

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

In the Matter of:

Revised Inventory and Auction Start Date) PN Rpt. AUC-04-37-I
for FM Broadcast Construction Permits) DA 04-1020

TO THE WIRELESS TELECOMMUNICATIONS BUREAU AND THE MEDIA BUREAU

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits its Comments in response the Public Notice, PN Rpt. No. AUC-04-37-I (Auction #37), DA 04-1020 (released April 15, 2004) (“Auction 37 PN”).^{1/}

I. The Commission Should Prevent Auction Fraud

For over three years, MMTC has attempted to draw the Commission’s attention to the critical need to ensure minority ownership in Auction 37. Auction 37 is the last, best chance for minorities to acquire a significant number of new FM facilities. The need is urgent: for two generations, the Commission did virtually nothing to eliminate the gross disparity in media ownership, and as a result, minorities control only 4.2% of the nation’s radio stations. Because these stations tend to be lower powered or exurban facilities, they constitute only 1.3% of industry asset value.

Even the whiff of fraud would likely doom even the very modest new entrant bidding credits that the Commission adopted in 1996 as a weak substitute for minority ownership bidding credits. It is widely appreciated that widely exaggerated allegations concerning a single proposed transaction led to Congress’ 1995 repeal of the tax certificate policy, which since 1978 had been responsible for 2/3 of minority owned broadcast stations.

Thus, on April 19, 2001, MMTC filed a Petition for Clarification of the auction rules (Exhibit 1). Therein, MMTC pointed out a major flaw in the rules: they allow an auction bidder to conceal from its opponents that it is actually not entitled to the bidding credits it had claimed on Form 175.

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

The loophole works like this: as the auction rules are written now, an applicant can claim new entrant bidding credits, deploy the credits in the auction against other applicants, and then, during or after the auction, quietly abandon the attributes that gave rise to those credits. Sometimes this will happen when inexperienced applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. However, in too many cases, applicants will scheme in advance to retain their diversification attributes only long enough to claim bidding credits. An applicant that does not plan ultimately to be structured as a new entrant can simply create a shell new-entrant structure, claim the bidding credits, and then, during the auction, revert to its long-planned permanent structure. It could then quietly disclose that fact 30 days later, after the auction is over, when the competing bidders can do nothing about it. See Petition for Clarification, pp. 3-8.

While frauds in comparative hearings were generally detected at the deposition stage, fraud in auctions will be widespread and unchecked because there is no transparency in the auction process. Once a Form 175 is filed, it must be taken at face value. It is not going to be audited. Petitions to deny the winning bidder's construction permit application are permitted, but none will be successful because there will never be any evidence that the winner acted in bad faith.

The operation of this fraud, and its consequences for honest bidders, are described by the Declaration of an expert witness MMTC has engaged, Kofi Ofori, Esq. (Exhibit 5). Mr. Ofori, who had been engaged by the Commission to perform one of its 2000 Section 257 studies (see infra) was a co-author of MMTC's FM Auctions Guide (2001) and a trainer at MMTC's 2001 FM Auctions Seminar. Mr. Ofori explains:

Access to accurate information about one's opponents is an objective for all competitors participating in the auction process. Bidders are more likely to prevail against their opponents based on how much they know about their opponents' capabilities, needs and strategies. While needs and strategies are generally unknowable to opposing bidders, capital capabilities are determinable through customary research methods such as credit reports, corporate records, newspaper articles, court records and the like. Using these methods, it is generally possible to ascertain whether one's opponent has great or slight access to capital.

A bidder's entitlement to bidding credits has profound consequences for the strategy of the competing bidders. It signals to opposing bidders that a competitor is capable of bidding at higher amounts than would otherwise be assumed based upon the competitor's capital resources. Thus, when a bidder changes its ownership and capital structure after filing its Form 175, and is permitted by the auction rules not to inform others that it is no longer qualified for bidding credits, the fairness of the bidding process is severely undermined. Consider this example, which roughly mirrors the typical scenario in a multiple allotment, multiple round auction less than 30 days in length.

In this scenario, there are five bidders: A, B, C, D, and E, and two allotments: Huntsville and Florence, Alabama. Each bidder has performed research on the others, generally knows the assets available to the others, and bases its knowledge about the availability of bidding credits on what its opponents have stated in their Form 175's.

In the first three rounds of bidding, Bidders A and B compete for Huntsville, and Bidders C and D compete for Florence. Bidders A and B claim bidding credits, while Bidders C and D do not. Bidder E does not choose which allotment to pursue until the start of round 4 of the bidding.

Bidder E prefers Huntsville -- but upon observing that competitors A and B are using bidding credits, she recognizes that the bidding could go higher on a per pop basis in Huntsville than in Florence. The reason, of course, is that bidding credits reduce the financial contribution required of the winning bidder, enabling it to bid more.

Faced with the choice of bidding for Huntsville against two entities with bidding credits, or bidding for Florence against two entities without bidding credits, Bidder E chooses to bid for Florence. Perhaps she will win -- but the Florence market offers less profit potential and was not her preferred allotment.

Bidder E reasonably relied upon the information contained in the Form 175's filed by Bidders A and B. However, if Bidders A and B (or even one of them) serendipitously changed their ownership structures the day before the auction such that they would be disentitled to bidding credits, and did not disclose this information until after the auction concluded, Bidder E would have foregone her opportunity to bid on Huntsville due to bidding manipulations on the part of her opponents.

Bidder E would be livid, and with good reason. If she had known that Bidder A or Bidder B really was not entitled to bidding credits, Bidder E could have won her prize -- Huntsville -- knowing that Bidders A and B could not outbid her.

Suppose Bidder A wins Huntsville. To be sure, Bidder A will pay a premium after the auction is over, because Bidder A will not have bidding credits. But Bidder A will have her prize -- Huntsville. Further, Bidder A will have secured this prize in competition with only one opponent, Bidder B, rather than in competition with Bidder E as well. In this way, Bidder A may win Huntsville at a lower price as a result of the reduced number of bidders -- offsetting the premium that would be paid post-auction as a result of not having bidding credits. If Bidder B dropped out before the last round, Bidder A would be rewarded with Huntsville at a substantial discount from its fair market value.

Alternatively, Bidder E could have bid for Huntsville, paying far more for it than she would have paid if she had known that Bidders A and B were actually not entitled to bidding credits. Worse still, Bidder E could bid for Huntsville and lose, only to discover later that she was tricked into bidding for the wrong allotment.

In these ways, the lack of transparency in bidding credit reporting undercuts the value of bidding credits, rewards gamesmanship, and ultimately undermines public confidence in the integrity of the auction process.

The cure is very simple, fortunately. The Commission already contemplates having daily updates of bids during the auction. Therefore, it can also require daily updates of entitlements to bidding credits. Disgorgement, and penalties for 11th hour ownership changes, could also provide a disincentive to auction gamesmanship.

In sum, by relying detrimentally on false information, the genuine applicants will be harmed in three ways. First, they will waste resources bidding on allotments they cannot win. Second, they will overbid to win their desired allotments. Third, in a multiple allotment, multiple round auction, they will abandon their optimal allotments and pursue inferior ones that they would not have pursued had they enjoyed timely and accurate information on their opponents' entitlements to bidding credits.

Notwithstanding the importance of this question, the Commission never ruled on MMTC's 2001 Petition for Clarification.

MMTC has raised this issue of auction fraud repeatedly in meetings with the Media Bureau, OGC, and each commissioner. After Bureau and OGC officials advised MMTC that its concerns were more appropriately raised comments in MM Docket 95-31, on May 15, 2002 MMTC filed them as Comments in that docket. Exhibit 2. Yet the Second Report and Order in MM Docket 95-31, Reexamination of the Comparative Standard for Noncommercial Educational Applicants, 18 FCC Rcd 6691 (2003) did not mention MMTC's Comments, except to list MMTC in Appx. A thereto as having filed them.

Undaunted by the Commission's two failures to respond to its concerns, on June 16, 2003 MMTC filed a petition for reconsideration (Exhibit 3). To be certain that the Commission would not overlook the matter a third time, MMTC also filed a motion for stay (Exhibit 4).

Nobody opposed any of these papers. Yet for the third time, the Commission ignored MMTC's pleadings. The Commission even ignored the motion for stay -- doing so even after the Third Circuit granted a stay of the broadcast multiple ownership rules upon learning that the Commission had ignored an MMTC request for a stay in the broadcast ownership rulemaking.^{2/} On top of all of this, not only are MMTC's pleadings not mentioned in the Auction #37 PN, the

Auction #37 PN contains not a word about minority ownership.

This systematic disregard of critical matters offends due process. See 5 U.S.C. §555(e) (1966) (agency must give “[p]rompt notice...of the denial in whole or in part of a...request of an interested person made in connection with any agency proceedings...the notice shall be accompanied by a brief statement of the grounds for denial”); see also 5 U.S.C. §§553(c), 706(1) and 706(2). It should not take four attempts to secure a ruling on a fraud-inducing loophole in the rules. It should not take another NextWave scandal for the Commission to become sensitive to the likelihood that auction fraud could deeply undermine public confidence in the integrity of the auction process -- and endanger even the continuation of such modest pro-diversity initiatives as bidding credits.

The Commission is again respectfully requested to require same-day reporting of entitlements to bidding credits, and disgorgement and penalties for 11th hour ownership changes, in order to eliminate the potential for bidding credit fraud.

II. The Commission Should Reestablish Minority Ownership Bidding Credits

When the Commission eliminated minority bidding credits, it promised to conduct research that could establish whether the restoration of these credits could be justified to remedy the present effects of past discrimination or to promote diversity.^{3/} The Commission completed

^{2/} See Prometheus Radio Project v. FCC (Order), No. 03-3388 (3d Cir., September 3, 2003).

^{3/} See Section 257 Inquiry, 11 FCC Rcd 6280, 6305 ¶34 (1996) (seeking a “broad and comprehensive record from which to determine whether the experiences of women and particular minority groups in entering and participating in the telecommunications market warrant adopting more specific gender or race-based incentives...”); Wireless Report and Order, 12 FCC Rcd 10785, 10878 ¶192 (1997) (declining to consider adopting race or gender conscious auction provisions, but noting that Commission has “initiated a comprehensive rule making proceeding to gather evidence regarding market barriers to entry faced by small businesses as well as minority- and women-owned firms [citing the Section 257 Inquiry]. If a sufficient record is adduced that will support race- and gender-based provisions that will satisfy judicial scrutiny, we will consider race- and gender-based provisions for future auctions”); Paging Systems Second Report, 12 FCC Rcd 2732, 2809 ¶173 (1997) (to the same effect).

those studies in December, 2000, and subsequently promised to review them.^{4/} Thereafter it has repeatedly failed to do so.^{5/} Delay is no longer a fair option, since Auction 37 is likely to be the final significant opportunity to remedy the scandalous underinclusion of minority talent in the ranks of broadcast owners.

Fortunately, the task of surviving strict scrutiny for a program advancing broadcast diversity is substantially easier now: last year, in Grutter v. Bollinger, 123 S.Ct. 2325, 2337 (2003) (“Grutter”), the Supreme Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”^{6/}

Grutter has profound and promising implications for broadcast regulation, since the purpose of diversity in higher education is closely analogous to diversity in broadcasting. Justice

^{4/} See Section 257 Staff Report (December 12, 2000), p. 4 (“the five market entry barrier studies released today explore a series of research questions posed by this strict scrutiny standard. They have been designed to examine both the diversity rationale and the remedial rationale and to evaluate whether the evidence supports them. No single study was designed to provide the definitive answer to this question. Rather, the studies should be evaluated together, along with other studies conducted in the field, to determine whether a compelling interest exists”); Television Duopolies (Second Order on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (rejecting two MMTC proposals to protect minority television ownership, but adding that “[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.”)

^{5/} See Radio Ownership NPRM, 16 FCC Rcd 19861 (2001) (not mentioning the Section 257 Studies or minority ownership); Broadcast Ownership NPRM, 17 FCC Rcd 18503, 18521 ¶50 (2002) (citing the existence of Section 257 studies but not seeking comment on them); Broadcast Ownership Order #2, DA 02-2989 (MB, November 5, 2002) at 2 n. 6 (responding to MMTC/NABOB motion asking the Commission to seek public comment on the Section 257 Studies, the Media Bureau stated that the MMTC/NABOB request “remain[s] pending with the Commission and will be addressed separately” (which never happened); Broadcast Ownership Order #3, DA 02-3575 (MB, December 23, 2002) at 3 n. 12 (to the same effect); Broadcast Ownership Report and Order, 18 FCC Rcd 13620, 13635 n. 70 (2003) (mentioning the existence of the Section 257 Studies without providing or discussing the studies’ findings, and adding that “we believe additional evidence is necessary, however, before we reach conclusions” on market entry barriers facing minorities, women and small business); Section 257 Third Report to Congress, FCC 03-335 (February 12, 2004) (containing no mention of the Section 257 Studies, even though they were the principal work the Commission performed pursuant to Section 257 during the congressionally-mandated three year reporting period).

^{6/} Even before Grutter was handed down, it was possible to design a contracting plan tailored to remedy past discrimination. See Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), certiorari dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001). The underlying DOT program was defended in the Supreme Court by Solicitor General Olson.

O'Connor's opinion in Grutter cited with approval Justice Powell's invocation, in Bakke, of "our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy[.]"^{7/} Her opinion cites with approval Justice Powell's conclusion in Bakke that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission."^{8/} Further, Justice O'Connor's opinion pointed to the importance of "diminishing the force of...stereotypes" as "both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."^{9/}

Promotion of the "robust exchange of ideas" and "diminishing the force of...stereotypes" are exactly the purposes of the Commission's policies that advanced minority ownership.^{10/} Perhaps there are some industries for which racial diversity might not inevitably lead to a better product.^{11/} Nonetheless, if there is any industry for which racial diversity in employment and ownership unquestionably produce a better product, broadcasting is that industry. Just as racial diversity in the classroom promotes competitiveness and quality in business, racial diversity in broadcasting promotes competitiveness and quality in the programming that sustains the well

^{7/} Id. at 2339.

^{8/} Id., citing Regents of U. of California v. Bakke, 438 U.S. 265, 313 (1978) ("Bakke") (quoting Keyishan v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

^{9/} Grutter, 123 S.Ct. at 2341.

^{10/} Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 556 (1990) ("[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community, but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934...but also of the First Amendment"); see also Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 27887 ¶1 (1995) (purpose of developing new minority ownership initiatives "is to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity" (fn. omitted)).

^{11/} See NAACP v. FPC, 425 U.S. 662, 670 (1976) (where the public interest standard in the Power and Gas Acts were "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates" and a court could find that an EEO rule might not advance that objective).

informed populace that is essential to democracy. Minority ownership impacts viewpoint diversity in three ways:

First, minority ownership is by far the largest incubator of minority employment^{12/} -- a proven diversifier of viewpoints through the interactions of employees within a station.^{13/} The impact of racial diversity in broadcast employment has been profound; indeed, the entry of people of color into the world of broadcasting may have done more than any other trend in the past two generations to improve the quality of what viewers see and what listeners hear. The all-White “Mickey Mouse Club” seems quaint now when compared to the bold and highly effective initiatives of the modern ABC-TV, from its hiring of Mal Goode as its U.N. correspondent in 1962, to its choice of Max Robinson as a co-anchor for “World News Tonight” in 1978, to the multiracial cast of “Disney’s Cinderella” in 1997. Without racial diversity, the Fox, UPN and WB networks might never have survived. Nobody misses the poor quality of what passed for journalism on Jackson, Mississippi’s WLBT-TV in 1955.^{14/}

Second, minority ownership enhances diversity of viewpoints by bringing the station owner’s perspective to the airwaves on her station. Station owners are expected to decide what goes out over the air.^{15/} Research, including the Commission’s own research, shows that

^{12/} See EEO Supporters Comments in Docket 98-204 (April 15, 2002), p. 53 n. 124 (reporting that 52% of minorities in radio work at minority owned stations).

^{13/} NAACP v. FPC, 425 U.S. at 670 n. 7 (in dictum, noting that the FCC’s broadcast EEO rules “can be justified as necessary to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees’ programming fairly reflects the tastes and interests of minority groups.”)

^{14/} See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966).

^{15/} See TV-9, Inc. v. FCC, 495 F.2d 927, 938 (D.C. Cir. 1973) (“it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news” (fn. omitted)).

minority ownership significantly influences programming decisions.^{16/}

Third, minority ownership enhances diversity on stations owned by nonminority broadcasters who interact with, respect and learn from their minority counterparts. Just as racial interaction within a broadcast station influences the way the station programs to its community, the interactions among minority and nonminority owners, each with its own perspective on the world, helps make a multiplicity of viewpoints available to the public. Broadcast station owners constitute one of the most exclusive and influential clubs in the American polity. Station owners gather in local ad councils, at local, state and the national associations of broadcasters, at professional conferences, and in local and national charitable and service organizations like the Broadcasters Foundation and the Emma Bowen Foundation for Minority Interests in Media. In these venues, broadcasters convene as equals, exchanging information and forming and refining their viewpoints. When those viewpoints find expression in broadcast programming, they become the greatest single influence on the direction and quality of democracy in our nation.

^{16/} These studies are collected in the Initial Comments of Diversity and Competition Supporters in MB Docket 02-277 (January 2, 2003), pp. 69-71, in the Supplemental Comments of Diversity and Competition Supporters in MB Docket 02-277 (January 27, 2003), Exhibit 1, and Reply Comments of Diversity and Competition Supporters in MM Docket No. 02-277 (February 2, 2003) at 9 n. 15. See also Christine Bachen, Allen Hammond, Laurie Mason and Stephanie Craft, "Diversity Of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity And News And Public Affairs Programming?" Santa Clara University School of Law (2000) (one of the Section 257 studies), which found, inter alia, that minority owned radio stations aired more racially diverse programming than did majority owned stations; minority owned radio stations were significantly more likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings, and to have a minority format for their music programming. Minority owned TV stations were found to be significantly more likely than their majority owned counterparts to have current events related programming and issues relevant to senior citizens. Furthermore, radio and TV stations with more minorities on their staffs were found to have more racially diverse programming than comparable stations with few minority employees.)

As Grutter reminds us, the inclusion of a critical mass of minorities in a classroom would show that the views of minorities are not monolithic.^{17/} In like manner, public awareness of the wide diversity of views held by minorities will lead to a stronger democracy. Therein may reside the greatest value that racial diversity in broadcast ownership has to offer.

Grutter amply justifies the conclusion that promoting racial diversity in broadcasting is a compelling state interest, and that narrowly tailored means that modestly consider race are constitutionally permissible. Armed with this finding, the Commission can and should take steps to redesign and reinstate the minority ownership bidding credits originally intended for broadcast auctions. If necessary, the Commission should delay the auction to provide sufficient time to complete its review of the Section 257 studies and design a constitutionally sustainable minority ownership bidding credits program.

Respectfully submitted,

/s/

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^{17/} Grutter, 123 S.Ct. at 2334 (citing expert testimony that “indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”)

EXHIBIT 1

Petition for Clarification,
filed April 19, 2001

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

In the Matter of:)
)
Amendment of Section 309(j) of the)MM Docket No. 97-234
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)
)
Reexamination of the Policy Statement)GC Docket No. 92-52
on Comparative Broadcast Hearings)
)
Proposals to Reform the Commission's)GEN Docket No 90-264
Comparative Hearing Process to Expedite)
the Resolution of Cases)

TO THE COMMISSION

PETITION FOR CLARIFICATION

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SUMMARY

Throughout half a century of broadcast comparative hearings, the Commission provided for automatic comparative downgrading, commensurate with any downgrading of a diversification showing following a cutoff date. However, it is at best unclear whether new broadcast auction rules prohibit the retention of bidding credits by an entity that downgrades its diversification showing before the auction concludes.

The Commission should clarify its broadcast auction rules to specify that after the Form 175 deadline, an applicant that changes its ownership structure in a manner that would have entitled it to fewer (or no) bidding credits on the Form 175 deadline can retain only those bidding credits that are commensurate with its new ownership structure. Such a clarification would ensure that the value of a bona fide new entrant's bidding credits would not be diluted by bidding credits claimed by those who should not be entitled to them. The requested clarification would particularly benefit minority applicants by relieving them of the risk that those not deserving of bidding credits could deploy the suspect credits to out-finance and outbid them in broadcast auctions. Finally, the requested clarification would ensure that the public would receive the full diversification benefits represented by bidding credits.

Acceptance of an auction password and submission of a bid should constitute affirmative reaffirmation of a bidder's ownership structure and entitlement to bidding credits. If a bidder downgrades comparatively after the filing of Form 175 but before the end of the auction, it should be required to post that fact on the auction website fact at the start of each round of bidding, and thereafter should enjoy only those bidding credits that correspond with its actual structure. Requiring such reports and adjustments to bidding credits would ensure that no bidding credit continues to be deployed after its diversification predicate becomes inoperative. It is a complete and virtually cost-free remedy.

If an auction selectee downgrades comparatively after the auction, but before the start of the initial term that awakens the unjust enrichment rule, it should disgorge to the Treasury the book value of any improvidently deployed bidding credits, plus a substantial "penalty for early withdrawal" of its diversification promise. If the penalty is substantial enough, it will operate prophylactically to ensure that only those who were always capable of building and operating their stations will have an opportunity to do that.*/

*/ This Petition reflects the institutional position of MMTC rather than the views of members of the MMTC Executive Committee, Board of Directors, Board of Advisors or Braintrust, or of any individual MMTC member.

The Minority Media and Telecommunications Council ("MMTC") respectfully requests clarification on a matter of profound importance affecting the integrity of broadcast auctions.^{1/}

BACKGROUND

On December 5, 2001, the Commission is scheduled to hold an auction ("Auction #37") for 351 new FM construction permits.^{2/} These permits comprise the largest group of FM facilities being made available since the 689 Docket 80-90 permits drew their first applications in 1984.

For minorities, the FM auction is supremely important. Ownership concentration, and lack of access to capital have made it increasingly difficult for minorities to enter the industry by buying stations.^{3/} Consequently, for many minorities, winning an

^{1/} This petition may be considered under the Commission's duty to act in the public interest. 47 C.F.R. §1.429(b)(3). Alternatively, this Petition may be considered under 47 C.F.R. §1.429(b)(1) and (b)(2) because no party flagged the subtle but critical issue addressed herein until it arose at the Commission's March 7, 2001 Auction #37 workshop. Finally, the Commission may consider this Petition under its general powers, 47 C.F.R. §1.1, or its power to issue declaratory rulings, 47 C.F.R. §1.2. If leave is required to file this Petition, it is respectfully requested.

^{2/} Auction for FM Broadcast Construction Permits Postponed Until December 5, 2001, Public Notice, Report No. AUC-00-37-G (Auction No. 37), DA 01-619 (released March 7, 2001) ("Auction #37 Postponement") at 1.

^{3/} See generally K. Ofori et al., Blackout? Media Ownership Concentration and the Future of Black Radio (1997) (documenting how concentration is forcing African Americans out of radio ownership); U.S. Department of Commerce, National Telecommunications and Information Administration, Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States (December, 2000) ("NTIA 2000 Minority Ownership Report") at 45-46 (discussing minority broadcasters' endemic difficulties in securing access to capital.)

auctioned construction permit affords the only realistic opportunity to become a station owner.^{4/}

^{4/} When auctions were proposed in 1994, MMTC opposed them because auctions disfavor those without inherited wealth. See Comments of MMTC, NAACP, LULAC and the National Bar Association in GC Docket No. 92-52 (Reexamination of the Policy Statement on Comparative Broadcast Hearings), filed July 29, 1994 at 2 (in light of the "unsurpassed influence" of radio on youth socialization and racial tolerance, "the Commission should not...throw[] up its hands and raffl[e] off the last parcels of broadcast spectrum...Title III radio broadcasting services should not be licensed only to the party with the deepest pockets.")

Assuming auctions were to be used, MMTC advocated race-conscious bidding credits narrowly tailored to remedy the consequences of the Commission's ratification and validation of the past discrimination of its licensees. See Reply Comments of MMTC, PP Docket No. 93-253 (Reexamination of Section 309(j) of the Communications Act - Competitive Bidding), filed October 3, 1994, at 3 ("MMTC Competitive Bidding Comments") (applauding Commission's adoption of a 40% bidding credit and installment payment plan for designated entities for the regional narrowband auctions, and urging that "[i]t is also appropriate for the Commission to adopt additional minority ownership incentives.")

Although the Commission did not adopt a race-conscious plan, it did predict that the new-entrant bidding credits it adopted for broadcast auctions would "promote opportunities by minorities and women consistent with congressional intent without implicating prematurely the constitutional issues" that figured in Adarand v. Peña, 515 U.S. 200 (1995) ("Adarand"). Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (First Report and Order), 13 FCC Rcd 15920, 15995 ¶189 (1998) ("Competitive Bidding First R&O"), recon. granted in part, denied in part on other grounds by Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), modified in other respects by Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999) ("Competitive Bidding Further MO&O"), affirmed sub nom. Orion Communications Limited v. FCC, D.C. Cir. No. 98-1424 (per curiam), 20 C.R. 784 (released June 13, 2000). See also Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996) (holding that FCC acted reasonably in adopting small business-based eligibility rules and abandoning former race conscious rules in order to avoid Adarand challenge.)

Generally, race-neutral programs should be attempted before race-conscious ones are considered. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-510 (1989). Auction #37 will be the first test of the Commission's race-neutral approach to broadcast ownership. MMTC has invested considerable resources into helping this initiative succeed.

Bearing this in mind, on March 1, 2001 MMTC published The MMTC FM Auction Guide and distributed it widely to minority broadcasters. From March 7-9, 2001 at the Department of Commerce, MMTC held a seminar on Auction #37. Fifty minority broadcasters, virtually all of whom were new entrants, attended the MMTC seminar.

Many of MMTC's seminar participants also attended the Commission's March 7, 2001 workshop on Auction #37 regulations and procedures. This Petition is filed to clarify a point raised by a question at the Commission's workshop.

I. THE BROADCAST AUCTION RULES CONTAIN A LOOPHOLE THAT COULD SIGNIFICANTLY DILUTE THE VALUE OF BIDDING CREDITS

The Auction #37 rules specify that an applicant's eligibility for bidding credits, based on the mass media interests of the applicant and those with attributable interests in the applicant, "shall be determined as of the short-form (FCC Form 175) filing deadline[.]"^{5/} The question asked at the Commission's workshop was essentially this: suppose, after the Form 175 date, an applicant changes its structure to one that would not have yielded as many bidding credits before the Form 175 date. Will the Commission reduce the applicant's bidding credits? The Commission's staff responded, accurately, that the rules might be ambiguous on that point.

While the broadcast auction rules almost surely prevent the acquisition of new or additional bidding credits after the Form

^{5/} Auction Notice and Filing Requirements for FM Broadcast Construction Permits, Public Notice, Report No. AUC-00-37-C (Auction No. 37), DA 01-119 (released January 19, 2001) at 13 ("Auction #37 Rules"). The Form 175 deadline for Auction #37 is now October 5, 2001. See Auction #37 Postponement at 1.

175 date,^{6/} they appear not to clearly require that an applicant must relinquish its credits or face other penalties if it abandoned its Form 175 ownership structure that yielded bidding credits before the auction ends, or after the auction but before the "initial term" whose commencement awakens the unjust enrichment rule, 47 C.F.R. §1.211(d)(1).^{7/}

^{6/} The Auction #37 Rules expressly require divestitures to be consummated before the Form 175 deadline in order to avoid attribution. Id. at 13 and n. 29. While not expressly mentioning a no-upgrade policy, this attribution-avoidance requirement amounts to the same thing because the only manner by which a comparative upgrade could be effectuated under the current definition of bidding credits is through the divestiture of an interest in a medium of mass communications. It is noteworthy that in the wireless auction context, the Commission has had occasion to deny a request for waiver of its general no-upgrade rule, 47 C.F.R. §1.2105(b)(2). Two Way Radio of Carolina, Inc., 14 FCC Rcd 12035, 12043 ¶15 (1999) ("Two Way Radio") (holding that a proposed post-auction upgrade in a wireless applicant's eligibility for treatment as a small business would make it "possible for a bidder to use the amendment process as a mechanism to gain unfair advantage over other bidders in the auction.") Thus, a no-upgrade policy appears safely embraced within the Commission's law of both broadcast and wireless auctions.

^{7/} Not only do the rules not state that a post-Form 175 comparative downgrade occurring before the auction ends will result in the loss of bidding credits, the rules can easily be read in good faith to mean that the bidding credits would be retained:

First, the Auction #37 Rules specify that an applicant's eligibility for bidding credits, based on interests of the applicant and those with attributable interests in the applicant in other media of mass communications, "shall be determined as of the short-form (FCC Form 175) filing deadline[.]" Auction #37 Rules at 13. The Auction #37 Rules are silent on the treatment of diversification downgrades occurring after Form 175 is filed but before the start of the "initial term" that marks the beginning of the time when the unjust enrichment rule (47 C.F.R. §1.211(d)(1)) applies. Indeed, the Auction #37 Rules state that after filing Form 175, an applicant may not "change New Entrant Bidding Credit Eligibility[.]" Id. at 18 (emphasis supplied); see also id. at 45 (Guidelines for Completion of FCC Form 175 and Exhibits) ("[a]pplicants are advised that [the Form 175 filing] is the sole opportunity to select 'New Entrant' status and claim a bidding credit level (if applicable). There is no opportunity to change

[n. 7 continued on p. 5]

7/ [continued from p. 4]

the election once the initial short-form filing deadline passes" (emphasis supplied)). The word "change", of course, includes both upgrades and downgrades. Thus, the Commission appears to be telling applicants that their bidding credits will remain intact even if their ownership structures happen to change.

Second, Form 175 requires a certification that the applicant will "remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications[.]" 47 C.F.R. §1.2105(a)(2)(vii) (emphasis supplied). Since bidding credits are a comparative incentive and not a "qualification," this language appears to inform applicants that they need not "remain in compliance" with the showing that yielded them their bidding credits. The rule's reference to "financial" adds to the inference that the word "qualifications" in the rule has the same essentially literal meaning that it had in the hearing-era phrase "basic qualifications." The broadcast-specific rule, 47 C.F.R. §73.5002(b) and the Auction #37 Rules are silent on whether any additional certifications must be made.

Third, the rules provide that after being filed, Form 175 cannot be amended to reflect "changes in an applicant's size which would affect eligibility for designated entity provisions." 47 C.F.R. §1.2105(b)(2) (emphasis supplied). The Commission referred again to an applicant's "size" in its decision adopting the broadcast auction rules. See Competitive Bidding First R&O, 13 FCC Rcd at 15976 ¶145. That has to have been a mistake; it is apparently an inadvertent carryover from the general auction rules' size-based definition of a small business designated entity. The word "size" is misplaced in a discussion of broadcast auction bidding credits, since they are calculated on the basis of the number and location of media outlets owned, and not on the basis of the "size" of a designated entity. For example, an applicant owning a media outlet in a market containing the community of license of a permit being sought (and thus entitled to no bidding credits) might be smaller in size than an applicant owning a media outlet in a different but larger market (and thus entitled to a 25% bidding credit.) However, even if the references to "size" were intended as an inexact way of referring to any and all changes in media holdings that would affect an applicant's entitlement to bidding credits, the language in the rule prohibiting amendments does not make it clear that those changing their structures to add new media interests after the Form 175 deadline will have their bidding credits adjusted downward. Neither the broadcast-specific rule nor Auction #37 Rules offer a contrary interpretation of §1.2105(b)(2). See 47 C.F.R. §73.5002(c) and Auction #37 Rules at 16.

[n. 7 continued on p. 6]

The Commission seldom construes its own silence or ambiguity to the detriment of a regulatee;^{8/} thus, a clarification is in order so the public will be sure what the law is.

7/ [continued from p. 5]

Fourth, Form 301 applications require the applicant to list and summarize agreements "that support the applicant's eligibility as a small business under the applicable designated entity provisions[.]" (emphasis supplied). 47 C.F.R. §1.2112(b)(2)(i); see also FCC Form 301 (May, 1999 version), Section II - Legal, Question 10. However, if "eligibility" is determined as of the Form 175 date, the documents that must be submitted with Form 301 would be the documents that had been in effect on the Form 175 date. The broadcast-specific rule and the Auction #37 Rules drop the "designated entity" terminology but are silent on whether an applicant must report on Form 301 its qualifications for bidding credits as of any date other than as of the Form 175 "eligibility" date. See 47 C.F.R. §73.5005(a) and Auction #37 Rules at 31.

Fifth, the unjust enrichment provision of the rules relating to bidding credits provides only that "within the initial term" a licensee using a bidding credit that seeks "to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit" or that "seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit)" will be required to reimburse the government for the amount of the ineligible bidding credit, plus interest. 47 C.F.R. §1.2111(d)(1). Since this disgorgement is contemplated only if the ownership change occurs "within the initial term", it appears to omit ownership changes that occur at any time between the Form 175 date and the start of the license term. The Commission's decision adopting broadcast auction rules adopts no broadcast-specific rule paralleling §1.2111(d)(1), and the Commission's discussion of this issue simply adopts the "unjust enrichment" formulation in Part I of the rules. See Competitive Bidding First R&O, 13 FCC Rcd at 15997 ¶194. The Auction #37 Rules do not address unjust enrichment.

8/ "[W]here the regulation is not sufficiently clear to warn a party about what is expected of it[,], an agency may not deprive a party of property by imposing civil or criminal liability." General Electric Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995), quoted in Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 628 (2000) ("Trinity"). In Trinity, the court vacated the denial of license renewal for an applicant whose ownership structure allegedly conflicted with the Commission's rules. See also Fox Television Stations, Inc., 10 FCC Rcd 8452, on reconsideration, 11 FCC Rcd 5714 (1995) (declining to impose sanctions where an applicant allegedly had evaded the Commission's policies on reporting alien stock ownership interests.)

It would be a mistake to allow an applicant to propose a structure that confers bidding credits, then abandon that structure and still retain the credits or the post-auction benefits flowing from the credits. An applicant taking advantage of such a loophole would receive a considerable transfer of wealth as a reward for having abandoned its ownership structure.

For example, an individual without media interests could initially create a sole proprietorship company and thereby secure a 35% bidding credit on the Form 175 date. On the next day, that person could deliver a substantial interest in her company, and a secure option to acquire the radio station as soon as the rules allow, to a company that holds multiple media interests.^{9/} The multimedia company could supply virtually all of the applicant's

^{9/} Actually, these pre-auction restructurings would be most likely to occur at an 11th hour decision point, such as the day before upfront payments are due, the day before the auction, or even during the auction itself. If an applicant restructures on the day before the auction, this scenario might obtain:

October 5, 2001	Individual files Form 175 claiming bidding credits
November 5, 2001	Individual makes upfront payment
December 4, 2001	Individual takes on multimedia partner
December 5, 2001	Auction #37 begins
December 10, 2001	Auction ends
December 11, 2001	Public Notice issued, announcing results
December 12, 2001	Merged entity submits downpayment and files Form 301
December 14, 2001	Form 301 accepted for filing
December 24, 2001	Petitions to Deny due; none filed against merged entity's Form 301
December 28, 2001	Merged entity's Form 301 granted
December 31, 2001	Merged entity commences construction of radio station
January 3, 2002	Merged entity quietly timely files \$1.65 report of its merger
January 4, 2002	Losing bidders read \$1.65 report but are powerless to seek redress.

[n. 9 continued on p. 8]

financing, and thus usually exercise de facto control, without competitors or the Commission knowing about it.^{10/} Although the original sole proprietor may have planned this scenario with her future partner well in advance of the lock-in date, no one would ever know that because there is no discovery. Yet even if the sole proprietor had made no such advance plans, she could still be unjustly enriched by absence of an automatic downgrading rule. She could simply raffle off her bidding credits to less diverse entities in what would amount to a private auction. The resulting merged entity, formed only for the unbusinesslike purpose of trumping its competitors, could accurately be characterized by a reviewing court as "strange and unnatural."^{11/}

^{9/} [continued from p. 7]

Under this scenario, the restructured entity would not be required to notify the Commission of its restructuring (whatever its effect on bidding credit eligibility) until after it had survived the petition to deny deadline, won the permit, and even begun construction. If the restructuring occurred during the auction (as is likely in an auction running longer than the five days in our example above) the restructured entity could deploy the bidding credits to win the auction, survive the petition to deny deadline, obtain a grant, and be testing its transmitter before it would have to file its §1.65 report. Worse yet, if the restructuring occurred after the auction but before the "initial term" that awakens the unjust enrichment rule, the applicant might never be held accountable.

^{10/} The Commission modified its attribution rules in the auction context, hoping to avoid this very result. Competitive Bidding Further MO&O, 14 FCC Rcd at 12543 ¶6 ("attributing the media interests held by very substantial investors would prevent a large media group owner from providing all the financing for an auction applicant that then claims new entrant status and eligibility for a substantial bidding credit" (fn. omitted)). See also Auction #37 Rules at 14.

^{11/} This famous phrase was expressed in Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992) ("Bechtel I").

II. **THE COMMISSION SHOULD ENSURE THAT NO APPLICANT USES BIDDING CREDITS THE APPLICANT DOES NOT DESERVE**

A. **THE COMMISSION HAS NEVER BEFORE PERMITTED THE RETENTION OF COMPARATIVE BENEFITS BY APPLICANTS WHOSE STRUCTURES WERE NO LONGER CONGRUENT WITH THEIR COMPARATIVE BENEFITS**

The Commission has had a longstanding policy requiring automatic comparative downgrading commensurate with an applicant's reported diversification downgrading. That policy is a corollary to the Commission's even longer-standing policy barring applicants from receiving credit for post-cutoff date comparative upgrading. The no-upgrade policy is over half a century old.^{13/} Most famously articulated in 1970,^{14/} it evidently remains in effect in the point system selection process for mutually exclusive reserved channel noncommercial applicants.^{15/} It has also been applied in wireless auctions,^{16/} and it will apply in broadcast auctions.^{17/}

^{13/} Board Member Norman Blumenthal has dated the no-upgrade policy to Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). See Daytona Broadcasting Company, Inc., 97 FCC2d 212, 216 (1984) ("Daytona"), review granted in part, denied in part, 59 RR2d 1302 (1985).

^{14/} The most-cited expression of the policy was in Erwin O'Connor Broadcasting Co., 22 FCC2d 140 (Rev. Bd. 1970), which set out six factors to be considered in satisfying the "good cause" criteria for postdesignation amendments. Among those criteria were "that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced, and that the applicant will not gain a competitive advantage." Id. at 143.

^{15/} See Reexamination of the Comparative Standards for Noncommercial Educational Applicants (Report and Order), 15 FCC Rcd 7386, 7423 ¶90 (2000) (explaining that an applicant's claimed entitlement to comparative points, as set out in its application, is reviewed by Commission to select a permittee, with no provision for amendments to point showings.)

^{16/} See Two Way Radio, 14 FCC Rcd at 12043 ¶15.

^{17/} See discussion at p. 4 n. 6 supra.

Like the no-upgrade policy, the automatic downgrade policy is well established in broadcast law.^{18/} The automatic downgrade policy serves the same purpose as its parent, the no-upgrade policy: preventing an applicant from gaining an unfair advantage relative to its competitors. Allowing applicants to retain bidding credits for abandoned pre-cutoff date proposals confers an unfair advantage in just the same way that it would confer an unfair advantage to allow applicants to claim additional bidding credits for post-cutoff date proposals.

Applying the automatic downgrade policy to auctions could not be more logical. As noted earlier, its parent of the automatic downgrade policy is the no-upgrade policy, which is already embraced within the Commission's laws of wireless and broadcast auctions.^{19/} In the comparative hearing context, the automatic downgrade policy was used to apportion diversification credits; thus, it makes sense to use the same policy to apportion bidding credits in auctions. After all, bidding credits in auctions are the direct policy successors of diversification credits in comparative hearings. The purpose of automatic downgrading in an auction is the same as its purpose in a hearing

^{18/} The Board articulated the automatic downgrade policy in Daytona, 97 FCC2d at 218 (holding that when applicants for the same permit merge after the cutoff date, the surviving applicant will inherit the least comparatively advantageous attributes of each of the merging applicants.) Earlier cases applying the automatic downgrade policy include W.S. Butterfield Theatres v. FCC, 237 F.2d 552, 556 (D.C. Cir. 1956) (change in programming and facilities) and Enterprise Co. v. FCC, 231 F.2d 708 (D.C. Cir. 1955), cert. denied, 351 U.S. 920 (1956) (merger). See discussion in Richard P. Bott II, 4 FCC Rcd 4924, 4927 ¶18 (Rev. Bd. 1989), review denied, FCC 90-109 (released April 12, 1990).

^{19/} See discussion at p. 4 n. 6 supra.

-- preventing unjust enrichment and thus preserving for the public the benefits of diversification. Whether the permittee is ultimately chosen by a computer or a judge is irrelevant to whether an applicant should be entitled to receive a comparative advantage. Indeed, because the integrity of auctions is based entirely on self-reporting by applicants, the downgrading of credits commensurate with diversification downgrading is needed even more critically in auctions than it was in hearings.^{20/}

In the hearing context, the determination of credits began when the Commission established a date beyond which amendments could not be filed as a matter of right, meaning that as of that date applicants were required to lock in their comparative showings.^{21/} This date, which in its final incarnation was known

^{20/} In discovery and at trial, comparative hearing applicants had to defend the genuineness of their ownership structures under the watchful eyes of their opponents and a judge. That safeguard is unavailable in auctions, which rely entirely on paper self-reporting. The reliability of self-reporting has only the degree of integrity possessed by the competitor most willing to push the regulatory envelope.

It is true that losing bidders in an auction have every right (and ten days) to file petitions to deny pursuant to 47 C.F.R. §73.5006. However, given the ambiguous status of automatic downgrading in the law of broadcast auctions, an allegation that a bidder used bidding credits to which it may not have been entitled would be unlikely to result in the bidder's disqualification. The Commission would probably have to view such an allegation as comparable to an allegation, in the comparative hearing context, that an applicant's diversification or integration proposal was unreliable. In such a case, diversification or integration credit would have been denied but the applicant would not have been disqualified. See, e.g., Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700-1701 ¶¶15-18 (1992) (holding that a showing of "deceptive or abusive intent" is necessary to sustain the conclusion that an applicant committed disqualifying misconduct.) Having no possibility of supplanting the winning bidder, no rational losing bidder would go to the effort and expense of filing a petition to deny.

^{21/} See generally Alexander S. Klein, 86 FCC2d 423, 434 (1981).

as the "B-cutoff date," fell promptly after the Commission issued a hearing designation order, and just before discovery was set to begin. While an applicant could change its comparative showing after the B-cutoff date,^{22/} such a change in its showing would generally be accepted into the record for reporting purposes only. Thus, the applicant would receive no credit for any comparative upgrading.^{23/}

By denying credit for post-B-cutoff comparative upgrades, the Commission prevented applicants from adopting new ownership or operating structures whose only purpose was to appear more attractive than their competitors' comparatively superior showings. Similarly, if an applicant changed its comparative showing to one less advantageous than the showing proffered as of the B-cutoff date, the applicant would be evaluated based on the new, less advantageous showing. In this way, the Commission prevented applicants from being rewarded for comparative attributes that no longer existed. Applicants were thereby disincentivized from falsely promising integration or diversification benefits on the B-cutoff date, secure in the knowledge that they could later quietly disclaim their promises

^{22/} Changes in comparative showings must be reported within 30 days. 47 U.S.C. §1.65.

^{23/} See, e.g., Kennebec Valley Television, Inc., 3 FCC Rcd 4522 ¶4 (1988) (explaining that the Commission would accept, for reporting purposes only, a post-B-cutoff amendment that would result in impermissible comparative upgrading.)

while still receiving comparative credit for them.^{24/}

The no-upgrade/automatic downgrade paradigms were high points of comparative hearing procedure. Although the Court of Appeals has viewed some aspects of the comparative process with skepticism,^{25/} it has never had occasion to quarrel with the no-upgrade/automatic downgrade paradigms. These paradigms served the Commission and the public well by preventing widespread structural abuse.

Having quite properly determined to withhold new bidding credits for post-cutoff comparative upgrades in broadcast auctions,^{26/} it would seem logical for the Commission to prevent applicants from retaining bidding credits for ownership structures they have abandoned. Bidding credits' value lie in the auction-winning power they deliver to an applicant, relative to applicants

^{24/} Board Member Blumenthal explained in 1984:

the bar against "upgrading" is indispensable to the assurance of full and fair notice to (actual or potential) competing applicants of the make-up and the potential strength of the proposals of a mutually-exclusive adversary. Broadcast licenses are awarded on the basis of relative competitive merit...and, to be blunt, comparative licensing proceedings conducted under the Policy Statement [1 FCC2d 393 (1965)] are far too exhaustive and expensive to allow an applicant to be drawn deeply into a competition for the license, only to be confronted by a competitor whose comparative position has been improved post hoc by decisionally significant changes in its ownership structure or its broadcast proposals.

Daytona, supra, 97 FCC2d at 216-17.

^{25/} See, e.g., Bechtel I, supra; Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II").

^{26/} See discussion at p. 4 n. 6 supra.

lacking them.^{27/} Thus, allowing a "downgrader" to retain bidding credits for a nonretained ownership structure hurts other applicants' chances as much as allowing an "upgrader" to secure bidding credits by creating a new and possibly nongenuine structure.

Indeed, allowing downgraders to retain their bidding credits would hurt the straight-arrow applicants much more than it would hurt to give upgraders new bidding credits. An upgrader seeks to obtain new bidding credits by proposing to divest media interests, while a downgrader seeks to retain bidding credits while bringing in a media owner that provides a new source of financing. Thus, the upgrader would get bidding credits but would have to carry a divestiture pledge, while the downgrader would get bidding credits and financing too. The downgrader would be much better positioned than the upgrader to prevail over the other applicants.^{28/}

^{27/} The economic operation of the tax certificate policy provides a close parallel to bidding credits. A buyer delivering a tax certificate to a seller was seldom able to secure stations at a price discount. The sale typically occurred at almost the same prices that would have obtained in a non-tax-certificate deal; thus, the seller retained the financial benefits of the tax certificate. The tax certificate's real value was that it brought the minority buyer to the dealmaking table. Buyers were able to deploy the tax certificates as a bargaining chip to persuade sellers that it would be at least as desirable to trade with them than with otherwise equivalent potential buyers. See generally E. Krasnow et al., "Maximizing the Benefits of Tax Certificates in Broadcast and Cable Ventures," 13 COMM/ENT Law Journal 753 (Summer, 1991). Similarly, in the auction context, bidding credits may have little effect on the financial exposure of the winning bidder. Instead, bidding credits are likely to assist new entrants in prevailing against other bidders in an auction.

^{28/} Media companies making post-cutoff date deals to buy bidding credits would be just as culpable as those selling the bidding credits. It is unfair to allow one multimedia company to deploy undeserved bidding credits as an engine of growth while other multimedia companies are limited to market competition as their only engine of growth.

The public, too, would be harmed even more by retained credits for downgraders than by new credits for upgraders. At least an upgrader promises to yield up some diversification in exchange for the new credits; someday, the public might collect on the upgrader's promise. On the other hand, a downgrader retaining its bidding credits, and then selling them in a private auction, would just retain the cash value of the bidding credits, without any obligation to give anything back to the public.

Experience with the Personal Communications Services (PCS) C and F block auctions suggests that there will probably be plenty of litigation over ownership structures in all auctions.^{29/} Inherently suspect ownership structures schemes also figured in

^{29/} See, e.g., TPS Utilicom, Inc. Petition to Deny applications of Alaska Native Wireless, L.L.C., File Nos. 0000364320 and 0000363827, Auction #35 (filed March 9, 2001) at 2-3 (alleging that when considering applicant's stock on a fully diluted basis, "AT&T exercises de jure control" of the applicant.) As one respected commentator has contended,

[O]f the 422 [C Block] licenses that were supposed to go to small competitors, 95 percent went to front companies for AT&T, Sprint, Cingular and the other giants....Not only did the giants cheat in order to devour a market set aside for small competitors, but they also used their front companies to qualify for a small-business credit to pay for these licenses, costing us taxpayers \$626 million. It's subsidization of monopolization.

Jim Hightower, "Stealing the Cell Phone Market," syndicated column, April 1, 2001.

virtually every comparative hearing.^{30/} In a few hearings, judges had to disqualify everyone. Even though hearing applicants faced crossexamination, the FCC Reports and FCC Record are littered with the detritus of dozens of frauds.^{31/} Hearings even attracted a number of serial offenders.^{32/}

With no opportunities for the examination of witnesses, auctions are likely to attract an even wider cast of envelope-pushers than were drawn to comparative hearings. Human nature being what it is, an unlocked and unattended bank vault makes sinners out of saints. Thus, unless airtight ownership structural integrity protections are designed in, auctions could prove to be even more litigation-prone than hearings.

^{30/} Judge Williams recited several "startling arrangements manifested just in" the Bechtel case:

best friends and co-owners of a station swear not to consult with each other; family members with valuable broadcast knowledge and experience agree not to assist the tyro station manager in the family; people with steady jobs and families in one city pledge to leave them and move permanently to another; and wealthy retirees promise to move to and work in small summer towns in Delaware with which they have no former connection.

Bechtel II, 10 F.3d at 886 (quoting Bechtel I).

^{31/} See Carta Corporation, 5 FCC Rcd 3696, 3701-72 ¶15 (Rev. Bd. 1990) (collecting cases to make the point that "the Commission has been confronted with a large volume of applications that disingenuously depict a two-tier ownership structure so as to exploit artificially the Commission's comparative structure[.]")

^{32/} See, e.g., Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities, 4 FCC Rcd 6342 (1989) (opening Section 403 investigation into Sonrise Management Services, Inc.)

B. RECERTIFICATION OF OWNERSHIP STRUCTURES AT THE START OF THE AUCTION AND DURING EACH ROUND WOULD PREVENT MISUSES OF BIDDING CREDITS BEFORE THE AUCTION ENDS

The Commission can choose from three three potential regulatory mechanisms that could prevent downgraders from benefitting from undeserved bidding credits before the auction ends: (1) reauctioning the permit; (2) requiring disgorgement of the book value of the bidding credits; or (3) requiring bidders to reconfirm their structures and flag decisionally significant structural changes as bids are rendered.^{33/} Of these, the third is by far the most desirable approach.

1. Reauctioning. If the Commission waits until after an auction to find out that an applicant downgraded its structure before the auction ended, no relief could make the unsuccessful bidders whole. Denying a Form 301 application or revoking a grant would require a Section 309 hearing and a reauctioning, delaying service to the public and draining resources from the agency.

Nor would reauctioning be fair to the straight-arrow bidder. Such a bidder would derive no consolation from the knowledge that it will have a second opportunity to incur the time

^{33/} Actually there is a fourth mechanism -- imposing conditions on a grantee. Cf. AirGate Wireless, L.L.C., 14 FCC Rcd 11827, 11835 ¶17 (Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, 1999) (imposing conditions on C and F Block PCS licensee to resolve dispute over whether an applicant was a designated entity at the time it filed its long form application.) However, since this procedure is necessarily ad hoc and situation-specific, it would carry the risk of arbitrariness. It would also consume far more regulatory resources than would a blanket rule, preferably one designed to be prophylactic and usually self-enforcing.

and expense of engaging professionals, raising capital, and placing that capital at risk.^{34/}

2. Disgorgement. It would not be sufficient for the Commission simply to declare that an applicant that downgrades after filing Form 175, but was not required to (and did not) report that fact until after the auction, must pay the Treasury the book value of the winning bid attributable to the bidding credits, plus interest. Such a remedy seems reasonable in the context of a post-licensing restructuring.^{35/} However, pre-licensing disgorgement only of the book value of bidding credits, plus interest, would unjustly enrich the downgrading applicant -- who by then would not even have built the station. The portion of the winning bid attributable to the bidding credits does not come close to representing the entire value of the bidding credits because it does not take into account the value attendant to winning the auction itself and possessing the permit.^{36/} To

^{34/} That is not the only harm attendant to learning too late that bidding credits were improvidently deployed. If the downgrading applicant lost the auction, the Commission would never know that the applicant had changed its structure and had used bidding credits it did not deserve. Thus, a straight-arrow bidder who won will have paid a premium to outbid the downgrading applicant's undeserved bidding credits. Furthermore, in a simultaneous, multiple-round, ascending auction, other straight-arrow bidders would inevitably have reacted to the undeserving bidder's deployment of bidding credits by focusing, to their detriment, on suboptimal allotments.

^{35/} The unjust enrichment provision applies only "within the initial term". 47 C.F.R. §1.2111(d)(1). That provision presents no significant risk of abuse. A bidder that wins a license, pays the auction price and builds the station with its own money has assumed all the risks assumed by any other new entrant.

^{36/} After all; "possession is rather more than nine points of the law." Corporation of Kingston-upon-Hull v. Horner (Lord Mansfield, 1774).

competing applicants who lost the auction disgorgement would be perceived as little more than a government loan of bidding credits that underwrote the ultimate winner's campaign to outbid them.

3. Recertification. The Commission could simply require that each bidder reaffirm its Form 175 ownership certification a few days before the auction and again at the start of each round of bidding. The Commission can do that by requiring each bidder to affirm, at the time it receives its password, that as of that moment and at each time it submits a bid, it is contemporaneously reaffirming that as of that day its ownership structure has not changed in a manner that would reduce its entitlement to bidding credits. During the auction, if an applicant downgrades its structure so as to reduce its entitlement to bidding credits, it would immediately adjust its bidding credits commensurate with its downgrading, and it would post that fact on the auction website at the start of the next round. In that way, all other bidders will be aware of their competitor's changed circumstances, and would not be subjected to bluffing or other tactics whose success depends on competitors having incorrect information about one another's relative strengths and weaknesses.

Not only would such a requirement be virtually cost free, it would be eminently fair. No revocation hearings would be needed except in instances of deliberate misrepresentations. No auctions would have to be repeated, since bidders could only enjoy bidding credits for so long as they deserved the credits.

This procedure would not only provide complete relief for downgrading, it would actively discourage downgrading and thus promote diversity. The reason is that few if any applicants would

downgrade before the end of the auction if they knew they would lose bidding credits by doing so. Even if they were to overbid, and thus needed to restructure to raise money quickly, it is unlikely that the extent of such an overbidding would come close to the 25% or 35% discounting power of a bidding credit they would stand to lose by restructuring.

C. DISGORGEMENT, WITH A PENALTY FOR EARLY WITHDRAWAL OF A DIVERSIFICATION PROMISE, WOULD PROVIDE AN ADEQUATE REMEDY FOR COMPARATIVE DOWNGRADES AFTER THE AUCTION BUT BEFORE THE INITIAL TERM BEGINS

A challenging scenario is presented by the bidder which enjoys bidding credits and wins an auction -- and then downgrades before the start of the "initial term" that awakens the unjust enrichment rule. Certainly an applicant that never had the interest or ability to build out a permit should not be permitted to restructure itself, disgorge only the book value of the bidding credits, and thereby make a nice but undeserved profit -- a profit that should have gone to a bidder that was always ready and able to build and operate the station. Unfortunately, the rules currently provide no remedy at all in this scenario.^{37/}

Owing to the cost to all concerned in time, money and foregone opportunity, reauctioning would provide no remedy at all for downgrades after an auction but before the initial term begins. While recertification works very well as a remedy for downgrades occurring before an auction ends, recertification loses its regulatory power the instant the auction is gavelled to a close. At that moment, the wrong winner has been chosen and the deserving bidder has lost.

^{37/} See p. 6 n. 7 ¶5 supra.

Disgorgement of the portion of the winning bid attributable to the bidding credits, plus interest, would only provide a partial remedy for downgrades after an auction but before the initial term begins. As in the case of downgrades before or during an auction, disgorgement only of the bidding credits' book value might only serve to commemorate that the Commission had granted the applicant a de facto loan equal to the book value of the bidding credits. The enterprise value attendant to winning the permit would still escape recapture.

Consequently, disgorgement would provide an adequate remedy for post-auction, pre-initial-term downgrades only if they include a very substantial "penalty for early withdrawal" of a diversification promise. A high enough penalty would prophylactically discourage applicants from submitting bids for facilities they know they cannot built out.^{38/} While the determination of the amount of such a penalty is unavoidably somewhat arbitrary, it would not appear unreasonable, in the first

^{38/} Following Congress' lead, the Commission has always sought to design its auctions so as to build in deterrence of structural abuse. As the Commission noted when it promulgated its first auction regulations,

The legislative history suggests that in the auction context Congress's directive to take steps to prevent unjust enrichment was similarly intended to prevent auction winners from acquiring licenses for less than true market value at auction and then transferring them for a large profit prior to providing service....The acquisition of a license through an effectively conducted competitive bidding process is in itself a strong deterrent to unjust enrichment.

Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2385 ¶212 (1994) (fn. omitted) (discussing H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 257 (1993)).

few auctions, to require downgraders to disgorge a total sum that is double the book value of the undeserved bidding credits.

III. BY ENSURING THAT BIDDERS MAINTAIN THEIR OWNERSHIP STRUCTURES, THE COMMISSION CAN IMPROVE THE PROSPECTS FOR GENUINE MINORITY OWNERSHIP

By ensuring congruence between bidding credits and the public benefit they represent, the Commission would achieve three worthwhile goals.

First, the Commission would ensure that the relative value of a bidding credit is not diluted by the inclusion of undeserved credits in the auction financing pool. If bidding credits can be retained even if an applicant downgrades its structure, almost every applicant will claim a 35% bidding credit. Were that to happen, bidding credits would lose virtually all of their diversification-promoting power. By preventing that outcome, the Commission would be faithful to Congress' expectation that the Commission use bidding credits or similar methods to promote competition and diversity.^{39/}

Second, the Commission would preserve new entrants' access to the limited pool of auction-friendly capital. Capital follows bidding credits when they have competitive value; dilution of bidding credits drives capital away. Furthermore, when a downgrader essentially sells its bidding credits to a multimedia company, the cash delivered in return will artificially inflate the bid prices irrespective of how much other applicants' bidding credits have been diluted. Thus, by preventing the dilution of deserved bidding credits with undeserved ones, the Commission

^{39/} 47 U.S.C. §309(j)(4) (1996). See FCC Report to Congress on Spectrum Auctions, 13 FCC Rcd 9601, 9629 (1997).

would help minorities overcome the unique challenges they face in accessing capital for startup ventures.

Third, the Commission would ensure that the public receives the diversification benefits represented by the public wealth embedded in the bidding credits. In particular, closing any loopholes in the structural rules would help prevent any recurrence of the unfortunate events that led to the loss of the tax certificate policy and other pro-diversity measures.^{40/}

Seven years ago, MMTC observed that "abuses of the Commission's processes reduce opportunities for legitimate minority entrepreneurs, and risk tainting a worthwhile program intended to promote diversity and create economic opportunity for minorities and women."^{41/} Today, minority new entrants' business plans place great confidence in the undiluted value of bidding credits. MMTC has been privileged to know dozens of the minority potential applicants in Auction #37. Virtually all of them are new entrants, or they own only one or two stations. Almost all of them should be entitled to bidding credits. These entrepreneurs look to the Commission for steadfastness and resolve in preserving and promoting diversity and inclusion.

^{40/} In 1995, exaggerated allegations of structural abuse figured heavily in Congress' decision to eliminate the tax certificate policy. Even before that, in 1993, the Court of Appeals' second Bechtel decision made it virtually impossible for the Commission to continue with comparative hearings. In the end, it mattered little that, for all their flaws, comparative hearings had been quite successful in enabling minorities to start new broadcast stations.

^{41/} MMTC Competitive Bidding Comments, supra, at 4.

CONCLUSION

For the reasons set out above, MMTC respectfully requests the Commission to clarify its broadcast auction rules as follows:

1. After the Form 175 deadline, an applicant that changes its ownership structure in a manner that would have entitled it to fewer (or no) bidding credits on the Form 175 deadline can retain only those bidding credits that are commensurate with its new ownership structure.

2. Acceptance of an auction password and submission of a bid will constitute affirmative reaffirmation of a bidder's ownership structure and entitlement to bidding credits. If a bidder downgrades comparatively after the filing of Form 175 but before the end of the auction, it will be required to post that fact on the auction website fact at the start of each round of bidding, and thereafter will enjoy only those bidding credits that correspond with its actual structure.

3. If an auction selectee downgrades comparatively after the auction, but before the start of the initial term that awakens the unjust enrichment rule, it should disgorge to the Treasury the book value of any improvidently deployed bidding credits, plus a substantial "penalty for early withdrawal" of its diversification promise. The total disgorgement might equal a sum that is double the book value of the undeserved bidding credits.

REQUEST FOR EXPEDITED TREATMENT

The Form 175 deadline for Auction #37 falls on October 5, 2001. The Commission's decision on this Petition could influence potential applicants' decisions on whether to participate in the auction, and on how to finance their bids. Minority entrepreneurs' difficulties in rapidly securing access to capital have been well documented.^{42/} Consequently, in order to allow enough lead time for potential applicants, including minorities, to absorb and react to the Commission's decision on this Petition, the Commission is respectfully requested to rule on an expedited basis.^{43/}

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April 19, 2001

^{42/} See, e.g., NTIA 2000 Minority Ownership Report at 45-46.

^{43/} MMTC recognizes with appreciation the helpful suggestions of Erwin Krasnow, Esq., Raymond Quianzon, Esq. and S. Jenell Trigg, Esq., and the editorial assistance of MMTC law clerk Carol Westmoreland.

EXHIBIT 2

**Comments of MMTC,
filed May 15, 2002**

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

In the Matter of:)
)
Reexamination of the Comparative Standards)MM Docket No. 95-31
for Noncommercial Educational Applicants)
)
Association of America's Public Television)
Stations' Motion for Stay of Low Power)
Television Auction (No. 81))

TO THE COMMISSION

**COMMENTS OF THE MINORITY MEDIA
AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the Second NPRM.^{1/}

In this proceeding, the Commission seeks to resolve one of the major pending issues affecting broadcast auctions, colloquially, the "NPR Issue." MMTC's Comments are intended to draw the Commission's attention to the other major pending issue -- the "Bidding Credits Issue," which carries at least the same potential as the NPR Issue to frustrate successful broadcast auctions.

Inevitably, applicants will claim bidding credits, but later, during the auction, they will relinquish the diversification attributes that yielded the bidding credits. Sometimes this will happen when applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. Other applicants actually will have schemed, in advance, to retain their diversification attributes only long enough to claim the bidding credits.

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

The Bidding Credits Issue is whether an applicant can still capture the economic benefit of the bidding credits it claimed before the auction began.

The Bidding Credits Issue arose at the March 7, 2001 FCC workshop for prospective participants in what was to be FM Auction #37. For three days beginning that day, MMTC conducted its own auctions workshop at the Department of Commerce. During the FCC and MMTC workshops, it became clear that the Bidding Credits Issue, if unresolved, would destroy the integrity of bidding credits in broadcast auctions, and in so doing would dash any serious hope that broadcast auctions could advance minority ownership.

Consequently, on April 19, 2001, MMTC filed a Petition for Clarification in MM Docket No.97-234 et al. (appended as an exhibit to these Comments, and incorporated by reference herein). Therein, MMTC noted that the traditional rule has been that an applicant for new facilities, on a date certain, must lock in all credits to which it is entitled based on its comparative attributes.^{2/} Thereafter, an applicant cannot game the comparative process by comparatively "upgrading" its application so as to trump its competitors on paper. Furthermore, if the applicant loses the attribute that gave rise to the credit (e.g. by adding investors with attributable interests in other facilities) the applicant must comparatively "downgrade" so that it will not undeservedly capture an economic reward for diversification attributes it no longer possesses.

^{2/} See Petition for Clarification, pp. 9-10 (citing authorities).

Nonetheless, the broadcast auction rules appeared to permit the retention of bidding credits by an entity that downgrades its diversification showing before the auction concludes. Thus, the best strategy for a comparative applicant is to claim a bidding credit when filing Form 175, then immediately restructure the company to shed the attribute giving rise to that credit. Such a strategy would reward game players that concocted "strange and unnatural" corporate structures,^{3/} cancel out the comparative value of the bidding credits of bona fide new entrants,^{4/} and deprive the public of the diversification benefits of bidding credits.^{5/}

MMTC recommended a straightforward correction: require immediate comparative downgrading attendant to the loss of a diversification attribute that gave rise to bidding credits, together with immediate public notice of the comparative downgrading. In that way, no bidding credit could be counted after its diversification predicate becomes inoperative.^{6/}

^{3/} This famous phrase in Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992) ("Bechtel I") refers to companies whose absurdly nongenuine ownership structures were designed to create the illusion of diversity in order to exploit FCC ownership criteria.

^{4/} See Petition for Clarification, p. 14.

^{5/} See id., pp. 15-16. As MMTC concluded:

[i]t would be a mistake to allow an applicant to propose a structure that confers bidding credits, then abandon that structure and still retain the credits or the post-auction benefits flowing from the credits. An applicant taking advantage of such a loophole would receive a considerable transfer of wealth as a reward for having abandoned its ownership structure.

Id., p. 7.

The Commission has not ruled on MMTC's Petition for Clarification, nor did it fold the Bidding Credits Issue into the instant rulemaking proceeding. That is unfortunate, because the Second NPRM was issued on an expedited schedule to resolve a serious outstanding issue standing in the way of a resumption of broadcast auctions. As noted above, there are two such issues, but the Second NPRM addresses only the NPR Issue; it does not mention the Bidding Credits Issue. The Commission's inattention to the Bidding Credits Issue creates the risk that even more delay will stand in the way of the reinitiation of broadcast auctions.

For a generation, one of the Commission's signature public policy goals has been to promote minority ownership.^{7/} MMTC recently found that the number of minority owned radio stations is increasing, although it still remains extremely low -- just north of 4% of all stations.^{8/} Moreover, the number of minority radio owners is decreasing.^{9/} The number of minority owned full power

6/ MMTC also recommended that if an auction selectee downgrades comparatively after the auction but before the start of the initial term that awakens the unjust enrichment rule, the selectee should disgorge to the Treasury the book value of any improvidently deployed bidding credits, plus a substantial "penalty for early withdrawal" of its diversification promise. Such a penalty would operate prophylactically to ensure that only those who were always capable of building and operating their stations would have an opportunity to do that. See id., pp. 20-22.

7/ See Policy Statement on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978).

8/ Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (MMTC, March, 2002), Exhibit 1 to MMTC Comments in MM Docket No. 01-317 (Local Radio Ownership Rules), filed April 15, 2002 ("MMTC Local Radio Ownership Comments"), pp. 10-12.

9/ Id.

television stations appears to have dropped from 33 to 17 in just the three years since the Commission deregulated TV duopoly.

When the Commission first developed its broadcast auction rules, it included both minority ownership and size-based bidding credits.^{10/} Soon afterward, the Commission decided not to retain minority ownership credits without first undertaking an Adarand study.^{11/}

In December, 2000, the Commission completed the Adarand study -
- really six related empirical and historical reports undertaken

^{10/} Section 309(j)(4)(D) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." Thus, the Commission originally sought comment on a proposal for bidding credits targeted to the groups named in the statute. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (NPRM), 12 FCC Rcd 22363, 22397-22404 ¶¶83-97 (1997).

^{11/} Since most minority owned businesses are small, the Commission predicted that the new-entrant bidding credits it adopted for broadcast auctions would "promote opportunities by minorities and women consistent with congressional intent without implicating prematurely the constitutional issues" that figured in Adarand v. Peña, 515 U.S. 200 (1995). Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (First Report and Order), 13 FCC Rcd 15920, 15995 ¶189 (1998), recon. granted in part, denied in part on other grounds by Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), modified in other respects by Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999), affirmed sub nom. Orion Communications Limited v. FCC, 213 F.3d 761 (D.C. Cir. 2000). See also Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996) (holding that the Commission acted reasonably in adopting small business-based eligibility rules and abandoning former race-conscious rules in order to avoid Adarand challenge.)

pursuant to Section 257 of the Telecommunications Act.^{12/}

Eighteen months have passed, but the Commission has not yet acted on the Adarand study.^{13/}

^{12/} Among the six studies, see particularly Ernest & Young LLP, "FCC Econometric Analysis Of Potential Discrimination: Utilization Ratios For Minority- And Women-Owned Companies In FCC Wireless Spectrum Auctions" (2000) (finding that, measured across all wireless auctions through 1999, minority and women applicants were less likely to win at least one license than were nonminority applicants); William Bradford, "Study Of Access To Capital Markets And Logistic Regressions For License Awards By Auctions" (2000) (finding that minority broadcast license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision; that minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables; that loan applications of minority wireless firms were less likely to be accepted than those of nonminority firms, after controlling for the effect of the other variables on the lending decision; that minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables; and that minority status resulted in a lower probability of winning in spectrum auctions); Ivy Planning Group, "Whose Spectrum Is It Anyway? Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing - 1950 To Present" (2000) (concluding based on extensive anecdotal research that for minority and women owned licensees, market entry barriers were exacerbated by the discrimination minorities and women have faced in the capital markets, in the advertising industry, in broadcast industry employment, in the broadcast station transactional marketplace, and as a consequence of various actions and inactions by the Commission and Congress, including weak enforcement of FCC EEO regulations, underutilized FCC minority incentive policies, use by nonminority men of minority and female "fronts" during the comparative hearing process, the lifting of the broadcast ownership caps, and minimal small business advocacy before the Commission.)

^{13/} When MMTC sought reconsideration in the TV duopoly proceeding, the Commission ruled that it was premature to consider MMTC's proposals because the Commission had just completed the Adarand study. Review of the Commission's Regulations Governing Television Broadcasting (MO&O and Second Order on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 and 1078-79 n. 69 (2001) (previous and subsequent histories omitted). As noted at p. 4 supra, while we wait for the Commission to review the Adarand study, the bottom is falling out of full power minority television ownership.

Remedial action on minority ownership is needed "yesterday, and that's not soon enough."^{14/} For sixty years, the Commission deliberately and systematically gave billions of dollars worth of public property to incorrigible segregationists and discriminators, and then repeatedly renewed their authorizations to occupy that property.^{15/} None of these licensees was qualified to occupy public property,^{16/} and all of them systematically prevented minorities from securing a foothold in the industry most central to the fulfillment of democracy. There is no greater scandal in broadcast history.

While the Commission considers how to correct this manifest injustice, it should ensure that the race-neutral steps to which it is already committed -- such as bidding credits -- are not abused in a manner certain to render them valueless as instruments of diversity and competition policy. Further, inasmuch as the current bidding credit rules disadvantage legitimate small

^{14/} This quotation is from Malcolm X, "Message to the Grassroots" (1964).

^{15/} This history is set out in detail in the MMTC Local Radio Ownership Comments, pp. 71-104.

^{16/} See, e.g., Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 630 (D.C. Cir. 1978) (intentional discriminators lack the character to be Commission licensees).

businesses, the Commission is obliged to reconsider them in light of Section 257 of the Telecommunications Act.^{17/}

No one opposed MMTC's Petition for Clarification. By granting the Petition now, the Commission will at last be prepared to recommence its FM and TV auctions, thus allowing new entrants to contribute their talents and resources toward strengthening and diversifying the broadcasting industry.

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^{17/} In Section 257, Congress directed the Commission to complete a proceeding "for the purpose of identifying and eliminating... market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...." 47 U.S.C. §257(a). Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity." 47 U.S.C. §257(b). Congress expects the Commission to report, every three years, on "any regulations prescribed to eliminate barriers within its jurisdiction...." 47 U.S.C. §257(c).

EXHIBIT 3

Petition for Reconsideration,
filed June 16, 2003

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

In the Matter of:

Reexamination of the Comparative Standards) MM Docket No. 95-31
for Noncommercial Educational Applicants)

TO THE COMMISSION

PETITION FOR RECONSIDERATION

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 C.F.R. §1.429, respectfully petitions for reconsideration of the Second Report and Order, 68 Fed. Reg. 26220 (May 15, 2003), FCC 03-44 (released April 10, 2003) ("Second R&O").^{1/} A motion for stay is being filed separately this date.

The rules plainly contain a major flaw: they allow an auction bidder to conceal from its opponents that it is actually not entitled to bidding credits it has claimed and has notified the public that it intends to deploy.

For more than two years, MMTC has tried in vain to secure a ruling on whether this major flaw in the broadcast auction rules has fatally weakened the Commission's only significant policy aimed at promoting minority broadcast ownership: the new entrant bidding credits. See Petition for Clarification in MM Docket No. 97-234 (filed April 19, 2001 and not yet ruled upon) ("Petition"); Comments of MMTC in MM Docket No. 95-31 (filed May 15, 2002) ("Comments"), both of which are incorporated by reference herein.

Since April, 2001, we have raised this issue repeatedly in meetings with the Bureau, the Office of General Counsel and each commissioner. In meetings with the Bureau and OGC, MMTC was advised that the issue raised in the Petition was more

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

appropriately raised by filing comments in MB Docket No. 95-31. We did that. No one had opposed the Petition, and in this docket no one opposed our Comments. Thus, imagine how astonished we were that the Second R&O contained no mention of our Comments, except to list MMTC in the Appendix as having filed them. Id. at 19, Appx. A. The Second R&O did not even state that the Commission would consider the matter in MM Docket No. 97-234, or in a separate order.

In light of the likely net adverse impact on minority ownership of the forthcoming Report and Order in the omnibus broadcast ownership proceeding, MB Docket 02-277, it is particularly urgent that the one significant minority ownership-promoting policy that is still on the books is not destroyed by gamesmanship and fraud. Allegations of gamesmanship (albeit overblown) were responsible for the loss of the tax certificate policy in 1995. Similar allegations have plagued the wireless auctions. Why would the Commission fail to act immediately to close the door on gamesmanship in broadcast auctions?

Here is how this gamesmanship would work: as the auction rules are written now, an applicant can claim new entrant bidding credits, deploy the credits in the auction against other applicants, and then, during or after the auction, quietly abandon the attributes that gave rise to those credits. Sometimes this will happen when inexperienced applicants realize, during the auction, that they must bring in additional investors to stay competitive as the bidding accelerates. However, in too many cases, applicants will scheme in advance to retain their diversification attributes only long enough to claim bidding credits. An applicant that does not plan ultimately to be structured as a new entrant can simply create a shell new-entrant structure, claim the bidding credits, and then, during the

auction, revert to its long-planned permanent structure. It could then quietly report that fact 30 days later, when the auction is over and the other applicants can do nothing about it. See Petition, pp. 3-8; Comments, pp. 1-3. No one would ever know, unless a whistleblower turns on its employer. Even then, a party claiming that an applicant committed fraud would lack standing to complain, since, according to the D.C. Circuit last week, a petitioner must make a showing of actual harm stemming from program service. See Rainbow/PUSH Coalition v. FCC, No. 02-1020 (D.C. Cir., June 10, 2003), Slip Op., pp. 10-11. Such a showing is impossible when challenging an auction bidder that has never offered any programming. Further, according to the Court, misrepresentations do not necessarily affect program service anyway. Id., pp. 9-10.

Can we expect gamesmanship in auctions? Such gamesmanship should have been unheard of in comparative hearings, where applicants underwent fierce cross-examination and faced disqualification if they cheated. Even so, the value of the spectrum prize was so tempting that about a third of comparative hearing applicants' proposals were rejected by ALJs as fraudulent or nongenuine. Broadcast auctions will be much worse, since auction applicants have virtually no transparency.

How does fraud harm honest bidders? Applicants who are genuinely entitled to bidding credits will be unaware that their opponents' claims of entitlement to bidding credits are no longer valid. The genuine bidders will have, at their disposal, only the publicly available information on the history, assets, attributable broadcast holdings and financial capabilities of their opponents. They won't know the hugely material fact that their opponents had secretly brought in new investors to game the system. Therefore, the bidding strategies of the genuine new

entrants will embed the erroneous assumption that their opponents are really other new entrants, just like themselves, dependent on bidding credits in order to prevail. Relying detrimentally on this false information, the genuine applicants will be harmed in three ways. First, they will waste resources bidding on allotments they cannot win. Second, they will overbid to win their desired allotments. Third, in a simultaneous multiple allotment auction, they will abandon their optimal allotments and pursue inferior ones that they would not have pursued had they enjoyed timely and accurate information on their opponents' entitlements to bidding credits.

When the Commission used comparative hearings, it adopted a "comparative downgrading" policy to avoid such abuse. See Petition, pp. 9-10 (citing authorities). It is a mystery why Commission would abandon this well-crafted anti-fraud provision.

The remedy could not be simpler: immediate posting on the auction website of the loss of any attributes that entitled an applicants to bidding credits, and disgorgement of the value of any improvidently deployed bidding credits. Comments, p. 3. Auctions will feature next-day status reports on bidding, and the bidding credits system already contemplates post-auction payment adjustments. Thus, the burden on the Commission and on bidders of preventing auction gamesmanship is virtually zero.

To be sure, there may be other ways besides bidding credit gamesmanship that an applicant could miraculously find "new money" during an auction -- a well-timed inheritance, or hitting the Powerball, perhaps. Yet it seems virtually self evident that partial but accurate information about competing bidders' finances is preferable to partial and inaccurate information. No city

declines to build a library on the theory that it would be missing a few books.^{2/}

WHEREFORE, MMTC respectfully requests that the Second R&O be reconsidered as described herein.

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June 16, 2003

^{2/} Nonetheless, in case a more rigorous explanation is required, two weeks ago MMTC issued an RFP to hire an expert in game theory. Thus far, no qualified expert has responded. Therefore, MMTC requests leave to supplement this Petition for Reconsideration, within a reasonable time, with a suitable expert declaration.

EXHIBIT 4

**Motion for Stay,
filed June 16, 2003**

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

In the Matter of:

Reexamination of the Comparative Standards) MM Docket No. 95-31
for Noncommercial Educational Applicants)

TO THE COMMISSION

MOTION FOR STAY

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 C.F.R. §1.429(k), respectfully moves for a stay of the application of the auction rules described in the Second Report and Order, 68 Fed. Reg. 26220 (May 15, 2003), FCC 03-44 (released April 10, 2003) ("Second R&O").^{1/}

A petition for reconsideration of the Second R&O is being filed this date. Therein, MMTC demonstrates that the auction rules, as finalized by the Second R&O, will lead to substantial gamesmanship and fraud, imperiling fatally the Commission's only significant policy aimed at fostering minority broadcast ownership -- auction bidding credits.

In determining whether there is good cause to stay the effective date of the Second R&O until the Commission revises its auction procedures as proposed in the Petition for Reconsideration, the Commission should apply the criteria set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) as explained in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) ("Holiday Tours"). Under the Holiday Tours test, MMTC must

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if a stay is granted; and (4) that the public interest favors a stay. Holiday Tours at 842. That showing is provided below.

(1) MMTC will prevail on the merits. In the two years in which MMTC has sought the relief advocated in the Petition for Reconsideration, no party has lodged an objection. The rules plainly contain a major flaw: they allow an auction bidder to conceal from its opponents that it is actually not entitled to bidding credits it has claimed and has notified the public that it intends to deploy. This flaw is very easy to cure. As noted in the Petition for Reconsideration, p. 4, the Commission can simply require

immediate posting on the auction website of the loss of any attributes that entitled an applicants to bidding credits, and disgorgement of the value of any improvidently deployed bidding credits[.] Auctions will feature next-day status reports on bidding, and the bidding credits system already contemplates post-auction payment adjustments. Thus, the burden on the Commission and on bidders of preventing auction gamesmanship is virtually zero.

(2) MMTC (more specifically, its members and constituents who are minority broadcasters, new entrants, and broadcast consumers desirous of receiving diverse program service) will suffer irreparable harm absent a stay. It is a national scandal that only 1.3% of the asset value of the radio industry is in the hands of minorities. To correct this, new entrants must have every opportunity to participate meaningfully in the last opportunities to secure access to the FM spectrum. Genuine new entrants, including many minorities, will be unable to raise financing to participate in an easily corruptible auction system; or if they do participate, their chances of prevailing against well-financed fraud artists will be minimal. The harm if the

Commission conducts a flawed FM auction will be irreparable. In Auction #37, the Commission contemplates offering probably the last new FM facilities in medium sized and small communities throughout the nation. Once these approximately 350 construction permits are issued, they cannot realistically be recalled. Only a stay can prevent this disaster.

(3) No party would be harmed by a stay. The auction is for new facilities only; it does not affect incumbent facilities. No party in this docket has claimed that absent an immediate opportunity to bid on new facilities it will experience irreparable injury.

(4) A stay would serve the public interest. Auction bidding credits are the only significant means remaining to promote minority broadcast ownership. The Commission has repeatedly emphasized the importance of providing opportunities for minorities in broadcast station ownership. See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978). Congress expects the Commission to use bidding credits or similar methods to promote competition and diversity. 47 U.S.C. §309(j)(4); see FCC Report to Congress on Spectrum Auctions, 13 FCC Rcd 9601, 9629 (1997). A stay would enable the Commission to correct its demonstrably flawed auction rules and thereby adhere to Congress' intention that it promote competition and diversity.

Rulemaking decisions, once rendered, are often irreversible. Consequently, the Commission in recent years has frequently

exercised caution by granting stays of the effective dates of controversial and contested rulemaking orders.^{2/} Such caution is also appropriate here.

WHEREFORE, MMTC respectfully requests that the effective date of the Second R&O be stayed until the Commission corrects its auction rules as described in MMTC's Petition for Reconsideration of this date.

Respectfully submitted,

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June 16, 2003

^{2/} See, e.g., Numbering Resource Optimization (Order), 15 FCC Rcd 17128, 17128-29 ¶2 (2000) (in which, much like the situation presented here, the Commission stayed the effective date of certain rules until it could have an opportunity to rule ab initio on petitions for waiver). See also Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services (Fourth MO&O), 15 FCC Rcd 7051, 7056 ¶14 (1999); Telecommunications Carriers' Use of Customer Proprietary Network Information (Order), 13 FCC Rcd 19390, 19392 ¶4 (1998); Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (Order), 10 FCC Rcd 4146, 4149 ¶8 (1994).

EXHIBIT 5

Declaration of Kofi Ofori

Declaration of Kofi Ofori

I, Kofi A. Ofori, state as follows:

1. I am the President of Ofori & Associates, a consulting firm that provides legal and business development services to broadcast companies and entrepreneurs. I founded the company in 1985. We develop business strategies and business plans, and conduct economic and marketing assessments of broadcast markets. My practice also involves representing clients before the FCC.

2. I am providing this statement at the request of the Minority Media and Telecommunications Council (MMTC).

3. I earned my B.A. degree in 1973 from Tufts University, with a major in political science. In 1976, I earned my J.D. degree from Boston University School of Law. Among my principal publications are: *Blackout! Media Ownership Concentration and the Future of Black Radio*, Medgar Evers College Press, (1997); *When Being No. 1 is Not Enough: the Impact of Advertising Practices on Minority-Owned and Minority-Formatted Broadcast Stations*, Civil Rights Forum on Communications Policy (1999); *The Value of Tax Certificates*, 51 Federal Communications Bar Journal 553 (1999); *In the Black: African-American Web Entrepreneurs, Reinventing Minority Media for the 21st Century*, The Aspen Institute (2001); and *Radio Local Market Consolidation and Minority Radio Ownership*, Minority Media and Telecommunications Council (2002). I was a contributor to the MMTC FM Auctions Guide (2001) and a trainer at MMTC's FM Auction #37 Seminar at the U.S. Department of Commerce (2001).

4. I have been asked to discuss the impact of the failure of competitors to disclose, in a timely fashion, changes in ownership structure and related entitlements to bidding credits upon the integrity of the auction bidding process.

5. Access to accurate information about one's opponents is an objective for all competitors participating in the auction process. Bidders are more likely to prevail against their opponents based on how much they know about their opponents' capabilities, needs and strategies. While needs and strategies are generally unknowable to opposing bidders, capital capabilities are determinable through customary research methods such as credit reports, corporate records, newspaper articles, court records and the like. Using these methods, it is generally possible to ascertain whether one's opponent has great or slight access to capital.

6. A bidder's entitlement to bidding credits has profound consequences for the strategy of the competing bidders. It signals to opposing bidders that a competitor is capable of bidding at higher amounts than would otherwise be assumed based upon the competitor's capital resources. Thus, when a bidder changes its ownership and capital structure after filing its Form 175, and is permitted by the auction rules not to inform others that it is no longer qualified for bidding credits, the fairness of the bidding process is severely undermined. Consider this example, which roughly mirrors the typical scenario in a multiple allotment, multiple round auction less than 30 days in length.

7. In this scenario, there are five bidders: A, B, C, D, and E, and two allotments: Huntsville and Florence, Alabama. Each bidder has performed research on the others, generally knows the assets available to the others, and bases its knowledge about the availability of bidding credits on what its opponents have stated in their Form 175's.

8. In the first three rounds of bidding, Bidders A and B compete for Huntsville, and Bidders C and D compete for Florence. Bidders A and B claim bidding credits, while Bidders C and D do not. Bidder E does not choose which allotment to pursue until the start of round 4 of the bidding.

9. Bidder E prefers Huntsville -- but upon observing that competitors A and B are using bidding credits, she recognizes that the bidding could go higher on a per pop basis in Huntsville than in Florence. The reason, of course, is that bidding credits reduce the financial contribution required of the winning bidder, enabling it to bid more.

10. Faced with the choice of bidding for Huntsville against two entities with bidding credits, or bidding for Florence against two entities without bidding credits, Bidder E chooses to bid for Florence. Perhaps she will win -- but the Florence market offers less profit potential and was not her preferred allotment.

11. Bidder E reasonably relied upon the information contained in the Form 175's filed by Bidders A and B. However, if Bidders A and B (or even one of them) serendipitously changed their ownership structures the day before the auction such that they would be disentitled to bidding credits, and did not disclose this information until after the auction concluded, Bidder E would have foregone her opportunity to bid on Huntsville due to bidding manipulations on the part of her opponents.

12. Bidder E would be livid, and with good reason. If she had known that Bidder A or Bidder B really was not entitled to bidding credits, Bidder E could have won her prize -- Huntsville -- knowing that Bidders A and B could not outbid her.

13. Suppose Bidder A wins Huntsville. To be sure, Bidder A will pay a premium after the auction is over, because Bidder A will not have bidding credits. But Bidder A will have her prize -- Huntsville. Further, Bidder A will have secured this prize in competition with only one opponent, Bidder B, rather than in competition with Bidder E as well. In this way, Bidder A may win Huntsville at a lower price as a result of the reduced number of bidders -- offsetting the premium that would be paid post-auction as a result of not having bidding credits. If Bidder B dropped out before the last round, Bidder A would be rewarded with Huntsville at a substantial discount from its fair market value.

14. Alternatively, Bidder E could have bid for Huntsville, paying far more for it than she would have paid if she had known that Bidders A and B were actually not entitled to bidding credits. Worse still, Bidder E could bid for Huntsville and lose, only to discover later that she was tricked into bidding for the wrong allotment.

15. In these ways, the lack of transparency in bidding credit reporting undercuts the value of bidding credits, rewards gamesmanship, and ultimately undermines public confidence in the integrity of the auction process.

16. The cure is very simple, fortunately. The Commission already contemplates having daily updates of bids during the auction. Therefore, it can also require daily updates of entitlements to bidding credits. Disgorgement, and penalties for 11th hour ownership changes, could also provide a disincentive to auction gamesmanship.

I declare under penalty of perjury under the laws of the United States of America that the foregoing Declaration is true.

Executed May 5, 2004.

Kofi Ofori

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CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 6th day of May, 2004 caused a copy of the foregoing "Comments of the Minority Media and Telecommunications Council" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

Hon. Michael Powell
Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Hon. Kathleen Abernathy
Commissioner
Federal Communications Commission
445 12th St. S.W.
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Hon. Michael Copps
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/s/

David Honig