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## **Legislative Recommendations To Advance Diversity In The Media And Telecommunications Industries**

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## EXECUTIVE SUMMARY

As matters of the highest priority, Congress should provide opportunities for minority entrepreneurs in media and telecommunications and act decisively to close the digital divide. It can achieve these goals by deploying economic stimulus funding, restoring the Tax Certificate Policy, providing targeted appropriations, instituting educational policy and USF reforms, eliminating market entry barriers in the Communications Act, and providing meaningful oversight. Specifically, Congress should:

- Design the Broadband Stimulus so that broadband is built out TO all Americans, BY all Americans, and to BENEFIT all Americans. Congress can achieve these objectives by:
  - Ensuring very substantial participation of MBEs and DBEs in the entire Economic Stimulus Package
  - Creating a direct loan program to support broadband infrastructure buildout
  - Adopting tax policies to stimulate MBE and DBE participation in telecommunications
  - Providing substantial support for broadband innovation and training
- Adopt Targeted Telecom-Related Appropriations and Tax Legislation that would:
  - Restore and expand the Tax Certificate Policy
  - Reinstate and expand the Telecommunications Opportunity Program
  - Finance the Telecommunications Development Fund with auction proceeds
  - Authorize an annual Media and Telecom Diversity and Digital Divide Census
  - Provide for Universal K-12 education in media, telecom, and Internet literacy, including skills, proficiency and policy
  - Reform the Universal Service Fund by authorizing sufficient Lifeline/Linkup and Rural Telemedicine support attendant to applying USF to broadband services, and by expanding the E-Rate Program to underwrite computer training for teachers and computer distribution to low income families with children
  - Extend the DTV Converter Box Program to underserved multilingual communities
  - Eliminate language barriers to public safety

- Clarify or revise these sections of the Communications Act:
  - Section 307(b) (Localism)
  - Section 309(j) (Spectrum Auctions)
  - Section 310(b)(4) (Foreign Investment in Broadcasting)
  - Section 334 and 634 (Equal Employment Opportunity)
- Amend the Federal Trade Commission Act to Prohibit Racial Discrimination in Advertising Placement and Terms
- Provide Comprehensive Oversight of the FCC and Executive Branch to Ensure that Civil Rights Objectives are Achieved

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## I. **A Broadband Stimulus Plan To Benefit All Americans**

MMTC – joined by the National Urban League (NUL), the nation’s leading minority entrepreneurship advocacy organization - urges the Obama Administration to put an end to second-class telecommunications citizenship by insuring delivery of first class telecommunication service to broadband-deprived low-income, minority and multilingual urban and rural communities. MMTC and NUL urge the new administration to act in the spirit of transformative inclusiveness to ensure that America’s urban and rural poor and minority communities fully participate in the new administration’s broadband stimulus efforts.

We urge that the broadband stimulus ensure that:

- **Broadband is built out TO all Americans** – including the urban and rural poor and minority communities.
- **Broadband is built out BY all Americans** – including minority business enterprises (MBEs) and disadvantaged business enterprises (DBEs) that train, employ and are owned by people of color, and that recirculate and reinvest money in communities of color.
- **Broadband is designed to BENEFIT all Americans** – offering universal, competitive, affordable and accessible high-speed services.

Our plan to accomplish these objectives is entitled **A Broadband Stimulus Plan To Benefit All Americans** (outlined in the Appendix). By including the initiatives in our plan as part of the overall stimulus package, the new administration would create millions of jobs and restore America’s leadership in the information age. Here are the four central elements of our recommendations:

- A. **Ensure very substantial MBE and DBE participation in every element of the entire economic stimulus package:** (1) by requiring compliance with all federal and state rules, regulations and guidelines regarding MBE and DBE utilization (such as Section 8(a) and other requirements), (2) by encouraging proactive bidding consideration policies that reward bidders who voluntarily include MBE participation in excess of the minimum requirements, (3) by eliminating unnecessary entry barriers for socially and economically disadvantaged businesses, (4) by ensuring that MBE and DBE participation targets are achieved with integrity and accountability, and (5) by authorizing the Labor Department to deploy national intermediary nonprofit organizations to monitor the integrity and extent of MBE and DBE participation in all stimulus initiatives.
- B. **Support broadband infrastructure buildout with a direct loan program:** (1) by providing direct loans to support broadband infrastructure buildout for fiber, wireless, satellite or other appropriate technologies in broadband-deprived low income, minority and multilingual urban and rural communities, and (2) by extending availability of Troubled Assets Relief Program (TARP) funding to

minority lending institutions and other community banks for direct loans to broadband MBEs and DBEs.

- C. **Stimulate MBE and DBE participation in telecommunications with tax policies:** (1) by allowing transferability of tax credits by MBEs and DBEs to ensure that large companies are not the sole beneficiaries of these tax credits, and (2) by reinstating the FCC's highly successful Tax Certificate Policy immediately and extending it to telecommunications (a matter also addressed in more detail below).
  
- D. **Provide substantial support for broadband innovation and training:** (1) by immediately reinstating the Telecommunications Opportunity Program (TOP) to seed broadband adoption and telecom literacy for low-income, minority and multicultural consumers and to foster creative broadband utilization by schools and community-based institutions, (2) expanding TOP to provide technical assistance and training for emerging telecom MBEs and DBEs, (3) providing substantial funding for broadband infrastructure installation and maintenance training of minority unemployed and underemployed workers who live in broadband-deprived urban and rural areas to contractors and subcontractors, Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs) and Native American Serving Institutions (NASIs); and (4) establishing and appropriately funding a National Minority Broadband Training and Technical Council within the Department of Commerce to provide policy guidance, information, technical support and coordination for a strategy to increase the number of minority broadband and wireless infrastructure companies and technicians.

## **II. Telecom-Related Appropriations and Tax Legislation**

### **A. Restore And Expand The Tax Certificate Policy**

No policy in the history of the FCC did more to advance minority media ownership than the Tax Certificate Policy. Adopted by the FCC in 1978 and repealed by Congress in 1995, the policy gave the FCC the discretion to permit those selling broadcast and cable properties to minorities to defer capital gains taxation on the sale, provided that the gain was reinvested in comparable property.

The policy brought about a five-fold increase in the number of broadcast licenses held by minority owners. Since the program's repeal, minority ownership of radio properties has stagnated and minority ownership of television stations has declined sharply.

In the media and telecommunications industries, minority entrepreneurs tend to own small facilities such as AM stations and local wireless licenses. Many of these disadvantaged businesses have found it increasingly difficult to compete with much larger companies, particularly since the passage of the 1996 Telecommunications Act. Using their stock, large companies can easily transfer assets to one another by structuring tax-deferred or tax-free exchanges. With only cash and no tax certificates to offer to sellers, disadvantaged businesses are often shut out of the transactional process.

Legislation has been introduced in Congress to restore the policy and extend it to telecommunications. Bills introduced in 2003 by Senator John McCain and in subsequent years by Congressman Charles Rangel and by Congressman Bobby Rush were not given hearings in the House Ways and Means Committee. This year, MMTC anticipates tax certificate legislation introduced in 2008 by Senator Robert Menendez would be well received in both chambers. The current draft legislation would limit the total capital gain deferrals, institute a minimum holding period for property acquired with a tax certificate and extend benefits of the policy to disadvantaged businesses rather than only to minorities, thus satisfying potential constitutional objections.

The current initiative to restore the tax certificate program has received a broad base of support from civil rights organizations, industry associations, broadcasters, cable companies and telecom companies. This mainstream support is possible because restoration of the tax certificate program would reduce business tax burdens and as it increases the amount of equity capital that is available to disadvantaged businesses.

### **B. Reinstating And Expanding The Telecommunications Opportunity Program**

The Telecommunications Opportunities Program (TOP), administered by the Department of Commerce's National Telecommunications and Information Administration (NTIA), promoted the widespread use and availability of digital network technology in the nonprofit and public sectors. According to the NTIA website's 2006 report on the TOP program, from 1994-2004 TOP awarded 610 grants, throughout the U.S., totaling \$233.5 million, and leveraged \$313.7 million in local matching funds on behalf of local and tribal governments, healthcare providers, schools, libraries, police departments and community based non-profit organizations. TOP-funded projects were geared toward improving the quality of and the public's access to education, healthcare, public safety and other community-related initiatives. TOP was integral for providing underserved communities with networking equipment, software, videoconferencing systems, computers, training and a variety of other technological necessities.

In 2002, the Bush Administration proposed to cut all funding for TOP, stating that the program was no longer necessary. TOP was cut from the Commerce Department's budget in 2005.

According to the June 2007 Pew Internet and American Life Project study on Home Broadband Adoption, home broadband adoption has actually slowed in recent years. Furthermore, after accounting for survey respondents who have access to the Internet but do not use it (2%), almost one-third (27%) of respondents to the Pew study reported that they do not use a computer at work, school, home, or elsewhere. While 76% of respondents to the Pew study with incomes over \$75K had access to broadband at home, only 30% of respondents with incomes under \$30K had home access to broadband.

Hispanic home broadband adoption remains at dismal levels. October 2006, the Pew Internet Project and Pew Hispanic Center surveyed 6,016 Hispanic adults to gauge Internet usage and broadband adoption in the Latino community. According to this report, just 29% of Hispanic adults have a home broadband connection. These statistics underscore the urgency of reauthorizing TOP.

TOP is also essential to the United States' ability to compete internationally. According to a June 2008 study by the Organization for Economic Cooperation and Development, the United States ranks only twelfth worldwide in its ratio of broadband penetration to population density.

TOP's objective was to introduce information technology applications specifically designed to address unmet needs in disadvantaged communities. The introduction of new technologies into a community drives interest and demand for such technologies, thereby unlocking consumer demand for broadband adoption and providing an incentive for investment in broadband in disadvantaged communities. Thus, reauthorizing TOP would help improve broadband penetration in communities that are still underserved, and help keep the United States competitive in the global market.

**C. Finance The Telecommunications Development Fund With Auction Proceeds**

In 1996, Congress created the Telecommunications Development Fund (TDF) to provide financing to small and disadvantaged businesses, particularly those owned by minorities and women. Section 707 of the 1996 Telecommunications Act restricts the primary funding for TDF to the interest earned on up-front deposits paid by telecommunications companies that qualify to bid for FCC licenses in spectrum auctions. Thus, no interest has been earned by TDF on the tens of billions deposited as down payments or auction proceeds.

Unfortunately, the TDF has had little impact on access to capital for minorities. Moreover, TDF did not offer loans, due to the stringent requirements of the Federal Credit Reform Act of 1990, with which TDF must comply pursuant to statute. The interest on upfront auction deposits has never exceeded the \$50 million range – far too small a sum to support an equity or debt fund with national impact. A single medium market network affiliated television station often sells for well in excess of that amount.

The TDF should be funded with interest earned from all spectrum auction proceeds, including down payments. Flexibility is needed to allow auction proceeds to be deposited in an escrow account that can generate maximum interest is also needed. Further, in addition to providing equity financing, TDF should be required to provide debt financing, but with flexible and advantageous terms and conditions to offset a history of discriminatory lending practices and the current tight credit market. The use of auction proceeds to fund the TDF would be particularly equitable in light of the near-exclusion of minorities from the class of spectrum auction winners. With significant funding, the TDF would contribute profoundly to the elimination of market entry barriers faced by minorities and women and would inject necessary competition into the telecommunications industry.

**D. Authorize An Annual Media and Telecom Diversity And Digital Divide Census**

Congress should require the FCC to collect and maintain annual longitudinal statistical data, and anecdotal evidence on EEO, procurement, transactions and advertising by media and telecommunications companies, and provide an authorization and an appropriation for this purpose.

Through Sections 257, 303(g) and 403 of the Communications Act, the Commission already has extensive general authority to collect evidence needed to support its civil rights agenda. However, the Commission does not collect EEO, procurement and transactions data. Unfortunately, its broadcast ownership database is so muddled that the Commission itself acknowledged, in the 2008 Broadcast Diversity Order (23 FCC Rcd 5922 (2008)) that its ownership data collection methods could be improved.

There are no constitutional impediments to the collection of racial data, as long as the data is not applied in an unconstitutional manner, as established in Bush v. Vera, 517 U.S. 952 (1996). Courts have upheld the collection of racial statistics in numerous instances. In Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007), Justice Kennedy encouraged the collection of racial data as a means to achieve a diverse student body. Relevant raw statistical data on race and ethnicity may be collected regardless of a party's fear of misuse, as demonstrated in United States v. New Hampshire (539 F.2d 277 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976)).

Conducting an annual diversity census would aid the Commission in addressing minority access to spectrum, access to capital and access to opportunity. Current and accurate data is vital as the Commission monitors its current rules and formulates new and improved policies to eliminate discriminatory practices and market entry barriers for minorities.

**E. Provide For Universal K-12 Education In Media, Telecom, And Internet Literacy, Including Skills, Proficiency And Policy**

Every American public school student receives essentially the same science education offered almost uniformly since the 1950s, with only the addition of newly discovered scientific facts: sporadic general science education through middle school, then from the 9<sup>th</sup> through 12<sup>th</sup> grades, earth science, biology, chemistry and physics. This teaching schedule was appropriate for an industrial economy but it is hopelessly outdated in our current information economy. As Bill Gates has dramatically pointed out, weak science education disproportionately disadvantages minorities who attend poorly financed inner city schools.

After World War II, the United States' meteoric economic rise was attributable to a thriving, manufacturing-based economy. With this thriving economy came higher salaries and a higher standard of living. The Internet and digital age, however, have leveled the worldwide competitive playing field. Many developing nations now have the ability to produce technology-related products and services at a fraction of the cost of American production. Consequently, American companies have sent millions of jobs offshore – jobs that formerly were performed by American workers. These lost jobs are not returning home.

Thus, for America to remain competitive, it is imperative that our children receive the training that is necessary not just to produce, but to innovate. Our children must be able to speak the language of technology in order to compete in a “flattened” world economy. This training – focused on Internet and technology skills, proficiency and policy - must begin in grade school.

With media gravitating from traditional outlets to Internet-based platforms, the media and telecom industries are particularly susceptible to the effects of globalization. Therefore, minorities who are interested in media and telecom careers, who have not been well-prepared in science, technology, engineering and mathematics (STEM) will be doubly disadvantaged – because of the pervasive effects of past discrimination and by the lack of STEM training to offset these effects.

Technology leaders agree that the United States is failing to produce the next generation of scientists who will enable the U.S. to remain technologically competitive with the rest of the world. While China and India have poured resources into technology-related programs, the U.S. has faltered. Minority communities have been the hardest hit. For example, in a May 2008

report released by the National Action Council for Minorities in Engineering (NACME), although African Americans, Latinos and American Indians comprise 30% of the U.S. population - a number that is expected to grow to 38% by 2025—fewer than 12% of baccalaureate engineering degrees were awarded to minorities in 2005. The percentage of engineering degrees awarded to African-American students declined from 3.3% of all bachelor’s degrees in 1995, to 2.5% in 2005. Moreover, although Latinos are expected to account for 25% of the U.S. population by mid-century, their educational attainment has dropped in all areas, not just engineering, compared to non-Latino ethnic groups.

Legislation is pending in the House and Senate to coordinate the nation’s STEM education initiatives (H.R. 6104, the “Enhancing Science, Technology, Engineering and Mathematics Act of 2008,” introduced by Congressman Michael Honda, and a companion bill, S.3047, introduced by Senators Barack Obama and Richard Lugar). In addition, using such proven methods as targeted appropriations and financial incentives to states and school districts, Congress should undertake to ensure that these steps are taken to reform American science and technology education:

- Training in media, telecom and Internet skills and proficiency should be offered from Grade 1 through Grade 12.
- Media, telecom and Internet operations and policy should be taught as the equivalent of earth science, biology, chemistry and physics in middle school and high school. For example, earth science could be moved to the 8<sup>th</sup> grade and biology to the 9<sup>th</sup> grade, making room for media, telecom and Internet literacy as a full year required course in the 10<sup>th</sup> grade.
- Additional programs should be developed to generate interest among minority students to pursue STEM-related coursework, by illustrating, through the use of gaming technologies, for example, the ways in which STEM is relevant to students’ everyday lives.

Teachers should be prepared to meet the challenges of cross-cultural pedagogy and classroom management when teaching about media, telecom and the Internet.

## **F. Adopt Reforms To The Universal Service Fund**

### **1. Authorize Sufficient Lifeline/Linkup And Rural Telemedicine Support Attendant To Applying USF To Broadband Services**

Accessible and affordable universal service has long been a hallmark of American communications policy. Because the future of telecommunications in America depends on ubiquitous access to broadband Internet services, the Universal Service Fund should support affordable broadband services in rural and inner city communities.

Transitioning the USF to encompass broadband services would also enhance the existing Low Income Program, commonly known as “Lifeline/Linkup,” as well as the Rural Health Care Program. Lifeline/Linkup, codified in Section 254(b) of the Communications Act, helps eligible low-income consumers establish and maintain telephone service by discounting the service provided to them by local telephone companies. Lifeline/Linkup not only allows consumers to remain connected in the event of an emergency, it also facilitates job-seeking and employment

retention. Moreover, the program has been a critical tool in ensuring traditional voice connectivity among all citizens. Unless Lifeline/Linkup evolves to include broadband services, low-income consumers will find it more difficult to compete effectively in the job marketplace, and the digital divide will widen.

The Rural Health Care Program, codified in Section 254(c) of the Communications Act, is another pillar of the Universal Service Fund that has been hindered by limited funding. The program allows physicians in urban centers to examine x-rays and provide immediate health care to rural patients thousands of miles away. Under the program, hospitals and health care centers in rural areas can transmit patient records electronically so that they may be accessed immediately from remote locations. The program thus enables rural patients receive quick diagnoses and timely check-ups, which help lower health care costs and reduce hospital visits. This program is especially vital to minorities in rural areas, whose levels of health care service often approximate third world conditions. Despite these benefits, the Rural Health Care Program is severely under-funded and almost entirely omits two dozen rural states.

Modernizing the Universal Service Fund to cover broadband, and fully funding the Lifeline/Linkup and Rural Health Care Programs are essential for achieving the accessibility and affordability goals of universal service and for closing the digital divide.

2. **Expand The E-Rate Program To Underwrite Computer Training For Teachers And Computer Distribution To Low Income Families With Children**

Codified in Section 254(h) of the Communications Act, the E-Rate or “Schools and Libraries” Program provides affordable access to telecommunications services for schools and libraries, particularly those in rural and economically disadvantaged areas. Although the E-Rate Program has been successful at facilitating Internet access in schools and libraries, more resources are needed to improve Internet literacy.

According to the Universal Service Administrative Company’s 2007 Annual Report, funds from the E-Rate Program have been instrumental in making Internet access available to nearly 100% of the nation’s schools, 94% of the individual classrooms, and 98% of public libraries across the country. Yet according to the National Center for Education Statistics’ 2000 report “Teachers’ Tools for the 21<sup>st</sup> Century: A Report on Teachers’ Use of Technology,” two-thirds of the public school teachers surveyed reported feeling not at all prepared or only somewhat prepared to use the technology in their teaching. Without additional tools, these teachers cannot take full advantage of the educational power of the Internet.

Currently, no E-Rate funds are authorized to create or improve professional development or training programs that would enable teachers to instruct students effectively in the use of computer and Internet technologies. Authorizing a percentage of E-Rate funds to be used for training teachers in computer and Internet literacy would improve classroom teaching and learning and would help the nation compete in an increasingly technologically advanced global economy.

Much of the digital divide stems from the unavailability of home computers in low-income households. For example, according to the June 2008 PPIC Statewide Survey of Californians and Information Technology, fewer than half of California Latinos (48%) have computers at home, compared to about eight in ten or more for whites (86%), Asians (84%) and African

Americans (79%). E-Rate funds ought to be deployed to underwrite computer distribution to low-income families with children.

**G. Extend The DTV Converter Box Program To Underserved Multilingual Communities**

Congress should enable the National Telecommunications and Information Administration (NTIA) to extend the converter box program to ensure inclusion of underserved communities, including undocumented families afraid of registering in a database and families residing in rooms within single-address multi-family dwellings. According to the Pew Hispanic Center's October 2008 report, "Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow," 4% of the nation's population, or 11.9 million people, are undocumented immigrants, comprising 30% of the nation's foreign-born population of 39 million people. The Pew study estimates that 81% of the nation's unauthorized immigrants are Hispanic, 12% are Asian, 4% are from Europe and Canada, and 4% are from Africa and other areas. This population may be left without access to television after the digital transition, leaving them without access to important news and public safety information.

Furthermore, the 2000 Census found that 9.1% of the housing inventory was made up of buildings in two to four apartments, while another 17.3% were in buildings with five or more apartments. Since the converter box program only supplies up to two coupons per household, families residing within single-address multi-family dwellings may be left ineligible for coupons.

Thus it is vital that NTIA be enabled to broaden its focus to include these communities and ensure that they are not left without the means to prepare for the imminent DTV transition.

**H. Eliminate Language Barriers To Public Safety**

In August 2005, Hurricane Katrina disabled the only Spanish language full-service broadcast station in New Orleans, KGLA(AM), with devastating results. Over 100,000 Spanish speaking residents of the area were left with no print or broadcast communications (and almost no telephone service) for over a week when they needed access to information the most. This tragic event magnifies the urgent need for emergency information to be collected, verified and voiced (not just translated) into Spanish, Chinese, and other languages that are widely spoken in most communities.

No one should die in an emergency because he or she doesn't speak English fluently. Therefore the Independent Spanish Broadcasters Association (ISBA), the Office of Communication of the United Church of Christ, Inc. (UCC) and MMTTC have recommended that Congress appropriate sufficient funds to enable broadcasters to rapidly implement a comprehensive multilingual emergency broadcasting plan.

Emergency broadcasting services are only as strong as the weakest link in the chain of warning and communications. Information must be collected, verified and voiced (not translated) into widely spoken languages in disaster-prone communities.

Thus, each of the federal entities responsible for providing emergency warnings should be directed and funded to provide multilingual emergency communications. Resources should be directed to the Federal Emergency Management Agency (FEMA), the National Weather Service

(NWS) and the National Oceanographic and Atmospheric Administration (NOAA). Of these, the most immediate need is at the NWS, which initiates approximately 85% of all Emergency Alert System (EAS) alerts. NWS provides no local weather warnings in Spanish because it employs no Spanish speaking staff in the relevant office.

### **III. Revisions Or Clarifications To The Communications Act**

#### **A. Clarification Of Section 307(b) (Localism)**

Codified in the 1927 Radio Act, Section 307(b) of the 1934 Communications Act requires the Commission to “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same.” Certainly this provision was necessary in the early days of radio, when there was a significant risk that high demand for radio frequencies in large cities would leave rural areas without service.

Yet today, Section 307(b) inhibits diversity and does little or nothing to ensure that broadcasters meet local needs. Relying on what it believes Congress intended over three generations ago, today’s FCC awards construction permits to those who game the system by proposing first services to tiny hamlets. A licensing process giving an advantage to “first service” for a hamlet is nonsensical when, since 1981, licensees have not been required to offer programming that addresses the specific needs of their communities of license.

Further, the Commission’s move-in restrictions make it almost impossible to relocate most stations closer to major cities, where large multicultural and multilingual audiences often lack stations serving their specific needs. Minority broadcasters often would like to serve these audiences, but since these broadcasters entered the industry two generations late, they often face the competitive disadvantage of operating with the only stations they could buy – those licensed to distant suburbs. Thus, in the name of localism, the Commission has precluded new diverse local service that could meet the local needs of our increasing diverse central cities. Further, these move-in restrictions lock in and perpetuate the present effects of past racial discrimination in broadcast licensing and financing.

Congress should update and clarify Section 307(b) to provide that FCC rules adopted to promote localism will be presumed invalid when these rules significantly inhibit diversity.

#### **B. Amendment To Section 309(j) (Spectrum Auctions)**

Until 1992, the FCC awarded spectrum to applicants who proved, at a hearing, that they would best serve the public interest. Lotteries were also used to award select spectrum in the mid-1980s and early 1990s. In 1993, in Section 309(j) of the Communications Act, Congress granted the Commission the authority to auction electromagnetic spectrum via a competitive bidding process. Section 309(j) directed the Commission to avert an “excessive concentration of licenses,” and to “disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women.” In response to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the FCC eliminated all race and gender-based classifications for the class of auction participants known as Designated Entities (DEs) and instead used a small business classification as a race and gender-neutral means to implement the congressional requirements under Section 309(j)(3). Nonetheless, the

Commission is required to take concrete steps to prevent entrenched incumbents from exploiting the bidding process at the expense of DEs.

To fulfill this congressional mandate, the Commission has employed a variety of measures over the years to promote successful DE participation in auctions, such as tax certificates, installment payments, spectrum set-asides, and bidding credits. Bidding credits have previously entitled a DE (based on the size of the DE as measured by its gross average revenue over the preceding three years) to subtract a range of 15 to 45 percent from the gross winning bid of a license or permit won at auction. However, all but one of the measures to aid a DE's access to capital have been either repealed or eliminated. Today, DEs enjoy no other measure to help level the playing field at auction except for bidding credits, and the value of bidding credits has been significantly diminished by recent FCC decisions.

In 2005, MMTC and other parties asked the Commission to improve the DE program by adopting limited, targeted rule changes, which would make it more difficult for large in-region incumbent wireless service providers to exploit the DE program in today's highly consolidated industry through the use of its relationships with companies that could benefit from DE bidding credits. However, it was not until 2006, after a well-publicized scandal involving the abuse of the DE process by the principals of a large communications holding company that the Commission acted to reform the DE program.

Unfortunately, rather than adopting the limited, focused measures recommended by MMTC, the Commission took an abrupt, unforeseen and debilitating change of course: it issued new rules, a mere two weeks before a 2006 major auction application filing deadline, that: (i) deferred taking any action to reform the DE program to protect its integrity, (ii) doubled the long-standing five-year unjust enrichment period for DEs to hold their licenses without a loss of bidding credits ("Five-Year Hold Rule") for all DEs, converting it to a "Ten-Year Hold Rule" with increased penalties, and (iii) imposed new leasing, resale and wholesale restrictions on all DEs' use of their licenses post-auction, restrictions that effectively deprive DEs of their bidding credits if they lease, resell, or wholesale even so much as 25 percent of their spectrum capacity to a single entity – regardless of the size of that entity. DEs cannot enter into any such arrangements with multiple entities for more than 50 percent, on a cumulative basis, of spectrum capacity. Ironically, non-DEs, including the large national wireless carriers, are subject to none of these FCC operating constraints.

Under the DE rules in place from 1997-2006, if within five years after taking advantage of an auction bidding credit a DE transferred or assigned the license to a non-DE, became ineligible through a change in corporate structure, or through the attribution of new management, affiliates or investors, the DE would have been required to repay its bidding credits, with interest, to the FCC. The Commission's 2006 decision to adopt a Ten-Year Hold Rule without the benefit of public notice and a record, and without being offset by other measures such as installment payments, severely limited the ability of new entrant DEs to secure venture or private equity financing. Many DEs are not eligible for traditional financing because, without subscribers, their spectrum is not yet generating revenue, and there are continued discriminatory practices in the banking industry. Securing debt capital has always been difficult for small businesses, especially those owned by minorities and women – even more so in today's volatile credit market. Moreover, private financiers will not invest in a new entrant if the financier cannot exit the business for ten years when the business plan is not succeeding. The average exit horizon is four to six years. Even the Telecommunications Development Fund (TDF), which was created by

Congress to aid small businesses (see p. 4 supra) has a six-year exit horizon. The FCC Chairman serves on the Board of Directors of TDF.

By limiting the degree to which DEs may collaborate with other businesses – even other DEs – the new 25 percent/50 percent “material/impermissible relationship” leasing, resale and wholesale restrictions also severely limits the ability of DEs to acquire financing. This new rule requires DEs to provide service on the retail market, competing directly for market share with very large entrenched incumbents that have more resources and money to market directly to the consumer, own and operate retail distribution and service centers, and provide handsets and other equipment at lower prices. The large incumbents are not subject to any such restrictions. Importantly, the lease, resale and wholesale business model was emerging in 2006 as an innovative approach for smaller and mid-sized carriers that have built out their licenses to distribute their network capacity; this model is now an industry standard and is critical to raising capital for new entrants.

Thus, the Commission’s extremely onerous exit requirements and lease, resale, and wholesale restrictions on DEs prevent DEs from obtaining capital and, therefore, tip the balance of auction success in favor of incumbents. Not surprisingly, in the last two large wireless auctions, Auctions 66 and 73, DEs secured only 4 percent and 2.9 percent of spectrum licenses based on value, respectively, compared to more than 70 percent in comparable auctions over a 10 year period preceding the rule changes. More importantly, virtually no spectrum was awarded to minorities or women. Auctions 66 and 73 were the two largest FCC auctions in history and represented the last major opportunity for new DE entry and participation in the wireless industry for the foreseeable future.

MMTC has encouraged the Commission to act on its own to institute DE program reform, and it has joined with two DEs in an appeal of the onerous new 2006 rules. To ensure that the Commission never again strays as far it has from Congress’ purposes in enacting Section 309(j), Congress should revise Section 309(j) to explicitly prohibit the Commission from hampering the ability of DEs, particularly minorities and women, to secure access to capital, and to take immediate affirmative steps to ensure that licenses are awarded among a wide variety of applicants.

### **C. Relaxation Of Section 310(b)(4) (Foreign Investment in Broadcasting)**

This poorly worded section of the Communications Act, dating from the Radio Act of 1912 and adopted out of fear of potential German dominance of U.S. radio, prohibits the Commission from granting licenses to companies that are owned, directly or indirectly, by a company owned 25% or more by aliens “if the Commission finds that the public interest will be served by the refusal or revocation of such license.” Today foreign investment in American cable and telecommunications facilities is routine; the Commission waived telecom foreign ownership restrictions in response to the the World Trade Organization’s Basic Telecommunications Agreement a decade ago.

There is no risk that overseas investments in American broadcasters would cause any harm. State Department and Treasury Department policies offer ironclad security against business investment by our enemies, while presuming that NAFTA and GATT members are qualified to hold interests in FCC licenses. Section 310(b)(4) could be revised to specify particular states whose nationals would be included or excluded from investing in American broadcasting.

Authorizing such investments could be profoundly beneficial. Minority broadcasters, although largely shut out from access to domestic capital, are often embraced by overseas capital. Further, relaxation of U.S. trade barriers could be conditioned on commensurate reciprocal trade barrier relaxation, thus opening overseas markets to American broadcasters.

#### **D. Expansion Of Sections 334 and 634 (Equal Employment Opportunity)**

In 1992, Congress adopted Sections 334 and 634 to prevent the FCC from repealing its then-operative EEO rules for television and cable. Other provisions of the Communications Act authorize the FCC to apply EEO rules to broadcasting and telecommunications, but that authority is only implicit and it is discretionary. Further, court cases decided in 1998 and 2001 struck down, on constitutional grounds, portions of the EEO rules that were in effect when Congress adopted Sections 334 and 634. The revised broadcast and cable EEO rules adopted by the Commission in 2002 are weak on paper and even weaker in practice. Research by the Radio Television News Directors Association and MMTC confirms that minorities have been virtually purged from English language, non-minority owned radio news employment. Minority employment levels throughout broadcasting are stagnant or falling.

Therefore, Congress should revise Sections 334 and 634 to clearly and unambiguously require the FCC to adopt and enforce effective EEO rules. In the spirit of platform neutrality, these rules should apply to every industry the FCC regulates. Congress should also protect most of its EEO requirements from unrelated litigation by providing for severability of any provisions a court might unexpectedly invalidate.

#### **IV. Amendment To The FTC Act To Prohibit Racial Discrimination in Advertising Placement and Terms**

To the FCC's credit, in December 2007, upon MMTC's recommendation, the agency adopted a regulation requiring broadcasters seeking license renewal to "certify that their advertising sales contracts do not discriminate on the basis of race or gender" and, further, to certify that these contracts contain nondiscrimination clauses. The Broadcast Advertising Nondiscrimination Rule took effect on July 15, 2008. It is the first new federal civil rights mandate on any subject in 31 years.

The Broadcast Advertising Nondiscrimination Rule takes aim at the insidious practices of "No Urban Dictates" (NUDs) and "No Spanish Dictates" (NSDs). NUDs and NSDs are instructions by advertisers to their agencies not to buy (or to buy only at reduced rates) advertising on stations largely reaching African Americans or Hispanics. NUDs and NSDs are generally premised on baseless stereotypes, particularly the belief that the presence of a critical mass of minority shoppers in a store will discourage white patronage at that store. MMTC has found that service and retail businesses frequently use NUDs and NSDs, including restaurants, hotels, amusement parks, cruise lines, casinos, clothing stores, hair salons, jewelers and automobile dealerships. Extrapolating from FCC-sponsored and other research findings, MMTC has estimated that NUDs and NSDs cost minority-owned radio at least \$200,000,000 in revenues annually. Minority-focused television is hit hard as well.

Resistance to civil rights laws has always been greatest when money is involved; thus the FCC's jurisdiction over broadcasters may not be enough to stop NUDs and NSDs. The FTC's

Consumer Protection Bureau oversees advertising practices, and thus the FTC could play a vital role in rooting out and prosecuting discriminatory advertisers.

The FTC Act authorizes the FTC to proscribe “unfair and deceptive acts or practices” as well as anticompetitive practices. However, on its own, the FTC cannot simply assume authority over discrimination in advertising by declaring that NUDs and NSDs are inherently unfair, deceptive and anticompetitive. After all, virtually any lawbreaking by businesses is unfair and deceptive and it is done to gain a competitive advantage; tax cheating, pollution and employment discrimination are all unfair, deceptive and anticompetitive, but Congress has not delegated the FTC to become a super-IRS, a super-EPA or a super-EEOC.

On the other hand, the FCC is unlikely to be able to cure advertising discrimination rapidly without assistance from the FTC. Like any commercial transaction, discriminatory advertising has a supply side and a demand side. The FCC can address the demand side, but only the FTC can address the supply side.

Thus, the FTC needs direction from Congress instructing the FTC, in cooperation with the FCC, to ban racial discrimination in the placement and terms of broadcast advertising. In this way, the FTC and FCC could work together, through an interagency memorandum of understanding (MOU), to attack both the supply and demand sides of advertising discrimination. A model can be found in the way the FCC and FTC avoided conflict and duplication of duties, and improved overall enforcement effectiveness, with their 2003 MOU implementing the National Do-Not-Call Registry.

New antidiscrimination legislation could draw from the complaint, investigation, probable cause and remedy provisions of Title VII of the 1964 Civil Rights Act, which offers complainants, including laypersons, an inexpensive and often expeditious administrative remedy for employment discrimination.

Further, Congress should give the FTC express authority to require nondiscriminatory advertising placement and terms and nondiscrimination provisions in the advertising contracts of companies in media industries not directly regulated by the FCC, including print and Internet advertising.

## **V. Comprehensive Oversight Of The FCC And Executive Branch To Ensure That Civil Rights Objectives Are Achieved**

The FCC’s failure for eight years to focus more than momentarily on diversity and inclusion is a case study in incompetence, blind ideology, and negligible congressional oversight. The epic legal and moral transgressions that we experienced during that time must never be repeated.

In 2003, the Commission completely ignored eleven media diversity proposals offered by fourteen of the nation’s leading civil rights organizations. After the Third Circuit scolded the Commission for this stunning violation of the Administrative Procedure Act and the agency’s own rules, the Commission actually ignored the very same proposals again for a year. While this unprecedented episode was unfolding, the Commission also failed to consider 44 recommendations made by its own Advisory Committee on Diversity.

The painstaking efforts of the Clinton administration to design narrowly tailored remedies for the pervasive effects of the FCC’s own history of licensing discrimination were entirely squandered

by the Bush administration. The Kennard FCC's five thorough Adarand research studies were allowed to gather dust for eight years – and now the data is stale and the new administration must start all over again. Meantime, minority entrepreneurs have lost eight years of their lives trying to gain entry and traction in the nation's most influential and powerful industries.

Under the Bush administration, the Commission's almost complete lack of EEO enforcement – a stunning 98% decline in enforcement actions and forfeitures since 10 years ago – has set minority broadcast employment back at least generation.

Even natural disasters failed to move the Commission into action. Four years after Hurricane Katrina, the Commission still has failed to adopt the recommendations of its own Independent Panel to require the nation's broadcasters to adopt a system of multilingual broadcasting in emergencies.

On this date we are providing the responsible congressional committees with a letter to Interim FCC Chairman Copps that describes the enormous backlog of civil rights policy matters awaiting action at the FCC. We have sent President Obama a similar letter regarding NTIA's failure to address civil rights issues there. These materials might be useful to Congress as a starting point for the unwavering oversight that is necessary to ensure that the industries that are most essential to democracy will truly serve the public interest.\*

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**APPENDIX**

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**A BROADBAND STIMULUS PLAN TO BENEFIT ALL AMERICANS**

**National Urban League  
Minority Media and Telecommunications Council**

**January 21, 2009**

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Key Objectives:

- Broadband must be built out TO all Americans – including the urban and rural poor and minority communities.
  - Broadband must be built out BY all Americans – including minority business enterprises (MBEs) and disadvantaged business enterprises (DBEs) that train, employ and are owned by people of color, and that recirculate and reinvest money in communities of color.
  - Broadband must be designed to BENEFIT all Americans – offering universal, competitive, affordable and accessible high-speed services.
- I. Ensure Very Substantial Participation Of MBEs And DBEs In The Entire Stimulus Package
- A. Parties (to include, but not be limited to, utilities, prime contractors, state and local governments, regional authorities, non-profits, institutions of higher education, and quasi-government agencies such as Tennessee Valley Authority) that receive a federal benefit from the stimulus must comply with all federal rules, regulations, executive orders, including but not limited to Section 8(a) federal procurement selection guidelines, agency directives, Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulations (DFAR) regarding MBEs and DBEs.
  - B. Absent a truly compelling business necessity (these exceptions should be defined in the legislation and implementing regulations), all contract requirements and procurement practices that could ensure the underutilization or exclusion of most MBEs and DBEs should be avoided, including:

1. Needless short deadlines for commencement and completion of a project
  2. Previous “very large project” experience
  3. Bundling of small and medium sized projects into large packages
  4. Excessive bonding requirements
  5. Number of years in business
- C. Establish expedited and favorable (at least tie-breaker) consideration to prime contractors that:
1. Voluntarily include in their bids genuine and substantial 1<sup>st</sup> tier MBE participation beyond the minimum federal 8(a) guidelines for MBE utilization, and have an established method to track and report verifiable outcomes on a periodic basis.
  2. Propose substantial initiatives to hire and train skilled and low-skilled unemployed minority labor in broadband technologies.
  3. Demonstrate a substantial and verifiable history of MBE utilization in the specific technical areas of the contract (e.g. design, construction and testing) rather than the company’s overall record of MBE utilization, which may include janitorial and related services dominated by MBE but having nothing to do with broadband and wireless technical services.
- D. Design a defensible way to ensure that state procurement laws, rules, regulations and programs related directly and indirectly to MBEs do not interfere with federal government MBE policies or provisions for utilization of socially and economically disadvantaged businesses.
- E. The Department of Labor should deploy national intermediary nonprofit organizations to monitor the operation of all stimulus initiatives to ensure that their contracting practices are free of entry barriers, that those performing these initiatives do not circumvent MBE and DBE requirements with sham structures or make-work projects, and that MBE and DBE participation targets are achieved with integrity and accountability.
- II. Support Broadband Infrastructure Buildout With A Direct Loan Program
- A. Implements the Broadband Bonds concept to ensure maximum cost-benefit impact
  - B. Technology independent – could include fiber, wireless, satellite or other appropriate technologies

- C. Covers rural, urban, and minority community infrastructure and buildout
  - D. Covers both broadband enablement and the last mile to the consumer
  - E. The top priority is first class service to broadband-deprived low income, minority and multilingual rural or urban communities. The FCC should gather and publish meaningful data on the extent of broadband access by census tract, detailing the level of broadcast facilities available to American neighborhoods. Urban, low-income, communities of people of color and rural communities should all be included in broadband updates in a timely fashion. Further, it is vital that already-wired communities receive supplemental infrastructure that will deliver the same high speeds as those designed into new rural infrastructure.
  - F. Provide Troubled Assets Relief Program (TARP) funding to minority lending institutions and other community banks for direct loans to broadband MBEs and DBEs.
- III. Stimulate MBE And DBE Participation In Telecommunications With Tax Incentives
- A. Structure the Broadband Stimulus Tax Credits to Permit MBE and DBE Participation
    - 1. The broadband stimulus tax credits currently contemplated should allow for transferability by MBEs and DBEs in order to fairly provide a broadband buildout incentive to MBE and DBE carriers that are not yet taxable (e.g. earlier stage, growth companies that have not achieved mature, taxable cash flows levels). Absent this provision, the tax credit benefit flows 100% to established telecommunications companies with mature businesses, and earlier stage MBE and DBE companies would yield zero benefit for delivering new broadband services – certainly not the intent of tax credit policy.
    - 2. MBEs should be permitted to earn tax credits that exceed those allotted to companies generally:
      - 25% incremental tax credit allowance to MBEs and DBEs generally, and
      - An additional 25% incremental tax credit allowance for MBEs and DBEs that disproportionately serve (e.g., 35% of customers) minority and disadvantaged customer segments with broadband services.
    - 3. Immediate restoration of the Tax Certificate Policy and extension of the policy to telecommunications. In effect from 1978 until Congress unwisely repealed it in 1995, this policy permitted those selling FCC-regulated media properties to minorities to defer capital gains taxes on the sale. This bipartisan policy quintupled the number of minority-owned broadcast stations in 17 years. Industry leaders and the FCC are of one voice in seeking the restoration of the Tax Certificate Policy and its

extension to telecommunications as a means of unlocking the managerial and entrepreneurial potential of entrepreneurs of color.

IV. Provide Substantial Support For Broadband Innovation And Training

- A. Restoration and substantial funding for the Telecommunications Opportunity Program (TOP), with a mission to develop:
  - 1. Innovative ways to stimulate broadband adoption and telecom literacy for low-income, minority and multicultural consumers
  - 2. Creative broadband utilization by schools and community-based institutions
  - 3. Provide technical assistance and training for emerging telecom MBEs.
- B. Substantial funding for training of minority un-employed and under-employed workers living in broadband-deficient urban and rural areas in broadband infrastructure installation and maintenance
  - 1. The Department of Labor should fund and administer this initiative in conjunction with the Department of Commerce.
  - 2. Funds should be awarded to contractors and subcontractors, as well as Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs) and Native American Serving Institutions (NASIs).
- C. To address the paucity of telecommunications MBEs and trained minority technicians, Congress should establish and appropriately fund a National Minority Broadband Training and Technical Council within the Department of Commerce to provide policy guidance, information, technical support and coordination for a strategy to increase the number of minority broadband and wireless infrastructure companies and technicians.

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