

Minority Media & Telecommunications Council

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December 11, 2007

Hon. Kevin Martin
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Robert McDowell
Hon. Deborah Taylor Tate
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Commissioners:

RE: MB Docket No. 06-121 et al. (Media Ownership)

This letter will set out the views of the Diversity and Competition Supporters (“DCS”) on what we hope will be regarded as an historic initiative to promote ownership diversity in our most influential industries.

Unfortunately, it appears that the Commission is far from agreement on the definition of “eligible entities” – the beneficiaries of the majority of DCS’ proposals. If the Commission is unable to arrive at a procedure under which it will develop a definition before the new rules go into effect, it should postpone action on a minority ownership package. It is better to have no package at all until the Commission can agree upon a package that will neither confuse the public nor cause considerable harm to minority entrepreneurs.

Definition of Eligible Entities

Some of the proposals of the Diversity and Competition Supporters have no eligible entity (e.g. Proposal #1 (Transactional Nondiscrimination); Proposal #22 (Advertising Nondiscrimination); Proposal #40 (Conference on Access to Capital). However, most of DCS’ proposals are aimed at specific beneficiaries. While it appears unlikely that a race-conscious SDB definition could be adopted at this time, it is our hope that as the Commission completes the task of developing an SDB definition that can satisfy strict scrutiny, it can craft an interim classification that will include substantial numbers of minorities and women while also being race-neutral both in concept and implementation.

At its meeting yesterday morning, December 10, 2007, the Commission’s Advisory Committee on Diversity in the Digital Age (“Diversity Committee”) decided to explore a race-neutral “full file review” system the Commission could use to identify eligible entities. A full file review paradigm would be based on an applicant’s success in overcoming obstacles and entry barriers,

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the overcoming of which would naturally yield diversity of information and viewpoints and would be predictive of success in a challenging environment. Without prejudging the matter, the Diversity Committee will consider criteria for identifying eligible entities, the sizes and types of transactions for which various eligible entities could qualify, the persons who would evaluate applications, a pre-qualification option to facilitate transactional planning, and the program's adherence to constitutional expectations. To undertake its review, the Diversity Committee will establish a new subcommittee and will bring in subject matter experts.

It would be a serious mistake for the Commission to adopt a "small business" classification, replace it later with a full file review system and, later still, with an SDB classification. The potential use of three classification systems in the course of just a year or two would confuse the public and prevent entrepreneurs from developing business plans that would be premised on their business' eligibility for new diversity programs.

A "small business" classification would be especially onerous. As set out in DCS' November 20, 2007 Supplemental Comments in MB Docket 06-121 ("DCS Supplemental Comments"), the percentage of minority owned stations among all commercial radio stations is 7.78% (Free Press calculation), and the percentage of minority owned commercial radio stations among SBA-defined "small businesses" is 5.88% (MMTC calculation based on Free Press data). Thus, the use of a small business definition would actually be regressive and adverse to minority ownership. To be sure, the inclusion of new entrants in an applicant pool might yield a different level of minority representation. However, the Commission does not know the level of representation of minorities among new entrants and, we suspect, the new entrant pool is even more dilute than incumbent ownership pool.¹ Further, many of DCS' proposals are not designed for new entrants but, rather, are designed to facilitate the growth of medium sized minority station owners (e.g. Proposal #5, which, as revised in the DCS Supplemental Comments, focuses

¹ The NAB Education Foundation's laudable Broadcast Leadership Training (BLT) program is one of a very few broadcast industry initiatives aimed at moving senior managers into ownership. According to the Radio-Television News Directors Association ("RTNDA"), in 2007 only 6.4% of television general managers are minorities and only 15.8% are women; only 5.5% of radio general managers are minorities and only 20.3% are women. %. See Women and Minorities in the Newsroom, RTNDA Communicator, July/August 2007 at 24. Further, RTNDA reports that large market television minority general managers work mostly at Spanish language stations, and in television DMAs 151+ (customarily the training ground for new entrants) the percentage of minority general managers is 0.0% (!) and the percentage of women general managers is 10.5%. Id. In 2004, recognizing the low representation of minorities and women in the ownership pipeline, the Diversity Committee proposed a restructuring of the Commission's EEO outreach rules to focus more on retention and promotion. See FCC News Release, Advisory Committee on Diversity for Communications in the Digital Age Adopts Recommendations, December 13, 2004. The Commission has yet to act on this recommendation.

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on large market radio). Although 5.88% is greater than the zero percentage of minorities who owned stations in the two generations when the FRC and FCC actively prevented minority ownership, the relevant benchmark for policies aimed at promoting minority ownership now is the percentage of minority broadcasters now.

Therefore, if the Commission is otherwise ready to vote now on a package of substantive minority ownership proposals, it should make those proposals' effective date the day the Commission acts on a recommendation from the Diversity Committee for a full file review procedure (or, if the Diversity Committee is unable to develop such a procedure, such other recommendation that the Committee may present). In this way, the Commission would not need to delay its plan to approve a package of minority ownership proposals next week.

Proposals to be Addressed

Several proposals that may not have been included in a draft report and order are especially deserving of being included there or, at least, kept alive by being incorporated into a Third FNPRM. These include the seven proposals listed in the DCS Supplemental Comments as Proposals #41-47, each submitted by parties other than DCS.² These proposals include:

- Proposal #41: Must-Carry For Class A LPTVs (Reply Comments of Community Broadcasters Association, MB Docket No. 06-121, November 1, 2007); see DCS Supplemental Comments at 10-11. Must-carry for Class A LPTVs is preferable to general must-carry for channels produced by undefined designated entities. Class A must-carry would assist owners rather than leaseholders. It would promote diversity in programming inasmuch as the 910 Class A's already have local service requirements. Class A must-carry would also promote ownership diversity, since roughly 15% of Class A stations are minority owned.
- Proposal #42: Replacement Of TV Channels 5 And 6 With FM Service (Mullaney Engineering, Inc. Petition for Reconsideration and/or Comment, MM Docket No. 87-268, October 26, 2007); see DCS Supplemental Comments at 11. Radio Business Report has editorially observed that "it really does seem like a good idea in so many ways, especially if TVs and LPTVs can easily be migrated to new digital territory. If Channel 5 spectrum is roped in for FM as well, it would open up fertile ground for minority-, female- and SDB-ownership in a way no other proposal we've seen can possibly even approach (emphasis supplied).³

² The Commission cannot simply disregard minority ownership proposals. Prometheus Radio Project v. FCC, 373 F.3d 372, 421 n. 59 (3d Cir. 2004), stay modified on rehearing, No. 03-3388 (3d Cir., September 3, 2004), cert. denied, 125 S.Ct. 2902 (2005).

³ Radio Business Report, December 7, 2007.

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- Proposal #43: Repeal Of Radio Subcaps; see DCS Supplemental Comments at 11-12. This is the unusual proposal for structural deregulation that has been offered as a means of advancing minority ownership. Its proponent, Multicultural Radio Broadcasting, Inc. (“Multicultural”) is the nation’s preeminent Asian language broadcaster. Yesterday, Multicultural filed an ex parte letter explaining in detail how its proposal would advance minority ownership and program diversity.⁴
- Proposals #44-47: Enhanced Consideration Of Minority Ownership And Viewpoint Diversity Attendant To Consideration Of Assignment And Transfer Applications; Bright Line Test With No Waivers For Assignment And Transfer Applications Exceeding Ownership Caps; Treatment Of LMAs As Attributable Interests; Allow Minorities To Own Station Combinations Equal To The Largest Combination In A Market; see DCS Supplemental Comments at 12-13. These proposals, advanced by NABOB and the Rainbow/PUSH Coalition and endorsed by DCS, have been pending for nearly five years. By focusing on the Commission’s administration of its structural rules, these proposals could not be more germane to the subject matter of this docket.

In addition, DCS particularly encourages the Commission to vote on the following DCS proposals or incorporate them in a Third FNPRM:

- Proposal #5: Structural Rule Waivers For Creating Incubator Programs; see DCS Comments, MB Docket No. 06-121 (October 1, 2007) (“DCS 2007 Comments”) at 11-14; DCS Supplemental Comments at 4-8. To satisfy concerns of Consumers Union and others, DCS narrowed its proposal considerably and reformulated it as a “Trial Incubation Plan,” narrowly tailored to maximize the likelihood of successful minority inroads into ownership while minimizing the risk of excessive consolidation. The plan would focus only on large radio markets for which the risk of excessive consolidation is relatively slight, the quality of entrepreneurs is high and the entrepreneurs need a large radio market presence to develop syndication potential. Further, the plan would require the incubating party to take steps that would definitely bring into existence an SDB-owned station in the same service (AM or FM) in the same market or a market of approximately the same size. To ensure that the incubation is sufficient in impact, the incubated transaction would close prior to or simultaneously with the incubating party’s transaction. Finally, the plan would have a two-year duration, permitting the Commission to review it and determine whether it should be renewed, expanded or terminated. With these improvements, the Trial Incubator Plan is ripe for adoption now.

⁴ See Letter to Hon. Kevin Martin et al. from Arthur S. Liu, President, Multicultural Radio Broadcasting, Inc., MB Docket Nos. 06-121 et al. (December 10, 2007).

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- Proposal #10: Zero Tolerance For Ownership Rule Abuse; see DCS 2007 Comments at 19-22; DCS Supplemental Comments at 8-9. Because whistleblowers usually lack access to the best evidence of ownership fraud, it is not enough simply to promise to act promptly on complaints. Indeed, the hasty termination of the complaint process could backfire by depriving whistleblowers of an opportunity to develop evidence, and by providing structural wrongdoers with an incentive to stonewall. The key to a meaningful zero tolerance program is regular random audits, such as those used by the IRS in tax enforcement and those used by the Commission in EEO enforcement. If an applicant knows that it stands one chance in ten of having to prove up the genuineness of an application, it is unlikely to file any nongenuine applications.
- Proposal #12: Opening FM Spectrum For New Entrants; see DCS 2007 Comments at 22-24. Among the greatest market entry barriers facing minorities is the Commission's historically narrow interpretation of Section 307(b) that prevents minority broadcasters from moving their disproportionately inferior distant signals closer to the stations' target audiences. At its meeting yesterday, the Diversity Committee adopted a creative new approach. Its "Recommendation on Diversifying Ownership of Terrestrial Radio" encourages the Commission, *inter alia*, to "relax its community of license and transmitter site rules and policies as follows:

where permitted by the contour overlap and community of license coverage rules, and upon a satisfactory showing, the Commission would authorize full power AM or FM radio stations to change their communities of license to any community within the same market (as "radio market" is defined in 47 C.F.R. §73.3555(a)), provided that if the community of license being vacated (the "Original Community") has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime (a "Local Service LPFM"), the licensee vacating the Original Community must underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community."⁵

This approach harmonizes three core Commission objectives: (1) preserving local service wherever possible; (2) promoting minority ownership; and (3) building the LPFM service. The Commission should consider this proposal immediately.

- Proposal #33: Relaxation Of Foreign Ownership Restrictions; see DCS 2007 Comments at 37-39. Under this proposal, offered by the Diversity Committee in 2004, the Commission would consider whether non-controlling foreign investment

⁵ FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendation on Diversifying Ownership of Terrestrial Radio (adopted December 10, 2007).

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(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. 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 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 #35: Relaxation Of The Grandfathered Cluster Transfer Deadline For Cluster Purchasers Who Will Resell Stations To Small Businesses;⁶ see DCS 2007 Comments at 40-41; Reply Comments of 48 Parties, RM 11388 (October 5, 2007). In 2003, the Commission authorized the transfer intact of grandfathered clusters if they are sold to small businesses;⁷ however, that policy has produced only one (non-minority) 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

⁶ On November 19, 2007, MMTC filed an ex parte letter to clarify that it agrees that a cluster spinoff rule should "include meaningful safeguards to prevent misuse of the rule and to provide the Commission with sufficient information to evaluate the entire transaction – including any necessary divestiture trust – at its inception." MMTC Ex Parte Letter, RM-11388 and MB Docket No. 06-121 (November 19, 2007).

⁷ 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, 13810 ¶488 (2003) (subsequent history omitted).

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time and flexibility to collect the capital necessary to make a competitive offer to the seller.

Enforcement

DCS Proposals #1 and #22 contemplate important and much-needed rules against transactional and advertising discrimination respectively. See DCS 2007 Comments at 5-7 (Proposal #1) and at 26-28 (Proposal #22); DCS Supplemental Comments at 9-10 (Proposal #22). If the Commission adopts these rules, it should announce immediately that they will be vigorously enforced. Thereafter enforcement will seldom be necessary because the industry will be on notice that the rules are deserving of respect.

Respectfully submitted,

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