consultants specializing in diversity in the investment industry and compiling a database of emerging investment mangers and brokers. In recent years, CalPERS has increased its investments in emerging markets, including more than $4.5 billion invested or committed for investment in underserved California areas. On the other hand, the New York State Teachers' Retirement System reported no mandates/initiatives nor does it seek out investments in women/minority-focused private equity funds or businesses. A review of the 2006 Annual Investment Reports for California State Teachers' Retirement System and New York State Local Retirement System found no apparent investments in women- or minority-focused private equity funds or businesses.

[124] Id.

number, it is estimated by the National Venture Capital Association that its member funds currently manage more than $65 billion.

Clearly, private equity funds which provide capital to these markets need greater access to capital. The [Committee] proposes that the FCC initiate discussions with the major pension funds to encourage the establishment of a fund of funds that would place capital with minority focused private equity funds. Data from an independent study indicates that the financial returns from NAIC member funds were comparable to or exceeded majority managed funds. The Commission has the opportunity to use its platform as a bully pulpit to encourage the pension funds to undertake such an endeavor.

Proposal #31: Revision Of The Distress Sale Policy To Institute Case-By-Case Review Of Purchasers' Qualifications[125]

In 2004, the Diversity Committee proposed that the Distress Sale Policy, in existence since 1978[126] but seldom used recently, be revised to ensure that it satisfies the narrow tailoring prong of strict scrutiny:[127]

> In 1977, Chairman Wiley convened the Minority Ownership Task Force to address the extreme under inclusion of minorities in broadcast station ownership. One of its recommendations was the adoption of a policy under which a broadcaster, in hearing for non-renewal or revocation of its license, could elect before the hearing to sell the station to a minority owned company for no more than 75% of fair market value. In this way, the licensee in the "distress" of possible loss of license can avoid the hearing while still incurring a very substantial financial penalty, save the Commission the time and expense of trying the hearing and subsequent appeals, and place the station in the hands of a qualified operator who would have few other opportunities to acquire a station.
>
> The Distress Sale Policy is still in effect. It has resulted in approximately 30 transactions involving the sale of approximately 40 stations to minorities. Its history and operation are detailed at length in the Subcommittee's "White Paper on the Distress Sale Policy," which is appended hereto and incorporated herein by reference as Exhibit C.
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> The [Committee] express[es] the sense of the body that the Commission should:
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> 1. reaffirm the viability and routine applicability of the Distress Sale Policy; and
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> 2. in the operation of the Distress Sale Policy, assess each distress sale purchaser's ability to promote diversity, e.g., by requiring a showing of the bonafides of the purchaser's company, its commitment to promoting diversity and providing

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[125] Proposal #31 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 18-19.

[126] See 1978 Policy Statement, 68 FCC2d at 983.

[127] Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 18-19.

service for a substantial length of time, and its plans to serve the needs of the public and to correct any deficiencies in station operations caused by the distress sale seller.

Thus, under the Diversity Committee's formulation, a potential buyer, of any race, could demonstrate that its proposed service to the community would address needs unmet by existing media. Service to minority audiences could be an unmet need. In this way, an important pro-diversity policy can be redesigned as a race-neutral policy that is likely to benefit minority broadcasters.

Proposal #32: Reservation, For A Company That Finances Or Incubates An SDB, Of First Place In The Queue To Form A Duopoly In A Market For Which Only A Limited Number Of Duopolies Are Permissible[128]

Originally offered by MMTC in 1999 and subsequently endorsed by the Diversity Committee, this proposal contemplates that a company financing or incubating an SDB would receive a guaranteed first place in line to create an LMA if local voice tests place a limitation on how many LMAs can be created in the market. The Diversity Committee recommended:[129]

> Presently, when the local television ownership rules permit only one additional duopoly in a market, a "race to the courthouse" could determine which duopoly application is processed first. See Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules (Public Notice), FCC 99-240 [14 FCC Rcd 15845] (released September 9, 1999). To cure this problem, the Commission could create an incentive plan under which a company financing or incubating an SDB will be reserved a place in line that it could subsequently use to duopolize another same-market facility. This vested first-place in a duopolization queue would provide the large broadcaster with the secure knowledge that its public spiritedness in incubating or financing an SBD will be rewarded with a guaranteed opportunity to acquire a greater complement of local properties.
>
> There is precedent for using advantageous placement in a processing queue as a minority ownership incentive. In the 1978 Minority Ownership Policy Statement [68 FCC2d 979] the Commission promised that tax certificate and distress sale applications "can be expected to receive expeditious processing." Id. at 983.

[128] Proposal #32 can be found in Advisory Committee on Diversity, Financial Issues Recommendations, June 14, 2004, pp. 17-18; see also Advisory Committee on Diversity, White Paper on Incentive-Based Regulations, May 23, 2004, p. 9.

[129] Advisory Committee on Diversity, White Paper on Incentive-Based Regulations, May 23, 2004, p. 9.

This reserved place in the duopolization queue would have substantial value and thus could serve as a strong incentive for SDB financing.

Proposal #33: Relaxation Of Foreign Ownership Restrictions[130]

Under this proposal, offered by the Diversity Committee in 2004, the Commission would consider whether non-controlling foreign investment (e.g. up to 49%) could be permitted where the investment would help eliminate a barrier to access to capital for domestic minority owned broadcasters as contemplated by 47 U.S.C. §257:[131]

> **Adoption of an Declaratory Ruling on Section 310(b)(4) Waivers**
>
> The Advisory Committee recommends that the Commission adopt the following declaratory ruling:
>
> In the absence of special national security, law enforcement, trade or foreign policy concerns -- as determined by the procedures established in the Foreign Participation Orders, 12 FCC Rcd 23891 (1997) and 12 FCC Rcd 24094 (1997) -- it is the policy of the Commission that in a transaction whereby a small disadvantaged business ("SDB") seeks to acquire a broadcast license, foreign companies or persons whose principal place of business (or headquarters) is located in a country that is a member of the WTO will be presumed to satisfy the public interest waiver standard of Section 310(b)(4) of the Communications Act, provided that aggregate foreign investment in the broadcast media in question does not exceed 49% of total equity and that such equity interests do not convey more than 25% of voting power in such broadcast media; provided, however, that if the foreign company or person is also from a country that is a member of NAFTA and/or the Caribbean Basin Initiative, it may hold up to 49% of voting power in the broadcast entity. Notwithstanding the foregoing, no such waiver will be presumed in cases where it is demonstrated that the home country of the foreign investor does not, or will not over the ensuing five years, provide comparable reciprocal treatment to U.S.-based entities or persons. An SDB shall be defined as an entity that is economically and socially disadvantaged (as referenced in the Telecommunications Ownership Diversification Act of 2003, S. 276, 108th Congress) and also meets the small entity size standards appropriate for its particular industry. The size standards would be determined by the Commission, and the certification process to determine SDB eligibility should be administered by the Commission in a streamlined and expedited manner.

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[130] Proposal #33 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Recommendation on Adoption of a Declaratory Ruling on Section 310(b)(4) Waivers, December 10, 2004.

[131] Id.

Explanation of Proposal

> A waiver policy for foreign ownership would have the practical effect of providing access to a great deal of capital for socially and economically disadvantaged entrepreneurs (SDBs). While open to all, a foreign ownership waiver initiative would as a practical matter most significantly benefit members of minority groups. We believe that a policy geared to SDBs, and containing especially attractive incentives for NAFTA and Caribbean Basin Initiative countries, could deliver approximately the impact on access to capital for minority entrepreneurs that a partial restoration of the tax certificate policy would deliver.
>
> Section 310(b) of the Communications Act provides that certain FCC licenses, including broadcasting, shall not be granted or held by aliens, their representatives, corporations organized under the laws of foreign governments, corporations having over 20% of their capital stock owned or voted by aliens, foreign governments (etc.) and — in subsection (4):
>
>> any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.
>
> Notwithstanding this language in Section 310(b)(4), the FCC must determine the qualifications of a proposed broadcast assignee or transferee before the assignment or transfer can take place. See 47 U.S.C. §310(d). It is unlikely that a foreign investor would volunteer the time, effort and expense to be a Section 310(b)(4) waiver test case without knowing up front that its application were going to be approved. Thus, the Commission should articulate a waiver policy before SDBs begin seeking foreign investments. While such a policy could be established through rulemaking, such a process would be needlessly time-consuming because Section 310(b)(4) is essentially self-executing. Consequently, the most straightforward approach would be for the Commission to issue a Declaratory Ruling, using such public comment procedures as it feels necessary or appropriate.

This groundbreaking recommendation deserves the Commission's close attention. Liberal application of Section 310(b)(4) in the cable context[132] has hardly resulted in any tangible harm to U.S. interests or to ownership diversity in that industry. The specter of hostile European domination of U.S. broadcasting that motivated Section 310(b)(4) as that provision

[132] See Foreign Ownership of Cable Systems, 77 FCC2d 73, 80-81 (1980) (refusing to place foreign ownership restrictions on cable operators).

evolved in the 1920s and 1930s certainly no longer exists, raising the question of whether the Commission's restrictive application of Section 310(b)(4) remains sustainable.[133]

In broadcasting, the more deregulatory interpretation of Section 310(b)(4) recommended by the Diversity Committee would have immediate application in the case of minority broadcasters able to draw on overseas capital, such as loans or equity from investors and programmers serving in-language populations in the United States with the cooperation of Commission licensees who are domestic in-language specialists. In light of the severe limitations faced by minority broadcasters seeking access to American capital, the Commission should place the highest priority on examining whether its continued narrow interpretation of Section 310(b)(4) acts as a market entry barrier that offends Section 257 of the Communications Act, and whether lifting that barrier would advance the cause of minority broadcast financing.

Proposal #34: Extension Of Divestiture Deadlines In Mergers Where Applicants Have Actively Solicited Bids For Spin-off Properties From SDBs[134]

Under this proposal, offered by MMTC in 1999 and recommended by the Diversity Committee in 2004, the Commission would consider requests to extend divestiture deadlines in mergers where applicants have actively solicited bids for spin-off properties from SDBs. This past week, Chairman Martin encouraged companies undertaking major transactions to recruit and assist minority and women entrepreneurs who might be interested in purchasing spinoff properties.[135] Certainly a process under which SDBs are afforded every opportunity to participate in a transactional process can facilitate capital formation.

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[133] See Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (noting that "[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears," citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

[134] Proposal #34 originated with a recommendation of the Diversity Committee. See Advisory Committee on Diversity, Recommendation on Merger Review, October 15, 2004.

[135] Letter of Hon. Kevin Martin to Hon. Henry Rivera, Chair, Advisory Committee on Diversity, September 27, 2007.

On several occasions, the Commission has recognized that minorities often need additional time to secure capital to close broadcast transactions.[136] Thus, affording a modest time to facilitate those transactions would increase the likelihood of minorities winning stations in private auctions. This procedure would incentivize sellers to seek out minority buyers because the seller would retain the cash flow from the spinoff stations for the additional time period and would not face time pressure for deal completion that can be detrimental to sellers in a buyer's market.

DCS emphasizes that it does not advocate a wink-and-a-nod "temporary waiver" that is temporary in name only and inevitably becomes permanent, never resulting in a transaction. Instead, a deadline must be firm, such that at the end of the waiver period the station must either be sold to an SDB or placed into an irrevocable trust governed by an independent trustee, insulated from the seller and empowered to promptly effectuate the sale of the asset to an SDB.

Proposal #35: Relaxation Of The Grandfathered Cluster Transfer Deadline For For Cluster Purchasers Who Will Resell Stations To Small Businesses[137]

In 2003, the Commission authorized the transfer intact of grandfathered clusters if they are sold to small businesses;[138] however, that policy has failed to produce a single closed

[136] See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as part of CBS' showing in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity "has already filed an application to assign one of the stations it will divest to a minority-controlled entity"); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver"); Combined Communications Corp., 72 FCC2d 637, 656 ¶45 (1979) (declaring that the opportunity to approve the spinoff from the Gannett/Combined Communications Corp. merger of WHEC-TV, Rochester, New York to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties"); cf. Midwest Communications, Inc., 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities).

[137] Proposal #35 is before the Commission in the Petition for Rulemaking of MMTC to Facilitate the Entry of Small Businesses into Local Radio Markets (RM-11338) (filed July 12, 2007) ("MMTC Cluster Petition"). Comments were filed on September 5, 2007 and Reply Comments are due on October 5, 2007.

[138] 2002 Biennial Report, 18 FCC Rcd at 13810 ¶488.

transaction. Therefore, MMTC proposed that the Commission should allow the sale of grandfathered radio clusters intact to any buyer, subject to the condition that the buyer file an application to transfer the excess stations to a small business buyer within 12 months after consummation of the cluster's purchase. When the application to transfer the intact cluster is filed, the buyer should be required to certify its intention to come into compliance within a year and outline the steps that it will take to market the cluster or specific stations exceeding the ownership cap to small businesses, including minorities and women.

This policy would redress the core problem with the existing rule: small businesses are less likely to have rapid access to sufficient capital during the short period of time when the broadcast station seller is soliciting bids. Under this approach, the larger entity could purchase the entire "above cap" cluster at the outset, and a small business would have the additional twelve month period, if necessary, to raise the capital to purchase the excess stations.

Thus, this approach would promote the public policy goal of promoting small business investment in broadcasting by providing small businesses with sufficient time and flexibility to collect the capital necessary to make a competitive offer to the seller.

Proposal #36: Use Of The Share-Time Rule To Foster Ownership Of DTV And FM Subchannels[139]

The Commission could afford DTV or FM licensees the voluntary option of assigning the right to operate a DTV subchannel or an HD radio channel -- essentially monetizing the channel by transferring a bundle of rights that is tantamount to ownership from the perspective of an investor or lender. Since this is a new concept, we present it here in detail.

Industry leaders strongly favor widespread use of DTV and FM subchannels, but these assets often lie fallow because entrepreneurs wishing to offer diverse programming find it difficult to raise financing for a lease rather than ownership. Responding to this need, on September 27, 2007 the Diversity Committee adopted the following recommendation:

Recommendation on Leasing or Ownership of FM
<u>or DTV Subchannels Under the Share-Time Rule</u>

[approved unanimously by the Advisory Committee, September 27, 2007]

> The Subcommittee on Emerging Technologies recommends that the full Advisory Committee commend to the Commission, for the issuance of a notice or notices of proposed rulemaking, the desirability of a mechanism that would permit FM radio or digital television licensees to lease or otherwise permit full-time or part-time use of portions of their multiplexed program feeds for the transmission of programming by unaffiliated entities which would be separately licensed by the Commission under the share-time rule, 47 C.F.R. §73.1715. If the Commission determines that it lacks the power to adopt such a procedure, the Commission should seek the requisite authority from Congress.
>
> The Commission and the Advisory Committee have found that access to capital is a significant barrier to entry for small, minority and woman owned broadcast entrepreneurs. This share-time proposal would address this problem by providing entrepreneurs with the choice of a route to entry that closely resembles traditional broadcast ownership as opposed to leasing. Raising capital for a lease has proven difficult for small businesses for two reasons: (1) a lease is not secured by an asset that resembles collateral, and (2) the sunk costs of a lease rapidly become non-recoverable when the lease is terminated. Similar considerations were among the original motivations for the use of the share-time rule in AM radio and VHF television in the 1950s. In addition, the share-time rule fosters ownership and programming diversity without the need to resort to the time-consuming and expensive auction process. Finally, since share-times would serve as an additional voluntary option available to the DTV or FM station licensee choosing to monetize its spectrum, the proposal would benefit broadcasters and the public by facilitating the growth of DTV and HD service.

Especially attractive candidates to occupy this spectrum would be new entrants serving local multicultural and multilingual audiences. Their programming could be supported by revenue derived from local multicultural and multilingual businesses seeking a narrowcast venue for advertising.

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[139] Proposal #36 originated with a recommendation of the Diversity Committee. Advisory Committee on Diversity, Recommendation on Leasing or Ownership of FM or DTV Subchannels Under the Share-Time Rule, September 27, 2007.

To afford minorities and women a headstart in accessing this spectrum, DCS proposes that the Commission initially limit the assignment of a DTV subchannel or HD channel to SDBs. As a further incentive to promote minority and women ownership, a broadcaster that assigns to an SDB a DTV subchannel or HD channel at a fraction of fair market value could be permitted to assign a second DTV subchannel or HD channel at fair market value.

If just 20% of DTV or commercial FM broadcasters split off one channel each for sale under the share-time rule (i.e., about 2,500 channels), minorities acquired 20% (about 500) of these channels and women also acquired 20% of these channels, then, applying Free Press' minority and women ownership figures (about 818 minority owned and 688 women owned stations),[140] we would experience a 61% increase in minority ownership and a 73% increase in women's broadcast ownership. That would represent the greatest advance in ownership diversity since the quintupling in minority ownership from 1978 to 1995 that was largely brought about by the Tax Certificate Policy.

The relationship between the DTV station and the subchannel owner, and between the FM station and the HD channel owner, would be analogous to the relationship between the owner of a condominium building and the owners of condominium units in the building. The DTV subchannel or HD channel licensee would control its channel's content, while its engineering would continue to be handled by the DTV or FM station licensee for a fee. In this paradigm, the DTV subchannel or HD channel licensee's control of its channel's programming is analogous to a residential condominium owner's enjoyment of his unit, while the DTV subchannel or HD channel's engineering is analogous to the condominium building owner's management of the building's common areas. Just as the sale of a condominium building can occur without the simultaneous sale of each unit and vice versa, the sale of the DTV station or

[140] See Off the Dial, p. 16; Out of the Picture, pp. 2, 12.

FM station would not affect the package of rights being enjoyed by the DTV subchannel or HD channel licensee, and vice versa. If the main channel licensee loses its license, the subchannel licensee could continue to broadcast while the main channel would be assigned by a nonprofit entity in anticipation of being relicensed to a new entity.[141]

Share-times have been a common feature of broadcasting since the 1920s.[142] With the creation of the FCC, Congress continued to allow for restrictions on when licensees could broadcast.[143] The Commission later adopted the share-time rule, allowing licensees some flexibility in crafting share-time agreements.[144] The Commission's power to act in this manner has been confirmed by the Supreme Court.[145]

The new form of share-time contemplated by the Diversity Committee is permissible because it would not trigger the competitive bidding rules under 47 U.S.C. §309(j). Adopted in 1992, Section 309(j) authorized the use of competitive bidding for mutually exclusive initial applications for a license or construction permit.[146] Congress intended the competitive bidding system, commonly referred to as auctions, to "encourage innovative ideas, and give the proper incentive to spur a new wave of products and services that will keep the United States in a

[141] Typically a broadcast station whose license has been revoked or non-renewed is operated by a nonprofit interim operator while a permanent licensee is selected. See, e.g. Lamar Life Broadcasting Co., 46 RR2d 1054, 1055 ¶3 (1979). Thus even if the DTV or FM station's license is revoked or non-renewed, the DTV subchannel or HD channel licensee could continue to operate.

[142] See City of New York v. FRC, 36 F.2d 115, 117 (D.C. Cir. 1929); see also Pacific Development Radio Co. v. FRC, 55 F.2d 540 (D.C. Cir. 1931) and Reading Broadcasting Co. v. FRC, 48 F.2d 458 (D.C. Cir. 1931) (discussing various challenges to share-time arrangements by radio licensees).

[143] Communications Act of 1934, 47 U.S.C. §§303(c), 308(b).

[144] The share-time rule, 47 C.F.R. §73.1715, was codified in its present form in 1978, but it dates back two generations. See Main Auto Supply Co., 1 FCC 251 (1935). See also HATCO-60, 60 RR2d 1521, 1527 ¶17 (1986) (upholding broadcast licensees' right to determine and alter terms of share-time agreements).

[145] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390-91 (1969) ("[T]he Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.")

[146] Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993); see also H.R. REP. 103-111, at 246, 1993 U.S.C.A.A.N. 378, 573 (May 25, 1993).

competitive position."[147] Congress felt that auctions would help "promot[e] efficient use of spectrum" and encourage "rapid deployment of new technology."[148]

Congress found that the benefits of auctions included speeding the delivery of communications services and promoting "efficient and intensive use of the electromagnetic spectrum."[149] Competitive bidding was intended strictly for initial license applications and was not to be permitted in situations where there was a single application for a license or in cases of license renewal or modification.[150] In implementing the competitive bidding system, Congress ordered the Commission to seek methods of "promoting the development and rapid deployment of new technologies, products, and services for the benefit of the public … without administrative or judicial delays."[151]

Congress intended for the new regulations to "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."[152] Congress expected the Commission to adopt regulations that would "ensure that small businesses will continue to have opportunities to become Commission licensees."[153] Congress anticipated that most of the licenses granted under section 309(j) would not be for broadcast services "where diversity of ownership contributes to diversity of viewpoints" but would be for services "where race and gender of the licensee

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[147] H.R. REP. 103-111, at 249, 1993 U.S.C.A.A.N. at 576.

[148] Id.

[149] Id. at 253, 1993 U.S.C.A.A.N. at 580.

[150] Id.

[151] Id. at 254, 1993 U.S.C.A.A.N. at 581.

[152] Id.

[153] Id. at 254-55, 1993 U.S.C.A.A.N. at 581-82.

[would] not affect the delivery of service to the public."[154] Congress encouraged the Commission to "continue the use of engineering solutions" and other methods "in order to avoid mutual exclusivity."[155] This included tools such as "spectrum sharing arrangements" to be used "when feasible and appropriate."[156]

Currently, share-time agreements are filed with the Commission and are considered part of the station license.[157] Thus, to share time on a current licensee's spectrum, the other entity must become a licensee.[158] Section 310(d) authorizes a licensee to apply for transfer of a construction permit or station license.[159] The proposed transferor is reviewed just as if it were applying for its own station.[160] Such an application may state the hours of the day or other periods of time during which it plans to operate the station.[161] Section 309(j) applies to situations where there is more than one mutually exclusive applicant for a license, rather than situations where transfer of control to a single entity is proposed.[162] As noted above, Congress did not intend for the competitive bidding system to apply to situations where there was only one application for a license.[163] The Diversity Committee's proposal does not contemplate a contest between mutually exclusive applicants seeking to operate on a subchannel; thus, its proposal can be implemented without triggering the 309(j) auction rules.

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[154] Id. at 255, 1993 U.S.C.A.A.N. at 582.

[155] Id. at 258, 1993 U.S.C.A.A.N. at 585.

[156] Id. at 258-59, 1993 U.S.C.A.A.N. at 585-86.

[157] 47 C.F.R. §73.1715(a).

[158] 47 C.F.R. §73.1715. The regulation consistently refers to "licensees," implying that both parties to the agreement are already licensed by the Commission. Id.

[159] 47 U.S.C. §310(d).

[160] Id., §308(b).

[161] Id.

[162] See 47 U.S.C. §309(j)(1) (mandating competitive bidding for "mutually exclusive applications … for any initial license or construction permit").

[163] H.R. REP. 103-111, at 253 1993 U.S.C.A.A.N. at 580.

The applicability of the share-time rule has profound advantages 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 subchannels – the option being to monetize the subchannels 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 multichannel 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 ownership and programming, it could someday become easier to justify additional relaxation of the local radio ownership rules.

Proposal #37: Retention On Air Of AM Expanded Band Owners' Stations If One Of The Stations Is Sold To An SDB[164]

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

[164] Proposal #37 is before the Commission in the "Request for Waiver of Rules Requiring Return of AM Licenses," MM Docket No. 87-267 (filed March 27, 2006) ("AM Expanded Band Petition"). The AM Expanded Band Petition was filed by eleven broadcast companies (including Clear Channel, Entercom, Multicultural and Starboard Media) and four public interest organizations (MMTC, the Independent Spanish Broadcasters Association (ISBA), NABOB and the Office of Communication of the United Church of Christ, Inc. The proposal has been fully briefed and the Bureau has been granting STAs to prevent the surrender of licenses while the Commission considers this proposal.

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 groups (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.

The Joint Petitioners contended that the benefit the Commission expected to realize from a licensee's returning its initial AM band authorization – reducing congestion and interference in the AM band – does not justify requiring Expanded Band stations to return one of their authorizations when doing so would deprive the listening public of service. Rather than having those licenses returned to the Commission, with the expectation that those stations would simply go silent, the Joint Petitioners requested that the Commission take the following actions:

1. Temporarily waive the multiple ownership rule by extending the disposition required by Note 10 to Section 73.3555, 47 C.F.R. §73.3555, so that the exemptions to the multiple ownership rule established in Note 9 would not apply during the period when an AM licensee is permitted to hold both an Expanded Band AM license and paired in-band AM license;
2. Modify the five-year disposition condition imposed on all expanded AM band stations for the same time period;
3. Waive Section 73.1150(c), 47 C.F.R. §73.1150(c), so that prior to the extended disposition date, the licensee of an Expanded Band AM station could assign or transfer control of one of its stations to an entity qualifying as a "small business" as that term applies to radio broadcasters in the Small Business Association's regulations, 13 C.F.R. §121.201 (i.e., an entity having annual gross receipts under $6.5 million).[165] Pursuant to this waiver,
    - The price for which a licensee could sell its authorization could not exceed 75% of the station's fair market value, using a system comparable to that which exists under the Commission's distress sale policy.[166] Further, the assignee or transferee would be subject to an anti-trafficking period of three years to ensure that the public interest benefits of the price discount enjoyed

[165] This definition of "small business" was applied in the 2002 Biennial Report, 18 FCC Rcd at 13810-12 ¶¶488-89 (making small businesses the eligible parties for purchasing radio clusters that must be broken up if sold).

[166] The distress sale policy was created in the 1978 Policy Statement, 68 FCC2d at 983. In 1980, the Commission held that a distress sale price should not exceed 75% of fair market value. See Lee Broadcasting, 76 FCC2d 462 (1980).

by the assignee or transferee will be enjoyed by the public for a substantial period of time.

- After a station's assignment or transfer, both the Expanded Band station and the original band station could operate throughout their license terms, with neither license having to be returned to the Commission following the transition period; and
- Any licensee already qualifying as a "small business" (or attaining that status during the pre-divestiture year) would not need to dispose of its station at all, although if it sells one of the stations within the three year anti-trafficking period it would be expected to sell to another small business at a price not to exceed 75% of fair market value.

4. Reinstate AM band authorizations that have already been returned to the Commission in reliance on the existing policy, extending their disposition dates by one year.[167]

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 with the public interest, unless such loss is outweighed by other public interest considerations.[168] 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 entity would directly further the

[167] Reinstatement of these facilities nunc pro tunc would ensure that broadcasters who quickly constructed facilities that were fully in compliance with Commission rules, and had to surrender their licenses because the five years had already elapsed before the AM Expanded Band Petition was filed, will not be penalized for having acted expeditiously. Licenses reinstated in this manner should be subject to the same interference requirements that would have applied had the licenses not been tendered for cancellation.

[168] 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).

Commission's goal of promoting diversity of ownership by encouraging station ownership by small businesses and minorities.[169]

Proposal #38: Permitting AM Stations To Use FM Translators[170]

Minority owners' asset values would increase substantially if AM stations could extend their signals using FM translators. The vast majority of minority owned stations are on the AM band, and these stations tend to have inferior facilities. This initiative would help cure this disparity in service that originated with the late entry of minorities into radio ownership, which was caused in significant part by regulatory barriers to entry.

Owing to societal discrimination that was facilitated by the Commission,[171] minority broadcasters entered the business 50 years later than other broadcasters. Therefore, minority broadcasters tended not to have access to FM stations or low dial position AM stations. In 2001, 5.9% of AM stations were minority owned; a minority owned station was 43% more likely to be an AM station than was a non-minority owned station. Only 3.9% of the low-band (540 kHz to 800 kHz) stations were minority owned; minorities were 36% less likely than non-minorities to own these desirable facilities. Further, 33.9% of minority owned AM stations operated between 1410-1600 kHz, and minorities were 19% more likely than non-minorities to own these generally

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[169] 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 Brodacast 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.

[170] Proposal #38 originated in a Petition for Rulemaking of the National Association of Broadcasters, RM No. 11338 (filed July 14, 2006). ISBA, NABOB and MMTC each endorsed the NAB's Petition. The Commission has sought comment on the NAB's proposal in Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MB Docket 07-172 (NPRM), FCC 07-144 (released August 7, 2007).

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

less desirable high band facilities.[172] Examining station asset values, the Commission's Advisory Committee on Diversity for Communications in the Digital Age concluded that "the typical minority owned station is worth only about 30% of the value of the typical non-minority owned station."[173]

Given these inherent disadvantages facing minority broadcasters, an initiative to enable AM stations to use FM translators to expand their coverage areas could not be more welcome. Such an initiative would do much to increase AM stations' asset values, and thereby enhance minority broadcasters' ability to raise capital and expand their holdings.[174]

Proposal #39: Convening Of An Access To Capital Conference[175]

Large private equity firms are playing a growing role on the equity side of broadcast holdings. Minority and women new entrants ought to have an opportunity to build a dialogue with their new fellow broadcasters. Such a dialogue might begin at a conference on access to capital, as initially suggested by Commissioner Tate and being reviewed by the Access to Capital Subcommittee of the Diversity Committee. The Subcommittee presented the following report on this subject at the full Committee's meeting last week:

Convening of an Access to Capital Conference

[submitted to the Advisory Committee, September 27, 2007]

> The Subcommittee on Access to Capital proposes that the Advisory Committee consider recommending to the Commission that the Commission, in cooperation with a major university in New York City, convene a Conference on Access to Capital for Media and

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[172] See Advisory Committee on Diversity, FM Radio Recommendations, June 11, 2004 ("FM Recommendations"), pp. 2-4 (citing Kofi Ofori, "Radio Local Market Consolidation & Minority Ownership" (MMTC, March 2002)).

[173] See FM Recommendations at 2.

[174] To offset any unintended adverse impact on LPFM, the Commission should act promptly to repeal its outdated third adjacent channel restrictions, which operate as a classic market entry barrier of the type Congress sought to eliminate when it adopted Section 257 of the Communications Act, 47 U.S.C. §257 (1996). Eliminating those outdated rules, long rendered irrelevant by advances in receiver technology, would free up sufficient FM spectrum to accommodate the needs of commercial AM stations and the needs of potential LPFM operators.

[175] Proposal #39 is the subject of an Interim Report of the Access to Capital Subcommittee of the Diversity Committee, September 27, 2007.

Telecom Entrepreneurs. A Conference along these lines, originally proposed by Commissioner Deborah Tate, could be scheduled in Q1 2008 and could focus on the investment banking and private equity communities. The objectives of the conference could include:

1. having a dialogue among scholars, bankers and entrepreneurs on the status and difficulties attendant to capital access for small and minority media and telecom ventures
2. introducing members of the Advisory Committee to entrepreneurs and capital providers and to the capital formation issues entrepreneurs encounter, such that the Advisory Committee can develop recommendations for the Commission on access to capital
3. providing for networking between entrepreneurs and capital providers that could evolve into transactions or mentoring relationships

To fulfill these objectives, the conference could include a reception, an educational and training workshop featuring panels on the capital-raising environment and process, and one-on-one networking among entrepreneurs, bankers and investors.

Speakers could be drawn from the academic and financial communities, and particularly from private equity funds. Members of the Advisory Committee would recommend speakers and topics. By way of illustration, substantive panels might include:

- Business planning in anticipation of seeking private equity sponsorship
- Strategic and financial models equity funds expect from entrepreneurs
- How regulatory initiatives could facilitate capital access for media and telecom entrepreneurs

The Advisory Committee would offer the Commission its services in organizing such a conference. University, nonprofit organization and private sector sponsorship could be sought consistent with FCC guidelines. Sponsorship could be sought from, and through the members of, leading trade associations active in media and telecom finance or operations, including the NAB, NCTA, CTIA, CEA, NAIC and the Private Equity Council.

Proposal #40: Preparation Of A Guidebook On Diversity[176]

If the Commission plans to rely in significant part on voluntary industry initiatives to promote diversity, it should provide the industry with the necessary tools, including solid, comprehensive information on what diversity initiatives are most likely to have an impact and how companies can most effectively implement these initiatives. Toward that end, the Diversity

[176] Proposal #40 is the subject of the Recommendation of the Outreach Subcommittee of the Diversity Committee, Preparation of a Guidebook on Diversity, September 27, 2007.

Committee has adopted the following recommendation for a guidebook that would define diversity, explain how diversity promotes competition and economic growth, and explain how to advance diversity in contracting and ownership:

Preparation of a Guidebook on Diversity

[approved unanimously by the Advisory Committee, September 27, 2007]

> The Outreach Subcommittee proposes that the Advisory Committee recommend to the Commission that it engage an author to prepare a guidebook tentatively entitled Increasing Diversity in the Media and Telecom Industries. The guidebook, modeled after the Advisory Committee's workplace diversity best practices book, Workplace Diversity: A Global Necessity (Fatima Fofana, May 2004) would be posted on the Advisory Committee's website and would be widely distributed to media and telecommunications companies' CEOs, diversity officers and contracting officials. The guidebook would focus on activities companies can take to promote diversity in ownership and contracting[.]

II. Two Substantive Initiatives The Commission Could Adopt After Further Study

Proposal #9: Mathematical Touchstones: Tipping Points For The Non-viability Of Independently Owned Radio Stations In A Consolidating Market, And Quantifying Source Diversity[177]

Two formulas suitable for crafting and implementing rules to promote diversity are before the Commission.

MMTC's "Tipping Point Formula" establishes how the Commission could ensure that local radio markets could preserve independent owners. This formula was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a tipping point in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market's cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity.

DCS' "Source Diversity Formula" expresses consumers' utility derived from marginal increases in source diversity. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale. This formula would require field-testing before it could be applied in practice to measure source diversity.

Proposal #14: Market-based, Tradable Diversity Credits As An Alternative To Voice Tests[178]

This proposal, developed by DCS and commended to the Commission in 2004 by the Diversity Committee,[179] contemplates a significant paradigm shift in the way the Commission evaluates and incents diversity. Instead of promoting diversity through command and control regulations and structural ownership limits based on voice tests, the Commission's diversity policy portfolio would evolve to become a system of market-based, tradable Diversity Credits.

A quantity of Diversity Credits would be given to SDBs, commensurate with the extent of their social and economic disadvantages. Diversity Credits would also be given to the seller at the closing of a transaction that would result in greater structural diversity. If a transaction would add to media concentration, the buyer would return a number of Diversity Credits to the Commission when the transaction closes. Finally, companies could buy or sell Diversity Credits to one another, thereby providing a market-based source of access to capital for SDBs.

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[177] Proposal #9 includes two formulas. The "Tipping Point Formula" can be found in the record in the MMTC 2002 Reply Comments, pp. 22-27. The "Source Diversity Formula" can be found in the record in the DCS 2003 Reply Comments, pp. 17-24, and the MMTC April 28, 2003 Letter, pp. 6-7.

[178] Proposal #14 can be found in the record in the DCS 2003 Reply Comments, pp. 34-38 and the MMTC April 28, 2003 Letter, pp. 8-10.

[179] See Advisory Committee on Diversity, Transactional Transparency Recommendations, May 14, 2004, p. 3; White Paper on Diversity Credits, May 22, 2004.

A similar paradigm used by the EPA has replaced much command-and-control environmental regulation.[180]

Diversity Credits would (1) incentivize diversity, (2) disincentivize consolidation, (3) place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects, (4) serve as a mechanism to provide access to capital to SDBs, (5) capture the measure of diversity more precisely than an inherently approximate voice test, and (6) allow for easier administration than a system of voice tests and waivers. The Commission should ask its Chief Economist to examine the viability and desirability of Diversity Credits.

III. Eight Voluntary Initiatives The Industry Could Implement Now

Proposal #15: Equity For Specific And Contemplated Future Acquisitions[181]

Because of the enormous racial wealth gap,[182] friends-and-family equity is extraordinarily difficult for minorities to raise. Equity funds certainly could provide a partial solution (see Proposal #17 infra), but seed money equity must always come first inasmuch as the entrepreneur needs to be able to pay for the due diligence, station valuation, engineering and legal services necessary to evaluate acquisition opportunities.

A desirable model would be the pooling of equity contributions by high net worth individuals, who would pair up with an experienced but cash-poor operator to explore and close

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180 Environmental Protection Agency Cap and Trade Program (http://www.epa.gov/airmarkets/cap-trade/index.html). See also Robert N. Stavins, "Market-Based Environmental Policies", in Public Policies for Environmental Protection (1998); Robert N. Stavins, "What Can We Learn from the Grand Policy Experiment? Lessons from SO2 Allowance Trading," 12 J. of Economic Perspectives 69 (1998); cf. Cass Sunstein, "Television and the Public Interest", 88 Calif. L. Rev. 499 (2000) (exploring how the environmental market-based paradigm could be applied to television programming).

181 Proposal #15 can be found in Twelve Solutions.

182 See, e.g., Griff Witte and Nell Henderson, "Wealth Gap Widens for Blacks, Hispanics," Washington Post, October 18, 2004, p. A11 ("As of 2002, the latest year for which data are available, the median Hispanic household had a net worth of $7,932 and the median black family had $5,998, meaning that half of the households in those groups had less and half had more. The median white family, by contrast, had more than 10 times either amount -- $88,651.")

station acquisitions. Social and professional organizations, as well as churches, should be encouraged to establish friends-and-family equity pools.

Proposal #16: Debt On Favorable Terms – Enhanced Outreach And Access To Debt Financing By Major Financial Institutions[183]

In 1977, Chairman Wiley's Minority Ownership Task Force recommended that broadcast companies solicit commitments from large institutional lenders to work with new entrants in providing debt financing for acquisitions, with or without the participation of the SBA as a guarantor. Although a handful of firms have entered the small deal broadcast debt market in the past five years, the number of firms and the amount of financing available are still quite small. Any significant infusion of small deal debt capital into the broadcast transactional marketplace would need to come from institutional lenders. These lenders should be persuaded to create affiliated entry level funds geared to first-time borrowers who have the potential to graduate into customers of the institutional lenders' traditional large deal funds.

Proposal #17: Investments In Institutions Specializing In Minority And Small Business Financing[184]

In 1977, Chairman Wiley's Minority Ownership Task Force came up with the idea that that broadcast companies consider collaborating with one another and with institutional investors to create new targeted funds specializing in providing equity for broadcast new entrants. An example of such a fund is the Quetzel Fund, created in 1998 by the NAB and fifteen broadcast companies and initially capitalized at $173,000,000. The Quetzal Fund has invested its corpus in eight companies; it is now managing and harvesting these investments and is not making new investments.

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[183] Proposal #16 can be found in Twelve Solutions.

[184] Proposal #17 can be found in Twelve Solutions.

Given the near-absence of small deal equity funding, broadcast companies and private equity firms heavily invested in broadcasting should seriously consider creating new and sizeable equity funds that would support small, entry-level transactions while offering mentoring and training to first-time entrepreneurs.

Proposal #18: Assistance – Cash And In-Kind – To Institutions That Train Future Minority Media Owners[185]

As recommended in 1992 by Chairman Sikes' Minority Ownership Task Force, media institutions should provide assistance to colleges and other programs that provide minorities the skill sets needed to transition from management to ownership. Examples of these institutions are Historically Black Colleges and Universities (HBCUs) and Hispanic Serving Institutions (HSIs) with broadcasting departments, as well the National Association of Broadcasters Education Fund (NABEF)'s Broadcast Leadership Training (BLT) Program.

As of 2006, the U.S. Department of Education recognizes 103 HBCUs and 26 English-language speaking HSIs. Based on an MMTC August 2007 survey of HBCU and HSI websites, 17 HBCUs and one HSI offer courses and/or concentrated programs of study in media management.[186] This is quite a small number of institutions, suggesting that much more needs to be done, with the industry's cooperation and assistance, to build broadcast management programs at HBCUs and HSIs.

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[185] Proposal #18 can be found in Twelve Solutions.

[186] The HBCUs that offer media management courses/programs of study are Bethune-Cookman College, Bowie State University, Coppin State University, Delaware State University, Grambling State University, Hampton University, Howard University, Jackson State University, Knoxville College, Miles College, Morgan State University, North Carolina A&T State University, Prairie View A&M University, Shaw University, West Virginia State University, Winston-Salem State University and Xavier University. The HSI that offers a media management course of study is the University of New Mexico.

Proposal #19: Creation Of Business Planning Centers[187]

In 1992, Chairman Sikes' Minority Ownership Task Force suggested that business planning centers, typically affiliated with universities, could work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing and pursue acquisitions.

Many organizations, including the federal government's Small Business Administration, operate business planning and development centers across the country. These centers provide management assistance and information to current and prospective small business owners on business plans and strategies, how to create a finance portfolio and other business-related topics. While the SBA's business development centers generally do not provide business-specific advice, and an MMTC telephone survey of these business centers identified only three that would provide business development assistance specific to the broadcasting industry.[188] Thus, it would be desirable for the broadcasters to collaborate with the SBA to develop business development centers specifically tailored to the broadcasting industry.

Proposal #20: Executive Loans, And Engineers On Loan To Minority Owned Companies And Applicants[189]

In 1992, Chairman Sikes' Minority Ownership Task Force recommended that the broadcasting industry create an executive loan program, following the examples of similar programs in other industries. In recent years, corporations have implemented executive loan programs (sometimes for up to three years) to philanthropic organizations and minority-owned companies. The goal of these programs is to loan corporate executives to non-profit

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[187] Proposal #19 can be found in Twelve Solutions.

[188] MMTC telephone survey of SBA business development centers, August 6-7, 2007. The only ones that provide broadcast-specific advice are located at the University of Mississippi and at the SCORE (SBA partner) offices in Atlanta and Detroit.

[189] Proposal #20 can be found in Twelve Solutions.

organizations and minority-owned businesses in order to help them develop talent and successful business strategies.[190]

Loaned executives or engineers could work on the staffs of minority broadcasters fulltime for six months to two years, providing mentoring and much-needed expertise in negotiating and closing transactions that add assets to a company's initial portfolio.

Proposal #21: Enhanced Access To Broadcast Transactions[191]

In 2002, MMTC recommended that sellers make it their practice to recruit minorities, especially new entrants, as potential buyers and assist them in navigating the transactional process. Several leading companies have already adopted this practice in various contexts, among them Clear Channel, Citadel, Multicultural Broadcasting, CBS Radio and Fox Television Stations. Chairman Martin has encouraged those pursuing major transactions to adopt this practice.[192]

Proposal #23: In-House Incubation and Mentoring Programs For Future Minority Owners[193]

In 1977, Chairman Wiley's Minority Ownership Task Force recommended that media companies develop their own in-house programs to incubate and mentor future minority owners,

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190 Perhaps the most outstanding example of a successful executive loan program was the (former) Federal Executive Loan Program, under which Lloyd Davis was detailed to the Martin Luther King Jr. Center for Nonviolent Social Change in the late 1970s. Mr. Davis, who passed away September 17, 2007, is credited with helping to start and promote the federal holiday honoring Dr. King. Other examples of executive loan programs can be found in Beyond Philanthropy by Hannah Clark, Forbes.com, May 31, 1996, http://www.forbes.com/home/ceonetwork/2006/05/31/philanthopy-executive-loaner-cx_hc_0531beyondphilanthropy.html, Proctor and Gamble Invests in New Minority Business Enterprise, Proctor and Gamble Press Release, July 6, 2004, http://phx.corporate-ir.net/phoenix.zhtml?c=104574&p=irol-newsArticle_Print&ID=628854&highlight, and Forbes Reports on Executive Loan Programs - "Volunteerism on Steroids", by 2Nonprofits, June 1, 2006,http://2nonprofits.org/node/26/print.

191 Proposal #21 can be found in Twelve Solutions.

192 Letter of Hon. Kevin Martin, Chairman, Federal Communications Commission, to Hon. Henry Rivera, Chair, Advisory Committee on Diversity, September 27, 2007.

193 Proposal #23 can be found in Twelve Solutions.

including their own executives who might wish to transition into ownership. Radio One and LIN Television have assisted executives making this transition.

Typically when a manager wishes to become an owner, she must resign and become self-supporting while exploring ownership opportunities. Instead, more companies ought to nurture their executives' desire to become owners.

The Commission Should Hold Oral Argument On Minority Ownership

The paucity of minority ownership is so deep, and it has gone unaddressed for so many years, that the time has come for the Commission to deliberate publicly on the subject.

At signature moments in the Commission's history, the agency has been well served by full public debate.[194] Oral argument is expressly permitted in rulemaking proceedings,[195] and when the Commission has considered issues having the magnitude of minority ownership, it has benefited from oral argument.[196] Following a remand, any reviewing court is bound to appreciate the fact that an agency has held oral argument.[197]

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[194] See, e.g., American Broadcasting Companies, Inc., 7 FCC2d 245 (1966) (the ABC-ITT merger case).

[195] See 5 U.S.C. §553(c), implemented by 47 C.F.R. §1.423.

[196] See Amendment of Section 3.606 of the Commission's Rules and Regulations, Dockets 8736 et al. (Television Allocations), Sixth Report and Order, 1 RR 91:601, 91:603 ¶9 (1952); Amendment of Section 3.606 of the Commission's Rules and Regulations, Dockets 8736 et al. (Color Television), First Report of Commission, 1 RR 91:265 (Introductory) (1950). Unfortunately, the practice of holding oral argument has fallen out of favor. See, e.g., Cable Television Syndicated Program Exclusivity Rules, 79 FCC2d 652, 660-61 (1980) (denying request by the NAB for oral argument).

[197] See, e.g., Friends of Iwo Jima v. National Capital Planning Commission, 176 F.3d 768, 773 (4th Cir. 1999) (where court cited "vigorous debate" in commission meetings and denied claim that agency failed to consider options). There has been considerable criticism of the Commission's lack of meaningful discussion of issues, particularly during open meetings. See, e.g., Harry M. Shooshan, III, A Modest Proposal for Restructuring the Federal Communications Commission, 50 Fed. Comm. L.J. 637, 648-49 (1998) (discussing the deterioration of the Commission's meeting process from "logical, well-written, scholarly opinion" to "neatly choreographed events"); id. at n. 39 (stating that points of contention are resolved in staff meetings as opposed to being publicly debated resulting in Commission meetings with "virtually no collegial interaction" and "no bearing on the outcome" of the matters on the meeting agenda).

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APPENDIX

THE DIVERSITY AND COMPETITION SUPPORTERS (DCS)

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