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January 21, 2009

Hon. Michael J. Copps
Interim Chairman
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Dear Chairman Copps:

RE: Structural and Procedural Reforms in FCC Operations

The Minority Media and Telecommunications Council (“MMTC”) respectfully requests that as the Commission considers its agenda for this new and historic Presidential administration, the agency should give serious consideration to structural, rulemaking procedure, adjudication and enforcement reforms which would “expand opportunities” and “facilitate ownership diversity” in the communications industries.¹

In the MMTC Road Map for Telecommunications Policy (July 2008) (enclosed), we pointed out that the rulemaking, policy development and enforcement processes often function to the great disadvantage of parties that are resource-poor, such as small and minority businesses, civil rights advocates, and consumers.

Even with over a generation of FCC experience, MMTC has often found the FCC’s inner workings to be lacking in transparency, timeliness and responsiveness. The classic example was the Commission’s failure in 2003 even to mention eleven serious media diversity proposals offered by fourteen of the nation’s leading civil rights organizations – a grave omission not corrected until

¹ See Promoting Diversification of Ownership in the Broadcasting Services, Second Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5924-5 ¶¶2, 5 (2008) (“Broadcast Diversity Second Report and Third FNPRM”).

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a year after a court of appeals remanded the rules on that basis.² While this unprecedented episode was unfolding, the Commission also failed to consider 44 recommendations of its own Advisory Committee on Diversity.³

The system is broken and we hope you can begin the process of fixing it. Here are our immediate recommendations:

Structural Reforms

The Commission should create and underwrite staff offices and positions that will promote, expand and enforce diversity initiatives, including:

- **Chief Diversity Officer**

A Chief Diversity Officer should be designated within the Office of General Counsel. The Chief Diversity Officer would be the point person for implementing the Commission's diversity agenda and, especially, for overseeing the work of senior constitutional scholars who would develop and defend pro-diversity policies, including race-conscious policies where necessary.

- **Funding and Staff for the Office of Communications Business Opportunities**

OCBO, the Commission's internal voice for diversity and small business, seldom is actively involved in policymaking. The Commission should fully fund and staff OCBO, and ensure that it is actively consulted regarding the diversity impact of every major rulemaking or merger cases prior to proposing final rules or settlement actions.

² See Prometheus Radio Project v. FCC, 373 F.3d 372 (2004), cert. denied on other grounds, 545 U.S. 1123 (2005); on remand, 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006) (again omitting to describe the civil rights organizations' proposals); 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215 (2007) (correcting that omission and properly seeking comment).

³ See generally Adopted Recommendations of the Advisory Committee for Diversity in the Digital Age, 2004-2008, available at <http://www.fcc.gov/DiversityFAC/recommendations.html> (last visited January 19, 2009).

- **Civil Rights Enforcement Branch**

A new Civil Rights Branch of the Enforcement Bureau should encompass the Media Bureau's Equal Employment Opportunity ("EEO") staff and also include compliance officers for transactional and advertising nondiscrimination enforcement. In the spirit of platform neutrality, this new branch should apply civil rights regulations uniformly across every technology platform, including broadcasting, cable, satellite, wireless and wireline.

The need for this office was underscored last summer when the Commission adopted its Broadcast Advertising Nondiscrimination Rule, but then failed to designate anyone to enforce it.⁴ Full compliance with this rule would lead to the elimination of "no urban dictates" ("NUDs") and "no Spanish dictates" ("NSDs"), thereby advancing the Commission's goal of improving minority broadcasters' access to capital. MMTC estimates that full compliance with the Broadcast Advertising Nondiscrimination Rule would restore to minority broadcasters about \$200,000,000 in annual revenues that they earn but never collect.

Another vital civil rights protection, the 1993 Cable Supplier Diversity Rule,⁵ sits on the books with nobody responsible for enforcement or tracking compliance. This rule takes on heightened importance now that Congress is contemplating a broadband stimulus package that, hopefully, will provide entrepreneurial opportunities that could be accessed by minority business enterprises ("MBEs").

- **Advisory Committee on Diversity for Communications in the Digital Age**

From its inception in 2003 until its charter was allowed to expire on December 31, 2008, the Diversity Committee produced a comprehensive body of recommendations. Unfortunately, the Commission ignored nearly all of them. When its charter expired, the Committee had before it a considerable number of issues it had hoped to examine.

The Commission should re-charter the Diversity Committee for a further two-year term. Its charter should be revised to specify that the Committee reports to the full Commission (rather than only to the Chairman) and that it may examine any issues it regards as falling within its mission (rather than only those issues the Chairman authorizes it to examine).

⁴ On July 15, 2008, the day the Broadcast Advertising Nondiscrimination Rule took effect, MMTC wrote the Chairman to ask him to designate a compliance officer. See MMTC Letter to Hon. Kevin J. Martin re: Nondiscrimination in Advertising Sales Contracts, MB Docket No. 07-294 (July 15, 2008). Unfortunately, this letter went unanswered.

⁵ See 47 U.S.C. §554(d)(2)(E)-(F); see also 47 C.F.R. §76.75(e) (requiring cable operators to seek out and consider doing business with minority suppliers).

Rulemaking Procedural Reforms

The Commission should collect accurate data and use the tools given it by Congress to develop a thorough record in its proceedings - thereby ensuring that the civil rights aspects of policy questions are not overlooked or brushed aside. It should adopt these specific reforms:

- **More frequent use of Section 403 for fact-finding**

Through Section 403 of the Act, Congress granted the Commission the authority to inquire as to any matter related to the enforcement of its rules.⁶ Communications policy does not exist in a vacuum. There are a number of stakeholders, most of which are Commission licensees, but increasingly, more are not. Section 403 investigations allow the Commission to learn about relationships between FCC licensees and non-licensees when the agency or the public raises concerns that the actions of a non-regulated stakeholder may have an adverse effect on Commission licensees, goals, and policies. Collecting such information would afford the Commission access to information that is helpful in determining Commission policies, rulemaking, and carrying out the agency's duty to regulate in the public interest.

- **Consider and vote promptly on the recommendations of advisory committees**

The Commission has chartered a number of advisory committees in recent years.⁷ Many of these committees, which are generally comprised of stakeholders from FCC-regulated industries, public interest groups, and other government bodies, submit recommendations to the Commission that sit for months or years without action. For example, the Advisory Committee on Diversity for Communications in the Digital Age, chartered in 2003, submitted 44 recommendations that the Commission has yet to consider. Many of these committees were formed to review timely issues and as such, their recommendations should be considered in a timely manner.

- **Perform a line-by-line Section 257 examination of all rules and policies, and submit to Congress a thorough 2009 Section 257 Triennial Report**

Section 257 of the Communications Act mandates that the Commission identify and eliminate market entry barriers in its rules and report to Congress its progress in revising those rules.⁸ Unfortunately, in recent years the Section 257 report has devolved into a

⁶ See 47 U.S.C. §403; see also 47 C.F.R. §1.1 (“The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations.”)

⁷ The Commission's website (<http://www.fcc.gov/>) shows ten advisory committees.

⁸ See 47 U.S.C. §257.

useless laundry list of the Commission's routine activities. The Commission should instead perform a critical review of its rules to determine what regulations should be modified to foster entrepreneurship on the part of minorities and women. Further, the Commission should make every effort to file the report in a timely manner, a task it did not manage to accomplish in 2006.⁹

- **Trial-type formal hearings before Administrative Law Judges**

Most federal agencies develop complex rules on the record before ALJs, special masters or the commissioners themselves. The FCC uses an informal pleading process, replete with opaque ex parte letters, that is inherently skewed toward those armed with resources and against those armed only with evidence. At a minimum, the Commission can supplement this informal process with trial-type hearings.

- **Oral Argument before the Commission**

The Commission's monthly meetings have been widely criticized as being little more than Kabuki Theater. It would be far preferable for the commissioners to openly debate the issues among themselves or with advocates for the parties and (especially in civil rights matters) with amici.

- **Accurate longitudinal data as the touchstone for policymaking**

The Commission's minority ownership researchers¹⁰ and independent observers¹¹ agree that the Commission's minority and women ownership database could be substantially improved.¹² No constitutional impediment prevents the Commission from collecting data on minority or women ownership.¹³ As MMTC has suggested, this data should be reported

⁹ The 2006 Section 257 Report was not delivered to Congress until December of 2007.

¹⁰ See Arie Beresteanu and Paul B. Ellickson, "Minority and Female Ownership in Media Enterprises" (released July 31, 2007), p. 3.

¹¹ See S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007), pp. 12-14 (identifying several serious deficiencies in the FCC's data collection and reporting).

¹² The Commission sought comment on this issue in 2008. See Broadcast Diversity Second Report and Third FNPRM, 23 FCC Rcd at 5955 ¶¶95-96.

¹³ See Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("it is permissible to consider the racial makeup of schools"; school boards may draw "attendance zones with general recognition of the demographics of neighborhoods" and may engage in "tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but

annually because of the impact rule changes would have on the relationships among Commission licensees, lenders and investors.¹⁴ The Commission's minority and women ownership census ought to be expanded to include a questionnaire administered to minority and women owners – to ensure that those identifying themselves as minority or women controlled really are what they claim to be¹⁵ – and to provide the Commission with real-time feedback on the impact of Commission rules and policies on minority and women broadcasters' access to capital, spectrum and opportunity and on minority and women broadcasters' ability to serve the public. Sophisticated data gathering would also allow the Commission to ascertain the macroeconomic impact of new regulations.

- **Opening the rulemaking process for transparency and accountability**

In the Road Map, MMTC recommended that the Commission consider a variety of steps that would enhance public confidence in the rulemaking process, improve its overall quality and add to the agency's credibility when rules are appealed. The Commission should consider these recommendations:

- Commit to a regular schedule of field hearings at which the agency can elicit scholarly and public testimony
- Include, in major proceedings, multilateral negotiations among the stakeholders (in the nature of “negotiated rulemakings” to attempt to gain consensus among the parties), with a deliberate effort to include minority groups and consumers who usually are invisible in these proceedings
- Strengthen the requirements for the level of detail to be provided in lobbyists' ex parte letters
- Impose shot clocks for action on petitions for rulemaking
- Have commission decisions assigned to and prepared by a commissioner

do not lead to different treatment based on a classification that tells each student he or she is to be defined by race[.]”)

¹⁴ See Initial Comments of the Diversity and Competition Supporters, MB Docket No. 06-121, October 1, 2007, at 31.

¹⁵ See S. Derek Turner and Mark Cooper, Out of the Picture: Minority and Female TV Station Ownership in the United States, Free Press (September 2006) p. 12 (identifying eight television stations reported as woman owned but actually controlled by men, and two television stations reported as minority-owned but actually controlled by nonminorities).

- Have public discussion and voting by the commissioners on non-ministerial decisions, rather than voting on “circulation”
- Vote only on nearly complete texts, with only non-substantive editorial privileges; re-vote if there are substantial changes after an initial vote.

Adjudicative and Enforcement Reforms

- **Restore Effective EEO Enforcement**

The Commission’s EEO enforcement program has dwindled to a shadow of its former self,¹⁶ with dire consequences. RTDNA found that only 3.6% of non-Hispanic television stations had minority general managers in 2007, and that minority employment in radio news declined from 14.7% to 6.2% between 1995 and 2007. MMTC has calculated that minority employment at non-minority owned, English language radio news operations is about 0.4%, or statistically zero, which is about where it stood in 1950. Evidently minorities have been almost entirely purged from radio news – a profession that is vital to the promise of the First Amendment.

- **Prohibit Excessive Use of Word of Mouth Recruitment from Homogeneous Workplaces**

Word of mouth recruitment generally reaches no further than the homogeneous family and social affinity groups of station employees. The Commission has repeatedly recognized that word of mouth recruitment from a homogeneous workforce is inherently discriminatory.¹⁷

¹⁶ MMTC’s examination of all 300 of the broadcast audits the Commission conducted in 2003 and 2004 found that only 12% of the recruitment sources were minority-targeted while 36% of the job notices still did not contain an “EOE” tag line. Yet, every one of the stations passed its audit. While current enforcement efforts feature higher forfeitures in particular cases than those issued a decade ago, the size of the Commission’s EEO docket is down 96% (from 251 cases in 1994-1997 to 10 cases from 2004-2007), and the total forfeiture amounts imposed annually have also decreased 96% (from \$312,250 in 1994-1997 to \$12,125 in 2004-2007).

¹⁷ See, e.g., Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997) (Commission was “troubled that a significant number of the station’s hires, for which recruitment efforts were made, resulted from staff or client referrals.”) The Commission has observed that it is necessary to “ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.” Broadcast and Cable Equal Employment Opportunity Rules and Policies, 15 FCC Rcd 2329, 2331 ¶3 (2000). See also Walton Broadcasting, Inc., 78 FCC2d 857, 865, 875, recon. denied, 83 FCC2d 440 (1980) (criticizing overuse of “word of mouth” referrals from a predominately white work force, which, while unintended, effectively discriminated against minority group employment.”) A similar principle applies to gender-based discrimination. See, e.g., EEOC v. N.Y. Times Broadcasting, Inc., 542 F.2d 356, 360-61 (6th Cir. 1976) (holding that a television station engaged in unlawful hiring practices when it

Unfortunately, the Commission has disabled itself from prosecuting this most common and invidious form of employment discrimination by choosing not to collect or publish Form 395 EEO data, which neutrally reports employment information for all races and both genders and thus neither contains nor implies a preference for one race or gender.

- **Ethics and genuineness reviews of major mergers**

During the previous administration, FCC inattention contributed to the massive WorldCom debacle - costing the taxpayers billions of dollars because the constable was asleep. A generation ago, sham applications were a tawdry practice undertaken at the fringes of the licensing process by small time hustlers, but now they have become so rife that in the infamous Gabelli litigation in 2005, one of the nation's leading telecom financiers almost got away with it. It is past time for the Commission to consistently verify the structural ownership bonafides of those seeking the privilege of an FCC license.

- **Designate evidentiary hearings promptly**

Not since the Wiley administration has the Commission taken seriously its obligation under Section 309 to hold a public hearing when an applicant engaged in discrimination or other anti-consumer or anti-competitive practices. Entire broadcast renewal cycles now occur in which the Commission manages to find that every single radio and television station in the nation is entitled to renewal. The Commission's almost complete failure of oversight rewards bad actors and attributes no public interest value to the FCC license of a good actor.

- **Minority impact and digital divide reviews as part of each major rulemaking and merger decision, especially those involving network neutrality, ownership and deployment**

This proposal originated over 35 years ago with the Citizens Communications Center and was recently championed by NABOB and the Rainbow/PUSH Coalition.¹⁸ Minority Impact and Digital Divide reviews would be incorporated into large merger proceedings and general rulemaking proceedings. A model for such an impact statement can be found in the Regulatory Flexibility Act statements that accompany the adoption of Commission rules of general applicability. To its credit, the Commission recently sought comment on the impact that media consolidation has on minorities,¹⁹ and in that spirit the Commission should

recruited broadcast news personnel solely from two radio stations that had employed virtually no women in such positions).

¹⁸ Broadcast Diversity Second Report and Third FNPRM, 23 FCC Rcd at at 5956-57 ¶101.

¹⁹ See 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 06-121 (Further NPRM), 21 FCC Rcd 8834, 8837-38 ¶6 (2006).

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include, in its deliberations in all major rulemaking proceedings, the impact of proposed rules on minority and female ownership. Almost everything the Commission does has a substantial impact on minority and female entrepreneurship, but this impact is often not recognized until years later. Minority/Female Impact Statements would address and very likely eliminate the unintended consequences of many rules that seek to otherwise promote diversity and expand broadcast ownership opportunities for minorities and women.

We would appreciate an opportunity to meet with you to explore these and other means of advancing the Commission's credibility, integrity, transparency and effectiveness in protecting and promoting civil rights.

Sincerely,

David Honig

David Honig
Executive Director

Enclosure

cc: Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell