Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, 03-4072 & 03-4073

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of
the Federal Communications Commission

REPLY BRIEF OF INTERVENORS AMERICAN HISPANIC OWNED RADIO ASSOCIATION, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, NATIONAL ASIAN AMERICAN TELECOMMUNICATIONS ASSOCIATION, NATIONAL ASSOCIATION OF LATINO INDEPENDENT PRODUCERS, NATIONAL COALITION OF HISPANIC ORGANIZATIONS, NATIONAL COUNCIL OF LA RAZA, NATIONAL HISPANIC MEDIA COALITION, NATIONAL INDIAN TELECOMMUNICATIONS INSTITUTE, NATIONAL URBAN LEAGUE, NATIVE AMERICAN PUBLIC TELECOMMUNICATIONS, INC., PRLDEF-INSTITUTE FOR PUERTO RICAN POLICY, UNITY: JOURNALISTS OF COLOR, INC., AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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Introduction

The Intervenors herein (collectively "MMTC") respectfully reply to certain arguments in the Brief for Respondents ("FCC Brief") and to one argument in the Brief for Petitioner Clear Channel Communications, Inc. ("Clear Channel Brief")

Summary of Argument

After unreasonably failing to address and respond to MMTC's Comments, the FCC turns to this Court and argues that it lacks jurisdiction to hear MMTC's claims. However, MMTC's filing of a petition for reconsideration is not a jurisdictional bar, since the Court will be reviewing similar claims by others raising issues that MMTC argues with greater specificity. Further, the FCC's eleven years of delay in addressing minority ownership is sufficient cause to trigger mandamus or the futility exception to exhaustion.

To conserve judicial resources, the Court should require the FCC to conclude its reconsideration proceedings promptly. This will enable the court to consolidate all objections to the FCC's decisions.

The FCC abused its discretion when it repealed the Failing Station Solicitation Rule ("FSSR"). The FCC's broad and uninformative statements regarding its intentions failed to provide notice that it was planning to repeal the FSSR. Further, the FCC's decision omitted mention of the principal reason the FCC created the FSSR in 1999 -- to protect minority ownership.

The FCC acted arbitrarily and capriciously when it failed to address thirteen proposals aimed at advancing competition and diversity, including racial diversity. The FCC's promise to consider minority ownership in a future rulemaking rings hollow in light of its long record of postponement and delay.

Apparently the rulemaking would primarily address matters that are actually outside the FCC's jurisdiction, leaving the fate of the proposals submitted by MMTC in these proceedings uncertain. By the FCC's own admission, minority ownership is an important aspect of its regulatory mandate in a structural rulemaking. It deserves good faith treatment and full consideration as an integral part of the current media ownership initiative.

The FCC's eleven year delay is unacceptable. This Court should take all necessary steps, including appointment of a Special Master, to ensure that the FCC ends racial ownership exclusivity in the nation's most influential industry.

Argument

I. The Court Can And Should Consider MMTC's Arguments

Broadcasting is invested with a public interest, and broadcasters use public property. Yet just 1.2% of the asset value of this industry rests in the hands of people who comprise nearly 30% of Americans. MMTC Brief, p. 5, citing MMTC Comments, p. 17, JA4311. In the 2002 Omnibus NPRM and in the R&O, the FCC acknowledged that racial and gender diversity is a established element of ownership regulation for the nation's most influential industry.[1/]

1/ 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277 (Report and Order and Notice of Proposed Rulemaking), 17 FCC Rcd 18503, 18521 ¶50 (2002), JA3468 ("2002 Omnibus NPRM") ("the Commission has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses"); 2002 Biennial Regulatory Review -- Review of the

[n. 1 continued on p. 3]

For two generations, the FCC contributed to racial exclusion in media ownership by licensing segregationists and erecting irrational barriers to entry. See MMTC Brief, p. 5, citing Initial Comments of Diversity and Competition Supporters, MB Docket 02-277 (filed January 2, 2003) ("MMTC Comments"), pp. 19-35, JA4313-4329. More recently, using a full complement of tools of avoidance, the FCC delayed for eleven years its consideration of racial diversity in broadcast ownership. See MMTC Brief, pp. 7-9. Leading civil rights organizations copiously developed and submitted thirteen proposals to promote diversity and competition. The FCC unlawfully ignored ten of their proposals and irrationally postponed or rejected the other three. MMTC Brief, pp. 11, 18–32.

Having committed this manifest injustice, the FCC now advocates still more delay on procedural grounds. Its jurisdictional challenges are without merit.

A. The Pendency Of Reconsideration Petitions Need Not Prevent This Court From Deciding All Questions Presented In This Case

Citing West Penn Power Co. v. EPA, 860 F.2d 581 (3d Cir. 1989) ("West Penn"), the FCC contends that "the Court lacks jurisdiction to consider MMTC's arguments, because the same parties have petitioned the Commission for reconsideration of the Order on the same grounds." FCC Brief, p. 42.

1/ [continued] Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No 02-277 (Report and Order and Notice of Proposed Rulemaking), 18 FCC Rcd 13620 13634 ¶46 (2003), JA0051 ("R&O") ("[e]ncouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here.")

West Penn does not bar this Court from considering MMTC's arguments because these arguments were also raised by petitioners in this Court who did not file them on reconsideration. See n. 6 infra (identifying seven issues discussed by other parties which are also discussed by MMTC. Technically, under West Penn, the Court could not treat MMTC as the lead proponent of such an issue, but West Penn does not bar MMTC from discussing any issue that is also brought to this Court by a petitioner for review that is not a petitioner for reconsideration at the FCC. For example, MMTC is free to address issues discussed in the Brief of Prometheus Radio Project ("Prometheus Brief"), whose entire focus is on promoting diversity. MMTC's Brief (i.e., pp. 1-47) primarily addresses racial diversity, a subset of that issue. See R&O, 18 FCC Rcd at 13627 ¶18, JA0044 ("[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity.") Thus, West Penn does not jurisdictionally bar consideration of MMTC's Brief.

Although MMTC raises one issue not discussed by other parties, West Penn does not govern it because MMTC addressed it only in this Court. The issue is whether the FCC failed to decide the issues raised by MMTC within a reasonable time. See MMTC Brief, pp. 39, 47-48, arguing that the FCC unlawfully withheld or unreasonably delayed action on MMTC's proposals in violation of 5 U.S.C. §706(1) (1966). Due to the FCC's failure to address most of MMTC's proposals, and its eleven-year delay (see MMTC Brief, pp. 7-9), this Court should assert its jurisdiction over MMTC's Brief by using its powers of mandamus under 28 U.S.C. §1651(a) (1983). Authority is provided by 5 U.S.C. 706(1), and by

5 U.S.C. §555(b) (1966) (requiring thatagencies conclude matters presented to them "within a reasonable time."[2/] Specifically, upon a finding of unreasonable delay, the Court "can order an agency to either act or provide a reasoned explanation for its failure to act." PCHRG v. FDA, 740 F.2d 21, 34 (D.C. Cir. 1987). Such a remedy is especially warranted in this instance, where the FCC's continuing delay imposes unreasonable harm on innocent parties facing a massive wave ownership consolidation. For example, the FCC's continued delay in addressing, e.g., proposals for incubation of minority owned stations, and a formula aimed at preventing radio market consolidation from "tipping" beyond the point where independent operation is sustainable would ensure that by the time these initiatives are adopted, vertical and horizontal consolidation will have caused the most desirable properties to be locked up beyond the reach of new entrants. Alternatively, this Court should invoke the futility exception to exhaustion, and hold reconsideration to be a futile exercise whose pendency ought

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2/ See, e.g., PCHRG v. Chao, 314 F.3d 143, 153 (3d Cir. 2002) ("PCHRG") (requiring mediation, to be followed by other action if the mediation is unsuccessful, where OSHA delayed a rulemaking for nine years, noting that "in no reported case has a court reviewed a delay this long without compelling action"); Middle Rio Grande Conservancy District v. Norton, 294 F.3d 1220, 1226 (10th Cir. 2002) (eight year delay held to be "massive," justifying mandamus); cf. Watson v. Memphis, 373 U.S. 526, 530 (1963) (compelling prompt desegregation of public parks because segregation had been held unlawful nearly eight years earlier). The instant case meets each applicable part of the TRAC test for whether an agency's delay is so egregious as to warrant mandamus: (1) the length of the delay is beyond any rule of reason; (2) human welfare is at stake; (3) the FCC has no higher priorities than broadcast ownership diversity (see 47 U.S.C. §151 (1996)); and (4) delay has prejudiced broadcast consumers of all races who need to hear the diverse views of racial minorities. See TRAC v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

not to defeat jurisdiction.[3/] Under either mandamus or the futility exception, the proper remedy would be an order compelling the FCC to act on MMTC's contentions within a reasonable time, while leaving undisturbed this Court's Stay Order. The Court can also proceed much as it did in PCHRG, where after nine years of OSHA's delay in completing a rulemaking, the Court assigned a senior judge as a mediator to devise a mutually acceptable timetable and announced that it would establish its own timetable if the parties were unable to reach agreement within 60 days. Id., 314 F.3d at 153.

The West Penn issue would disappear entirely if the Commission issues an order on reconsideration before this Court rules on the merits. Consolidation of the instant petitions for review with petitions for review of an order on reconsideration would profoundly advance the interest of judicial economy. See West Penn, 860 F.2d at 586-87. Some 27 petitions for reconsideration are pending, and they raise most of the issues presently before this Court, as well as many interrelated issues.

[3/] Apart from a small number of issues raised on reconsideration because the FCC has not had a opportunity to address them (see 47 U.S.C. §405 (1988)), the likelihood that MMTC's Petition for Reconsideration will cause the FCC to suddenly reverse an eleven year course of avoidance is negligible. This Court has already held that it would have been futile for Prometheus to seek a stay first at the FCC. See Prometheus Radio Project v. FCC (Order), #E-59, 3d Cir., September 3, 2003 (per curiam), p. 2 n. 2 ("Stay Order") ("under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.") The Prometheus Motion for Stay, filed August 13, 2003, p. 1 n. 1, pointed out that the FCC denied a motion to postpone voting until the FCC's electronic filing system caught up with the record, and ignored a request for a stay. MMTC had lodged both of those futile motions.

West Penn provided a road map for averting multiple appellate rulings:

> If West Penn's petition for reconsideration is withdrawn, or if the EPA denies it, we will have jurisdiction to review the [EPA] Administrator's [decision]. West Penn may then file a new petition for review. If it does, the case will proceed on original briefs and letter memoranda thus far received by the panel, supplemented by such additional submissions as may be appropriate.

West Penn, 860 F.2d at 587. A similar procedure is appropriate in this instance, where parties have already briefed the case an expedited basis,[4/] a stay is in effect,[5/] and the stakes are high.

As the pleading cycle on reconsideration petitions closed October 21, 2003, the FCC can and should rule promptly, mooting the West Penn issue and allowing consolidation of every objection to the R&O into a single case. On the other hand, FCC delay could reproduce the scenario in West Penn, where the EPA apparently caused jurisdiction to be defeated by sitting on reconsideration petitions "for some eighteen months after issuance of the final rule," whereupon this Court, unable to wait any longer, ultimately had to dismiss West Penn's

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4/ So committed are all parties to expedition that no party has moved to hold the case in abeyance until reconsideration proceedings are completed.

5/ This Court granted a stay because, inter alia, petitioners Prometheus et al. would otherwise incur "the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part." Stay Order, p. 2. The same considerations that justified the stay would also apply if major issues are left unsettled. Further, all of the issues are intertwined. Thus, to the extent possible, it would be highly desirable for all issues to be addressed simultaneously. It is especially critical to ensure that minority ownership issues do not fall months behind the rest of the policy train, as they so often have in the past. See discussion in MMTC Brief, pp. 7-9.

appeal. Id. at 587. To avoid that outcome, this Court should insist that the FCC complete its proceedings on reconsideration within a reasonable time (e.g. mid-January). As suggested in West Penn, once the FCC rules on reconsideration and additional petitions for review are filed, this Court may proceed on original briefs and such additional submissions as might be appropriate.

B. The Court Should Address MMTC's Arguments Irrespective Of The Degree To Which Other Parties Discussed Them

The FCC contends that

> MMTC seeks improperly to expand the issues in these cases beyond the issues presented by the petitioners. While Prometheus briefly complains of the Commission's revised waiver policy, Prometheus Brief 57-58, no petitioner has addressed the Commission's actions with respect to MMTC's proposals regarding minority ownership of broadcast stations.

FCC Brief, p. 42. The FCC does not suggest that other parties' silence on issues raised by MMTC deprives this Court of jurisdiction to consider these issues. Rather, the FCC contends that "[t]here are no special circumstances here that would warrant the Court considering the issues raised only by MMTC." Id. The FCC relies on Southwestern Penn. Growth Alliance v. Browner, 121 F.3d 106 (3d Cir. 1997) ("Southwestern Penn"),

Like the West Penn issue, the Southwestern Penn issue will become moot once the FCC issues an order disposing of petitions for reconsideration and (as appears likely) MMTC applies for review of that order. But even before then, the uniqueness of MMTC's contentions are not jurisdiction defeating.

In most cases, "an intervening party may join issue only on a matter that has been brought before the court by another party." Illinois Bell Tel. Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990). The Illinois Bell rule is applied in this

Circuit as well. Southwestern Penn, 121 F.3d at 121 (it is a "general rule" that an intervenor "may argue only the issues raised by the principal parties and may not enlarge those issues.") However, the general rule is predicated on concerns that courts not be obligated to consider complex legal questions without proper briefing or legal support by the parties. See id. at 122. Consequently, this Court has granted an exception to the general rule where the intervenor's challenge related to the challenges brought by petitioners and expanded upon issues raised by those parties. Id. The court likened the situation to the practice of co-briefing, which is expressly permitted under Fed. R. App. Proc. Rule 28(i). Id. Since other parties generally discussed the global issues as to which MMTC provided much more detail, MMTC has provided value in the manner expected of intervenors. As set out in the margin,[6/] MMTC has developed several complex issues raised by petitioners. See Southwestern Penn, 121 F.3d at 122. Nonetheless, even if the Court regards some issues discussed by MMTC as

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6/ In particular:

1. Minority ownership. Clear Channel referred to "minority and female ownership" and asserted that "[t]o encourage the proliferation of these stations [is] a valuable public good[.]" Clear Channel Brief, p. 41 (citing R&O, 18 FCC Rcd at 13627-37, ¶¶18-52, JA 0044-0054, which includes FCC's discussion of minority ownership and (to the extent they are addressed) MMTC's proposals.) Further, as the FCC acknowledges, Prometheus stated that repeal of the FSSR "will make it extremely difficult for any new potential entrant, including minorities and women, to purchase a television station and thus have a significant effect on diversity, localism and competition." Prometheus Brief, p. 58. Prometheus' Reply Brief is also expected to address minority ownership.

[n. 6 continued on p. 10]

6/ [continued]

2. Transactional Transparency. The FCC saw "merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities." R&O, 18 FCC Rcd at 13637 ¶52, JA0054. MMTC addressed this issue by opposing the repeal of the FSSR, which is the FCC's only existing transparency rule, MMTC Brief, pp. 12-14, 34-37, and by proposing an equal transactional opportunity rule, id, pp. 16-17, 41-43. As noted above, Prometheus opposed the repeal of the FSSR. Prometheus Brief, pp. 57-58.

3. Cluster Spinoff Limitations were opposed in the Clear Channel Brief, pp. 40-51 and in the Brief for National Association of Broadcasters et al. ("NAB Brief"), pp. 30-33. MMTC objected also, contending that the new spinoff limitations did not address minority ownership, as the FCC claimed they did. MMTC Brief at 14-16, 39-41.

4. Metrics -- the necessity of having a rationally sustainable means of measuring diversity -- was raised in MMTC's Brief, pp. 26-27, 46. Essentially the same issue was discussed at length in the Brief for Tribune Company and Media General, Inc., pp. 53-57 and in the Prometheus Brief, pp. 34-48. MMTC addressed the FCC's failure to pretest such an index (MMTC Brief, p. 26 n. 49) and its failure to consider two alternative formulas for protecting diversity. MMTC Brief, p. 26 n. 49, 26-27, 46. MMTC also proposed staged implementation with periodic measurements of diversity, competition, localism and minority ownership to calibrate the speed of deregulation. Id., pp. 28-31, 46–47.

5. Voice Tests. Several parties challenge the voice test paradigm. See Brief for Sinclair Broadcast Group, Inc., pp. 2-11; Brief for Fox Entertainment Group, Inc. et al., pp. 52-58 ("Networks' Brief") MMTC's proposal for diversity credits was offered as an alternative to voice tests. MMTC Brief, p. 31-32, 47. If this Court agrees with Sinclair and the Networks that voice tests are unsustainable, MMTC's alternative paradigm would avoid the need for the extraordinary remedy of vacating the rules entirely.

[n. 6 continued on p. 11]

insufficiently related to issues raised by the petitioners, the Court is not barred from considering these issues. The Illinois Bell requirement is a prudential matter, Synovus Fin. Corp. v. Board of Governors, 952 F.2d 426, 434 (D.C. Cir. 1991) ("Synovus"), and the rule can be waived in "extraordinary cases." See New York v. Reilly, 969 F.2d 1147, 1154 n. 11 (D.C. Cir. 1992). The D.C. Circuit held in Synovus that

> our local rule encourages intervenors to present arguments 'not made' by the party they are supporting. D.C. Cir. R. 11(e)(2). There is nothing in our local rule or in Rule 15(d) of the Federal Rules of Appellate Procedure (intervention) that forbids an intervenor from raising, or a reviewing court from considering, an issue not mentioned by the petitioner or respondent but fully litigated in the agency proceedings and potentially determinative of the outcome of judicial review. Rule 15(d) simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought[.]

6/ [continued]

6. Waiver Criteria. Several parties objected to the FCC's waiver paradigms. See Prometheus Brief, pp. 62-63 (contending waiver criteria are too liberal); NAB Brief, pp. 50-54 (waiver criteria are too conservative). As an alternative, MMTC offered a staged implementation plan under which industry-diversifying transactions would be authorized under the rules themselves rather than through waivers. MMTC Brief, p. 30, discussing MMTC Comments, pp. 93-97, JA4377-4381; see also MMTC Brief, pp. 46-47. MMTC also offered several seven incentive proposals based on the availability of waivers. MMTC Brief, pp. 14-16, 17-25, 43-46.

7. Diversity and Competition were the crux of MMTC's proposals for mathematical touchstones for diversity, zero tolerance for ownership rule abuse, opening FM spectrum for new entrants, staged implementation of deregulation and market-based diversity credits as an alternative to voice tests. See MMTC Brief, pp. 25-32, 46-47. The adequacy of the FCC's consideration of diversity and competition is the entire subject of the Prometheus Brief.

Synovus, 952 F.2d at 544.[7/]

Applying these principles, review of the matters raised by MMTC, even when not also raised by petitioners, is appropriate in the interest of justice because this case could not be more extraordinary. As noted above, there is both a stay and expedition, the principal issues are interrelated, and the FCC has for years been dilatory in addressing issues raised by MMTC.

Finally, rather than invoking the (fortunately erroneous) perception that MMTC stands without allies as a reason not to address racial diversity, the Court should regard the uniqueness of MMTC's contentions as a reason why it should address these issues. Mainstream businesses did not bring the court cases which delivered our nation its civil rights jurisprudence. Rather, the nation is free of the yoke of segregation because civil rights organizations seized the initiative and the federal courts listened.[8/]

[7/] In this circuit, no local rule governs the issues an intervenor may raise. However, this Court has directed all parties to address divergent issues in separate briefs. Prometheus Radio Project v. FCC (Order), 3d Cir., October 14, 2003 (per curiam), p. 2 ¶¶1, 2.

[8/] See A. Leon Higginbotham, Jr., "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague," 140 U. Pa. L. Rev. 1005, 1026-27 (1992) (the "magnificent achievement" of America's civil rights jurisprudence evolved only because a handful of civil rights advocates "dedicated much of their lives to create the America that made your opportunities possible.")

II. The FCC Abused Its Discretion When It Repealed The Failing Station Solicitation Rule

MMTC contended that the FCC's repeal of the FSSR, 47 C.F.R. §73.3555 Note 7 (1999), was invalid on five grounds: (1) lack of notice, (2) failure to weigh minority ownership, the original rationale for the rule, (3) disregard of Congress' instructions to promote diversity and eliminate entry barriers; (4) lack of evidence of harm from the rule, and (5) irrational reasoning. MMTC Brief, pp. 34-38.

In response, the FCC first contends that the R&O did provide adequate notice when it "invited comment on the local television ownership rule, raised the option of 'case-by-case determinations of multiple ownership' and emphasized the possibility that the Commission might 'revis[e]'" or "modify" the local television rule. FCC Brief, p. 43, quoting 2002 Biennial NPRM, 17 FCC Rcd at 18528, 18535 ¶¶75, 97, JA3475, 3482. Paragraph 75 of the 2002 Biennial NPRM seeks comment on whether the "local TV ownership rule" promotes "all the various forms of diversity, competition, and localism," and then states "[i]n the following paragraphs, we explore these questions in more detail." Id. at 18528 ¶75, JA3475. The subsequent paragraphs that address diversity mention neither the FSSR nor racial diversity. 17 FCC Rcd at 18529-31 ¶¶78-83, JA3476-3478. Paragraph 97 contains four sentences discussing television news, then asks "[a]re there other factors or policy goals we should consider in determining whether to retain, modify, or eliminate the local TV ownership rule?" Id. at 18535 ¶97, JA3482.

Although the FCC has flexibility to adjust its regulations to respond to a dynamic and complex regulatory environment, it "must conform its conduct to the APA notice requirement." See Sprint Corporation v. FCC, 315 F.3d 369, 377 (D.C. Cir. 2003) ("Sprint"). Section 553(b) of the APA requires an agency to provide notice "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." See MCI v. FCC, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995) ("MCI"), citing Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989) ("FP&L").

By relying on the opaque paragraphs ¶¶75 and 97 of the 2002 Biennial NPRM to provide notice, the FCC would deprive the notice obligation of Section 553(b) of the APA so broadly as to deprive it of any meaning. Under the FCC's reading, an agency could say in an NPRM "we are considering revising any and all of the rules in the C.F.R." and the agency would be deemed to have provided adequate notice of any of the rules found therein. However, Section 553(b) requires more specificity.

Paragraphs 75 and 97 of the 2002 Biennial NPRM were far too vague to alert interested parties to the possibility of repeal. See Sprint, 315 F.3d at 376. The FCC provided no factual detail or a rationale addressing repeal of the rule. See Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) ("Hall"), citing FP&L, 846 F.2d at 771. Further, the 2002 Biennial NPRM did not elicit meaningful

comment.[9] See Hall, 273 F.3d at 1162. Finally, the repeal of the FSSR was not a logical outgrowth of the 2002 Biennial NPRM, inasmuch as it deviated sharply from the FCC's discussion of the principal issue -- minority ownership -- that would be implicated by the repeal of the FSSR.[10] See Hall, 273 F.3d at 1163.

In addressing whether the FCC acted arbitrarily and capriciously and considered all relevant factors, the FCC's Brief only points to the R&O's conclusion that "the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the

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[9] The FCC misses the point when it states that the fact that "a number of parties submitted comments on the failing station waiver policy is ample illustration that notice here was adequate." FCC Brief, p. 43 n. 20. It is well established that "comments received do not cure the inadequacy of the notice given." MCI, 57 F.3d at 1142, citing AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985) ("AFL-CIO"); Wagner Elect. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3rd Cir. 1972). First, "each interested party is not required to monitor the comments filed by all others in order to get notice of the agency's proposal." MCI, 57 F.3d at 1142. In fact, the FCC does not point to anything in the comments it received to indicate that the commenters had actual notice of its intention to repeal the FSSR. Id. Moreover, the goal of the notice requirement is for the agency to elicit meaningful comments so that "the agency will have before it the facts and information relevant to a particular administrative problem." Id. at 1141. As stated by the D.C. Circuit, "there must be an exchange of views, information, and criticism between interested persons and the agency." See HBO v. FCC, 567 F.2d 9, 71 (D.C. Cir. 1977). Significantly, the FCC's Brief does not assert any interest in seeking such an exchange or that the comments it received met this standard.

[10] The FCC's intention to repeal minority ownership protections was further obscured because the 2002 Omnibus NPRM stated that the FCC was instead searching for ways to promote minority ownership. Id., 17 FCC Rcd at 18521 ¶50, JA3468 (seeking comment on "how should we accommodate or seek to foster [the] goal" of "ownership by diverse groups, such as minorities, women and small businesses.")

owner of another station in that market." R&O, 18 FCC Rcd at 13708 ¶225, JA0127; see FCC Brief, p. 43. However, the record contains no documentation in support of this conclusion,[11/] much less any indication that the FCC had consciously reexamined the opposite conclusion it reached in 1999. See Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12936-37 ¶74 (1999) (subsequent history omitted). Even if it were true that same-market efficiencies will always lead to a duopoly "absent unusual circumstances," it does not follow that (1) marketing the station outside the market is a meaningless burden or that (2) the FCC should not retain a transparency regulation that made these "circumstances" less "unusual." The FSSR only requires a company to take the easy, low-cost and rapid step of making it known outside the local market that the station is for sale. Thus, even if transactional transparency might not always produce an out-of-market buyer, it does not rationally follow that transparency should be abandoned.

Finally, the FCC's Brief does not address MMTC's contentions that the FCC failed to address minority ownership, failed to follow Congress' instructions, or acted irrationally. Thus, the FCC has essentially abandoned the issue. Consequently, this Court should vacate the FCC's repeal of the FSSR.

[11/] In fact, this conclusion is objectively erroneous. In 2001, the last year for which television station sale data was publicly aggregated, there were thirteen full power television station transactions in duopoly-eligible markets in the continental United States. Review of this data shows that of these thirteen transactions, six buyers were in-market competitors who created duopolies, but seven were out-of-market buyers. See Broadcasting & Cable Yearbook 2002-2003, pp., A-91-A-93 (official notice requested). Thus, it is hardly "almost always" the case that a buyer will be an in-market competitor.

III. The FCC Arbitrarily Failed To Address Proposals Aimed At Advancing Minority Ownership

In the R&O, the FCC acknowledged the criticality of minority ownership in a structural rulemaking, then omitted reference to most of the proposals before it that address minority ownership. MMTC Brief, pp. 38-48, discussing the R&O, 18 FCC Rcd at 13634-37 ¶¶46-52, JA0051-0054.

The FCC's Brief tersely states that the agency promised that "a more thorough exploration of these issues" would occur in a further rulemaking. FCC Brief, p. 44, citing R&O ¶50-51, JA0053-0054. This promise is hollow and the Court should afford it no credit.

First, with one exception, the proposals that the FCC says should be subject to a "thorough examination" are not even the proposals MMTC raised in the rulemaking proceeding. Indeed, most of them actually lie outside the FCC's jurisdiction, as they are generally nonregulatory in nature.[12/] Therefore, it is uncertain that the FCC ever intends to rule on the proposals MMTC advanced in the rulemaking.

Second, the FCC's history proves why it is a mistake to cabin minority ownership issues into separate proceedings, unequal to the mainstream of structural rulemaking. An inquiry into minority ownership incentives was begun

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12/ See "Twelve Minority Ownership Solutions," in MMTC, "Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002, cited in the R&O, 18 FCC Rcd at 13636 ¶49 and n. 76, JA0053. These items include, e.g., "equity for specific and contemplated future acquisitions." Id. Of course MMTC feels they are worthwhile, but they are simply not within the ambit of the Communications Act.

in 1992, rolled into a minority ownership rulemaking in 1995, and enhanced by five research studies produced in 2000. See MMTC Brief, pp. 7-8. And still we wait. Now the FCC promises yet another separate rulemaking, to conclude at some unstated time in the future, covering topics over which it lacks jurisdiction and ignoring proposals within its jurisdiction.

Third, while the FCC states it will eventually provide a "more thorough exploration of these issues," the FCC does not explain why this proceeding was not the time to do so. Although this rulemaking contained a "thorough exploration" of dozens of other issues, the FCC went out of its way in this proceeding to avoid a "thorough exploration" of minority ownership. Specifically, when the FCC issued the 2002 Omnibus NPRM, it released and sought comment on twelve FCC-commissioned research studies but not on the five FCC-commissioned studies on minority ownership conducted under 47 U.S.C. §257 (1996). See MMTC Brief, pp. 9-10. MMTC and NABOB twice moved for an order in which the FCC could have stated, in two sentences, that it desired public comment on these studies. Id., p. 9 n. 20. Instead, the FCC issued two orders saying it would decide, later, whether to seek public comment. Then, in the R&O itself, the FCC: (1) stated that it had decided not to seek comment on the minority ownership studies; (2) failed to evaluate these studies; (3) stated that it would undertake a further rulemaking at an uncertain date to consider matters that are generally outside the FCC's jurisdiction; (4) failed to state that this new rulemaking would address any of the proposals MMTC actually made in this proceeding; (5) omitted any mention of ten of the MMTC's thirteen proposals; (6) rejected one MMTC proposal, while instead adopting a substitute whose

impact was unknown and which, in fact, will have no impact on minority ownership at all;[13/] (7) referred another proposal to an advisory committee with as surprising a rationale as any tribunal has ever issued in a civil rights case,[14/] and (8) in a surprise move, repealed the only policy aimed at promoting minority television ownership, the FSSR. MMTC Brief, pp. 9-32, 41-43.

13/ The FCC states that "in response to MMTC's suggestion, the Commission adopted a limited exception to allow the sale of grandfathered station combinations to eligible small entities." R&O, 18 FCC Rcd at 13637 ¶51, JA0054, cited in the FCC Brief, p. 44 n. 21. At the time the FCC adopted the R&O, it did not even know the racial composition of this "small business" classification in the new, radio-only policy that it holds out as its only step to address minority ownership. MMTC Brief, p. 15 and n. 31. Now, however, the FCC has been apprised that the eligible group is only 4.5% minority -- barely more than the 4.2% of the total number of radio stations that are owned by minorities. See MMTC Petition for Reconsideration, p. 8 n. 68 and Annex 2 (Statement of Kofi Ofori, September 3, 2003), §2 (official notice requested). Consequently, the cluster spinoff exception is valueless in protecting minority ownership.

However, the FCC did not act unreasonably in holding that it can limit the entities that will be eligible to purchase cluster spinoffs. Clear Channel contends that small companies would have difficulty raising "the level of financing needed to acquire the radio combinations at issue." Clear Channel Brief, p. 46. If a company could not buy a business larger than itself, no new entrant would ever buy a business. There is no record evidence that new entrants, particularly those already experienced in broadcasting, lack the capability to raise sufficient capital to purchase radio station clusters. Thus, MMTC agrees with the FCC that the agency may limit the class of eligible transferees. See FCC Brief, pp. 62-64 and particularly p. 63 n. 36.

14/ The FCC declined to adopt a transactional nondiscrimination "without further consideration of its efficacy as well as any direct or inadvertent effect on the value and alienability of broadcast licenses." R&O, 18 FCC Rcd at 13637 ¶52, JA0054. Somehow, on this question of civil rights, the FCC's expert economists failed to grasp that facilitating more purchasers does not decrease property values. See MMTC Brief, p. 42.

Unless directed otherwise by this Court, the FCC is certain to continue its eleven-year course of obstruction and delay.

IV. The FCC Arbitrarily Failed To Address Proposals Aimed At Advancing Diversity And Competition

The FCC's Brief does not respond to MMTC's contention that the FCC acted improperly in disregarding MMTC's five proposals aimed at diversity and competition generally. See MMTC Brief, pp. 25-32, 46-47 (discussing mathematical touchstones for diversity, zero tolerance for ownership rule abuse, opening FM spectrum for new entrants, staged implementation of deregulation and market-based diversity credits as an alternative to voice tests). Thus, the FCC should be deemed to have conceded this issue.

Conclusion And Request For Relief

The FCC's cursory response to MMTC's Brief shows that the agency has no substantive defense for its failure to address serious proposals aimed at advancing diversity generally and racial diversity specifically -- major objectives of the rulemaking. Indeed, the FCC's Brief is significant primarily for its failure to explain why the FCC has spent eleven years avoiding these issues. The brief offers no serious defense of the repeal of the FSSR. It does not assert that MMTC's proposals were unworthy of a response in the R&O. Instead, for the fourth time since 1992, the FCC promises that, someday, it will study the issue -- just not in this proceeding, where the real decisions are made.

Where the nation stood on school integration in 1968, it stands today on the integration of the airwaves. Recall that in 1955, the Supreme Court declared that recalcitrant school districts must integrate "with all deliberate speed." Brown v.

Board of Education, 349 U.S. 294, 299-301 (1955) ("Brown II"). Yet after Brown II, hundreds of school districts continued to force millions of Black and White children to endure the savage inequalities of segregated schools.

By 1968, having lost patience with de facto nullification and interposition, the Supreme Court declared intolerable "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system" of public education. Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968) ("Green"). Thirteen years after Brown II, the Court declared that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now* (emphasis in original). Green, 391 U.S. at 438. Federal judges then began to assume control of pupil placement, teacher assignment, resource allocations in dozens of school districts.

Particularly in the rural South, post-Green school integration profoundly improved the quality of life of Black and White Americans. Today, the hundreds of thousands of radio listeners and television viewers who are members of the intervenors herein look to this Court for a decree like Green that will require the FCC at last to put an end to the racial ownership exclusivity in the nation's most influential industry.

Courts normally yield to agency expertise, and the FCC's expertise on matters of communications law is certainly entitled to the greatest respect. But when it comes to the subset of communications law which intersects with civil rights law, the FCC has missed every opportunity since 1992 to display whatever expertise it might possess.

The FCC identified seven critical policy goals for this proceeding: viewpoint diversity, program diversity, outlet diversity, source diversity, minority and female ownership diversity, competition and localism. R&O, 18 FCC Rcd at 13627-45, ¶¶18-79, JA0044-0062. These goals are as interrelated as seven links in a chain. In 1968 it was established that every chain that has "got a weak link...is gonna break."[15/] A weak link has broken the policy chain; thus, ascertaining the strength of the other links would be superfluous. The FCC's grave mishandling of racial diversity shows that the agency can no longer be left to its own devices in addressing any of the issues in this docket. Consequently, the Court can dispose of this entire case with a short initial opinion holding that since the minority ownership link has failed, the chain of interrelated issues is broken and the R&O is without credibility.

An efficient way to repair the broken rulemaking would be to appoint a Special Master. See MMTC Brief, p. 50. He or she could be afforded the flexibility to consider supplemental briefs, engage experts, hold hearings, take testimony, or convene the parties for a negotiated rulemaking.[16/] This Court could then adopt or modify the Special Master's report. The designation of a

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15/ Aretha Franklin, "Chain of Fools" (1968) ("but up until then, I'm gonna take all I can take.")

16/ See MMTC Comments, pp. 145-47 (proposing a negotiated rulemaking). An outstanding illustration of the work of a special master in school desegregation litigation is D. Bruce LaPierre, "Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale," 1987 Wis. L. Rev. 971 (1987). A not dissimilar approach, the designation of a senior judge for a mediation limited to 60 days, was employed by this Court in PCHRG, 314 F.3d at 153.

Special Master would ensure that all of the issues in this proceeding receive the attention and close scrutiny they deserve, that all parties' contentions are afforded expansive and thoughtful review, and that this Court will ultimately have before it for consideration a rational, well informed and sustainable resolution of all of the issues in this proceeding.

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Certificate Of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and TypeStyle Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Appleworks 6 in 14 Point Times New Roman.

/ss/

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Dated: December 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of December, 2003, I caused two copies of the foregoing "Reply Brief of Intervenors American Hispanic Owned Radio Association et al." to be served by e-mail and by by overnight courier upon the following parties:

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