

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

In the Matter of

	)	RM: _____
Review of Technical Policies and Rules	)	MB Docket No. 09-52
Presenting Obstacles to Implementation	)	
of Section 307(b) of the Communications	)	
Act and to the Promotion of Diversity	)	
and Localism	)	

To the Commission

**MMTC RADIO RESCUE PETITION FOR RULEMAKING**

By: David Honig  
Executive Director  
Joycelyn F. James  
John W. Jones Fellow  
Jacqueline Clary  
Counsel  
Minority Media and  
Telecommunications Council  
3636 16<sup>th</sup> Street, NW  
Suite B-366  
Washington, D.C. 20010  
202-332-0500  
[www.mmtconline.org](http://www.mmtconline.org)  
[dhonig@crosslink.net](mailto:dhonig@crosslink.net)

Of Counsel:

Joycelyn Tate, Associate Media Broker, MMTC

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**SUMMARY AND VALUE PROPOSITION FOR THE  
MMTC RADIO RESCUE PETITION FOR RULEMAKING<sup>1</sup>**

The radio industry gravely needs an economic rescue, and the FCC can provide one. By granting this Radio Rescue Petition quickly, the FCC can provide lenders and investors with assurance that the federal government stands behind the survival and sustainability of this industry that is so vital to public service, public safety, minority entrepreneurship and democracy.<sup>2</sup>

The revision and deletion of outdated and ineffective engineering rules is a matter of grave import for the Commission, not only because the broadcasting industry is ready for these rules to be changed, but also because Congress demands it.

Section 257 of the Communications Act of 1934, as amended (“the Act”), directs the Commission to eliminate market entry barriers for small businesses and entrepreneurs for the purpose of promoting “...diversity of media voices, vigorous economic competition,

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<sup>1</sup> This Petition represents the institutional views of the Minority Media and Telecommunications Council (“MMTC”) and is not intended to represent the individual views of MMTC’s officers, directors, advisors or members of its Section 307(b) Task Force. MMTC warmly expresses its appreciation to the members of its Section 307(b) Task Force, each of whom gave generously of their pro bono time to assist in researching and developing some of the issues in this Petition: Parul Desai, Frank Jazzo, Mark Lipp, Frank McCoy, Jack Mullaney, Julian Shepard, Melodie Virtue, Howard Weiss and Scott Woodworth.

<sup>2</sup> On July 13, 2009, MMTC joined with Radio One et al. in Comments in response to the Notice of Proposed Rule Making in MB Docket No. 09-52 (Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (“Rural Radio NPRM”). We contended that many of the proposals advanced in the Rural Radio NPRM would adversely impact minority broadcasters while offering no material benefit to rural radio listeners and thus, unfortunately, would take the Commission in the opposite direction from the thrust of this Petition.

technological advancement, and promotion of the public interest, convenience, and necessity.”<sup>3</sup>

Congress has also explicitly stated its policy favoring deregulation, having directed in the context of structural ownership regulation that “[t]he Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”<sup>4</sup> Indeed, a regulation premised upon circumstances no longer extant cannot be sustained.<sup>5</sup>

The seventeen proposals contained within this petition are offered to promote diversity, localism and competition, to remedy the effects of past discriminatory policies against minorities and women, and to provide an urgently needed stimulus for the broadcasting industry as a whole.<sup>6</sup> The Commission should adopt these proposals because they provide race-neutral methods of promoting the public interest.<sup>7</sup>

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<sup>3</sup> 47 U.S.C. §257(a)-(b).

<sup>4</sup> Cf. 47 U.S.C. §161(b) (applicable to the structural ownership rules).

<sup>5</sup> See City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.... Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”); see also Geller v. Federal Communications Commission, 610 F.2d 973, 980 (D.C. Cir. 1979) (“Even assuming that the rules in question initially were justified... it is plain that that justification has long since evaporated. The Commission’s general rulemaking power is expressly confined to promulgation of regulations that serve the public interest[.]”).

<sup>6</sup> See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, 5924 ¶2 (rel. March 5, 2008) (“Broadcast Diversity Order”) (recognizing the essential nature of a diverse media).

<sup>7</sup> Compare Adarand v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to judicial review under strict scrutiny and must be narrowly tailored to further a compelling government interest).

As detailed throughout this petition, certain archaic broadcast engineering rules operate as market entry barriers, effectively stifling diversity and impeding competition. These rules are at odds with Congressional intent and are ultimately detrimental to minority entrepreneurs as well as the American public, which is currently deprived of the opportunity to benefit from the education and experience of listening to a diverse array of viewpoints and perspectives.<sup>8</sup>

The elimination of these market barriers would improve the general state of broadcasting and ease the path of entry for small businesses and entrepreneurs by allowing stations more flexibility in station location and operations. This flexibility, especially with respect to site location, is instrumental toward allowing small, women- and minority-owned stations to operate in close proximity to diverse, urban areas.

Modernization of the engineering rules would especially assist small, minority, and women broadcasters, which have suffered numerous injustices as a result of misadministration by prior commissions.<sup>9</sup> Today, small, minority, and women owned stations struggle to comply

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<sup>8</sup> See FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978) (“Acute under-representation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved, and the larger, non-minority audience will be deprived of the views of minorities.”)

<sup>9</sup> See Supplemental Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233 (May 18, 2008) at 2-4.

with anachronistic engineering regulations, which are often costly and burdensome, making it even more difficult for small stations to survive.<sup>10</sup>

Minority groups were not allowed into broadcasting until two generations after the industry was born.<sup>11</sup> As a result of this late entry, minorities were often able to acquire only those stations with inferior technical parameters and exurban site locations.<sup>12</sup> Further, minority broadcast ownership does not remotely reflect the representation of minorities in the overall population. Despite the fact that minorities comprise over one-third of the population in the

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<sup>10</sup> See, e.g., Letter from David Honig, Executive Director of MMTC to Hon. Kevin J. Martin, Chairman, FCC (Sept. 8, 2008) at 1-2, available at [www.mmtconline.org](http://www.mmtconline.org) (follow link to “Law & Policy” and follow link to “AM Directional Antenna Verification – September 8, 2008”) (last visited May 19, 2009). “AM stations are currently subject to overly complex, burdensome and unnecessary regulatory requirements relating to maintenance, operation and improvement of AM directional antenna systems. AM stations must routinely take field strength measurements to track changes in signal levels at specified monitor points, which frequently go out of tolerance due to circumstances beyond the AM licensees’ control...an AM station typically must engage the services of an RF consulting engineer to identify the source of the problem, a very costly and time consuming process. Pending the resolution...the AM station is required to operate at a reduced power....”)

<sup>11</sup> See *id.* at 2.

<sup>12</sup> See *id.* at 3-4. See also Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233, p. 3 (April 28, 2008) (“[MMTC Localism Comments](#)”). “The vast majority of the minority-owned stations are on the AM band, and these stations tend to have inferior facilities...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 less desirable high band facilities.” *Id.*, citing to Advisory Committee on Diversity, FM Radio Recommendations, June 11, 2004, pp. 2-4 (citing Kofi Ofori, “Radio Local Market Consolidation & Minority Ownership” (MMTC, March 2002)).

United States, minorities own a mere 7.7 percent of full-power commercial radio stations.<sup>13</sup>

Further, many large markets that are majority-minority are served almost entirely by non-minority owned media.<sup>14</sup>

Finally, we ask the Commission to exercise special care when applying the proposals in this Petition to stations serving Native American reservations and tribal lands. These stations often serve as the only lifeline for emergency services in Native American communities.<sup>15</sup> Native American sovereign entities, which are a political rather than a racial classification,<sup>16</sup> would benefit from many of the proposals in this Petition because rural-to-urban move-ins often

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<sup>13</sup> S. Derek Turner, *Off The Dial, Female and Minority Radio Station Ownership in the United States*, Free Press, at 4, 17 (June 2007) (“Free Press Report”), available at [http://www.stopbigmedia.com/files/off\\_the\\_dial.pdf](http://www.stopbigmedia.com/files/off_the_dial.pdf) (last visited June 22, 2009).

<sup>14</sup> *Id.* at 7 (stating “23 of the 293 U.S. Arbitron radio markets have “majority-minority” populations. But in these markets, too, the percentage of radio stations owned by people of color is far below the percentage of minority populations.”) *See also id.* at 43 (Spanish, then Religion and Urban formats account for “two-thirds of all minority owned stations but only 15 percent of the stations not owned by minorities.”)

<sup>15</sup> See Support for the Center for Native American Public Radio’s Request Urging the Federal Communications Commission to Hold an Official Commission Media Ownership Hearing within Indian Country Focusing on Tribal Broadcast Ownership Issues, National Congress of American Indians, Resolution #SAC-06-093C, p. 2 (Oct. 16, 2006), available at <http://www.ncai.org/ncai/resolutions/doc/SAC-06-093C.pdf> (last visited June 25, 2009) (“Native radio stations are essential institutions in their communities serving as critical means of communication by providing hard news and information about tribal sovereignty, health, public safety, public service announcements and community events and other tribal issues...Native radio supports the efforts of Native Nations to police and secure their often remote homelands as part of homeland security and emergency preparedness by keeping citizens informed of news and information about emergencies and disasters[.]”).

<sup>16</sup> Native American Sovereign governments are distinct from racial classifications because unlike racial classifications which are subject to strict scrutiny, the Constitution expressly grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...” U.S. CONST. art. I, §8.

free up spectrum for new rural stations. However, in the interest of protecting stations already serving these areas, MMTC offers as a blanket exception to this Petition that stations providing local service to Native American reservations and tribal lands should not be permitted to abandon that service.

## **INTRODUCTION**

The Minority Media and Telecommunications Council (“MMTC”) proposes seventeen specific revisions to the Commission’s broadcast technical rules to ensure that there are no unnecessary obstacles that inhibit the ability of broadcasters, particularly small, women, and minority broadcasters, to improve their stations and serve media-poor communities.

America’s radio industry is endangered and it needs to be rescued now.<sup>17</sup> The broadcasting industry as a whole suffers from a debilitating economic paralysis, and most small, women, and minority-owned broadcasters are on life support. As the operator of the nation’s only minority-owned media brokerage, MMTC is keenly aware that the current financial crisis has all but destroyed the broadcasting industry’s equity value. Lenders have tightened access to capital. Local governments continue to restrict the construction of new towers. Competition from new technologies and the Internet challenge broadcasters’ economic stability.

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<sup>17</sup> See President-Elect Barack Obama, Remarks at George Mason University, As Prepared for Delivery, American Recovery and Reinvestment Act (given Jan. 8, 2009) (noting that the U.S. is in the “midst of a crisis unlike any we have seen in our lifetime”).

MMTC anticipates that these proposals will receive broad support by many diverse organizations and companies, as was the case in 1978 when the Commission adopted the Tax Certificate Policy.<sup>18</sup>

MMTC is not asking for a bailout for broadcasters. We are only asking the Commission to consider lifting outdated and unnecessary technical obstacles to competition and diversity. While not intended to be all-encompassing, the proposals in this Radio Rescue Petition are a starting point for a comprehensive evaluation of AM, FM and, in some cases, TV technical rules, as our changing demographics generate new demand for more stations in large cities.

**1. ESTABLISH AN “AM TRANSITION FEDERAL ADVISORY COMMITTEE” TO MAKE RECOMMENDATIONS FOR THE USE OF CHANNELS 5 AND 6 POST DTV TRANSITION**

Now that the DTV transition has taken place, the time has come for the Commission to determine the best use of Channels 5 and 6. This is an especially important proposal due to the breadth of opportunity that is presented by this spectrum for an exodus and – in today’s economic climate – probably saving AM radio while also eliminating a great deal of interference among AM stations that choose to remain in the AM band.

In MB Docket No. 07-294, the Commission solicited comments on a proposal advanced by 29 national organizations -- the Diversity and Competition Supporters (MMTC et al. or DCS)

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<sup>18</sup> See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 982 (1978) (“A similar proposal was advanced by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General Electric Broadcasting Company and the National Black Media Coalition.”)

to reallocate TV Channels 5 and 6 for FM broadcasting.<sup>19</sup> In response, a variety of interested parties submitted proposals to expand various broadcast services. One proposal, submitted by the Broadcast Maximization Committee (“BMC”), is of particular interest to MMTC. BMC suggested that within the spectrum vacated by the analog TV Channel 5 and 6 stations post transition, there would be enough space for a major expansion of the noncommercial educational service (“NCE”), a reallocation of the low power FM service (“LPFM”), and enough space for all interested AM stations to migrate to the Channel 5 and 6 band (between 76 to 88 MHz).

Because of the potential to completely transform AM radio, it should be handled by creating a high profile advisory committee – the “Advisory Committee on the AM Transition” - to work through the technical details and arrive at a plan agreeable to all stakeholders. The model is the Advisory Committee on Advanced Television Services in the DTV transition, created at a time when the Commission recognized DTV’s potential to transform television.<sup>20</sup>

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<sup>19</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5956 ¶100 (stating “We agree with DCS that this proposal could yield tremendous opportunities for new entrants, and we seek comment on it.”)

<sup>20</sup> See Bernard J. Lechner, High-Definition-Television (HDTV) Technology, Information Display Magazine, Nov. 2007 Vol. 23, No. 11, available at <http://www.informationdisplay.org/article.cfm?year=2007&issue=11&file=art3> (last visited June 23, 2009) (“...the FCC created an Advisory Committee on Advanced Television Services (ACATS to gather information on possible systems and to recommend a standard to the FCC...ACATS voted on November 28, 1995 to recommend that the FCC adopt the Advanced Television Systems Committee (ATSC) standard.”) See also Fritz J. Messere, Advanced Television Systems Committee, The Museum of Broadcast Communications, available at <http://www.museum.tv/eotvsection.php?entrycode=advancedtele> (last visited June 23, 2009) (“Advanced Television Systems Committee membership consists of 53 organizations including representatives from the National Association of Broadcasters, the National Cable Television Association, the Institute of Electrical and Electronics Engineers, the Electronic Industries Association and the Society of Motion Picture and Television Engineers.”)

The Advisory Committee on the AM Transition would bring together representatives of noncommercial and commercial interests, full and low power interests, AM/FM and TV broadcasters, translator supporters and HD radio advocates to make suggestions on how to best achieve the exodus of AM radio to the 5/6 band.

If the use of these channels is developed properly, the benefits will be in accord with the Congressional mandate of promoting diversity.<sup>21</sup> This is an especially important opportunity for minority-owned stations, which are predominately AM stations, to serve the same large audiences as majority-owned FM stations.<sup>22</sup>

Adopting this proposal would foster diversity as well as conserve judicial, legislative and Commission resources. While the goals of promoting diversity and localism were reaffirmed by recently introduced legislation that proposes to eliminate the third adjacent channel spacing protection to full service stations,<sup>23</sup> questions remain as to the Commission's scope of authority to eliminate second-adjacent interference protections.<sup>24</sup> However, the issues

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<sup>21</sup> See 47 U.S.C. §257 (1996).

<sup>22</sup> See MMTC Localism Comments at 3.

<sup>23</sup> See Local Community Radio Act of 2009, H.R. 1147, 111th Cong. §2 (2009); Local Community Radio Act of 2009, S. 592, 111th Cong. §2 (2009).

<sup>24</sup> See National Association of Broadcasters v. FCC, D.C. Cir., Case No. 08-117, Slip Op. at 15 (June 5, 2009) (“NAB v. FCC”) (“Congress spoke directly to third-adjacent channel minimum protections but was silent regarding the Commission’s authority to reduce or eliminate protections for other channels.”) The Court also found that NAB’s challenge to the Commission’s procedures allowing an LPFM to obtain a waiver of minimum distance requirements was not ripe for review. Id. at 22. Since MMTC lacks empirical data showing the impact and identifying any unintended consequences of a relaxation of second adjacent channel protection, MMTC has taken no position on that subject at this time.

surrounding second-adjacent and third-adjacent channels could be entirely eliminated with the migration of the LPFM service to the Channel 5/6 spectrum.

## **2. REQUEST THE REMOVAL OF AM NIGHTTIME COVERAGE FROM SECTION 73.24(i) OF THE COMMISSION'S RULES**

The elimination of the AM nighttime coverage rule would allow AM radio stations to improve daytime broadcasts to consumers, reduce burdensome operating costs, and conserve the Commission's scarce resources.

The nighttime coverage rule for AM stations requires, *inter alia*, that “for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. Thus, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher”<sup>25</sup> (the “nighttime coverage” rule). The Commission allowed for some flexibility when it clarified how to attain substantial compliance with the nighttime coverage rule. Substantial compliance is achieved by showing either 80% coverage of the “area” or 80% of the “population” within the political boundaries of the community of license.<sup>26</sup> In addition, the FCC will waive these requirements such that a new site may comply with pre-annexation boundaries

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<sup>25</sup> 47 C.F.R. §73.24(i). “That for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. That, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That for stations in the 1605-1705 kHz band, 50% of the principal community is encompassed by the 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That, Class D stations with nighttime authorizations need not demonstrate such coverage during nighttime operation.” *Id.*

<sup>26</sup> Pamplin Broadcasting, Inc., 23 FCC Rcd 649, 652 (2008).

as opposed to requiring coverage of the entire community including its newly annexed areas.<sup>27</sup> Nevertheless, it is still possible that the Commission may find that the annexed areas must be served upon finding that significant future development is likely.<sup>28</sup> The effect of the nighttime coverage rule is to unduly burden AM stations, thereby hampering their ability to improve daytime coverage. Even in cases where the applicant wishes to use only one site, the site must comply with both the daytime and nighttime coverage requirements. The ability to increase daytime coverage while using the same site is limited by the physics of nighttime propagation and protection requirements. The hardships imposed on AM stations as a result of the nighttime coverage rule can be exacerbated by a station's loss of its AM antenna site, change in community boundaries, and/or situations in which a station cannot initially demonstrate substantial compliance at the application stage.

When an existing AM station loses its antenna site, it may become increasingly difficult or impossible for that station to comply with the nighttime coverage rule. For example, if an old site originally located within a particular community becomes overrun by development with higher land valuations, this development and the rising associated land costs would make site relocation to an outer, less-developed area imperative because AM station ground systems require large parcels of land. However, moving to less developed areas may mean that 80%

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<sup>27</sup> Bay City Communications Corp., 83 FCC2d 210, 212 (1980).

<sup>28</sup> See Broadcasting, Inc., 20 FCC2d 713, 718 (Rev. Bd. 1969) (where the percentages of population deviation were minimal "absent a finding of significant future growth"). The Commission also reviews whether the areas excluded from coverage do not contain urbanized residential areas, such as in New England towns, where township boundaries bear little resemblance to urbanized areas. See Andy Valley Broadcasting System, Inc., 12 FCC2d 3, 4 (1968).

coverage of the community of license at night is not possible, even though the daytime 5 mV/m contour would encompass the entire community of license from the same location.

Changes in community boundaries also pose problems for compliance with the nighttime coverage rule. These changes occur as a result of the passage of time and growth in the community. Initial sites that were able to comply with the nighttime coverage rule may no longer be in compliance as communities annex adjacent areas and change their boundaries. The resulting political boundaries can have unusual shapes that are impossible to fit within the required 80% nighttime coverage contour.

The nighttime coverage rule also serves as an entry barrier by requiring substantial compliance to be demonstrated in the application for a new site. Failure to demonstrate substantial compliance at the application stage results in waiver requests, which require expensive reports that either analyze each pocket of land to justify why it is not necessary to provide the requisite signal strength, or demonstrate that no other site can possibly be used that would comply with the rule. The applicant must endure uncertainty and delay, as it is not known whether the FCC will grant the waiver.<sup>29</sup>

To do away with these negative effects, the Commission should eliminate (or, at the very least, relax) the nighttime coverage rule. Elimination of the rule would allow AM stations to have much greater flexibility in site selection and the ability to move farther away from

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<sup>29</sup> For instance, in Pamplin, 23 FCC Rcd at 650, n.2, the Commission decision was made in January 2008, but the application was filed in January 2000. In situations where site loss is imminent, a station's survival could be doomed by waiting eight years to find out if its waiver request will be granted.

developed and costly downtown areas, owing to larger daytime city grade contours. Without this rule change, in order to maximize its daytime coverage and provide the requisite nighttime community coverage, the AM licensee is faced with the additional and extraordinary cost of maintaining two AM transmission sites. Elimination of the nighttime community coverage requirement would remove this enormous burden.

Further, the elimination or relaxation of the nighttime coverage rule is consistent with the Commission's treatment of other AM policies. For example, Class D stations (former daytime stations) that have some nighttime service are not required to meet nighttime community coverage requirements. When the FCC adopted rules for the AM Expanded Band, it relaxed the nighttime coverage requirement from 80% to 50% because "close-in sites suitable for AM antennas are increasingly difficult (and expensive) to find."<sup>30</sup> The Commission recognized that "the 50% requirement nonetheless insures a signal of significant quality to the community of license and the added flexibility...to locate...facilities at cost effective locations."<sup>31</sup>

The Bureau previously granted waivers of the community coverage requirement for the purpose of enabling a minority-owned station to target coverage to minority populations within the community of license.<sup>32</sup> However, the proposal we advance today is race and gender neutral, such that the elimination or revision of the nighttime coverage rule would help all owners of AM

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<sup>30</sup> See Review of the Technical Assignment Criteria for the AM Broadcast Service, 6 FCC Rcd 6273, 6322 ¶153 (1991).

<sup>31</sup> Id. at 6323 ¶158.

<sup>32</sup> See e.g., Brunson Broadcasting Co. of Maryland, Inc., 50 RR2d 941, 942 (Broadcast Bur. 1981).

stations substantially improve their daytime coverage. This flexibility would enable licensees to find new sites when their old sites are no longer available to them, thus providing an opportunity for struggling stations to find more cost efficient sites from which to operate, improve daytime service to the public, and conserve Commission resources by eliminating the need to review waiver requests on a case-by-case basis.

### **3. MODIFY PRINCIPAL COMMUNITY COVERAGE RULES FOR COMMERCIAL STATIONS**

This proposal would allow commercial stations to have increased flexibility in site location and opportunities to improve the quality of broadcast for their target audience. The rule currently provides that commercial stations must provide coverage to 80 percent of their community of license.<sup>33</sup> The purpose of the community coverage rule is to provide sufficient signal coverage to the community of license.<sup>34</sup>

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<sup>33</sup> The commercial FM rule states that a station must cover 100 percent of the community of license from its transmitter site. The Commission, however, has a “longstanding policy” to waive the rule to the 80% level. CMP Houston-KC, LLC, 23 FCC Rcd 10656, 10657 n. 8 (2008). “The Commission traditionally accepts proposals that would cover at least 80 percent of the community of license as constituting substantial compliance” with the rule. See Barry Skidelsky, 7 FCC Rcd 5577, 5577 ¶3 (1992) (citing John R. Hughes, 50 Fed. Reg. 5679 (1985)).

<sup>34</sup> See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making, 20 FCC Rcd. 11169, 11184 ¶¶41-44 (2005) (discussing a proposal to change the standards for relocating a station where the station is the community’s only local service, “Because a station has a particular obligation to serve its community of license, a proposal claiming to provide first local transmission service is properly evaluated based on the community itself, rather than the community plus any outlying areas that might also receive aural service from the proposed facility.”) See also Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, Report and Order, 94 FCC2d 152, 153 ¶3 (1980) (“When a new station is desired...[t]he proposed station must be located at a sufficient distance from pertinent co-channel and adjacent channel stations and still be capable of providing a strong signal over the desired community.”)

Many commercial stations, including most minority-owned stations, have difficulty covering their target audiences due, in part, to restrictions currently imposed by the Commission's community coverage rules.<sup>35</sup> Further, the rule limits the ability of commercial stations to move or make improvements because, if one of these stations wants to change its site, it must demonstrate that the station would cover at least 80 percent of the community from the new site. Often this proves to be impossible and it usually leads to a protracted waiver proceeding at a high cost in Commission resources.<sup>36</sup> Relaxing the rule would eliminate the need for waivers and permit Commission resources to be better used elsewhere.

It is also extremely difficult in and around large urban areas to find new tower sites. This difficulty, combined with the current commercial coverage requirements, limits commercial stations from changing sites and making other improvements that benefit the public interest.

To alleviate the hardships posed by the commercial coverage rule, the Commission should amend Sections 73.24(i) and 73.315(a) of the Commission's Rules, which govern the community of license coverage requirements for commercial stations,<sup>37</sup> to conform to the coverage requirements for non-commercial educational (NCE) stations.<sup>38</sup>

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<sup>35</sup> In some cases, communities have expanded and boundaries have changed since stations were originally licensed and these stations do not currently provide a 70 dBu signal to the community of license.

<sup>36</sup> See, e.g., Community Communications Corp., 5 FCC Rcd 3413 (1990); Northland Broadcasters, 4 FCC Rcd 6508 (1989); George S. Flinn, Jr., 5 FCC Rcd (1990); Lester H. Allen, 15 FCC2d 767 (1968); Mid-Ohio/Capital Communications Limited Partnership, 5 FCC Rcd 424 (1990); Quality Broadcasting Corp., 62 FCC2d 586 (1977).

<sup>37</sup> 47 C.F.R. §§73.24(i) and 73.315(a).

<sup>38</sup> See 47 C.F.R. §73.515.

Section 73.515 of the Commission's Rules requires NCE stations to provide coverage to at least 50 percent of the community of license with a 60 dBu signal.<sup>39</sup> If a commercial station were permitted to cover only 50 percent of its community of license, then the remaining 50 percent of the community, in nearly all cases, would still receive a very listenable signal. Thus, modification of this rule would provide commercial licensees additional flexibility without materially frustrating the purpose of the rule.<sup>40</sup>

MMTC believes that modification of these rules will directly benefit small, women, minority, and all other broadcast licensees by providing them with additional flexibility for site location. As the Commission recognized when it modified the NCE community coverage rule, permitting NCE stations to cover 50 percent of the community of license "should ensure

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<sup>39</sup> See 47 C.F.R. §§73.515 and 73.24. The commercial FM rule, 47 C.F.R. §73.315, bases coverage on a station's 70 dBu contour, and the commercial AM rule, 47 C.F.R. §73.24, bases coverage on a station's 5 mV/m contour. The NCE rule, Section 73.515, bases coverage on a station's 60 dBu contour.

<sup>40</sup> In a related vein, there is currently a distinction between the coverage required at the allotment stage and that required at the application stage for commercial FM stations desiring to change community of license, channel, or class of channel. Specifically, applicants at the allotment stage must demonstrate coverage to 100 percent of the community of license. In 2006, the Commission eliminated the rulemaking stage of community of license change proposals. See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Report and Order, 21 FCC Rcd 14212, 14213 ¶¶4-9 (2006) ("FM Amendments Report and Order"). This followed the previously eliminated rulemaking stage for channel and class of channel changes. See Amendment of the Commission's Rules To Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4736 ¶10 (1993). These changes are now accomplished by one-step applications. Thus, the distinction between the community coverage requirements should be eliminated and the 50 percent threshold should be adopted at both the allotment and application stages.

sufficient flexibility in siting facilities and reaching target audiences.”<sup>41</sup> At the same time, the Commission stated, “this modification balances the Commission’s mandate under Section 307(b) of the Act with the service, technical, and financial realities of operation NCE FM stations.”<sup>42</sup> This same flexibility should be afforded to commercial stations.

#### **4. REPLACE MINIMUM EFFICIENCY STANDARD FOR AM STATIONS WITH A “MINIMUM RADIATION” STANDARD**

This proposal would reduce the regulatory burden on AM stations, particularly lower frequency AM stations, by increasing the flexibility in antenna choice and site selection and allowing stations to increase power and use less land. The Commission’s minimum efficiency rules are found in Sections 73.45, 73.186 and 73.189 of the Rules.<sup>43</sup>

The minimum efficiency standard dates back to the dawn of the Federal Radio Commission. In a 1927 letter to Dr. Ralph Bown, President of the Institute of Radio Engineers, the Committee on Standardization of the Institute of Radio Engineers shed light on the origins of

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<sup>41</sup> Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules 15 FCC Rcd 21649, 21670 ¶42 (2000).

<sup>42</sup> Id.

<sup>43</sup> See 47 C.F.R. §§73.45, 73.186 and 73.189. “All applicants for new, additional, or different AM station facilities and all licensees requesting authority to change the transmitting system site of an existing station must specify an antenna system, the efficiency of which complies with the requirements for the class and power of station. (See §§73.186 and 73.189.)” 47 C.F.R. §73.45(a).

the minimum efficiency standard.<sup>44</sup> The letter makes several recommendations on best practices in power measurement<sup>45</sup> and discusses the rationale behind requiring antenna efficiency:

“...it is known that the efficiencies of antennas and the absorbing tendencies of various territories may vary widely from one station to another. Considering first the antenna efficiencies, it is evident that due to this factor two stations having identical transmitting sets of equal power rating may nevertheless deliver into space quite different amounts of power. This obviously puts a premium on good antenna efficiency, since the station with the better antenna, other things being equal, will give stronger signals to its listeners. Good antenna efficiency is certainly desirable, but it is a fair question as to whether this way of favoring it is just in all cases. For instance, to render a given service a station may find it cheaper to use a high-power set and an inefficient antenna than to use a lower-power set and a better antenna, since conditions local to the station may make an efficient antenna very expensive to construct. Yet either alternative might give identical service to the public.”<sup>46</sup>

As shown by this letter, in 1927 electric power was in short supply while land was widely available. Given the relative availability of land and electric power resources at that time it was appropriate to choose to use more land to conserve power. However, today, the relative availability of land and electric power are exactly reversed.<sup>47</sup> In circumstances, such as here,

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<sup>44</sup> See Letter to Dr. Ralph Bown, President, Institute of Radio Engineers (August 20, 1927) (on file with the National Archives and MMTTC).

<sup>45</sup> Id. at 4 (“Your committee...recommends that broadcasting stations be rated in power in terms of antenna input computed by multiplying the plate-circuit input of the power vacuum tube or tubes by an assumed vacuum-tube efficiency[.]”)

<sup>46</sup> Id. at 5.

<sup>47</sup> See e.g., Ruben N. Lubowski et al., Major Uses of Land in the United States, 2002, Economic Information Bulletin Number 14, United States Department of Agriculture (May 2006), available at <http://www.ers.usda.gov/publications/EIB14/eib14.pdf> (last visited June 24, 2009) (demonstrating how land use has changed over the years). “Urban land area quadrupled from 1945 to 2002, increasing at about twice the rate of population growth over this period...[in terms of land ownership]. Over 60 percent (1,378 million acres) of U.S. land is privately owned. The Federal Government owns nearly 28 percent...State and local governments own about 9

where the factual premise linking the regulation to the public interest has disappeared and no other fact, by itself, will support the regulation, the Commission must reevaluate the regulation to conform to its public interest obligation.<sup>48</sup>

The Commission expects its technical standards to be “based on the best engineering data available.”<sup>49</sup> However, a generation ago, the Commission acknowledged that these rules were outdated.<sup>50</sup>

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percent...Over 2 percent...is in trust by the Bureau of Indian Affairs.” *Id.* at v. “The most consistent trends in major uses of land (1945-2002) have been an upward trend in special-use and urban areas...” *Id.* at 5. See also *Electric Power Annual 2007: A Summary*, Energy Information Administration Brochures (rel. April 2009), available at <http://www.eia.doe.gov/bookshelf/brochures/epa/epa.html> (last visited June 24, 2009) (demonstrating the recent strides made in increasing the generation of electric power, “In 2007, net generation of electric power increased 2.3 percent to 4,157 billion kilowatt hours (kWh) from 4,065 billion kWh in 2006.”) See also *Estimated Primary Energy Consumption in the United States, Selected Years, 1635-1945*, available at [http://www.eia.doe.gov/aer/pdf/pages/sec13\\_e\\_1.pdf](http://www.eia.doe.gov/aer/pdf/pages/sec13_e_1.pdf) (last visited June 24, 2009) (total estimated consumption of fossil fuels in 1930 was 21.468 Quadrillion Btu and total estimated consumption of renewable energy in 1930 was 23.680 Quadrillion Btu). *Compare U.S. Energy Consumption by Energy Source, 2003-2007* (rel. April 2009), available at [http://www.eia.doe.gov/cneaf/solar\\_renewables/page/trends/table1\\_1.pdf](http://www.eia.doe.gov/cneaf/solar_renewables/page/trends/table1_1.pdf) (last visited June 24, 2009) (total energy consumption of all energy sources, including fossil fuels, electricity net imports, nuclear electric power and renewable energy was 101.545 Quadrillion Btu).

<sup>48</sup> See *Geller v. FCC*, 610 F.2d at 980.

<sup>49</sup> 28 Fed. Reg. 13596 (1963) (Section 73.181(b) describes the standards for collecting data) (on file with MMTC).

<sup>50</sup> See *Re-Examination of Technical Regulations, Notice of Inquiry and Proposed Rule Making*, FCC 83-67, 48 Fed. Reg. 14399 ¶11 (1983); *Report and Order*, 99 FCC2d 903 (1984). “Much of the rationale behind these [minimum performance standards] is no doubt seated in the traditional regulatory concepts applied to the broadcast services and the high degree of standardization and uniformity of technical quality which is a part of that traditional view of the service. The broadcast service of today, however, is quite different from that of many years ago. There appear to be stronger market incentives today to control performance and thus reduce the

A rule that requires minimum efficiency imposes substantial hardship on lower frequency stations because, provided that the minimum radiation is achieved, efficiency levels are immaterial. Currently, lower frequencies are having trouble meeting the minimum efficiency standard due to the large size of the antenna required to meet the standard. Although frequencies are inversely related to antenna size—the lower the frequency, the larger the antenna must be—lower frequencies provide better coverage. Thus, using minimum radiation rather than minimum efficiency allows the lower frequencies more flexibility in powering the station.

MMTC proposes that the Commission replace “minimum efficiency” for AM antennas with “minimum radiation” in mV/m, thereby allowing AM stations to use very short antennas and enjoy more flexibility in site selection including rooftop installations.

By replacing “minimum efficiency” with “minimum radiation,” the Commission would allow increased flexibility in antenna choice and site selection. This flexibility will enable small businesses and entrepreneurs, operating in the lower frequency band, many of whom are having trouble meeting the efficiency levels, to continue their operations by increasing power and using less land, thus providing the opportunity to move closer to larger, more viable areas.

**5. ALLOW FM APPLICANTS TO SPECIFY CLASS C, C0, C1, C2 AND C3 FACILITIES IN ZONE I AND IA**

Allowing FM stations to specify Class C, CO, C1, C2 and C3 facilities in Zones I and IA would reduce spectrum warehousing in Class B areas and allow lower class stations to upgrade.

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need for detailed regulations.” Re-Examination of Technical Regulations, Notice of Inquiry and Proposed Rule Making, 48 Fed. Reg. 14399 ¶11.

This proposal would also increase spectrum efficiency by extending the application of proven Zone II protections.

The current rules governing FM authorized power are cumbersome and difficult to navigate for stations seeking to improve their services. FM stations have limited ability to specify desired classes. Only “Class A, B1 and B stations may be authorized in Zones I and I-A. Class A, C3, C2, C1, C0 and C stations may [only] be authorized in Zone II.”<sup>51</sup>

To promote efficiency and improvement of service, the Commission should allow applicants for existing FM stations and new allotments to specify Class C, C0, C1, C2 and C3 facilities in Zones I and IA (i.e., anywhere in the U.S.) rather than in Zone II exclusively. Such Class C stations would receive protection to their ‘C’ protected contours (60 dBu) rather than the 54 dBu (Class B) and 57 dBu (Class B1) contours that would otherwise apply in those zones. Stations’ “interfering contours” would likewise be based on Class C standards. Such proposals must work within the existing spacing rules as provided in Sections 73.207, 73.215 or 73.213.<sup>52</sup> Stations opting to retain Class B status would continue to be protected with respect to their existing contour protections unless they change their class, including a change to a Class C station.

This proposal would promote diversity by reducing spectrum warehousing and increasing spectrum efficiency. Allowing stations to specify class C, C0, C1, C2 and C3 facilities in Zones I and IA would reduce “spectrum warehousing” in the crowded northeast and other class B areas,

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<sup>51</sup> 47 C.F.R. §73.210.

<sup>52</sup> 47 C.F.R. §§73.207, 73.215 and 73.213.

enabling class C stations, which could fit in full compliance with current interference and spacing rules, to upgrade, move closer to areas needing service, and in some cases even make room for new full power aural services. This change would increase spectrum efficiency because the lesser protection distances and ratios proven to work in Zone II could then apply in other zones.

## **6. REMOVE NON-VIABLE FM ALLOTMENTS**

Removing non-viable FM allotments would increase spectrum efficiency by allowing others to expand into these areas.

Numerous vacant allotments waste space on the spectrum because of an uncertain and complicated rulemaking procedure, favoring maintenance of the vacant allotment, is required before the Commission will delete it.<sup>53</sup> Almost four years have elapsed since the Commission postponed removing “non-viable” FM allotments.<sup>54</sup> With the electronic database now showing over 700 vacant allotments, the time is ripe for the Commission to revisit this proposal.<sup>55</sup>

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<sup>53</sup> First Broadcasting Investment Partners, LLC, Amendment of the Commission’s Rules Governing Modification of FM and AM Authorizations, Petition for Rulemaking, at 19 (filed on March 5, 2004) (“First Broadcasting Petition for Rulemaking”).

<sup>54</sup> Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making, 20 FCC Rcd 11169, 11172 ¶11 (2005).

<sup>55</sup> See 47 C.F.R. §73.202.

These burdensome regulations result in inefficient use of spectrum space, which literally bar participation from new entrants and make it difficult for existing stations to improve or expand their service.<sup>56</sup>

The Commission should remove non-viable FM allotments. As the Commission auctions vacant allotments, the allotment for any channel placed for auction that does not produce a successful bidder should be deleted. Allotments should be deleted where any winning bidder fails to construct and license the facility, unless the permit is sold to a qualified eligible entity in accordance with the Broadcast Diversity Order.<sup>57</sup>

Deleting non-viable FM allotments would foster diversity by allowing stations to upgrade and expand thus enabling increased minority and new entrant participation and higher quality broadcasting. Deleting vacant allotments would also promote diversity by allowing space for other stations to expand. The deletion of these allotments would benefit the communities where vacant allotments are situated by allowing other stations to take their places and provide new service.<sup>58</sup>

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<sup>56</sup> See, e.g., First Broadcasting Petition for Rulemaking at 19-20 (stating “these [vacant] allotments—which provide no current benefits to the public whatsoever—prevent other licensees from expanding their signal coverage. In addition, the presence of these long-vacant allotments thwarts the addition of new allocations in nearby more populated areas which could obtain an allotment and support a station if the vacant allotment was not present.”)

<sup>57</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5927 ¶¶6 -9 (defining the term “eligible entity”). The FCC’s Advisory Committee on Diversity for Communications in the Digital Age has under consideration a new, race-neutral eligible entity definition based on Full File Review (“FFR”) that would be considerably less dilute in impact than the “small business” standard now in effect. References to “eligible entity” herein should not be read as an implicit endorsement of the “small business” standard.

<sup>58</sup> See First Broadcasting Petition for Rulemaking at 22.

## 7. REAFFIRM TO CONGRESS THE COMMISSION'S SUPPORT FOR THE REPEAL OF THIRD ADJACENT SPACING RULES

This proposal would preserve Low Power FM (“LPFM”) service for the purpose of providing increased ownership opportunities for minorities, women and independently-owned broadcasting outlets, as well as strengthen communities at the neighborhood level by providing a much-needed diverse array of media voices and opportunities for local expression.<sup>59</sup>

In 2000, the Commission decided to provide new entrants access to the FM spectrum by creating the LPFM service.<sup>60</sup> The Commission initially authorized LPFM stations to operate on third adjacent channels.<sup>61</sup> However, Congress suspended the Commission’s authority to allocate LPFM stations on third adjacent channels until further studies were conducted to determine whether claims of interference to full-power broadcasters were valid.<sup>62</sup> Although the studies have been conducted, Congress has not yet lifted the third adjacent restriction.<sup>63</sup> However, a

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<sup>59</sup> See Comments of the Civil Rights Organizations, Creation of a Low Power Radio Service, MM Docket No. 99-25, p. 7-14 (filed Aug. 3, 1999).

<sup>60</sup> See Creation of Low Power Radio Service, First Report and Order, 15 FCC Rcd 2205, 2208 ¶4 (2000) (“Low Power Radio Service First Report and Order”).

<sup>61</sup> Creation of Low Power Radio Service, Second Report and Order, 16 FCC Rcd 8026, 8027 ¶3 (2001) (“Low Power Radio Service Second Report and Order”).

<sup>62</sup> See The Making Appropriations for the Government of The District of Columbia for FY 2001 Act, Pub L. No. 106-552, §632, 114 Stat. 2762, 27620A-111 (2000) (“2001 DC Appropriations Act”).

<sup>63</sup> See NAB v. FCC, *supra* n. 24 at 5-6 (citing in part to Federal Communications Commission, Report to the Congress on the Low Power Interference Testing Program, Pub.L. No. 106-553 (2004)) (“The Commission...forwarded the independent study to Congress in 2004 with the recommendation that Congress “modify the statute to eliminate the third-adjacent channel distance separation requirements for LPFM stations”...To date, Congress has not acted on that recommendation.”)

recent court case affirmed that the Commission has the authority to modify distance protections for second-adjacent channels.<sup>64</sup> Due to this Congressional restriction, the Commission has not yet opened any new filing windows for LPFM applicants.

The Commission should reaffirm to Congress the Commission's support for repeal of the third adjacent spacing rules and quickly implement the legislation once passed. Congress has had over four years to act on the Commission's finding, pursuant to a Congressionally required study, that the third-adjacent spacing rules should be eliminated.<sup>65</sup>

The Commission should further reiterate to Congress how the importance and necessity of eliminating third-adjacent spacing rules meets the Congressional mandate of increasing diversity and advancing localism. The LPFM service allows new entrants and minorities to own and operate non-commercial educational stations in local communities. The Commission recognizes the importance of allowing new entrants access to the airwaves as a way to increase its goals of localism and diversity.<sup>66</sup> The Supreme Court also notes that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."<sup>67</sup>

The promotion and growth of LPFM stations would expand ownership opportunities for minorities and result in more independently owned broadcasting outlets. Independent outlets

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<sup>64</sup> See id. at 16.

<sup>65</sup> See NAB v. FCC, supra n. 24 at 5-6.

<sup>66</sup> See Low Power Radio Service First Report and Order, 15 FCC Rcd at 2208 ¶4.

<sup>67</sup> FCC v. NCCB, 436 U.S. 775, 780 (1978).

advance localism by making their own programming decisions and focusing on a community's needs and issues.

## **8. MAINTAIN A RULE OF 10 TRANSLATOR APPLICATIONS PER APPLICANT**

Maintaining the rule of 10 translator applications per applicant promotes diversity by allowing room for LPFM growth.

The Commission has not opened any new LPFM filing windows since the Congress restricted allocating LPFM stations on third-adjacent channels. However, in March 2003, the Commission did afford translator applicants an opportunity to apply for new translators, which are licensed under a different standard than LPFMs. The translator filing window attracted more than 13,000 applications<sup>68</sup> and allowed translator applicants, in some cases, to eliminate these channels for LPFM use.<sup>69</sup>

As desirable as translators might be, the Commission's unbalanced tilt in favor of translators creates entry barriers for LPFMs seeking to enter local markets. While the Commission recognizes the role translators play in extending the signals of broadcasters to unserved and underserved communities, the Commission has expressed concern that the processing of translator applications might have the unintended effect of precluding opportunities for local communities from receiving LPFM stations.<sup>70</sup>

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<sup>68</sup> Creation of a Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rule Making, 22 FCC Rcd 21912, 21927 ¶43 (2007).

<sup>69</sup> See id. at 21931 ¶46 (“REC also submits both national and market-specific analyses and identifies several communities in which 2003 window filings have allegedly precluded or diminished LPFM station licensing opportunities.”)

<sup>70</sup> Id. at 21929 ¶43.

Furthermore, the Commission noted that due to the different licensing standards, translators could preclude LPFMs from licensing opportunities. “Thus the next LPFM window may provide the last meaningful opportunity to expand the LPFM service in spectrum-congested areas. In contrast, [the Commission] expect[s] significant filing activity in many future translator windows.”<sup>71</sup> Thus, in view of the large number of applications, in 2007 the Commission limited the number of translator applications an entity could apply for to ten. In determining this limit, the Commission balanced the interests of the public, translator applicants and the LPFM service concluding that the unprecedented number of translator applications “would frustrate the development of the LPFM service and [the Commission’s] efforts to promote localism.”<sup>72</sup>

The Commission should maintain a rule of 10 translator applications per entity. Due to the important goals that LPFMs address, such as to promoting diversity of media voices and serving community needs at a neighborhood level, a balance needs to be struck to encourage the LPFM’s growth. This balance can be achieved by limiting the number of translator applications and eliminating third-adjacent restrictions. Limiting translator applications serves the Congressional mandate to promote diversity by preserving opportunities to expand LPFM growth thus ensuring a greater level of diversity and localism.

## **9. CREATE A NEW LOCAL “L” CLASS OF LPFM STATIONS**

The Commission should create a new local “L” Class of LPFMs that would be entitled to primary service status upon having operated for two years as a significantly local service. This

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<sup>71</sup> Id. at 21934 ¶53.

<sup>72</sup> Id. at 21933 ¶53.

proposal would promote diversity by enabling an array of media voices and, due to their limited service range, LPFMs present a unique opportunity to serve the needs of individual communities thereby enhancing localism.<sup>73</sup>

In its quest to preserve LPFM service by appealing to Congress and limiting the number of translator applications, the Commission should revisit and explore the potential that LPFM has to promote localism. Support for local service is found in Section 307(b) of the Communications Act and in the Commission's promulgation of the localism requirements, which includes the goal of increasing local service.<sup>74</sup> Creating a new "L" Class for local LPFMs would allow small stations with limited service ranges to meet the needs of individual communities thus advancing the Commission's goal of localism.

## **10. RELAX THE LIMIT OF FOUR CONTINGENT APPLICATIONS**

This proposal is intended to advance spectrum efficiency in urban areas and to increase minority, women, and small business participation in the broadcast industry by gradually relaxing the contingent application-filing limit of four. Adoption of this proposal would also

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<sup>73</sup> See Comments of the Civil Rights Organizations, Creation of a Low Power Radio Service, MM Docket No. 99-25, p. 9 (filed Aug. 3, 1999). The Supreme Court also notes that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." FCC v. NCCB, 436 U.S. 775, 780 (1978)

<sup>74</sup> See 47 U.S.C. 307(b). See also Comments of the Civil Rights Organizations, Creation of a Low Power Radio Service, MM Docket No. 99-25, p. 6 (filed Aug. 3, 1999) (citing to Revision of FM Broadcast Rules, 40 FCC 662, 664 (1962); WHW, Inc. v. FCC, 753 F.2d 1132 (D.C. Cir. 1985)).

conserve Commission resources by imposing a fee on applications containing large numbers of contingent applications and outsourcing engineering analyses.

In 2007, the Commission significantly streamlined its procedures for proposing community of license changes for existing AM and FM stations.<sup>75</sup> Previously, an FM station in the non-reserved portion of the FM band had to initiate a rulemaking proceeding in order to change its community of license.<sup>76</sup> Such rulemaking proposals were subject to counterproposals, which often took many months, if not years, to resolve.<sup>77</sup> Once the FM station's community of license was changed by rulemaking, the licensee would have to file a minor change construction permit application in order to implement the community change.<sup>78</sup> AM stations and reserved band noncommercial educational ("NCE") FM stations would have to wait for a rare application filing window and file a major change application, which could be subject to conflicting applications.<sup>79</sup> The FM Amendments Report and Order made changes of community of license for AM commercial full-power and FM commercial and NCE broadcast stations a minor

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<sup>75</sup> FM Amendments Report and Order, 21 FCC Rcd at 14213, ¶1.

<sup>76</sup> See id. at 14213 ¶4.

<sup>77</sup> See id. at 41213 ¶¶4, 9.

<sup>78</sup> See id. at 41213 ¶4.

<sup>79</sup> See id. at 41221 ¶13 ("...NCE FM licensees in the reserved band must wait for an NCE filing window before applying to change communities..."). See also Comments of the Minority Media and Telecommunications Council, Revision of Procedures Governing Amendments to FM Table of Allotments And Changes of Community License in the Radio Broadcast Services, MB Docket No. 05-210 (filed Oct. 3, 2005) ("MMTC FM Allotments Comments"). "Processing times for FM allotment changes currently run for several years and AM filing windows occur infrequently." Id. at 8.

modification to be accomplished on a first come-first served minor modification application, subject to certain procedural requirements.<sup>80</sup>

MMTC supported the streamlining of the community change process.<sup>81</sup> Replacement of the cumbersome rulemaking and major change application processes promised to better enable minority, female and small business broadcasters to improve their facilities and better serve their audiences.<sup>82</sup> It also promised to create the first new signals in major metropolitan areas in many years and add much needed diversity to over-consolidated radio markets.<sup>83</sup>

One flaw in the FM Amendments Report and Order, however, subjected community change applications to a limit of four contingent FM minor modification applications found in Section 73.3517(e).<sup>84</sup> Under the prior rulemaking procedure for FM community of changes, there was no limit on the number of stations that could be relocated to a new frequency to permit a station to change its community of license.<sup>85</sup> Due to the spectrum congestion in and around

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<sup>80</sup> See FM Amendments Report and Order 21 FCC Rcd at 14217 ¶9.

<sup>81</sup> See id. at 14215 ¶6. See also MMTC FM Allotments Comments, supra n. 79 at 8.

<sup>82</sup> See MMTC FM Allotments Comments, supra n. 79 at 9.

<sup>83</sup> See id. at 11 (“...the new procedures will provide small and minority-owned businesses with greater opportunities to move into and serve the urban markets where their target audiences reside, resulting in larger audiences and the availability of more diverse programming”).

<sup>84</sup> See FM Amendments Report and Order 21 FCC Rcd at 14217 ¶9. See also 47 C.F.R. §73.3517(e).

<sup>85</sup> 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, ¶¶2-6 (filed January 19, 2007) (“Petition for Partial Reconsideration”) (discussing origins of limit of four).

most major metropolitan areas, where many minority broadcasters are located or where their intended audiences are located, community change proposals in or near such metropolitan areas often require the involvement of more than four stations.<sup>86</sup> Accordingly MMTC, along with a substantial number of broadcasters, large and small, sought reconsideration of the limit of four.<sup>87</sup> The petitions for reconsideration were filed over two years ago and remain pending.

The continued imposition of the limit of four threatens to prevent the broadcast industry and the public from realizing the full benefits of the Streamlining Order. The limit of four acts as an artificial barrier, with no substantive justification, to more efficient use of the spectrum where it is needed most, in and around major metropolitan areas.

The Commission should gradually relax the limit of four in order to bring some relief now and enable the Commission to gain experience with a larger number of applications involved in community change proposals.

Accordingly, MMTC proposes that the limit on the number of contingent applications to be filed in connection with a community of license change proposal should be increased to ten applications for the first two years. After two years, provided that the Commission does not experience substantial hardship in processing applications within the limit of ten, the limit should be increased to twenty applications. These changes are fully consistent with the requirement

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<sup>86</sup> See id. at ¶¶24-26.

<sup>87</sup> Id.

found in Section 307(b), to distribute frequencies in a fair, efficient and equitable manner, “insofar as there is demand for the same.”<sup>88</sup>

An additional filing fee, beyond the one currently imposed on contingent applications, could be required for community change proposals that include more than six applications.<sup>89</sup> The surcharge could, perhaps, be pegged to the community change/upgrade rulemaking filing fee, which is imposed on rulemakings that result in a new community of license or an upgrade to a higher class channel.<sup>90</sup> The surcharge would help recover any added costs associated with the Commission processing these complex community change proposals and would also ensure that only the most compelling proposals are proffered to the Commission.

Finally, MMTC proposes that if Commission staff has not been able to process applications within six months of their filing, then the Commission should authorize outsourcing of the Commission's independent engineering analysis to disinterested contractors chosen by the Commission, in its sole discretion, and compensated by the applicants at rates specified by the Commission. This proposal should alleviate concerns that the Commission’s resources will be overtaxed by more complex community change proposals while helping to expedite the public interest benefits contained in these proposals.

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<sup>88</sup> 47 U.S.C. §307(b).

<sup>89</sup> See Amendment of the Schedule of Application Fees Set Forth In Sections 1.1102 through 1.1109 of the Commission’s Rules, Order, GEN Docket No. 86-285, 23 FCC Rcd 14192, 14217-14224 (2008).

<sup>90</sup> See id. (approving increase of this fee to \$2,595.00 in the new fee schedule).

The gradual relaxation of the limit of four would facilitate significant improvements in the arrangements of allotments in and around major metropolitan areas, thus creating new opportunities for minority, women, and small business broadcasters. With every station move or improvement, new opportunities for more efficient use of the FM spectrum will be created in the more rural and exurban areas.

## 11. RELAX THE MAIN STUDIO RULE

In addition to setting up a more cost-efficient mechanism to ensure the continued advancement of localism, this proposal would simultaneously allow the Commission to receive feedback on the multiple benefits of relaxing the main studio rule. It would promote minority ownership and employment and would allow stations to move closer to their audiences.<sup>91</sup>

Prior to 1987, the Commission's rule required all broadcasters to maintain main studios in their communities of license. This rule was relaxed in 1987 and again in 1998.<sup>92</sup> The rule

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<sup>91</sup> Similar proposals were advanced by the FCC's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee"). See Recommendation on Diversifying Ownership in the Commercial FM Radio Band, Emerging Technologies Subcommittee Recommendation to the Federal Communications Commission's Advisory Committee on Diversity for Communications in the Digital Age, p. 1 (Oct. 4, 2004); see also Recommendation on Diversifying Ownership in Terrestrial Radio, Emerging Technologies Subcommittee Recommendation to the Federal Communications Commission's Advisory Committee on Diversity for Communications in the Digital Age, p. 1 (Dec. 10, 2007) (recommending that the Commission allow full power AM or FM radio stations to change their communities of license to any community within the same market, if 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).

<sup>92</sup> See Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233, 23 FCC Rcd 1324, 1343 ¶41 (released Jan. 24, 2008) ("Broadcast Localism Report and NPRM"). "The main studio rule is rooted in Section 307(b) of the Communications Act." Id. Under the dictates of this section, the Commission must "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to

currently allows a station's main studio "to be located within either the principal community contour of any station, of any service, licensed to its community of license or 25 miles from the reference coordinates of the center of its community of license, whichever location the licensee chooses."<sup>93</sup> Licensees are also required to maintain a station's public inspection files at its main studio.<sup>94</sup>

The purpose of the rule is to ensure that a broadcast station's main studio is accessible to its community of license. This permits "community residents to readily contact the station to voice suggestions or complaints."<sup>95</sup> The benefit gained by stations through the implementation of the main studio rule is "[e]xposure to daily community activities and other local media of communications helps stations identify community needs and interests, which is necessary to operate in today's competitive marketplace and to meet our community service requirements."<sup>96</sup>

The cost of maintaining and staffing main studios is a fixed cost falling almost equally on small and large operators and thus making it inherently more difficult for small operators to afford to program their stations competitively.

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provide for a fair, efficient, and equitable distribution of radio service to each of the same." Id. (citing 47 U.S.C. 307(b)).

<sup>93</sup> Broadcast Localism Report and NPRM, 23 FCC Rcd at 1343 at ¶41 (citing Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order, 13 FCC Rcd 15691, 15694 ¶7 (1998); 47 C.F.R. §73.1125).

<sup>94</sup> 47 C.F.R. §73.3526(b).

<sup>95</sup> See Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, Report and Order, 2 FCC Rcd 3215, 3217 ¶29 (1987).

<sup>96</sup> Id. at 3218 ¶36.

To promote both objectives of aiding minority and small business owners and advancing localism goals, the Commission should seek comment on whether to replace the studio location rule with a new rule that would authorize a station whose studio is not located within its contour or the 25-mile area to:

- Maintain its public file at the nearest library to the community of license;<sup>97</sup>
- Maintain, at the library where the station maintains its public file, a direct telephone tie line to a management employee at the station; and
- Host three town hall meetings a year in the community of license to hear from local citizens.

A relaxation of the main studio rule would promote minority ownership and employment because it would generate savings that could be put to more productive use for the benefit of the community served by the station. The proposal would allow localism goals to be met in a cost-efficient manner, therefore providing increased opportunities for small, minority and women owned broadcasters to enter the field.

**12. CLARIFY THAT ELIGIBLE ENTITIES CAN OBTAIN 18 MONTHS TO CONSTRUCT MAJOR MODIFICATIONS OF AUTHORIZED FACILITIES**

This proposal recommends that the Commission permit minority, women, and small business owners to upgrade existing stations in order to improve the quality and coverage of their broadcasts to underserved communities.

Section 73.3598(a) states:

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<sup>97</sup> The Commission could indicate that when the nation attains universal broadband service, broadcast stations should be able to transition to all-electronic versions of their public files for access via the Internet.

“each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations....” (emphases added.)<sup>98</sup> The purpose of the inclusion of the eighteen-month extension for construction permits to encourage sales of broadcast facilities to “eligible entities,” which are small, often minority owned businesses.<sup>99</sup> This proposal was introduced by the Diversity and Competition Supporters, a coalition of twenty-nine members,<sup>100</sup> and adopted in the Broadcast Diversity Order.<sup>101</sup>

The language in 73.3598(a) bears an expansive reading of the meaning of “original construction permits.” On its face, the rule seems to apply to both “original construction permits” for new stations and “original construction permits...to make changes in...existing stations.” However, the Audio Services Division (“ASD”) has indicated that it will not apply the rule to major modification applications due to a narrow reading of the language in the Broadcast Diversity Order<sup>102</sup> and §73.3598 of the Rules.<sup>103</sup> Under ASD’s reading, the rule only applies to

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<sup>98</sup> See 47 C.F.R. §73.3598(a) (emphasis added). Section 73.3598(a) applied this language in the provision prior to the eighteen-month extension and subsequent to the extension. See Broadcast Diversity Order, 23 FCC Rcd at 5963 Appx. A.

<sup>99</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5928 ¶10 (“This revision is intended to foster diversity of ownership by providing eligible entities with additional market entry opportunities.”)

<sup>100</sup> See Initial Comments of the Diversity and Competition Supporters In Response To The Second Further Notice of Proposed Rule Making, MB Docket No. 06-121, at 9-11 (Oct. 2, 2007). The Diversity and Competition Supporters include, among others, MMTC, Asian American Justice Center, Independent Spanish Broadcasters Association, International Black Broadcasters Association, National Congress of American Indians, National Council of La Raza, National Urban League, and Alliance for Community Media. See id. at Appx.

<sup>101</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5930 ¶¶14-15.

<sup>102</sup> See Broadcast Diversity Order, supra n. 6.

<sup>103</sup> 47 C.F.R. §73.3598.

new construction permit applications and not to modification applications. That was a surprise to MMTC – the moving party behind the rule.

The barriers created by not applying the eighteen-month extension to modification permits are severe. In many cases, a station is essentially valueless without the capability to upgrade by changing to a non-adjacent frequency and the task of building out station modifications is an arduous and time-consuming challenge. AM stations often present the primary point of entry into broadcasting for minorities,<sup>104</sup> and AM station modifications are especially difficult. AM modifications often require highly complex multiple tower arrays and large parcels of land, usable only after time-consuming, hard-to-secure local zoning and building approvals are awarded. An eighteen-month extension can therefore be critical to the preservation of the major modification construction permit.

Narrowing of the amendment's scope to exclude these upgrade permits is inconsistent with the core purpose of the Broadcast Diversity Order. To deny these extensions to broadcasters attempting to upgrade by major modifications would serve no perceptible public interest purpose.

The Commission should clarify that the eighteen-month extension for new construction permits sold to eligible entities applies to construction permits for major modification permits.<sup>105</sup> The purpose of section 73.3598(a) would be best served by granting the extension for new permits and major modifications.

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<sup>104</sup> See MMTC Localism Comments, supra n. 12 (“The vast majority of minority-owned stations are on the AM Band”).

<sup>105</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5930 ¶15.

This clarification should be adopted because the rule does not distinguish the eighteen-month extension on the basis of original permits or changes in existing stations.<sup>106</sup> The eighteen-month extension amendment should apply to all construction permits, including both initial and modification of original permits because when 73.3598(a) was amended to include the eighteen-month extension, the language pertaining to changes in existing stations was carried over from the rule into the amended version. This demonstrates the intent to have the extension apply, not only to initial permits but also to modification permits. Further, even if this does not plainly show intent to include modification permits in the eighteen-month extension, an “original construction permit” could just as logically include a modification of the original permit that has not previously been extended or tolled, rather than just the initial permit for a new station.

Further confirmation of the Commission’s intent to apply the eighteen-month extension to modification permits is found in each amendment of the rule. Each time the Commission changed the term of the construction period for permits in the past - 1970, 1985, and 1998 – it applied the identical changed term to both initial construction permits and major modification of license permits.<sup>107</sup>

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<sup>106</sup> The rule does not read “each original construction permit...[or construction permit] to make changes in such existing stations”. See 47 C.F.R. §73.3598(a). Thus, “original” permits are not distinguished from permits to “make changes in existing stations.”

<sup>107</sup> See Amendment of Section 1.598 of the Commission’s Rules to Provide A Revised Period for Construction for Various Broadcast Stations, 23 FCC 2d 274 (1970); see also Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC2d 1054, 1056 ¶7 (1985). See also 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 13 FCC Rcd 23056, 23090 ¶¶83-53 (1998) (“[T]he lengthened three year construction period will also apply to modification of

The last piece of proof of intent comes from the Commission’s own website, detailing the Commission’s internal understanding of the “original” versus “modification” distinction. When electronically filing the Commission’s CDBS Pre-Form 301, upon providing the file number of the original construction “permit” that is being modified by a minor change application in Section 1, Question 4, automatically inputs the file number for the last major modification permit; it does not insert the initial new permit file number under which the station was first built.<sup>108</sup> Thus, even within the Commission’s internal system, a major modification construction permit is treated the same as an original construction permit.

The eighteen-month extension would encourage sales of stations undergoing such major changes to disadvantaged businesses and new entrants. Thus through the extension of the major change construction permit, broadcasters would have an opportunity to take advantage of the increased coverage area and service to underserved communities.

Allowing an eighteen-month extension for modification applications would allow a station the flexibility to upgrade by making major changes that could increase the coverage area and population of the station and allow it to serve a much larger minority audience.<sup>109</sup> The

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licensed facilities. Likewise, the grounds for tolling a construction period will apply to modifications of licensed facilities.”)

<sup>108</sup> See FCC Consolidated Database System (CDBS), available at <http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts> (Upon login, follow link to “Pre-form” in Main Menu to access the form).(last visited July 13, 2009).

<sup>109</sup> MMTC and others have cited the need to help minorities upgrade existing stations to better serve their target audiences. See Comments of the Minority Media and Telecommunications Council, Revision of Procedures Governing Amendments to FM Table of Allotments And Changes of Community License In the Radio Broadcast Services, MB Docket No. 05-210 (filed Oct. 3, 2005).

eighteen-month extension would also serve the purpose of the Broadcast Diversity Order by “foster[ing] diversity of ownership by providing eligible entities with additional market entry opportunities.”<sup>110</sup>

### **13. EXTEND THE THREE YEAR PERIOD FOR NEW STATION CONSTRUCTION PERMITS**

The Commission should adopt a blanket one-year extension of the three-year deadline for construction in Section 73.3598 for broadcasters unable to take advantage of the limited eighteen-month extension for eligible entities that purchase stations under the amended Section 73.3598.

This proposal would assist small, minority and women owned broadcasters by allowing them sufficient time to secure financing and build broadcast facilities during these challenging economic times. Broadcasters who are unable to take advantage of the eighteen-month extension could have a blanket one-year extension of the three year construction deadline, which would alleviate some the pressure on broadcasters caused by the current economic crisis and assist small, women, and minority ownership and new entrants, as well as boost the industry as a whole.

The three-year period for new station construction permits is found in 73.3598(a):

“...each original construction permit for the construction of a new TV, AM, FM or International Broadcast...or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and an application for license filed. Except...An eligible entity that acquires an issued and outstanding construction permit for stations in

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<sup>110</sup> See Broadcast Diversity Order, 23 FCC Rcd at 5928 ¶10.

any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer [the “eighteen month extension”].”<sup>111</sup>

By allowing a blanket one-year extension of the three-year construction deadline, the Commission could alleviate hardship and barriers to entry in these difficult economic times. Timely construction of many new and modified facilities has become increasingly difficult to complete due to the near shutdown of financing available to broadcasters. The worsening credit crunch, which has brought the American economy to its knees, has hit the broadcast industry particularly hard. Even the largest group owners, and certainly small, small-market and new entrant broadcasters are simply unable to timely secure sufficient equity and debt financing to rapidly construct or modify station facilities.

Further obstacles prevent timely construction. Tower rental costs continue to rise and the erection of new towers is a daunting challenge due to saturation of communications tower sites and increasing resistance to new construction. New land use, zoning and environmental restrictions and new governmental bodies regulating construction are problems at the federal, state and local levels.

The current economic conditions are so adverse that the Commission’s concerns expressed in the past about warehousing of spectrum pale by comparison. An additional year to construct would allow struggling minority and women owned and small businesses to have an opportunity to continue operating through this current economic crisis.

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<sup>111</sup> 47 C.F.R. §73.3598(a). See also section 12 supra for discussion of the eighteen-month extension.

#### **14. STUDY THE FEASIBILITY OF A NEW RADIO AGREEMENT WITH CUBA**

This proposal would set the foundation for creating an international radio agreement between Cuba and United States for the purpose of reducing and ultimately eliminating interference issues that threaten small business and minority broadcasters – particularly those in Florida where, in many markets including Miami, minorities are now the majority of the population and where, in every market, public safety needs in hurricane season require uninterrupted multilingual radio service.

Radio interference has been a source of conflict between the United States and Cuba for many years.<sup>112</sup> The North American Radio Broadcasting Agreement (NARBA),<sup>113</sup> signed in 1950, was the last radio agreement between the United States and Cuba. In accordance with NARBA, which was signed by the U.S., the Bahama Islands, Canada, Cuba, Dominican Republic, and Jamaica, medium wave AM radio stations in these countries were reallocated. This treaty required clear channel frequencies to be set aside across the radio dial, at a rate of about one per 100 kHz and generally reserved channels 1230, 1240, 1340, 1400, 1450, and 1490 for local stations. The agreement also officially expanded the upper limit of the AM broadcast spectrum from 1500 kHz to 1600 kHz.

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<sup>112</sup> Federal Communications Commission's Observation of TV Marti, p. 4 (May 11, 1990), available at <http://www.state.gov/documents/organization/28512.pdf> (last visited May 14, 2009) (discussing interference from AM signals originating from Cuba).

<sup>113</sup> North American Regional Broadcasting Agreement, Final Protocol to the Agreement Resolutions and Recommendations, 11 UST 413, TIAS 4460 (November 15, 1950).

NARBA remains in effect with respect to the U.S. and the Bahamas and the U.S. and the Dominican Republic<sup>114</sup> but has been superseded by U.S.-Canada and U.S.-Mexico working agreements for AM radio.<sup>115</sup> Cuba has withdrawn from NARBA and is only subject to the basic regional provisions established by the International Telecommunications Union (ITU).<sup>116</sup>

Although Cuba is subject to the ITU provisions, ongoing radio interference problems between the U.S. and Cuba still persists. A generation ago there was an attempt to solve the radio interference problems by bilateral discussions between the U.S. and Cuba, but consensus has yet to be achieved.<sup>117</sup>

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<sup>114</sup> 47 C.F.R. §73.1650(b) (6).

<sup>115</sup> There are two U.S.-Canada Agreements. See Agreement Between the Government of the United States of America and the Government of Canada Relating to the AM Broadcasting Service in the Medium Frequency Band (1984) (535-1605 kHz band); Interim Working Arrangement Between the Federal Communications Commission and the Department of Communications Relating to the AM Broadcasting Service in the Medium Frequency Band (1991) (1605-1705 kHz band). There are also two U.S.-Mexico Agreements. See Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the AM Broadcasting Service in the Medium Frequency Band, (1986) (535-1605 kHz band); Agreement Between the Government of the United States of America and the Government of the United Mexican States for the Use of the Band 1605 to 1705 kHz in the AM Broadcasting Service, (1992) (1605-1705 kHz band).

<sup>116</sup> Final Acts of the Regional Administrative MF Broadcasting Conference (Region 2) Rio de Janeiro, Brazil, International Telecommunications Union (1981) (sets forth the principle that stations broadcasting in the medium wave (AM) band shall not employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned).

<sup>117</sup> Radio Marti Issue Brief Number IB83105, Library of Congress Congressional Research Service, May 1984, p. 6 (“U.S. officials were optimistic after those meetings and a related meeting in Geneva in June 1981 that the Cubans were anxious to work out technical solutions to interference.”)

The Commission should request that the Department of State study the feasibility of a new treaty with Cuba to afford mutual protection to existing and proposed AM stations. In order to end the radio interference problems that continue to plague AM radio stations as well as ensure the viability of existing and future AM radio in the U.S., the Commission should strongly urge the Department of State to explore the adoption of a new radio treaty with Cuba.

Studying the feasibility of a new radio agreement with Cuba would start the process of eliminating interference. This would ensure that stations within the range of interference could continue to operate and create opportunities for new stations to enter the market.

**15. THE COMMISSION SHOULD CONDUCT TUTORIALS ON RADIO ENGINEERING RULES AT HEADQUARTERS AND ANNUAL CONFERENCES**

This proposal would benefit the Commission and the radio industry, especially small stations and new entrants, by providing an opportunity for the Commission to explain complex radio regulations for the purpose of promoting compliance and by reducing regulatory burdens on small and minority owned stations that currently operates as a barrier into the industry.

The Commission's media ownership rules and technical radiofrequency rules have gradually evolved over many decades and, as a result, have become increasingly complex over time.

Due to this complexity, it is extremely difficult for small and local radio broadcasters to fully understand and comply with the existing radio regulatory regime. Furthermore, unlike the largest broadcasters, which can easily disperse the cost of obtaining the necessary regulatory expertise over several stations and thereby take full advantage of the Commission's radio rules, smaller broadcasters must expend substantially more resources per station to remain abreast of,

and in compliance with, the radio rules. This serves as a further competitive disadvantage to small radio broadcasters and also creates substantial barriers for new entrants to the radio broadcast industry. The net result of the complexity of the current radio regulatory framework is to reduce the number of independent voices available to the listening public and reduce diversity of radio station ownership.

To help enable small businesses and nonprofits to compete in the new regulatory environment, the Commission should conduct tutorials on the radio engineering rules at the Commission's headquarters and at the annual conferences of organizations that represent the interests of broadcasters, and in particular diverse broadcasters, such as:

- The annual conferences of the National Association of Black Owned Broadcasters ("NABOB"). NABOB is the first and largest trade organization representing the interests of African-American owners of radio and television stations across the country. NABOB hosts two annual broadcast management conferences—one in the spring and one in the fall.<sup>118</sup> The conferences focus on critical issues and trends in the broadcast industry that impact the growth of minority broadcast entrepreneurs.
- The Access to Capital and Telecom Policy Conference, held annually by the Minority Media and Telecommunications Council. This conference is the largest minority media and telecom financial forum in the nation, and attracts entrepreneurs, service providers, bankers, private equity investors, Members of Congress and FCC Commissioners.<sup>119</sup>

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<sup>118</sup> For additional information on the NABOB's Fall Broadcast Management Conference and Spring Broadcast Management Conference, please visit the NABOB website, available at <http://www.nabob.org/events.html> (last visited July 14, 2009).

<sup>119</sup> For further information about MMTC's Access to Capital Conference, please visit MMTC's website, available at <http://www.mmtconline.org/access> (last visited July 14, 2009).

Broad public dissemination and understanding of the existing radio rules and any new rules adopted pursuant to this Petition are necessary for the proposals to achieve their maximum effectiveness in benefiting small businesses and diverse owners.

This proposal is consistent with the Commission's existing practice of providing outreach to the public by holding workshops and tutorials at the Commission's Washington D.C. headquarters, as well as at other locations around the country.<sup>120</sup>

Moreover, such outreach is consistent with President Obama's directive that the federal government during his administration will "disclose information rapidly in forms that the public can readily find and use" and will use "innovative tools, methods, and systems to cooperate... with nonprofit organizations, businesses, and individuals in the private sector."<sup>121</sup>

By conducting the proposed tutorials, the Commission could ensure that its existing rules and any new rules adopted in response to this Petition are fully understood by, and are accessible to current diverse radio stations owners, managers, and engineers, and potential new entrants into the radio market. Furthermore, by holding the tutorials at the annual conferences of broadcast

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<sup>120</sup> See, e.g., FCC Workshops, Tutorials & Roundtables, available at <http://www.fcc.gov/realaudio/workshops.html> (last visited July 13, 2009) (regarding DTV converter boxes and analog television sets). See also New Broadband Grants Tutorial, available at <http://wireless.fcc.gov/outreach/index.htm?job=workshop> (last visited July 14, 2009); FCC Office of Engineering and Technology Tutorials, available at <http://www.fcc.gov/oet/tutorial/Welcome.html> (last visited July 13, 2009) (describing the Office of Engineering and Technology's tutorials on subjects ranging from optical network interoperability to radio noise).

<sup>121</sup> Memorandum for Heads of the Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009) ("Transparency Memorandum"). Although the Commission is not an Executive Branch agency, the public interest would nevertheless be served by Commission efforts to comply with the directives set forth in the Transparency Memorandum.

organizations, the Commission could make this information available to broadcasters throughout the country including those that would be financially challenged to attend tutorials held in the Commission's Washington, D.C. headquarters.

**16. THE COMMISSION SHOULD CREATE A BROADCAST PUBLIC ENGINEER POSITION TO ASSIST SMALL BUSINESS AND NONPROFITS WITH ROUTINE ENGINEERING MATTERS**

This proposal would increase diversity within the broadcast industry by providing a valuable tool for small businesses and nonprofits to help navigate the Commission's complex regulatory system, which would allow increased participation of these entities in broadcasting.

As the radio industry grew so too did the complexity of the Commission's regulatory system. Small broadcasters do not have the same resources that larger stations do, and as a result they often struggle to maintain the cost of compliance with these complicated rules. The effect of this system is the creation of entry barriers for small businesses and nonprofits in the broadcast industry.<sup>122</sup>

The Commission should create a new staff resource, a position titled Broadcast Public Engineer, to assist small businesses and nonprofits with routine engineering matters.<sup>123</sup>

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<sup>122</sup> See section 15 *supra* for discussion on the effect of the complicated regulatory scheme.

<sup>123</sup> Most Commission applications include one or more engineering exhibits that cannot be completed by station managers or owners but instead require the services of an outside radiofrequency engineer with access to sophisticated engineering software. See, e.g., the engineering portions of the following FCC Forms: (i) Application for Construction Permit for Commercial Broadcast Stations (FCC Form 301); (ii) Application for AM Broadcast Station License (FCC Form 302-AM); (iii) Application for FM Broadcast Station License (FCC Form 302-FM); (iv) Application for Renewal License for AM, FM Stations (FCC Form 303-S); (v) Application for Construction Permit for a Low Power FM Broadcast Station (FCC Form 318); (vi) Application for Low Power FM Broadcast Station License (FCC Form 319); (vii)

The Broadcast Public Engineer should act as the Commission's broadcast ombudsman by conducting public outreach to develop proposals that would streamline and clarify certain FCC applications and filing procedures, thereby benefiting small businesses and nonprofits as well as the entire broadcast industry.

The Broadcast Public Engineer should specifically be tasked with the following activities:

- Preparing routine technical exhibits for small businesses and nonprofits, to the extent that it can be done using available software products without field testing;
- Administering an engineering assistance hotline to assist small businesses and nonprofits to complete the engineering portions of routine applications.
- Reviewing the FCC Forms and corresponding instructions to recommend modifications or additions for the purpose of clarifying and simplifying completion of the engineering portion of these forms;
- Educating small businesses and nonprofits about the FCC's current radio rules and any changes to them;
- Developing user guides and brochures providing explanations regarding how to complete the engineering portions of FCC applications that are more detailed than the instructions to the forms; and
- Reviewing the FCC's CDBS database to recommend ways to make the technical information memorialized in the database more easily accessible and comprehensible to the public.

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Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station (FCC Form 340); (viii) Application for Authority to Construct or Make Changes in a FM Translator or FM Booster Station (FCC Form 349); and (ix) Application for an FM Translator or FM Booster Station License (FCC Form 350). Hiring an outside engineering firm can be very costly, especially given the limited regulatory budgets available to small broadcasters and nonprofits. For example, one prominent radiofrequency engineering firm estimates that, on average, it charges approximately \$2,000 per application for many types of engineering analyses and showings; the firm notes that its fees can be higher depending on the complexity of the application.

Furthermore, the Broadcast Public Engineer could work with the Media Bureau's engineering staff to identify frequently made engineering errors on broadcast applications and, through public outreach, reduce the incidence of such errors going forward.

The Commission's Broadcast Public Engineer could be part of the Office of Communications and Business Opportunities ("OCBO").<sup>124</sup> The OCBO "develops, coordinates, evaluates, and recommends to the Commission, policies, programs, and practices that promote participation by small entities, women, and minorities in the communications industry."<sup>125</sup> The Broadcast Public Engineer's responsibilities would be consistent with this mandate.

The addition of the Broadcast Public Engineer position to the other Commission resources for the public would ultimately provide significant efficiencies to the Commission by reducing the number of inadequately and inaccurately completed applications filed. Accordingly, the position of Broadcast Public Engineer would not only support the public interest by furthering the mission of the OCBO to remove barriers to participation by small entities, women, and minorities, but it may also improve the Commission's processing of broadcast applications generally.

This proposal is also consistent with President Obama's stated objective of making federal agencies more open and transparent. On his very first day in office, the President issued the Transparency Memorandum, which called on the heads of federal agencies to make

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<sup>124</sup> This Petition proposes a public engineer focused only on broadcasting. If the Commission grants this proposal, it may also want to add additional public engineer positions for other communications sectors subject to Commission regulation, particularly cable, wireline and wireless.

<sup>125</sup> 47 C.F.R. 0.101(b)(2).

government more transparent, participatory and collaborative.<sup>126</sup> By enacting this proposal, the Commission would be making great strides in fulfilling this administrative goal.

**17. THE COMMISSION SHOULD ISSUE A ONE-YEAR BLANKET WAIVER OF APPLICATION FEES FOR SMALL BUSINESS AND NONPROFITS**

This proposal would offset the effect of the current economy and ensure a diversity of media voices in the broadcast industry by giving struggling small businesses and nonprofit stations financial assistance and a greater chance to survive.

In an effort to financially assist small businesses and nonprofits that own or are acquiring radio stations, the Commission should issue a one-year blanket waiver of application fees for such entities<sup>127</sup> for the following applications:

- FCC Forms 175 (Application to Participate in an FCC Auction);
- FCC Form 301 (Application for Construction Permit for Commercial Broadcast Station);
- FCC Form 302-AM (Application for AM Broadcast Station License);
- FCC Form 302-FM (Application for FM Broadcast Station License);
- FCC Form 303 (Application for Renewal License for AM, FM, TV, Translator, or LPTV Station);
- FCC Form 323 (Ownership Report for Commercial Broadcast Station);
- FCC Form 340 (Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station);

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<sup>126</sup> Transparency Memorandum, 74 Fed. Reg. 4685 (January 26, 2009).

<sup>127</sup> See id. The Commission could use the Small Business Administration's definition of a small business as set forth in 13 C.F.R §121 as a gating requirement for individualized access to the Public Engineer or may determine that further gating requirements are appropriate. The Commission could also choose to define nonprofits consistent with the definition set forth in 26 U.S.C. §501(c)(3).

- FCC Form 349 (Application for Authority to Construct or Make changes in a FM Translator, or FM Booster Station);
- FCC Form 350 (Application for an FM Translator or FM Translator or FM Booster Station License); and
- Application for Special Temporary Authority.

Pursuant to Section 158(d)(2) of the Communications Act as implemented by Section 1.117(a) of the Commission’s Rules, the Commission has authority to waive application fees for “good cause” where such action would “promote the public interest.”<sup>128</sup> Good cause exists here because radio stations, in particular, have been grappling with decreasing advertising revenue, mounting debt and diminished access to capital.<sup>129</sup> As a result of the economic crisis the entire radio industry is struggling, forcing some radio stations to shut down.<sup>130</sup>

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<sup>128</sup> See 47 C.F.R. §1.1117(a) (implementing 47 U.S.C. §158(d)(2)).

<sup>129</sup> Heavy Debt, Fewer Ads Put Radio Stations in a Squeeze, Wall Street Journal (Nov. 10, 2008), available at [http://online.wsj.com/article/SB122627806175712191.html?mod=dist\\_smartbrief](http://online.wsj.com/article/SB122627806175712191.html?mod=dist_smartbrief) (last visited May 23, 2009); Stephanie Clifford Radio Revenue Falls Even as Audience Grows, N.Y. Times (Nov. 25, 2008), available at [http://www.nytimes.com/2008/11/26/business/media/26adco.html?\\_r=1&scp=1&sq=%22Radio%20Revenue%20Falls%20Even%20as%20Audience%20Grows%22&st=cse](http://www.nytimes.com/2008/11/26/business/media/26adco.html?_r=1&scp=1&sq=%22Radio%20Revenue%20Falls%20Even%20as%20Audience%20Grows%22&st=cse) (last visited May 23, 2009).

<sup>130</sup> Tough Economy Shuts Down Dickinson Radio Station, NewsChannel15.com (posted Mar. 20, 2009), available at <http://www.topix.com/forum/city/only-tn/TKQ1TSR769B3JISPU> (May 23, 2009).

Although historically the FCC has only issued fee waivers on a case-by-case basis, it is in the public interest for the FCC to respond to the current economic crisis<sup>131</sup> with a broader approach to fee waivers for financially challenged small businesses and nonprofits.

A one-year blanket fee waiver would promote diversity by providing small businesses and nonprofits partial economic relief from radio-related application filing fees without the burden of individually showing good cause, which is sorely needed in the midst of this crisis. Adopting the blanket waiver would make the application process more affordable and accessible for financially challenged small businesses and nonprofits. Therefore, the Commission should use its Section 158(d)(2) waiver authority and issue a blanket fee waiver to small business and nonprofits with respect to application filing fees.<sup>132</sup> As such, the Commission should adopt this proposal in an effort to make the radio rules and application processes more affordable and accessible for financially challenged small businesses and nonprofits.

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<sup>131</sup> See President-Elect Barack Obama, Remarks at George Mason University, As Prepared for Delivery, American Recovery and Reinvestment Act (given Jan. 8, 2009) (noting that the U.S. is in the “midst of a crisis unlike any we have seen in our lifetime”).

<sup>132</sup> See Transparency Memorandum, 74 Fed. Reg. at 4685.

Respectfully submitted,

*David Honig*

David Honig  
Executive Director  
Joycelyn F. James,  
John W. Jones Fellow  
Jacqueline Clary  
Counsel  
Minority Media and  
Telecommunications Council  
3636 16<sup>th</sup> Street NW  
Suite B-366  
Washington, DC 20010  
202-332-0500  
[www.mmtconline.org](http://www.mmtconline.org)  
[dhonig@crosslink.net](mailto:dhonig@crosslink.net)

Of Counsel:

Joycelyn Tate, Associate Media Broker, MMTC

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