

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2010 Quadrennial Regulatory Review –)	MB Docket No. 09-182
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	MB Docket No. 07-294
Promoting Diversification of Ownership)	
In the Broadcasting Services)	

To The Commission

FURTHER COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS

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Summary and Background

The Diversity and Competition Supporters (collectively “DCS”)¹ respectfully submit this Further Comment in response to the FCC’s Public Notice,² seeking comment on the recently released Commercial Broadcast Ownership Report.³ In two previously submitted comments in the current proceeding, DCS made several recommendations concerning minority ownership.⁴ In this Further Comment, DCS addresses certain data contained in the Report and, in light of this data, urges the Commission to adopt the 47 pending DCS proposals to increase broadcast industry diversity.

I. The New Form 323 Study Data Underscore the Urgency Of Rules And Policies That Will Increase Diversity In Broadcast Industry Ownership Now.

In this proceeding, DCS has expressed its concern with the acute underrepresentation of minority and women ownership of the nation’s broadcast stations.⁵ DCS also emphasized the need for the Commission to continue its efforts to collect data to better inform its policy efforts

¹ The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277 and subsequent dockets (see Appendix). This and all DCS pleadings reflect the institutional views of each of the Diversity and Competition Supporters, and are not intended to represent the individual views of each of the Diversity and Competition Supporters’ officers, directors and members.

² See Commission Seeks Comment on Broadcast Ownership Report, Public Notice, 2012 FCC LEXIS 4906 (2012) (rel. Dec. 3, 2012).

³ See Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report on Ownership of Commercial Broadcast Stations, 77 Fed. Reg. 73461, 2012 FCC LEXIS 4710 (2012) (“Report”).

⁴ See Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182, et al. (Mar. 5, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021898416> (last visited Dec. 19, 2012) (“DCS 2012 Initial Comments”). See also Supplemental Comments of the Diversity and Competition Supporters in Response to The Notice of Proposed Rulemaking, 2010 Quadrennial Regulatory Review - Review Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182 et. al. (April 3, 2012), available at <http://mmtconline.org/wp-content/uploads/2012/04/Supplemental-Media-Ownership-Comments-040312.pdf> (last visited Dec. 19, 2012) (“DCS 2012 Supplemental Comments”).

⁵ See, e.g., DCS 2012 Initial Comments at pp. 5-9.

to advance broadcast industry diversity.⁶ While DCS applauds the Commission for updating Form 323 to collect more comprehensive data on minority and women commercial broadcast station ownership,⁷ DCS remains appalled at the persistently low numbers of minority and women commercial broadcast stations and station owners. According to the Report, racial and ethnic minorities own a majority interest in eight percent or 756 of the nation's commercial radio stations, while women own less than seven percent of these stations.⁸ The Report also demonstrates that racial minorities own a majority interest in a mere 2.2 percent of the nation's full power television stations, with Blacks owning 10 of these stations and Asians owning 6 of these stations in 2011, while Whites owned 935 full power television stations in the same year.⁹

These numbers follow a disturbing trend. In mid-2009 minorities owned 7.24 percent or 815 of the nation's commercial radio stations¹⁰ and 2.1 of the nation's full power television stations.¹¹ Further, from 2007 to 2009, "minority ownership of TV stations decreased by one-

⁶ See id. at pp. 16-19.

⁷ See Report at p. 1, ¶1 (holding that the new Form 323 "requires full power commercial television and radio broadcast stations and low power and Class A television stations, including any of these stations owned by sole proprietorships and partnerships of natural persons, to file a biennial ownership report using the same 'as of' date (October 1) for reported data during each filing cycle. A station's report must identify all of its attributable interest holders. The revised Form 323 also requires all attributable interest holders to obtain and provide FCC registration numbers (FRNs) to facilitate the tracking and cross-referencing of reported ownership interests," among other changes).

⁸ See id. at p. 4.

⁹ See id. at p. 6.

¹⁰ See DCS 2012 Initial Comments at p. 7 (citing Catherine J.K. Sandoval et al., Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest (2009) at p. 4, available at http://mmtconline.org/lp-pdf/Minority_Commercial_Radio_Broadcasters_Sandoval%20MMTC_2009_final_report.pdf (last visited Dec. 17, 2012) ("Sandoval Study").

¹¹ See DCS 2012 Initial Comments at p. 8 (citing 2010 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, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17549 ¶156 (2011) ("NPRM").

third.”¹² The Report indicates that from 2009 to 2011, the years covered by the revised Form 323 data,¹³ diverse ownership has not materially improved. The meager steps the Commission has taken to cure minority and women underrepresentation in the broadcasting industry are woefully inadequate. Form 323 data presented in the Report serves as a glaring reminder that the Commission must act now to promulgate rules and policies that will foster substantial increases in the numbers of women and minorities owning broadcast stations.

A. The Persistent Low Levels Of Minority And Women Broadcast Station Ownership Demonstrate Market Failure And Oblige The Commission To Adopt New Pro-Diversity Rules And Policies Immediately.

The abysmal levels of women and minority broadcast station ownership are decreasing the availability of programming targeted to the nation’s diverse consumers over commercial radio and television stations. These numbers also illustrate the failure of the communications marketplace to serve diverse consumers, and indicate that the Commission has not met its public interest goals of promoting competition and diversity through its media ownership rules. As stated in DCS’ Initial Comments, there is a strong empirical nexus between minority ownership and minority oriented programming available in a broadcast market.¹⁴ DCS has referenced research showing that “approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming in “Spanish, Urban, Urban News, Asian, Ethnic and Minority-oriented Religious formats.”¹⁵ While the nation is experiencing

¹² DCS 2012 Initial Comments at p. 8.

¹³ The Commission notes that the data from the Form 323 biennial report is current as of “October 1, 2011 (the most current biennial information available).” See Report at p. 3.

¹⁴ See DCS 2012 Initial Comments at p. 7 (citing Joel Waldfogel, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009 (July 18, 2011) at pp. 24-25, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308591A1.pdf%20%20 (last visited Dec. 13, 2012) (holding that “[t]he presence of minority-owned stations in market appears to raise the amount of minority-targeted programming.”))

¹⁵ See DCS 2012 Initial Comments at p. 8 (citing Sandoval Study at pp. 19-21).

explosive growth in minority populations,¹⁶ broadcast stations serving minority communities across the nation are going off the air with no replacements.¹⁷ The Commission must act immediately to ensure that its rules and policies promote a marketplace that provides diverse consumers with the critically important service that these broadcast stations render.

B. The 2012 Section 257 Market Entry Barriers Report, Due To Congress December 31, Should Identify Entry Barriers and Recommend Specific Rules And Policies To Address Them.

DCS has addressed several barriers that prevent minority and women entrepreneurs from entering the broadcasting industry, including the lack of access to capital.¹⁸ The Commission has a statutory obligation, pursuant to Section 257 of the Communications Act, to report to Congress every three years on the Commission's efforts to detect and eliminate barriers to market entry for entrepreneurs and small businesses.¹⁹ The purpose of identifying barriers under Section 257 was

¹⁶ See William H. Frey, Census Projects New "Majority-Minority" Tipping Points, Brookings Institution (Dec. 13, 2012), available at <http://www.brookings.edu/research/opinions/2012/12/13-census-race-projections-frey> (last visited Dec. 19, 2012) (citing Census data projecting that "the nation's combined minority population is expected grow from 116 million in 2012 to 241 million in 2060. This translates into growth rates of 142 percent, 116 percent and 256 percent for the Hispanic, Asian, and multiracial populations, respectively. Blacks are expected to grow by 50 percent.")

¹⁷ In Houston, Texas, for example, KCOH-AM, the oldest station in the Houston radio market providing Black listeners for 50 years with African-American oriented news, talk, and music, is eliminating this programming. See, e.g., J.R. Gonzalez, Sale of KCOH Closes Chapter on Houston Broadcasting History, Bayou City History: Houston Chronicle Blog (Nov. 14, 2012), available at <http://blog.chron.com/bayoucityhistory/2012/11/sale-of-kcoh-closes-chapter-on-houston-broadcasting-history> (last visited Dec. 17, 2012).

¹⁸ See DCS 2012 Initial Comments at pp. 11-13 (citing United States Government Accountability Office, Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess (March 2008) at p. 5, available at <http://www.gao.gov/assets/280/273671.pdf> (last visited Dec. 18, 2012) (identifying "a lack of easy access to sufficient capital for financing the purchases of stations," as a primary barrier to "limited levels" of broadcast media ownership "by minorities and women."))

¹⁹ See 47 U.S.C. §257 (obligating the Commission to "identify and eliminate market entry barriers" for entrepreneurs and small businesses in telecommunications and "report and review" any "regulations prescribed to eliminate barriers within its jurisdiction.")

to comport with a “national policy” that “seeks to promote the policies ... favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”²⁰ In its Section 257 triennial report due to Congress on December 31, the Commission should specify every major market entry barrier facing entrepreneurs and small businesses in communications, and develop a policy framework that responds to each unique barrier and facilitates greater diversity in media ownership.

To facilitate this analysis, the Commission has at its disposal 47 workable rule and policy proposals, some of which have been pending for consideration by the Commission for decades. By way of illustration, DCS enumerates four of these rule and policy recommendations below.

II. The Commission Should Rule On 47 Pending Proposals To Advance Broadcast Industry Diversity.

A. DCS’ 47 Race- And Gender-Neutral Proposals Could Help Improve The State Of Broadcast Diversity While The Commission Conducts Adarand Studies To Develop A More Complete Record Should Race- And Gender-Conscious Proposals Prove To Be Necessary.

As the Report indicates, diverse broadcast ownership is at risk for extinction. However, the Commission is not without tools to remedy the situation. As diverse broadcast ownership is so low, the Commission might ultimately deem it necessary to implement race and gender specific policies to remedy such a dire situation. However, Supreme Court precedent requires that the Commission develop a sufficient record to support the implementation of these policies.²¹ Such precedent also requires that the Commission first give “good faith”

²⁰ See 47 U.S.C. §257(b).

²¹ See Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995) (“Adarand”) (supporting the proposition that all race-based government action is analyzed under strict scrutiny review and must be narrowly tailored to further a compelling government interest).

consideration to “workable race neutral alternatives.”²² In April 2012, DCS filed a compilation of 47 pending race neutral proposals to encourage diversity and competition among licensees by increasing access to spectrum, access to capital, and access to opportunity for women and minority-owned business entities (“WMBEs”).²³ These long-pending proposals provide incentives for incumbent broadcasters to conduct transactions with diverse entities and update Commission rules to encourage diverse participation by helping WMBEs and new entrants overcome barriers to entry. The Commission should immediately begin implementing DCS’ proposals including the NABOB Incubator Initiative, relaxing foreign broadcast ownership restrictions stemming from the Commission’s application of §310(b)(4) of the Communications Act, facilitating the migration of AM stations to VHF Channels 5 and 6, and encouraging Congress to reinstate and update the Tax Certificate Policy.

1. Adopt NABOB’s 1990 Incubator Initiative Proposal.

The incubator proposal provides the FCC a tool to incentivize diverse broadcast transactions. Pending since its origin in the Commission’s Minority Ownership Advisory Committee in 1990, the incubator proposal has garnered praise from Commissioners and has been supported by DCS in previous proceedings.²⁴ The current incubator initiative would permit

²² See Parents Involved in Community Schools v. Seattle School District No.1, 551 U.S. 701, 735 (2007) (holding that before implementing race conscious actions, government must give “serious, good faith consideration of workable race-neutral alternatives.”)

²³ See DCS 2012 Supplemental Comments.

²⁴ See Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, 2006 Quadrennial Regulatory Review – Review Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121 et al. (Oct. 1, 2007) at p. 9, available at <http://mmtconline.org/lp-pdf/DCS-MO-Comments-100107.pdf> (last visited Mar. 29, 2012) (“DCS 2007 Initial Comments”). It was favorably acknowledged by former Commissioner Michael Copps in his statement accompanying the NPRM. See NPRM at p. 17583 (Statement of Commissioner Copps) (“...I am pleased to see the proposal for an incubator program teed up for comment in the NPRM...”). As explained herein, this proposal has been refined and improved in some respects. See DCS 2012 Initial Comments at pp. 22-24.

structural rule waivers when, and only when, a broadcaster, through financing or other incubation steps, causes a diverse new voice to take to the airwaves in the same or a larger market.²⁵ Thus, once a business engages in a qualifying incubating activity, the local radio ownership rule would be waived such that the business could exceed the ownership limits by one station per incubating activity, thus encouraging new entrant participation.²⁶

Activities that would qualify for the incubator waiver should be measured on an ongoing basis to ensure the effectiveness of the incubating activity in increasing opportunities for eligible entities, without abuses.²⁷ The qualified activity must occur in the same market or a market at least as large as the market where the transaction occurs.²⁸

2. Relax The Broadcast Foreign Ownership Restrictions Under Section 310(b)(4).

The Commission should encourage access to capital by relaxing its broadcast foreign ownership policy that interprets and applies Section 310(b)(4) of the Communications Act. Relaxing this outdated policy²⁹ will not only provide new funding options for minority broadcast

²⁵ See, e.g., MMTC Ex Parte Letter re: 2010 Quadrennial Review, MB Docket No. 09-182, et al., (Sep. 7, 2011) at p. 3 (“MMTC Sep. 2011 Ex Parte Letter”).

²⁶ See MMTC Sep. 2011 Ex Parte Letter, Attach. at 3.

²⁷ Examples of qualifying activities are detailed in our Initial and Supplemental Comments, including sale and/or donation of stations to qualified entities or minority-serving institutions, LMA arrangements, underwriting and financing of deals, and other actions that the company seeking a waiver demonstrates are likely to enhance radio station ownership opportunities for qualified entities. See DCS 2012 Initial Comments at pp. 23-24. See also DCS 2012 Supplemental Comments at p. 6. See also MMTC Sep. 2011 Ex Parte Letter at pp. 3-4.

²⁸ See MMTC Sep. 2011 Ex Parte Letter at pp. 3-4.

²⁹ Section 310(b)(4) provides that “No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by any corporation directly or indirectly controlled by any other corporation of which more than one-fourth the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.” See 47 U.S.C. §310(b)(4) (2012). Congress enacted the predecessor to Section 310(b)(4) during the tumultuous climate of the early twentieth century when the U.S. was

entrepreneurs,³⁰ but will also give all U.S. broadcasters the opportunity to grow by investing in foreign broadcast outlets.³¹

Today, U.S. media is the most dominant media in the world.³² Social media, enabled by the Internet, has substantially changed the way organizations, communities and individuals communicate. Further, there are thousands of radio and full power television stations, LPTVs, and other mass media such as cable.³³ In light of industry changes, there is simply no logical reason to disallow foreign investment in U.S. broadcasting but permit foreign investment in wireline carriers and other non-broadcast facilities, especially since the Commission has not

preparing for World War I, when only a handful of radio stations were licensed. See Greg Snodgrass, Business Solutions to the Alien Ownership Restriction, 61 Fed. Comm. L.J. 457, 458 (2008).

³⁰ For example, MMTC referenced how the number of Spanish language broadcasters has decreased over the past few years due to the lack of capital investment. See generally Comments of the Minority Media and Telecommunications Council, Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended, IB Docket No. 11-133 (Dec. 1, 2011) at pp. 3-9, available at <http://mmtconline.org/lp-pdf/MMTC%20310b4%20Comments%20120111.pdf> (last visited Dec. 19, 2012).

³¹ In 2008, the Commission denied DCS' request to relax the foreign ownership policy. DCS sought reconsideration of the FCC's denial of a petition to relax the policy. That petition remains pending. See Petition for Partial Reconsideration of 29 Organizations, Promoting Diversification of Ownership In Broadcasting Services, MB Docket No. 07-294 (June 16, 2008), available at <http://mmtconline.org/lp-pdf/DCS-Diversity-Recon-061608.pdf> (last visited Dec. 19, 2012). Recently Commissioner Pai stated he supports exploration of foreign ownership on a case-specific basis. See Remarks of Commissioner Ajit Pai at the NAB Radio Show (Sep. 19, 2012) at p. 5, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-316374A1.doc (last visited Dec. 19, 2012).

³² See Tim Arango, World Falls for American Media, Even as It Sours on America, New York Times (Nov. 30, 2008), available at http://www.nytimes.com/2008/12/01/business/media/01soft.html?_r=1 (last visited Dec. 19, 2012).

³³ An examination of the cable industry shows that the absence of foreign ownership restrictions in that industry has posed no danger of foreign domination of that industry. Thus, if the foreign ownership policies are relaxed, it is reasonable to conclude that there would be no danger to the broadcast industry.

expressed concerns over radio stations, full power television stations, Class A stations, and LPTV stations programmed by non-citizens under LMAs or similar arrangements.

By relaxing foreign broadcast investment policies, U.S. broadcasters, and particularly minorities, who have difficulty accessing capital, would have access to new sources of capital and opportunity that are not available to them under the current regulatory paradigm.³⁴

3. Migrate AM Radio To VHF Channels 5 and 6.

The Commission should continue to examine the best use of Channels 5 and 6.³⁵ Post-DTV transition, these channels represent a tremendous opportunity to eliminate interference and save AM radio.³⁶ These channels, if developed properly, could promote diversity by helping minority owned AM stations serve larger audiences.³⁷ Minority broadcasters were not allowed entry into the broadcast industry for more than two generations after the industry was born; it wasn't until 1956 that minorities first received a radio license.³⁸ As a result of this late entry,

³⁴ The National Association of Multicultural Digital Entrepreneurs (NAMDE) has taken no position on this proposal.

³⁵ In 2007, Mullaney Engineering, Inc. submitted a proposal to reallocate TV Channels 5 and 6 to FM broadcasting. See Mullaney Engineering, Inc. Petition for Reconsideration and/or Comment, MM Docket No. 87-268 (Oct. 26, 2007); see also Comments of the Broadcast Maximization Committee, MB Docket No. 07-294 (July 30, 2008) (“BMC Comments”). Since that time, MMTC and the Broadcast Maximization Committee have endorsed and refined this proposal to encourage the FCC to use Channels 5 and 6 to save AM radio, expand noncommercial educational (NCE) service, and relocate much of the Low Power FM service. See MMTC Radio Rescue Petition, Review of the Technical Policies and Rules Presenting Obstacles to Implementation of Section 307(b) of the Communications Act and to the Promotion of Diversity and Localism, RM-11565, pp. 7-8 (July 19, 2009), available at <http://mmtconline.org/lp-pdf/MMTC-Radio-Rescue-Petition-071909-REV.pdf> (last visited Dec. 20, 2012) (“MMTC Radio Rescue Petition”); see also BMC Comments at p. 2. Specifically, BMC proposed that the FCC “(1) relocate the LPFM service to a portion of this spectrum band; (2) expand the NCE service into the adjacent portion of this band; and (3) provide for the conversion and migration of all AM stations into the remaining portion of the band over an extended period of time and with digital transmissions only.” Id.

³⁶ See MMTC Radio Rescue Petition at p. 7.

³⁷ See id. at 9.

³⁸ See Comments of Civil Rights Organizations, Creation of a Low Power Radio Service. MM

minorities were often only able to acquire stations with inferior technical parameters and exurban site locations.³⁹ As DCS stated in its Supplemental Comments in this proceeding, the Commission should be commended for creating a task force within the Diversity Committee to examine the issue and look forward to a resolution among all stakeholders.⁴⁰ The time has come for the Commission to move forward with a proposal for AM's migration to Channels 5 and 6 that accommodates the needs and concerns of all stakeholders.

4. Encourage Congress To Reinstate And Update The Tax Certificate Policy.

The Commission should continue to support and encourage Congress to reinstate and expand the transformative Tax Certificate Policy.⁴¹ The Commission adopted the Tax

Docket No. 99-25 (Aug. 3, 1999) at 40 (citing Antionette Cook Bush and Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 439 (1996)).

³⁹ See Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233 (Apr. 28, 2008) at p. 3, available at <http://mmtconline.org/lp-pdf/08-04-28-MMTC-ISBA-Localism-Cmts-042808.pdf> (last visited Dec. 20, 2012) (“The vast majority of minority-owned stations are on the AM Band”).

⁴⁰ In 2011, the Commission tasked the Diversity Committee with examining this issue. See Meeting of the Advisory Committee for Diversity in the Digital Age (Dec. 6, 2011), at 82:30-85:00, available at <http://www.fcc.gov/events/diversity-committee-meeting> (last visited Dec. 20, 2012). During the last Diversity Committee Meeting, the Office of Communications and Business Opportunities (“OCBO”) volunteered to help the Task Force clarify the issues and expectations of the Task Force and resulting recommendations. Diversity Committee Meeting (Mar. 14, 2012) at 56:45-59:45, available at <http://www.fcc.gov/events/diversity-committee-meeting-0> (last visited Dec. 20, 2012).

⁴¹ During the 17-year lifetime of the previous tax certificate policy, which was repealed by Congress in 1995, “the FCC granted 356 tax certificates – 287 for radio, 40 for television and 30 for cable franchises.” See *Sandoval Study* at p. 14. Since the policy’s demise, several members of Congress have sought to reintroduce the policy and these efforts have gained support with civil rights organizations, industry and industry associations. See *MMTC Road Map for Telecommunications Policy* (July 21, 2008) at pp. 1-2, available at <http://mmtconline.org/lp-pdf/MMTC-Road-Map-for-TCM-Policy.pdf> (last visited Dec. 19, 2012) (“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.”)

Certificate Policy in 1978, which allowed companies to defer capital gains taxation on the sale of media properties to minorities, providing companies with an incentive to increase minority media ownership.⁴² Given the policy's effectiveness in promoting diversity, the Commission should continue to endorse⁴³ and work with Congress to develop a renewed and updated Tax Certificate Policy. An updated version of the policy could address previous concerns by being race neutral, encompassing media and telecom, and capping deal size and total program size.⁴⁴

B. The Commission Should Tentatively Adopt, And Test, The Diversity Committee's Overcoming Disadvantages Preference ("ODP"), A Race- And Gender-Neutral Eligible Entity Definition Targeting Those Who Have Substantially Overcome Major Disadvantages.

Two years ago, the Commission issued a Public Notice on how the agency might implement a race and gender-neutral preference for overcoming disadvantage, aptly titled the Overcoming Disadvantages Preference ("ODP").⁴⁵ Unfortunately, the Commission took no

⁴² See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1979).

⁴³ See Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers, For Entrepreneurs and Other Small Businesses, 26 FCC Rcd 2909, 2965 ¶155 (2011) ("We propose that Congress adopt a new tax incentive program that would authorize the provision of tax advantages to eligible companies involved in the sale of communications businesses to small firms, including those owned by women and minorities. The proposed program could permit deferral of the taxes on any capital gain involved in such a transaction, as long as that gain is reinvested in one or more qualifying communications businesses. The proposed program could also permit tax credits for sellers of communications properties who offer financing to small firms. Additional conditions might include restrictions on the size of the eligible purchasing firm, a minimum holding period for the purchased firm, and a cap on the total value of eligible transactions. The provision of tax advantages has proven to encourage the diversification of ownership and to provide opportunities for entry into the communications industry for small businesses, including disadvantaged businesses and businesses owned by minorities and women.")

⁴⁴ See MMTC Sep. 2011 Ex Parte Letter supra n. 25 at p. 1.

⁴⁵ See Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, Public Notice, 25 FCC Rcd 16854 (rel. Dec. 2, 2010).

further action on this proposal that was developed by its Diversity Advisory Committee.⁴⁶ It is important for the Commission to remember that ODP was designed to help the agency be responsive to the court’s mandate in Prometheus II to develop a “long-awaited” and “workable” socially and economically disadvantaged businesses (“SDB”) definition.⁴⁷ ODP does this with the additional advantage of being race-neutral.

We believe that now is the time to act on the ODP proposal. We understand that with any new paradigm and especially one based on individualized assessments, administrative adjustments are needed to ensure the design meets the stated goals of the program, minimize the possibility of abuse, and reduce subjectivity. As such, we suggest that instead of looking to ODP as an immediate blanket preference for a number of services, the Commission should apply the preference to one or more of the 47 proposals, such as the NABOB Incubator Initiative, to determine how it might operate and to make any necessary adjustments so that it can be extended to other proposals, including those potentially requiring comparative, Ashbacker assessments of applications.⁴⁸

Conclusion

The sobering data in the Report should serve as a clarion call to the Commission that it can no longer wait to take affirmative steps to increase broadcast industry diversity. It must implement any necessary rules and policies to remove barriers for minorities and women

⁴⁶ This proposal, unanimously adopted by the Diversity Committee can be found on its webpage at <http://transition.fcc.gov/DiversityFAC/meeting101410.html> (then follow link to “Recommendation on Preference for Overcoming Disadvantage”) (last visited Dec. 19, 2012).

⁴⁷ See Prometheus Radio Project v. FCC, 652 F.3d 431, 466, 471-72 (3d Cir. 2011) (“Prometheus II”) (vacating and remanding the previous Diversity Order so that the Commission “may justify or modify its approach to advancing broadcast ownership by minorities and women during its 2010 Quadrennial Review”).

⁴⁸ See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330 (1945) (holding that the Supreme Court did “not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other.”)

entrepreneurs confront in their attempts to secure and grow footholds in broadcast ownership. These rules and policies will ensure that the nation's broadcast stations serve the unique needs of minority and women consumers and provide diverse viewpoints and information to all consumers. Forty-seven proposals are pending before it, thanks to the dedication of several stakeholders who have worked tirelessly to make our communications industry more inclusive. DCS members reiterate their steadfast commitment to working with the Commission to ensure that our communications industries truly serve the public interest and reflect the rich diversity of our nation.

Respectfully submitted,

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APPENDIX

THE DIVERSITY AND COMPETITION SUPPORTERS (DCS) SIGNING ONTO THE FURTHER COMMENTS⁴⁹

1. A. Philip Randolph Institute
2. American Indians in Film and Television
3. Black Entertainment and Sports Lawyers Association
4. Black Leadership Forum
5. Broadband & Social Justice
6. Communications Consumers United
7. Dialogue on Diversity
8. Hispanic Elected Local Officials
9. International Black Broadcasters Association
10. Lawyers' Committee for Civil Rights Under Law
11. League of United Latin American Citizens
12. MANA – A National Latina Organization
13. Minority Media and Telecommunications Council
14. National Association of Black County Officials
15. National Association of Black Telecommunications Professionals
16. National Association of Multicultural Digital Entrepreneurs
17. National Black Caucus of Local Elected Officials
18. National Black Church Initiative
19. National Black Religious Broadcasters
20. National Conference of Black Mayors
21. National Congress of Black Women, Inc.
22. National Hispanic Foundation for the Arts
23. National Newspaper Publishers Association
24. National Organization of Black County Officials
25. National Organization of Black Elected Legislative Women
26. National Puerto Rican Chamber of Commerce
27. Native American Public Telecommunications
28. Universal Impact
29. Women's Institute for Freedom of the Press

⁴⁹ In Initial Comments March 5, 2012 and Supplemental Comments April 3, 2012, 50 Diversity and Competition Supporters endorsed the 47 proposals and the eligible entity definition that are discussed in these Further Comments. These organizations continue to support the proposals and the definition. Some of the DCS organizations have been able to render a decision to sign onto any comments today, given the shortness of time and the holiday season, and some DCS organizations are filing separately so that they can address additional issues not addressed by DCS. In addition, several organizations that are not part of DCS, including the NAB and NAA, have filed in support of some of the 47 proposals. In DCS' Reply Comments, it will summarize the record regarding the 47 proposals and the definition.