ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-1090, 14-1091, 14-1092, 14-1113

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOWARD STIRK HOLDINGS, LLC
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents,

and consolidated cases.

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

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BRIEF OF INTERVENOR MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL

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April 27, 2015

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Federal Rules of Appellate Procedure Rule 28, intervenor Multicultural Media, Telecom and Internet Council ("MMTC") (formerly the Minority Media and Telecommunications Council) states as follows:

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Communications Commission ("FCC") and this Court are listed in the Brief for the Prometheus Radio Project *et al.* ("Prometheus Main Brief").

(B) Rulings Under Review. All references to the rulings at issue appear in the Prometheus Main Brief.

(C) Related Cases. All references to related cases are listed in the Prometheus Main Brief.

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Corporate Disclosure Statement

Pursuant to D.C. Circuit Rule 26.1 and Federal Rules of Appellate Procedure Rule 26.1, intervenor Multicultural Media, Telecom and Internet Council ("MMTC") states that it is a membership organization incorporated in the District of Columbia and recognized by the IRS as a nonprofit corporation under 26 U.S.C. §501(c)(3). MMTC has no parents, subsidiaries, or affiliates that have issued shares to the public.

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GLOSSARY

2008 Diversity Order	*2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCCRcd 5922 (2008)
2014 Quad Order	*2014 Quadrennial Review, Review of the Commission's Broadcast Ownership Rules, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCCRcd 4371 (2014)
APA	Administrative Procedure Act, 5 U.S.C. §501 *et seq.*
Communications Act	Communications Act of 1934, 47 U.S.C. §151 *et seq.*
DCS	Diversity and Competition Supporters (coalition of 50 national organizations led by MMTC; sometimes referred to interchangeably with MMTC)
Diversity Committee	FCC Advisory Committee on Diversity for Communications in the Digital Age
FCC or Commission	Federal Communications Commission
GAO	General Accounting Office
FNPRM	Further Notice of Proposed Rulemaking
JA	Joint Appendix
MB or Bureau	Media Bureau
MMTC	Multicultural Media, Telecom and Internet Council (formerly Minority Media and Telecommunications Council)

NOI	Notice of Inquiry
NPRM	Notice of Proposed Rulemaking
ODP	Overcoming Disadvantages Preference
ODP Recommendation	FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendations to the Federal Communications Commission, Preference for Overcoming Disadvantage (October 14, 2010)
Quad	Quadrennial Review
Prometheus or Petitioner	Prometheus Radio Project
Section 257	47 U.S.C. §257
Section 257 Reports	The triennial reports the FCC submits to Congress, pursuant to 47 U.S.C. §257(c), on the FCC's efforts to eliminate market entry barriers
SDB	Socially and Economically Disadvantaged Business
Section 202(h)	Telecommunications Act of 1996, Pub. L. No. 104 104, 110 Stat. 56(h)
Telecommunications Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.

Statement Of Jurisdiction

Intervenor Multicultural Media, Telecom and Internet Council ("MMTC", formerly the Minority Media and Telecommunications Council) subscribes to the Statement of Jurisdiction in the Prometheus Main Brief.

Statement Of Interest

MMTC is a nonprofit membership organization that seeks to advance media and telecom ownership opportunities for minorities, including MMTC's members. MMTC performs civil rights advocacy, offers media/telecom brokerage services, and provides training in radio ownership, entrepreneurship, and telecom law.

MMTC participated in the proceedings below. The decision below, *2014 Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules, Further Notice of Proposed Rulemaking and Order*, 29 FCCRcd 4371 (2014) ("*2014 Quad Order*"), JA ____-____, unless reversed, will deprive MMTC's members and constituents of (1) broadcast service addressing their needs and interests, (2) the ability to disseminate their views to a wide spectrum of the public, and (3) opportunities to compete in broadcast ownership.

Statement of Issues

The issues on which MMTC seeks review are:

1. Whether the Commission acted arbitrarily and capriciously in failing to develop a constitutionally sound eligible entities program, when the Commission reverted to a flawed revenue-based eligible entities definition without seriously considering a race-neutral proposal by the FCC's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee").

2. Whether the Commission acted arbitrarily and capriciously by summarily dismissing, without any analysis, 24 proposals to promote minority broadcast ownership (the "24 Diversity Proposals").

MMTC supports Prometheus' request to transfer these cases to the U.S. Court of Appeals for the Third Circuit for enforcement of its remand in *Prometheus Radio Project v. FCC*, 652 F.3d 431, 469-70 (3d Cir. 2011) ("*Prometheus II*"). All of the issues raised herein by MMTC pertain to the remand from the Third Circuit.

Statutes and Regulations

All applicable statutes and regulations are set out in the Prometheus Main Brief.

Statement Of The Case

MMTC subscribes to the Prometheus Main Brief's Statement of the Case, and offers this additional context.

I. The FCC And Minority Broadcast Ownership

It is settled that minority ownership is an important element of broadcast ownership diversity. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. ("Telecommunications Act"), Congress (1) provided that the FCC shall "make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service," 47 U.S.C. §151 (new language italicized) (cited in *Prometheus Radio Project v. FCC*, 373 F.3d 372, 418 n.59 (3d Cir. 2004) ("*Prometheus I*"), and (2) required the FCC to report triennially on its efforts to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership or telecommunications services and information services," 47 U.S.C. §257(a), (c). The FCC has long acknowledged that it has "an historic commitment to encouraging minority participation in the telecommunications industry." *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules, Notice of Inquiry*, 13 FCCRcd 11276, 11283 ¶22 (1998).

Nonetheless, minorities still control only a small percentage of stations,[1] with their late start due in great measure to the FCC's awarding licenses to two generations of segregationists. *See, e.g., Southland Television*, 10 R.R. (P&F) 699, *recon. denied*, 20 FCC 159 (1955) (holding that a segregated movie theater owner was qualified to hold a television license).

This Court pressed the minority ownership issue in 1973 and 1975. *See TV-9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974) (broadcast licensing) and *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (spectrum management). Soon thereafter, in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 983 (1978), the FCC adopted the Tax Certificate Policy, which the GAO has found to have been

[1] The Commission has "long recognized" the "low levels of broadcast station ownership by women and minorities[.]" *2014 Quad Order*, 29 FCCRcd at 4376, JA____. The most recent data is reported in *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Report on Ownership of Commercial Broadcast Stations*, 29 FCCRcd 7835, 7838 (2014), JA ____-____ (as of October 1, 2013, racial minorities, including Hispanic/Latino persons, held a majority voting interest in 6.0% of full power commercial television stations, 11.2% of commercial AM stations, and 6.2% of commercial FM stations).

one of the three primary factors driving minority ownership.[2] However, in 1995 Congress repealed the policy. Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995).

The FCC addresses minority broadcast ownership primarily through its quadrennial review dockets. In 2007, the FCC opened a second docket (MB 07-294) to specifically address diversity issues, and in 2008, the Commission combined its quadrennial review dockets with its ownership diversity docket. *See 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCCRcd 5922, 5925 (2008) ("*2008 Diversity Order*").

The Commission also can address minority ownership in its triennial "Section 257 Reports" to Congress on "identifying and eliminating…market entry barriers for entrepreneurs and other small businesses", 47 U.S.C. §257(a) and 47 U.S.C §257(c), and it can develop minority ownership initiatives through the

[2] *See* 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, http://www.gao.gov/assets/280/273671.pdf (identifying these factors: "(1) the large scale of ownership in the media industry, (2) a lack of easy access to sufficient capital for financing the purchases of stations, and (3) the repeal of the tax certificate program—which allowed for the deferral of capital gains taxes on the sale of broadcast and other media outlets and, thereby, provided financial incentives for incumbents to sell stations to minorities.")

efforts of panel of multicultural communications experts, the Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") (*see* http://www.fcc.gov/encyclopedia/advisory-committee-diversity-digital-age). However, Section 257 imposes on the FCC "nothing more than its obligation to issue a report", *see Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010); the Section 257 triennial reports due to Congress in 2006 and 2009 were months late, and the report due December 31, 2012 is 28 months late thus far. The Diversity Committee has not met since September 27, 2013. Thus, as a practical matter, the principal vehicles by which the FCC can address the paucity of minority broadcast ownership are its quadrennial media ownership/diversity proceedings such as the one on review here.

II. The FCC Advisory Committee On Diversity's Proposal For An Overcoming Disadvantages Preference

Since 2002 the FCC has failed three times to craft a meaningful definition of "eligible entity" that it could apply to diversity initiatives. In *Prometheus I*, the Court rejected, as premature, MMTC's contention that the Commission should have defined an eligible entity as a socially and economically disadvantaged business ("SDB") instead of using an ineffectual revenue-based definition. *Prometheus I*, 373 F.3d at 428 n.70. However, the Court stated that it

> anticipate[d] that by the next [2006] quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission's diversity objectives [compared to the revenue-based definition of eligible entities being used.]

Id. at 428 n.70.

Ignoring *Prometheus I*, the Commission in 2008 renewed its flawed 2002 revenue-based definition. *2008 Diversity Order*, 23 FCCRcd at 5950. The Third Circuit reversed, vacated, retained jurisdiction, concluded that "*ownership diversity is an important aspect of the overall media ownership regulatory framework*," and "*re-emphasize[d] that the actions required on remand should be completed within the course of the Commission's 2010 Quadrennial Review of its media ownership rules.*" *Prometheus II*, 652 F.3d at 472 (emphasis added).

In 2010, the Diversity Committee presented the Commission with a solution to the eligible entity definition problem: a preference "for individuals who have faced substantial disadvantages and overcome those disadvantages." *See* FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendations to the Federal Communications Commission, Preference for Overcoming Disadvantage (October 14, 2010), at 1, JA____-____, http://transition.fcc.gov/DiversityFAC/recommendations.html, reproduced in the Addendum hereto. The preference would be available to those who had

"substantially overcome" any of eight or more types of disadvantages, such as physical disabilities, trauma suffered in connection with military service, and unequal access to credit as a result of discrimination. *Id. at* 4, JA____ [pp.5-6 in the Addendum hereto]. The preference would not be conferred based on an individual's race, or even on whether she had been disadvantaged by discrimination, but rather on *the steps the individual had taken to overcome discrimination or any of several other types of substantial disadvantages.* Thus, the Diversity Committee concluded that the ODP "would be subject to rational basis review under the Equal Protection Clause" because:

> [A] qualified applicant who experienced and overcame substantial disadvantage in connection with racial or gender discrimination could obtain a preference. However, an individual's ethnicity or gender would never create a presumption that he or she faced a substantial disadvantage. Instead, each applicant's qualifications for the preference would be assessed *individually* – on the basis of an *individualized* showing of having achieved professional successes notwithstanding substantial disadvantages.

Id. at 10-11, JA____-____ [pp.15-16 in the Addendum hereto] (emphasis added); *see also id.* at nn.9-11, JA____-____. Yet the Commission summarily rejected the ODP, holding that " it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny." *2014 Quad Order*, 29 FCCRcd at 4506, JA____. *See also id.* at 4507, JA____ (asserting that the record did not contain answers to each detail of ODP implementation, such as which

disadvantages would be cognizable, how to validate them, and whether the Commission has "the resources to conduct such individualized reviews"). The Commission did not suggest, however, that it had determined that these relatively routine implementation issues were irresolvable by its expert staff.

Instead of seriously considering the ODP, the Commission adopted the same revenue-based definition the Third Circuit had twice rejected – even as it acknowledged that "we do not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership." *Id*. at 4479.

III. The 24 Diversity Proposals

According to the *Prometheus I* Court, a key aspect of the definition of an eligible entity is that the agency will need "several years of implementation experience" to determine what definition is optimal going forward. *Prometheus I*, 373 F.3d at 428 n.70. To gain that implementation experience, the FCC needs regulatory initiatives to which it either could apply a potential eligible entity definition or determine that the initiative need not be tethered to an eligible entity definition at all. Unfortunately, the FCC failed to consider 24 such potential initiatives that had been set out in extensive comments by a coalition of 50 national

organizations.[3]

Reviewing the 2002 Biennial Review proceeding, the Third Circuit found that the FCC had acted improperly when it failed to consider 14 minority ownership proposals. *Prometheus I*, 373 F.3d at 465.[4] This time, the FCC failed

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[3] The Diversity and Competition Supporters ("DCS") filed 47 proposals, which fell into three buckets in the *2014 Quad Order*, 29 FCCRcd at 4371, JA____-____: (Bucket#1): four proposals that were discussed thoroughly - loosening foreign investment restrictions, which had already been approved, *id.* at 4512-13, JA____-____; a legislative recommendation for tax deferral legislation that had already been sent to Congress, *id.* at 4513-14, JA____-____; radio ownership incubation (pending since 1990), which the Commission rejected, *id.* at 4514-16, JA____-____ (Commissioners Pai dissenting, *id.* at 4601-02, JA___ -____); and migration of AM service to VHF Channels 5-6, which the Commission rejected, *id.* at 4516, JA____; (Bucket#2): 19 proposals, primarily relating to radio engineering; the Commission promised to address three of them in a rulemaking on radio technical rules and did not say it was rejecting the other 16; *id.* at 4516-17 and nn.984-985, JA____-____; and (Bucket#3): the 24 proposals that were brushed away entirely, as discussed herein. *Id. at* 4517 nn.987, 988 and 989, JA____-____. All 47 proposals are described in the 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 (filed March 5, 2012) at 21-36, JA____-____, and in the Supplemental Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182 (filed April 3, 2012) at 4-92, JA____-____. *See also id.* at 93, JA____ (identifying the 50 organizations endorsing the proposals).

[4] *Prometheus I* was not *sui generis*: the FCC has a long history of giving short shrift to minority ownership proposals. *See, e.g.*, *Citizens Communications Center*, 61 F.C.C.2d 1095 (1976) (Commissioner Hooks dissenting in part) (rejecting all 30 minority advancement proposals). For additional examples, *see* Petition for Clarification, Minority Media and Telecommunications Council, 2014 Quadrennial Regulatory Review, MB Docket No. 14-50 (filed June 12, 2014) at 7 n.19, JA____ ("MMTC Petition for Clarification").

to consider two dozen such proposals,[5] even while acknowledging that the proposals had merit.[6] To justify this action, the FCC declared that the 24 proposals were all "outside the scope of this proceeding" and that eight of the 24, which sought FCC recommendations to Congress, were "beyond the Commission's authority[.]" *2014 Quad Order*, 29 FCCRcd at 4517, JA____. However, the FCC's "outside the scope" finding must be read against the Third Circuit's requirement that the FCC review minority ownership proposals "*within the course* of the Commission's 2010 Quadrennial Review"). *Prometheus II*, 652 F.3d at 472; *see also 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Notice of Proposed Rulemaking*, 26 FCCRcd 17489, 17546 and 17555 (2011), JA____, ____ and ____ (inquiring how it could "most effectively…expand upon its diversity initiatives *at the same time* that we address

[5] One might ask why it was necessary for DCS to advance 47 proposals (including the 24 on review here). The reason is that expanding minority participation in broadcasting, like many issues overseen by the FCC, is quite complex, involving engineering, spectrum, capital and content, a variety of assets (AM, FM, TV) and a variety of market sizes and types.

[6] The FCC acknowledged that the proposals were "accompanied by detailed and thoughtful analysis, and some of them may warrant further consideration[.]" *2014 Quad Order*, 29 FCCRcd at 4517, JA____. The FCC's Diversity Committee considered and endorsed eight of the 24 proposals; those eight proposals are identified in the MMTC Petition for Clarification at 2-3 n.5, JA ____-____. They include proposals to "Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees"; "Extend the Cable Procurement Rule to Broadcasting", and "Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts."

the Third Circuit's concerns…[i]n light of the Third Circuit's remand, *we again seek comment* on the proposals [carried over from *Prometheus I*] as well as those that have been suggested more recently, in this proceeding" (emphasis supplied)). Until the *2014 Quad Order*, the FCC had never given a hint that it regarded proposals to advance minority ownership as outside the scope of its quadrennial review.

Finally, when it formally combined the quadrennial dockets with its diversity docket in 2008 (*see* p.5 *supra*), the Commission put to rest any doubt about whether the quadrennials' scope encompasses minority ownership proposals. The quadrennial and diversity dockets are captioned together on the first page of the very order in which the FCC says that diversity proposals are outside the scope of the proceeding. *See 2014 Quad Order*, 29 FCCRcd at 4371 (caption), JA____.

In the Petition for Clarification it filed in the wake of the *2014 Quad Order*, MMTC expressed doubt that "the agency would deliberately defy a court order" and concluded that "the Commission's refusal to consider these proposals has to be an honest mistake" that it could correct with an erratum. Petition for Clarification at 4, JA____. Since no erratum was forthcoming, on April 24, 2015 MMTC withdrew the Petition for Clarification. JA____.

Summary of Argument

For the third time, the FCC has failed to develop a meaningful definition of eligible entity. The FCC also failed – as it did in 2003 – to consider a host of specific proposals to advance minority ownership, including proposals to which the FCC could have applied and tested a meaningful definition of "eligible entity" and others that could have reduced the need for eligible entities at all.

Argument

I. Standard Of Review

The FCC's failure to propound a meaningful eligible entity definition, and its summary rejection of the 24 Diversity Proposals, are reviewable under 5 U.S.C. §706(1) (a court must "compel agency action unlawfully withheld or unreasonably delayed") and under 5 U.S.C. §706(2) (a court must hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or "without observance of procedure required by law."

II. The FCC's Rejection Of The Overcoming Disadvantages Preference Proposal Ignored The Instructions Of The Third Circuit And Was Arbitrary And Capricious

The Third Circuit was clear in its expectation that the Commission must develop a workable eligible entities standard to promote minority and female ownership. *Prometheus II*, 652 F.3d at 469-471; *Prometheus I*, 373 F.3d at 428 n.70. Nonetheless, the FCC has admitted that despite the passage of over a decade since *Prometheus I*, it *still* has no idea whether its revenue-based definition will promote minority and female ownership. *See 2014 Quad Order*, 29 FCCRcd at 4489, JA____ ("We concede that we do not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership."). That is no excuse for 13 years of inaction. *See Prometheus II*, 652 F.3d at 471 n.42 ("The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider [non-revenue based] proposals presented over many years.").

The Diversity Committee's ODP proposal was a race-neutral method of satisfying the obligations imposed by the Third Circuit and also arriving at criteria for selecting the kinds of applicants an agency administering complex technical assets *should* want: persons who have proven their mettle in overcoming severe obstacles. Yet the Commission dismissed the idea, stating without elaboration

that "it is not entirely clear whether the proposed ODP standard would be subject to heightened scrutiny." *2014 Quad Order*, 29 FCCRcd at 4506, JA____.

The FCC's flippant brushing aside of the prime achievement of its own expert advisory committee was disingenuous, as well as highly ironic.[7] On its face, the ODP proposal is untethered to race and is even untethered to racial *discrimination*. Instead it gives credit for the *steps an individual takes to overcome* any of several forms of significant disadvantage. Despite the passage of a decade, and faced with the commands of *Prometheus I* and *Prometheus II*, this idea deserved more than an unexplained murmur of potential constitutional impairment.

By deciding to discard the ODP proposal and, instead, continue to use its flawed revenue-based definition, the FCC ignored "important aspect[s] of the problem" and "offered an explanation that runs counter to the evidence before it," an explanation that "was so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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[7] Elsewhere in the *2014 Quad Order* the FCC spoke glowingly about how the Diversity Committee "recommends policies and practices that will enhance the ability of minorities and women to participate in telecommunciations and related indsutries. Since the release of the [*2014 Quad*] *NPRM*, the Diversity Advisory Committee has continued its efforts to promote these goals." *2014 Quad Order*, 29 FCCRcd at 4481 ¶247 (fns. omitted), JA____. Actually, however, the FCC has not convened the Diversity Committee since September 27, 2013 – 19 months ago.

III. The FCC's Summary Dismissal Of The 24 Diversity Proposals Ignored The Instructions Of The Third Circuit And Was Arbitrary And Capricious

An eligible entity definition is meaningless without initiatives to which it can be applied. Yet the Commission failed to recognize this when it summarily dismissed 24 potential initiatives as "outside the scope" of "our statutory mandate under Section 202(h) [of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.]" *2014 Quad Order*, 29 FCCRcd at 4517, JA____. That was unfortunate because several of the 24 Diversity Proposals set out in the *2014 Quad Order* at 4517 n.989, JA____, could be well suited for eligible entities – *e.g.*, Proposal 9: Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees; Proposal 29: Increase Broadcast Auction Discounts to New Entrants; Proposal 37: Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests. Other proposals could have reduced the need for the eligible entity construct – *e.g.*, Proposal 5: Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings; Proposal 10: Extend the Cable Procurement Rule to Broadcasting; Proposal 36: Develop an Online Resource Diversity to Enhance Recruitment, Career Advancement, and Diversity Efforts. *Id.*, JA____.

Section 202(h) contains no restriction on the scope of minority ownership proposals. It only requires the Commission to "determine whether any of such [ownership] rules are necessary in the public interest as the result of competition" and "repeal or modify any regulation it determines to be no longer in the public interest." Thus the Commission may consider the state of minority ownership, and methods for its expansion, as factors in determining whether its structural ownership rules meet the Section 202(h) test of being "in the public interest."

Further, by combining its quadrennial reviews with the Diversity docket (*see* p.5 *supra)*, the Commission opened the door even wider to accommodate proposals to advance minority ownership. It is a challenge to assert that the diversity docket's scope doesn't encompass minority ownership.

In addition, the Commission's holding that eight of the proposals were outside the agency's authority because they sought recommendations to Congress (*2014 Quad Order* at 4517 n.987) obviously had no merit. The FCC is empowered to make recommendations to Congress, and it actually did make one (*see id.* at 4513-14, JA____-____.

Agencies are required to make a "rational connection between facts found and the choice made." *Prometheus I*, 373 F.3d at 389 (citing *State Farm*, 463 U.S. at 43, and quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156

(1962)). The FCC made no such connection when it summarily dismissed the 24 proposals for no logical reason. *See 2014 Quad Order*, 29 FCCRcd at 4517, JA____.

Finally, by reversing without explanation its prior position that minority ownership proposals fall squarely within the scope of these dockets, the FCC failed to provide "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 921 (1971).

Conclusion

This is the third time the FCC stands before a court of appeals having failed to consider serious proposals that could help cure a profound inequity that Congress expects the agency to address.[8] In response to this display of recidivism, the Court should apply progressive discipline, counseling, and judicial supervision to protect society. *Prometheus I* was resolved with a remand, but that did not work. The *Prometheus II* Court took the next step: it vacated the decision below

[8] To be fair, we are not suggesting that the FCC has done nothing to advance minority ownership. *See 2014 Quad Order*, 29 FCC Rcd at 4480-81, JA____-____ (describing steps the FCC has taken). However, the agency knows that the steps it has taken are grossly insufficient, as evidenced by its acknowledgement of the continuing very low participation of minorities in broadcast ownership. *See* n.1 *supra*. And quite properly, the agency nowhere attempts to justify its inaction on the eligible entity definition and its dismissal of the 24 Diversity Proposals on the theory that these steps are unnecessary because the FCC's current methods are solving the problem.

and retained jurisdiction – remedies imposed by the Supreme Court in 1968 in response to "massive resistance" to school desegregation, *see Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968), and by this Court in 1969 in a similar context, *see Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (finding that the FCC's hearing on a segregationist's TV license renewal application displayed "a curious neutrality in favor of the licensee", *id*. at 547, and that the record was "beyond repair," *id.* at 550.).

Yet even these extraordinary remedies have not been sufficient to motivate the FCC to provide elementary procedural due process to civil rights petitioners. Stronger remedies are necessary. Specifically, this Court should grant the relief sought in the Prometheus Main Brief at 39-40 (particularly as to the eligible entity definition) and, if mandamus is not granted, (1) vacate the FCC's summary dismissal of the 24 Diversity Proposals and instruct the FCC to rule on them by the close of 2015, and (2) require the FCC to provide the Court with monthly progress reports on its compliance with the Court's instructions.

Respectfully submitted,

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April 27, 2015

ADDENDUM

FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendations to the Federal Communications Commission, Preference for Overcoming Disadvantage (October 14, 2010)

10/14/10

ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE
RECOMMENDATIONS TO FEDERAL COMMUNICATIONS COMMISSION
PREFERENCE FOR OVERCOMING DISADVANTAGE

The FCC Advisory Committee On Diversity For Communications In The Digital Age (the "Advisory Committee") has been considering how the FCC should enhance its pool of qualified applicants for licenses to provide various kinds of communications services to the public. After exploring a number of options for advancing this goal, the Advisory Committee urges the FCC to incorporate in a notice of proposed rulemaking a proposal to amend its Designed Entity rules, 47 C.F.R. § 1.2110, which currently provide for preferences for small businesses and rural telephone companies that bid for FCC licenses.[1] The Advisory Committee recommends that the FCC design, adopt, and implement an additional, new preference program for individuals who have faced substantial disadvantages and overcome those disadvantages.[2]

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[1] In addition to the Designated Entity rules, there exists another bidding credit for "new entrants" which applies specifically to broadcast license auctions. *See* 47 C.F.R. § 73.5007. As a modification to the Designated Entity rules, the Advisory Committee's recommendation is intended to reach all licenses subject to competitive bidding, including broadcast.

[2] These recommendations use "overcome" and "overcoming" interchangeably. As discussed below, preference applicants will demonstrate that they have overcome disadvantage sufficiently for purposes of the preference by showing meaningful success in a professional, educational, or other related context in the face of

This new preference would enable otherwise-qualified persons or entities who have overcome substantial disadvantage to compete on comparable footing with other would-be applicants for FCC licenses. It would thereby expand the pool of well-qualified applicants for FCC licenses. In the case of FCC licenses to provide broadcast services to the public, the preference program would have the additional benefit of enabling applicants who otherwise might not be able to obtain FCC licenses to compete in auctions for broadcast licenses and if successful, contribute to viewpoint diversity.

The Core Concept of the Proposed Preference for Overcoming Disadvantage

The preference for overcoming disadvantage would facilitate entry into the telecommunications and broadcasting markets by individuals and companies who have overcome substantial disadvantage. The FCC rules currently limit designated entities who receive bidding credits to small businesses and rural telephone companies. Under the proposed recommendations, the FCC would expand the pool of designated entities to include those qualified applicants who have overcome substantial disadvantage. In some respects, the proposed program is analogous to programs employed by educational institutions in their admissions process insofar as (1) it recognizes that merit is multi-faceted and (2) it would

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substantial disadvantage. See discussion *infra* at 6-7. There is no need otherwise to resolve the abstract question of the point at which a disadvantage, whether historical or ongoing, is fully and finally overcome.

make applicant-by-applicant determinations of "disadvantage" qualifications on the premise that perseverance, resourcefulness, and hard work in struggling to overcome disadvantage are predictive of success. However, unlike in the educational context, the Commission would not undertake a review of the candidate's full file of attributes; the program would focus only on whether a candidate has overcome substantial disadvantage.

Description of Proposed Preference Program

Below we briefly describe the components of the proposed preference for overcoming disadvantage. The FCC should launch a rulemaking proceeding that would further refine these components.

Goals of the Program

The preference program would assist the FCC in achieving the following goals:

- *Ensuring a Fair Opportunity:* The proposed preference would provide a fair opportunity to those who have faced and overcome substantial disadvantage by ensuring that their unique strengths are represented in the application process. Without such a program, qualified applicants with these traits might be underrepresented and undervalued among applicants seeking FCC licenses. By expanding the pool of applicants to include these qualified – but underrepresented and undervalued – license applicants, the preference program would ensure these applicants have a fair opportunity to bid for licenses.

- *Selecting Highly Qualified Applicants:* Because of their perseverance and resourcefulness, individuals who have achieved success in the face of substantial disadvantage are especially well-equipped to overcome future challenges in providing communications services to the public.[3] If the program is adopted, the outcome of auctions would continue to be determined by the winning bid, but, by expanding the pool of applicants who have demonstrated perseverance and resourcefulness in the face of disadvantage, the program would further the goal of selecting highly qualified applicants.

- *Expanding Participation and Competition:* The program would promote a more competitive and diverse marketplace by awarding preferences to applicants who have overcome substantial disadvantages. Because such applicants are less likely to be incumbent licensees, the program would expand the FCC's applicant pool. Moreover, the program may inspire and incentivize others to overcome disadvantages to become successful entrepreneurs as FCC licensees or otherwise.

- *Promoting Diversity of Viewpoint:* In the broadcast context, the program would promote diversity of viewpoint because it would assist participants who have overcome a variety of disadvantages in obtaining broadcast licenses. Their experiences in facing and overcoming such disadvantages may provide them with insights and perspectives that otherwise would be underrepresented in broadcast station ownership.[4]

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[3] *See* Angela L. Duckworth *et al*, *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. OF PERSONALITY & SOC. PSYCHOL. 1087–1101 (2007), *available at* http://www.sas.upenn.edu/~duckwort/images/Grit%20JPSP.pdf (finding that "grit" is a better predictor of success than IQ score or conscientiousness); *see also id.* at 1090 & Tbl. 1 (noting that individuals who "overcome setbacks to conquer an important challenge" and/or who are not discouraged by setbacks demonstrate perseverance of effort).

[4] *See* In re Promoting Diversification of Ownership in the Broadcast Services, Notice of Proposed Rulemaking, MB Docket No. 07-294, FCC 07-217, at para. 5 (March 5, 2008), (noting FCC goal of "facilitat[ing] ownership diversity and new entry in the broadcasting industry").

Disadvantages That Might Justify Award of a Preference

The proposed program would afford designated entity status to qualified applicants who have overcome substantial disadvantage. The criteria for evaluating applicants – which should be refined with input in the rulemaking process – would be designed to provide a preference to qualified applicants who (1) have experienced a disadvantage (2) that had a substantial negative impact on their entry into or advancement in the professional world or other comparable context and (3) that they have substantially overcome. The following is a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference:

- Physical disabilities or psychological disorders that rendered professional or business advancement substantially more difficult than for most individuals;
- Physical or emotional trauma suffered in connection with military service;
- Unequal access to institutions of higher education, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination;
- Unequal access to credit, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination;
- Unequal treatment in hiring, promotions, and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment, or unequal treatment in other business opportunities;

- Exclusion without cause from business or professional organizations or from social and professional associations with students or teachers;
- Retaliatory or discriminatory behavior by an employer or an educational institution; or
- Social patterns or pressures which have discouraged the individual from pursuing education or business opportunities or which have made pursuing such opportunities more difficult.

The determination would look at all relevant evidence in evaluating whether an applicant had suffered substantial disadvantage and would be based on an individualized evaluation. The program would differ from federal and state programs that use across-the-board features, such as gender, to create a presumption of disadvantage. Accordingly, a female applicant would be permitted to demonstrate that she suffered a qualifying disadvantage in connection with gender discrimination in the workplace. But the applicant would also need to show that the experience substantially reduced her opportunities for advancement in the workplace or otherwise impacted negatively her professional or educational prospects but that she had achieved professional successes notwithstanding this disadvantage. No applicant would be entitled to or presumed entitled to the preference by virtue of being a woman. Further, a male applicant could also establish substantial disadvantage by making a similar showing in connection with gender-based discrimination.

Importantly, a qualifying disadvantage would have to be "substantial." The definition of what constitutes a substantial disadvantage would be addressed in the rulemaking and would be further refined on a case-by-case basis. To the extent possible, it is desirable to reduce subjectivity and achieve consistency among individualized determinations.

Efforts That Would Constitute "Overcoming" a Disadvantage

The preference for overcoming disadvantage would be designed in part to select highly qualified applicants who have demonstrated perseverance, resourcefulness, and other traits predictive of a successful licensee. Accordingly, the preference would be limited to those individuals who have endured *and, at least partially, overcome* a disadvantage. Individuals who qualify for the preference will be able to show that they have entered into and advanced in the professional world in the face of substantial disadvantages. This requirement does not contemplate that successful applicants necessarily will have fully and finally overcome the disadvantages they faced. In many cases, the disadvantage will continue to burden the applicant, such as where an individual suffers a physical handicap or is being excluded from important professional opportunities. Further, eligible applicants often will still be in the process of overcoming the disadvantage. They nonetheless will be able to show they have "overcome" their disadvantages

for purposes of being entitled to the preference so long as they can show that they have entered into or made some advancement in the professional world or a comparable context.

The degree of success required to show that a disadvantage has been sufficiently overcome would be further refined in a rulemaking and case-by-case determinations.

What It Would Mean to Be "Qualified"

Another important aspect of the program is that applicants who show that they have overcome substantial disadvantage would still have to demonstrate to the Commission that they are qualified to be licensees. Through the application and auction process, which is described in more detail below, the FCC would undertake review of whether the preference applicant is qualified, just as it does for other applicants, including designated entities. The applicant would still have to be financially and legally qualified. Thus, the FCC would still review an applicant's qualifications on the basis of information solicited in the applicable FCC application forms as to whether the applicant previously had an FCC station authorization, license, or construction permit revoked; been convicted of a felony by any state or federal court; or been finally adjudged by a court of unlawfully monopolizing or attempting to monopolize radio communication, directly or

indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition. In short, a candidate who qualifies for a preference for overcoming disadvantage still must demonstrate that it possesses all of the qualifications required of any other applicant, whether or not a preference applicant.

* * *

An FCC rulemaking proceeding would also determine under what circumstances not to grant a preference to individuals who have overcome disadvantage but who now have very substantial assets and wealth and/or ready access to capital. Those individuals who have considerable financial resources and are already able to participate in FCC auctions should not be awarded the preference because they do not need it. A critical purpose of the program, after all, is to assist applicants who otherwise would be underrepresented and undervalued in the application process. Designing the program so that the small group of individuals with sufficient resources is not entitled to the preference would better serve this purpose and is also consistent with the Commission's longstanding goal of promoting the ability of new entrants to compete for licenses. Of course, only those individuals with very substantial assets and wealth and/or ready access to capital would be deemed ineligible for the preference—a degree of wealth that

would be determined best through the rulemaking process. The Commission might also consider whether different levels of wealth or access to different levels of capital should be taken into account in granting the preference for different kinds of auctions. Thus, an applicant who has overcome disadvantage and has achieved a certain level of financial success might not be entitled to a preference for a small radio station license, yet might be eligible for a preference in an auction for a much more valuable station license.[5]

In addition to the above proposal, there may be additional design elements that the FCC might adopt to protect against the possibility that individuals who do not need the preference to bid successfully in FCC auctions could take advantage of the preference. This issue should be addressed in the rulemaking.

Suggested Administration of the Program

In considering procedures for administering the preference program, one might start by examining the procedures used to administer the two existing preference programs – the small business and rural telephone company

[5] It might be challenging to implement this concept in the context of the pre-certification option, discussed below at page 9 [in original; discussion is at pages 12-13 in this Addendum] but these challenges could be evaluated in the rulemaking process.

preferences. An FCC rulemaking should flesh out similarities and differences and would refine and resolve some of the issues identified below.

The small business and rural telephone company preferences, to which would be added the proposed preference for overcoming disadvantage, are administered within the context of the FCC's existing auction procedures. In that auction process, the FCC's first step is to propose, ask for comment on, and then adopt service rules for the service in which licenses are to be auctioned. This is a necessary first step because it enables interested parties to comment on the appropriate service rules, assess those rules in determining whether they wish to participate in the auction, and develop a business plan and raise funding for participation in that particular auction. The FCC's next step is to set a deadline for filing applications in which applicants set forth their qualifications, including the qualifications of those that seek to participate as designated entities and receive bidding credits – as either small businesses or rural telephone companies. The FCC then reviews these applications, determining which qualify to participate in the auction, which do not, and which will qualify if the applicants promptly make minor corrections to their applications. The FCC next conducts the auction; after the auction is concluded, losing bidders are given the opportunity to file petitions to deny (which occurs frequently) against the winning bidder. Petitioners can argue that the winning bidder is not qualified to be a licensee or, if the winning

bidder claims to be a designated entity, that the winning bidder is not qualified for a small business or rural telephone company preference. The final step is for the FCC to rule on the petitions – it can either uphold the grant or rescind it and re-auction the license in question.

If the preference for overcoming disadvantage were treated like the other two existing preferences, preference applicants would make a showing that they qualify for an overcoming disadvantage preference in the applicable FCC application forms, where they would also demonstrate that they are otherwise qualified. The Commission, in this pre-auction stage, would evaluate the applications and find applicants qualified or not qualified for the preference, as appropriate. (There could be some minor adjustments to this process to account for the less mechanistic assessments involved in qualifying for an overcoming disadvantage preference, as compared to those employed for the two existing preference programs for small business and rural telephone companies.)[6] Then, if an applicant who has been granted a preference wins the auction, its basic qualifications and preference eligibility would be subject to challenge in petitions to deny filed by losing bidders.

[6] Under either this approach or the alternative approach discussed below, the Commission should examine further the showing it would require of applicants to qualify for the preference.

An alternative approach would be for the FCC to "pre-qualify" would-be applicants for preferences outside the context of any particular auction. Such "pre-qualified" preference applicants could then apply in whatever auctions are of interest to them without the need to show entitlement to the preference again during a particular auction process. However, consistent with the FCC's existing auction procedures, they would still have to demonstrate with respect to a particular auction that they have the basic qualifications to be a licensee. In the post-auction, petition-to-deny stage of the process, winning bidders who have pre-qualified for the preference could be challenged only on the grounds that they lack the basic qualifications of a licensee. They could not be challenged in connection with preference eligibility, which the Commission will have already determined in the pre-certification process. The pre-qualification option would avoid delaying auctions while Commission staff evaluate applicants' qualifications for the preference and would enable preference entities, prior to an auction, to raise funds and develop business plans based on their having qualified for the preference.

Another set of issues is who would determine applicants' qualifications to be awarded a preference and what processes would the FCC use for this purpose. Options include (1) establishing a special cadre of FCC officials to evaluate each applicant's qualifications for the preference, (2) designing a modified ALJ

procedure for this purpose, and (3) assigning the function to the FCC Bureau that exercises oversight over the service in question.[7] Given the FCC's familiarity with its procedures and resources, it would be particularly appropriate for the FCC to tee up this set of issues in the notice of proposed rulemaking.

An additional set of implementation issues concerns the applicability of this program to corporations and other business entities. Specifically, if the applicant is a corporation, can it seek a preference for overcoming disadvantage based on the experience of a principal and how substantial must that principal's role be in the corporate applicant —in terms of ownership and management—to entitle it to a preference?

The overcoming disadvantage principle might also be considered as a factor in waiver cases. Such a concept would entail a different set of implementation issues.

Summary of why the program would meet legal tests

The recommendations have been designed to satisfy applicable legal standards, including the Equal Protection Clause of the Constitution and the

[7] This last option would not be suitable if the process for reviewing an entity's qualifications for the preference took place prior to and separately from any particular auction. Additionally, although there is a risk that this option could lead to different standards within different communications services, such a risk could be mitigated by information exchanges and coordination among FCC bureaus.

Administrative Procedure Act ("APA"). Because the program would not award preferences on the basis of an applicant's ethnicity or gender, the program would be subject to rational basis review under the Equal Protection Clause.[8] Under the program, a qualified applicant who experienced and overcame substantial disadvantage in connection with racial or gender discrimination could obtain a preference. However, an individual's ethnicity or gender would never create a presumption that he or she faced a substantial disadvantage. Instead, each applicant's qualifications for the preference would be assessed *individually*—on the basis of an *individualized* showing of having achieved professional successes notwithstanding substantial disadvantages.[9] Further, applicants of any ethnicity or

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[8] *Cf. Nguyen v. INS*, 533 U.S. 53, 60-61 (2001) (applying "intermediate scrutiny" to a federal law which used gender-based classifications); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the more onerous "strict scrutiny" standard applies to federal programs which use racial classifications).

[9] The Supreme Court has repeatedly emphasized the importance of individual assessments. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 555 U.S. 701, 743 (2007) (criticizing the dissenting justices for believing that "individualized scrutiny is simply beside the point" in school assignments); *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003) (striking down public university's pro-diversity admissions policy where the admissions review "d[id] not provide for a meaningful individualized review of applicants"); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))).

gender could show that they have suffered and overcome substantial disadvantages, including substantial disadvantage caused by discrimination, as well as types of disadvantages wholly unrelated to discrimination.[10] Constitutional Equal Protection principles should not be interpreted to diminish the ability of the FCC to enact the proposed program to further its goals of ensuring applicants a fair opportunity to participate in auctions, selecting highly qualified applicants, expanding participation and competition in auctions, and expanding the diversity of broadcast viewpoints.[11]

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[10] Justice Scalia has signaled that he would uphold a preference based on experience of discrimination so long as the category of persons permitted to show discrimination is not limited by ethnicity. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526-27 (1989) (Scalia, J., concurring in the judgment) ("Nothing prevents [a government entity] from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.").

[11] The preference program would be proposed by the FCC to further the policy objectives listed in Section II.A. "Racial motivation" would not be an object of the program. An analysis of permissible race-related motivations is thus besides the point. *Compare id.* at 507 (O'Connor, J.) (suggesting that the government should have considered "race-neutral means to increase minority business participation in city contracting") *and Parents Involved in Cmty. Sch*, 551 U.S. at 789-790 (Kennedy, J. concurring in part) (suggesting that "individual racial classifications" may be considered legitimate in some circumstances -- *i.e.* "only if they are a last resort to achieve a compelling interest") *with Hunter v. Underwood*, 471 U.S. 222 (1985) (finding unconstitutional a disenfranchisement measure "where both impermissible racial motivation [a "'but-for' motivation for the enactment"] and racially discriminatory impact [were] demonstrated").

The program, if properly implemented, also would be consistent with the APA. Under the APA, courts follow two steps to determine whether agency actions are "arbitrary and capricious."[12] First, they determine whether the agency has considered the relevant factors involved in its decision.[13] Second, they determine whether the agency has articulated a rational connection between the facts found and the choice made.[14] To satisfy the APA, the FCC's record in this proceeding must support the conclusion that the overcoming disadvantage preference program will serve the public interest and is a rational way to further the worthy objectives discussed above.[15] The agency need only supply a reasoned

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[12] *See* 5 U.S.C. § 706(2)(A).

[13] *See Citizens to Preserve Overton Park, Inc. v. Volpe*, *401 U.S. 402, 416 (1971); Tripoli Rocketry Ass'n v. BATFE*, 437 F.3d 75, 81 (D.C. Cir. 2006) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995).

[14] *See Tripoli Rocketry Ass'n*, 437 F.3d at 81; *Cincinnati Bell*, 69 F.3d at 758; *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[15] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasizing that the arbitrary and capricious test is a "narrow" and limited form of review); *Niobrara River Ranch, L.L.C. v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004) ("Our scope of review is narrow, and we may not substitute our judgment for that of the [agency]." (internal citations and quotation marks omitted)); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 888 (4th Cir. 1983) (upholding dairy regulations under arbitrary and capricious test despite "harsh" results which would have caused the court, acting in the agency's place, to have "searched long for a more humane alternative")[semi-colon in original – should be a period.]

basis for the action it has chosen. Based on the record to be developed in its rulemaking proceeding, the FCC should be able rationally to conclude that those who have overcome substantial disadvantages and are otherwise qualified to be licensees would make good licensees and that according designated entity status to them and awarding them bidding credits are an appropriate means to promote their participation in the FCC's applicant pool.

* * *

Based on these recommendations, the Advisory Committee urges the FCC to design, adopt, and implement a preference program for individuals that have faced substantial disadvantages and have overcome those disadvantages, at least in part.

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,255 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the (hand-entered) page numbers.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 (Version 14.4.9) in 14 Point Times New Roman.

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Dated: April 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2015, I electronically filed the foregoing "Brief of Intervenor Multicultural Media, Telecom and Internet Council" with the Clerk of the Court of Appeals for the District of Columbia Circuit through the CM/EDF system and it was served electronically to all parties and amici through that system.

/s/_____
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