

# **MMTC Road Map for Telecommunications Policy**

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# Acknowledgements

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The idea of producing the Road Map originated with MMTC Chair Henry Rivera, who also provided extensive guidance throughout the research and editing process. MMTC’s Telecom Policy Working Group Co-Chairs, Manny Mirabal and David Honig, organized four brainstorming meetings at which dozens of MMTC members and volunteers reached consensus on the proposals that would be included in the Road Map. David Honig and MMTC Fellow Joseph Miller served as the principal editors and writers. Several of the proposals were drafted by MMTC Fellow Joycelyn James, Associate Broker Joycelyn Tate and Research Assistant Marcella Gadson, as well as by MMTC volunteers Catherine McCullough, Inez Gonzalez, Margaret Lancaster, Nicolaine Lazarre and Mona McKenzie. Mark Brennan, Jeneba Ghatt, Nia Mathis and S. Jenell Trigg provided editing assistance.

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# Executive Summary

This Road Map for Telecommunications Policy seeks nothing less than the complete eradication of racial discrimination and its present effects from the nation's most influential and important industries – mass media and telecommunications. Here are MMTC's major recommendations:

**Restore and Expand the Tax Certificate Policy.** The tax certificate policy did more to advance minority broadcast ownership than any other policy in the history of the FCC. Since the program's repeal in 1995, minority media ownership has stagnated. MMTC supports legislation that would restore the tax certificate policy and extend it to telecommunications.

**Remove Market Entry Barriers in the Communications Act.** Several provisions of the Communications Act undermine the FCC's mandate to foster diversity in media and telecommunications. Provisions on localism (Section 307(b)), designated entities (Section 309(j)), foreign ownership (Section 310(b)(4)) and EEO (Sections 334 and 634) should be clarified and revised to promote diversity.

**Authorize the Federal Trade Commission to Prohibit Racial Discrimination in Advertising Placement and Terms.** The Federal Trade Commission Act ("FTC Act") does not specifically prohibit discrimination in commerce. Advertisers routinely discriminate against minority-owned radio and television stations in the placement and terms of advertising. Congress should revise the FTC Act to prohibit discrimination in advertising placement and terms and enable the FTC to assist the FCC in ending advertising discrimination in broadcasting.

**Reauthorize the Telecommunications Development Fund.** The Telecommunications Fund ("TDF") provided much-needed loans to small businesses, particularly businesses owned by minorities and women. However, TDF has not been reauthorized. TDF should be reauthorized and funded with auction proceeds, rather than solely from interest derived from auction upfront payments.

**Relax Third Adjacent Channel LPFM Restrictions.** Engineering studies have concluded that Lower Power FM ("LPFM") stations cause minimal interference to full power FM stations. Still, Congress has not removed the separation requirements which prevent broadcasters from operating LPFM stations on third adjacent channels. Congress should relax these restrictions to promote new entrants' access to spectrum.

**Hold an Annual Diversity Census.** The FCC does not currently collect annual statistical diversity data, even though it is empowered and certainly capable of doing so. Congress should direct the FCC to collect annual data on EEO, procurement, transactions and advertising.

**Establish Universal K-12 Media, Telecom and Internet Literacy Education.** As a group, minority students are underprepared to compete in the digital economy. The number of black and Hispanic students who specialize in science, technology, engineering and mathematics (“STEM”) has tumbled. MMTC recommends universal, K-12 telecom, media and Internet literacy education.

**Expand the E-Rate to Apply to Teacher Training.** The E-Rate Program provides affordable telecom access to schools and libraries, especially those located in rural and economically disadvantaged areas. While the E-Rate Program has been indispensable in making Internet access available to 100% of the nation’s schools, 94% of individual classrooms and 98% of public libraries, it should be expanded to ensure that teachers are trained to teach others to use media, telecom and Internet technologies.

**Authorize Sufficient USF Support for Broadband, Lifeline/Linkup and Rural Telemedicine.** The Universal Service Fund (“USF”) has been integral to ensuring telecommunications service to rural and inner city communities. It should be a given that USF would also apply to broadband. MMTC also recommends that the USF’s Lifeline/Linkup and Rural Telemedicine programs be fully funded and that Lifeline/Linkup be extended to include broadband service.

**Underwrite Multilingual Emergency Broadcasting.** The Emergency Alert System (“EAS”) is essential for relaying critical emergency information at the state and local levels. Currently, there is no backup system to provide multilingual communications if an emergency takes down the only local station in a widely spoken language. Congress should provide a modest appropriation to enable broadcasters to provide multilingual service in emergencies.

**Reinstate the Telecommunications Development Fund.** The Telecommunications Opportunity Program (“TOP”) was administered by the National Telecommunications and Information Administration (“NTIA”) to introduce digital applications in underserved areas. Although TOP was extremely successful, the Bush administration ended the program. MMTC proposes that Congress reauthorize TOP as a means of closing the race- and income-based digital divide.

**Approve Key Pending Proposals in the Broadcast Diversity Order.** The FCC recently sought comment on twelve diversity proposals introduced in its Broadcast and Diversity Order. MMTC recommends that the Commission adopt all of the proposals, particularly those calling for share-times for HD radio and DTV sub-channels, structural rule waivers for creating incubator programs, opening FM spectrum to promote move-ins, must-carry for Class A LPTV

stations that provide extensive local and multilingual programming, reallocation of TV Channels 5 and 6 for FM service, Minority/Female Impact Statements resulting from review of major applications and proposed, and development of a constitutionally sustainable, race-conscious eligible entity definition.

**Extend the EEO, Procurement, Advertising Nondiscrimination and Transactional Nondiscrimination Rules to all FCC Regulatees.** Platform neutrality is a signature regulatory goal, but the Commission does not follow platform neutrality when it comes to civil rights. EEO rules are enforced for broadcasting and cable but not wireline and wireless; procurement rules apply only to cable, and transactional and advertising nondiscrimination rules apply only to broadcasting. The Commission should apply all of its civil rights policies and rules across all industries within its regulatory authority.

**Firmly Reject A La Carte Mandates.** A la carte cable channel mandates would cause significant harm to minority- and women-owned media entrepreneurs, whose channels would never find their audiences without tiered packaging and the attendant channel surfing. Many studies demonstrate that a la carte's would result in greater costs and decreased diversity.

**Reform the Designated Entity Program.** The Designated Entity program for telecom entrepreneurs is broken and requires top to bottom reform. Large incumbents have exploited a system that was originally intended for underserved entrepreneurs seeking capital. Necessary reforms include redefining the types of relationships that constitute fraud, pre-auction review of applicants' qualifications, increased weights for bidding credits, restoration of the Five-Year Hold Rule, and relaxation on lease and resale and wholesale restrictions on designated entities.

**Enhance EEO Enforcement.** The Commission's EEO enforcement has dwindled to a shadow of its former self. Thanks to FCC neglect of word of mouth recruitment from homogeneous workplaces, minority employment in radio journalism has fallen essentially to zero except at minority-owned and Spanish language stations. The Commission ought to dramatically improve EEO enforcement in broadcasting and in all FCC-regulated industries.

**Learn the Facts Regarding Measurement of Minority Radio Audiences.** The Commission should examine the impact of the Portable People Meter ("PPM") on the measurement of minority radio listenership. It appears that current PPM research methodology results in a serious understatement of the extent and intensity of minority radio listenership, thus frustrating the Commission's ability to promote ownership diversity.

**Appoint Fulltime Nondiscrimination Compliance Officers.** MMTC proposes that the Commission appoint fulltime compliance officers who would enforce both the Broadcast Advertising Nondiscrimination Rule that took effect on July 15, 2008, and the 1993 Cable Supplier Diversity Rule.



**Strengthen the Federal Advertising Diversity Initiative.** President Clinton's 2000 Executive Order 13170 required federal departments that purchase advertising to substantially utilize minority media. The present administration has largely disregarded the Executive Order, and federal advertising in minority media is sparse. A new administration should reissue and strengthen the Executive Order.

**Direct FEMA, NWS and NOAA to Provide Multilingual Emergency Services.** Emergency communications is only as strong as its weakest link; thus, broadcasters' ability to provide multilingual notifications of emergencies and provide detailed life-saving information is only as good as the multilingual capabilities of first responder offices. The President should direct FEMA, NWS and NOAA to budget for and provide multilingual services to broadcasters in emergencies.

**Select a Diverse Array of FCC Commissioners and Telecom Policy Officials.** As the agency vested with oversight of industries that serve as custodians for the First Amendment, the FCC ought to always look like America, as the agency did from 1972 to 2005. MMTC has created a Task Force on Federal Staffing to collect and review the resumes of highly qualified candidates for senior telecommunications policy positions that may become available in the forthcoming administration.

**Establish a Blue Ribbon Commission to Consider FCC Reform and the Desirability of a Cabinet-Level Department of Telecommunications.** The FCC and NTIA often overlook civil rights priorities because the FCC and NTIA receive relatively little oversight from the White House, the Congress and the mainstream press. The gold standard for civil rights responsiveness is cabinet status, which would be amply justified for oversight of the industries that form the basis of our economy. Moreover, the FCC's transparency and responsiveness can be improved in several ways. Immediately after the November election, the next administration should empanel a Blue Ribbon Commission on Telecom Policymaking to consider FCC reforms and to consider the desirability of creating a cabinet-level Department of Telecommunications.

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# Why We Need A Road Map For Telecommunications Policy

MMTC is now in its 22<sup>nd</sup> year of tireless work with one goal: ensuring that people of color will have every opportunity to participate as owners, employees and suppliers in the electronic media and telecommunications industries. These industries constitute one sixth of our economy. They are our greatest export. They drive our culture, and their performance reflects how vital and responsive our democracy can be.

Civil rights has never been a partisan issue at the FCC. The most effective driver of minority media ownership, the former tax certificate policy, came about through Chairman Wiley's 1977 Minority Ownership Task Force and the Ferris Commission's 1978 Minority Ownership Policy Statement. Liberals and conservatives both understand that entrepreneurship, labor force participation, creative talent and ability to deploy capital are attributes of competition, and that the exclusion of Americans from industries using publicly owned resources is anticompetitive, inefficient, un-American and morally wrong.

Over the past 40 years, only three or four commissioners viscerally opposed all civil rights policies. Five commissioners – Clifford Durr, Benjamin Hooks, Andrew Barrett, William Kennard and Deborah Taylor Tate – arrived at the Commission with long records of civil rights achievement, and over a dozen commissioners have provided leadership to the cause in their post-FCC service. Former Commissioner Rivera chairs MMTC, and former Commissioners Barrett, Tyrone Brown, Anne Jones and Gloria Tristani serve or have served on the MMTC Board of Directors.

Yet neglect of civil rights on the FCC's 8<sup>th</sup> floor has also been nonpartisan. On December 17, 1986, with no rulemaking record and no notice, the FCC unanimously suspended two of its then-three minority ownership policies. Not one commissioner dissented and the civil rights world was in a state of shock. These policies had no (public) opposition. We no more thought the FCC would suddenly suspend these policies than that the sun would rise in the west.

MMTC was formed the next day to get the minority ownership policies back.

The circumstances of MMTC's birth placed us initially and unavoidably in the defensive role of reacting to the FCC's regressive decisions. Fortunately, in 1988, Congress intervened and prevented the FCC from spending money to suspend or repeal its minority ownership policies. Then, in the 1990 decision Metro Broadcasting, Inc. v. FCC (497 U.S. 547), the Supreme Court narrowly upheld race-conscious FCC broadcast diversity policies under intermediate scrutiny, a decision later partly overruled five years later in Adarand Constructors.

Inc. v. Peña (515 U.S. 200) when the Court began to apply strict scrutiny to federal affirmative action programs.

Metro Broadcasting permitted MMTC to evolve out of a reactive mode. For the first time, we began to ask “in a better world, what could the FCC be doing to promote diversity in the industries it regulates?”

Thus, in 1990 we assembled dozens of proposals to address diversity in a pro-active, comprehensive way. After all, comprehensive legislation – the 1964 Civil Rights Act, the 1965 Voting Rights Act and the 1968 Fair Housing Act – produced enormous progress in other key areas of civil rights policy. We imagined that the FCC, too, would appreciate that minority exclusion from publicly owned resources was so extreme, and so antithetical to democracy, that every stone must be turned until the nation achieves full equal opportunity.

Unfortunately, one can best sum up the FCC’s attitude toward civil rights by pointing to the Commission’s 1985 decision to repeal a modest initiative to create new minority-owned AM stations with a cursory order stating that initiative had “served its purpose.” In a series of decisions in the late 1980s and early 1990s, the FCC repeatedly failed to act on civil rights proposals by neglecting even to acknowledge the existence of pleadings filed by civil rights advocates.

After 1990, commissioners’ reactions to MMTC’s comprehensive lists of civil rights proposals were always sympathetic but seldom helpful. Again and again, commissioners advised us to “just pick the two or three biggest things on your list, and go after those.” We never followed that advice because we knew that piecemeal cherry-picking is not how the Commission handles other communications policy issues, including the DTV transition, inter-carrier compensation and universal service.

A breakthrough came with Section 257 of the Telecommunications Act of 1996, which required the FCC to report to Congress annually on the agency’s comprehensive efforts to identify and eliminate market entry barriers for small businesses. Now, at last, the Commission had to begin thinking about civil rights in a holistic, pro-active way.

Another breakthrough came on December 18, 2007 – MMTC’s 21<sup>st</sup> birthday. The Diversity and Competition Supporters – 29 national organizations represented by MMTC, had submitted 29 broadcast diversity proposals. Remarkably, almost none of the proposals drew any serious opposition. Instead, Free Press and Clear Channel, Prometheus Radio Project and News Corporation, the NAB and NCTA, and dozens of other public interest and industry parties filed in support of several of the proposals. The FCC knew that a consensus had formed. In its exhaustive Broadcast Diversity Order, 23 FCC Rcd 5922 (2008), the Commission granted thirteen proposals outright, put another twelve proposals out for comment and denied only four proposals.

This Road Map takes the process of systematic civil rights policymaking a step further. With the guidance of the dozens of brilliant communications lawyers and scholars who sit on the MMTC “Best Minds” Policy Committee, we present here a thorough plan to fully and rapidly desegregate the media and telecommunications industries.

We have called this a “Road Map” because it offers the nation a route from “here” to “there” – from the Present Dilemma to the Promised Land. “Here” is a place where minority entrepreneurs’ asset values are a tiny fraction of each industry’s total; where the absence of civil rights enforcement has caused a near-complete purge of minorities from radio journalism; where the Designated Entity (“DE”) program, which was supposed to promote minority wireless ownership, yields almost no spectrum for minorities in the largest auction in history. And “here” is a place where the next generation of young people of color still lacks the skills and resources necessary to compete in the world of broadband.

“There” is the place where all Americans will possess the tools to compete effectively in commerce, to contribute to and enjoy the fruits of democracy, to receive unbiased and uncensored news and information, to create culture – in sum, to build Dr. King’s “Beloved Community.”

The Road Map’s goal is nothing less than this: to show how present-day race discrimination and the extensive lingering consequences of segregation can entirely be swept out of the nation’s most influential and important industries.

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# MMTC Road Map for Telecommunications Policy

## **I. Legislative Priorities For Minority Entrepreneurship**

### **A. Restore and Expand the Tax Certificate Policy**

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

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

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

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

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

## **B. Remove Market Entry Barriers by Revising Portions of the Communications Act**

Section 257 of the Communications Act mandates that the Commission identify and eliminate market entry barriers from the Commission's rules. MMTC recommends that Congress remove several market entry barriers from the Communications Act itself.

### **1. Section 307(b) – Localism**

Created to advance localism, Section 307(b) today inhibits diversity and does little or nothing to advance localism. Dating from the 1927 Radio Act, Section 307(b) requires the Commission to “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same.” Certainly this provision was necessary in the early days of radio, when there was a significant risk that high demand for radio frequencies in large cities would leave rural areas without service.

Yet today, in the name of localism, the FCC awards construction permits to those who game the system by proposing first services to tiny hamlets. A licensing process giving an advantage to “first service” for a hamlet is nonsensical when, since 1981, licensees have not been required to programming that addresses the specific needs of their communities of license.

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

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

## **2. Section 309(j) – Designated Entity Program**

From 1934 to 1992, the FCC awarded spectrum to applicants who proved, at a hearing, that they would best serve the public interest. Lotteries were also used to award select spectrum in the mid 1980s and early 1990s. In 1993, in Section 309(j) of the Communications Act, as amended, Congress granted the Commission the authority to auction electromagnetic spectrum via a competitive bidding process. Section 309(j) directed the Commission to avert an “excessive concentration of licenses,” and to “disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women.” In 1995, because of Adarand Constructors, Inc. v. Peña (515 U.S. 200), the FCC eliminated all race- and gender-based classifications for DEs and instead used a small business classification as a race- and gender-neutral means to implement the congressional requirements under Section 309(j)(3). Nonetheless, the Commission is required to take concrete steps to prevent entrenched incumbents from exploiting the bidding process at the expense of these specific classes of auction participants, collectively known as “Designated Entities” or “DEs.”

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

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

Rather than adopting the limited, focused measures recommended by MMTC, the Commission took an abrupt, unforeseen and debilitating change of course: it issued new rules, a mere two weeks before a 2006 auction application filing deadline, that: (i) deferred taking any action to reform the DE program to protect its integrity, (ii) doubled the long-standing five-year unjust enrichment period for DEs to hold their licenses without a loss of bidding credits (“Five-Year Hold Rule”) for all DEs, converting it to a “Ten-Year Hold Rule” with increased penalties; and (iii) imposed new leasing, resale and wholesale restrictions on all DEs’ use of their licenses post-auction, restrictions that effectively deprive DEs of their bidding credits if they lease, resell, or wholesale even so much as 25 percent of their spectrum capacity to a single entity – regardless of the size of that entity. DEs cannot enter into any such arrangements with multiple entities for more than 50 percent, on a cumulative basis, of spectrum capacity.

Under the previous DE rules in place since 1997, if within five years after taking advantage of an auction bidding credit a DE transferred or assigned the license to a non-DE, became ineligible through a change in corporate structure, or through the attribution of new management, affiliates or investors, it would be required to repay its bidding credits, with interest, to the FCC. The Commission’s 2006 decision to adopt a Ten-Year Hold Rule without the benefit of public notice and comment, and an increased hold period that was not offset by other measures that helped to secure capital such as installment payments, severely limited the ability of new entrant DEs to secure venture or private equity financing. Many DEs are not eligible for traditional financing because the spectrum service is not yet generating revenue (no subscribers) and there are continued discriminatory practices in the banking industry. Securing debt capital has always been difficult for small businesses, especially those owned by minorities and women – even more so in today’s volatile credit market. Moreover, private financiers will not invest in a new entrant if the financier cannot exit the business for ten years when the business plan is not succeeding. The average exit horizon is four to six years. Even the Telecommunications Development Fund (“TDF”), which was created by Congress to aid small business (see §I(D) infra), has a six year exit horizon. The FCC Chairman serves on the Board of Directors of TDF.

By limiting the degree to which DEs may collaborate with other businesses – even other DEs – the new 25 percent/50 percent “material/impermissible relationship” leasing, resale and wholesale restrictions also severely limits the ability of DEs to acquire financing. This new rule requires DEs to provide service on the retail market, competing directly for market share with very large entrenched incumbents that have more resources and money to market directly to the consumer, own and operate retail distribution and service centers, and provide handsets and other equipment at lower prices. The large incumbents are not subject to any such restrictions. Importantly, the lease, resale and wholesale business model was then emerging as an innovative approach for smaller and



mid-size carriers that have built out their licenses to distribute their network capacity; this model is now an industry standard and is critical to raising capital for new entrants.

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

MMTC has encouraged the Commission to act on its own to institute DE program reforms (see §III(D) *infra*). To ensure that the Commission never again strays as far it has from the Congress' purposes in enacting Section 309(j), Congress should revise Section 309(j) to explicitly prohibit the Commission from hampering the ability of DEs, particularly minorities and women, to secure access to capital and to take immediate affirmative steps to ensure that licenses are awarded among a wide variety of applicants, as mandated by Congress.

### **3. Section 310(b)(4) – Foreign Ownership**

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

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

Authorizing such investments could be profoundly beneficial. Minority broadcasters, although largely shut out from access to domestic capital, are often embraced by overseas capital. Further, relaxation of U.S. trade barriers can be

conditioned on commensurate reciprocal trade barrier relaxation, thus opening overseas markets to multilingual and multicultural American broadcasters.

#### **4. Sections 334 and 634 – Equal Employment Opportunity**

In 1992, Congress adopted Sections 334 and 634 to prevent the FCC from repealing its then-operative EEO rules for television and cable. Other provisions of the Communications Act authorize the FCC to apply EEO rules to broadcasting and telecommunications, but that authority is only implicit and it is discretionary. Further, court cases decided in 1998 and 2001 struck down, on constitutional grounds, portions of the EEO rules that were in effect when Congress adopted Sections 334 and 634. The broadcast and cable EEO rules adopted by the Commission in 2002 are weak on paper and even weaker in practice (see §IV(A) *infra*).

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

### **C. Amend the FTC Act to Prohibit Racial Discrimination in Advertising Placement and Terms**

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

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

Resistance to civil rights laws has always been greatest when money is involved; thus the FCC's jurisdiction over broadcasters may not be enough to stop NUDs and NSDs. The FTC's Consumer Protection Bureau oversees advertising practices, and thus the FTC could play a vital role in rooting out and prosecuting discriminatory advertisers.

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

On the other hand, the FCC cannot be expected to cure advertising discrimination rapidly without assistance from the FTC. Like any commercial transaction, discriminatory advertising has a supply side and a demand side. The FCC can address the demand side, but only the FTC can address the supply side.

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

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

Further, Congress should give the FTC express authority to require nondiscriminatory advertising placement and terms and nondiscrimination provisions in the advertising contracts of companies in media industries directly regulated by the FCC, including print and Internet advertising.

## **D. Reauthorize the Telecommunications Development Fund Using Auction Proceeds**

In 1996, Congress created the Telecommunications Development Fund ("TDF") to provide financing to small businesses owned by small and disadvantaged businesses, particularly those owned by minorities and women. The text of Section 707 of the 1996

Telecommunications Act restricts the primary funding for TDF to the interest earned on up-front deposits paid by telecommunications companies that qualify to bid for FCC licenses in spectrum auctions. No interest has been earned by TDF on the tens of billions deposited as down payments or auction proceeds from auctions conducted since 1996.

Unfortunately, the TDF has not been reauthorized, nor has it had a significant impact on access to capital for minorities. Moreover, TDF did not offer loans given the stringent requirements of the Federal Credit Reform Act of 1990, which TDF must comply with pursuant to statute. The interest on upfront auction deposits never exceeded the \$50 million range – far too small to support a meaningful and effective equity or debt fund. A single medium market network affiliated television station often sells for well in excess of that amount.

The TDF should be reauthorized. This time, however, rather than being funded solely from the interest earned from upfront auction payments, the TDF should be funded with interest earned from all spectrum auction proceeds, including down payments. Flexibility to deposit the auction proceeds in an escrow account that can generate maximum interest is also needed; TDF has been limited to certain types of escrow accounts given statutory interpretation. Further, in addition to equity financing, TDF should be required to provide debt financing, but with flexible and advantageous terms and conditions to offset a history of discriminatory lending practices and the current tight credit market. The use of auction proceeds to fund the TDF would be particularly equitable in light of the near-exclusion of minorities from the class of spectrum auction winners (see §III(D) *infra*). Reauthorization of the TDF, with significant funding, would go a long way toward eliminating market entry barriers faced by minorities and women and would inject necessary competition into the telecommunications industry.

## **E. Relax Third Adjacent Channel Restrictions on Low Power FM**

MMTC has always supported the Low Power FM (“LPFM”) service as a means of entry and training for minorities and as a vehicle to serve rural communities after full power stations move closer to their large city core audiences (see §III(A)(3) *infra*). When the Commission adopted LPFM rules, it determined that an LPFM station would not cause significant interference to a full power FM station on a third-adjacent channel, and the Commission therefore removed the related separation requirements for LPFMs. However, Congress ordered the Commission to delay this action until an engineering study was completed to test the level of actual interference. The results of the study confirmed the Commission’s initial findings.

In 2007, Rep. Michael Doyle and Senator Maria Cantwell introduced the Local Community Radio Act to lift the third-adjacent channel restrictions. The Senate

Commerce Committee issued a report on S.1675, S.Rep. No. 110-271, on March 4, 2008 and placed the matter on the Senate Legislative Calendar.

Relaxing the third-adjacent restrictions would promote minority access to spectrum and access to opportunity by creating opportunities for more local programming and for minorities and women to gain entry into radio broadcasting.

## **F. Authorize an Annual Diversity Census for Media and Telecommunications**

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

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

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

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

## **II. Legislative Priorities For Minority Access To Technology**

### **A. Establish Universal Public Education, K-12, in Media, Telecom and Internet Literacy, Including Skills, Proficiency and Policy**

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

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

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

However, not only are American schools not rising to the task, minority students are faring much more poorly. With media gravitating from traditional outlets to Internet-based platforms, the media and telecom industries are particularly susceptible to the effects of globalization. Therefore, minorities who are interested in media and telecom careers, who have not been well-prepared in science, technology, engineering and mathematics (“STEM”) will be at a particular disadvantage – both because of the pervasive effects of past discrimination and the lack of STEM training, to offset these effects.

Technology leaders agree that the United States is failing to produce the next generation of scientists who will enable the U.S. to remain technologically competitive with the rest of the world. While China and India have poured resources into technology-

related programs, the U.S. has faltered. Minority communities have been the hardest hit. For example, in a May 2008 report released by the National Action Council for Minorities in Engineering (“NACME”), although African Americans, Latinos and American Indians comprise 30% of the U.S. population—a number that is expected to grow to 38% by 2025—fewer than 12% of baccalaureate engineering degrees were awarded to minorities in 2005. The percentage of engineering degrees, which were awarded to African-American students, declined from 3.3% of all bachelor’s degrees in 1995, to 2.5% in 2005. Moreover, although Latinos are expected to account for 25% of the U.S. population by mid-century, their educational attainment has dropped in all areas, not just engineering, compared to non-Latino ethnic groups.

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

- Training in media, telecom and Internet skills and proficiency should be offered from Grade 1 through Grade 12.
- Media, telecom and Internet operations and policy should be taught as the equivalent of earth science, biology, chemistry and physics in high school. For example, earth science could be moved to the 8<sup>th</sup> grade and biology to the 9<sup>th</sup> grade, making room for media, telecom and Internet as a full year required course in the 10<sup>th</sup> grade.
- Additional programs should be developed to generate interest among minority students to pursue STEM-related coursework, by illustrating, through the use of gaming technologies, for example, the ways in which STEM is relevant to students’ everyday lives.
- Teachers should be prepared to meet the challenges of cross-cultural pedagogy and classroom management when teaching about media, telecom and the Internet (see also Section II(B) infra).

## **B. Expand the E-Rate Program to Provide Teacher Training in Computer and Internet Literacy**

The Schools and Libraries Program, commonly known as the “E-Rate” Program, is one of the Universal Service programs that Congress created in the Telecommunications Act of 1996. Authorized under Section 254(h) of the

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

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

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

### **C. Authorize Sufficient USF Support for Broadband, Lifeline/Linkup and Rural Telemedicine**

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

Transitioning the USF to encompass broadband services would also enhance the existing Low Income Program, commonly known as “Lifeline/Linkup,” as well as the Rural Health Care Program. Lifeline/Linkup, authorized in Section 254(b) of the Act, helps eligible low-income consumers establish and maintain telephone service by discounting the service provided to them by local telephone companies. Lifeline/Linkup not only allows consumers to remain connected in the event of an emergency, it also facilitates job-seeking and employment retention. Moreover, the program has been a critical tool in ensuring traditional voice connectivity between all citizens. Unless Lifeline/Linkup evolves to include broadband services, low-income consumers will find it more difficult to compete effectively in the job marketplace, and the digital divide will only widen.



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

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

#### **D. Provide Funding for Broadcasters' Multilingual Emergency Information Services**

The Emergency Alert System (“EAS”), which is the successor to both the Emergency Broadcast System (“EBS”) and Cold War era CONELRAD, was established to provide the President of the United States with a method to address the entire nation in the event of an imminent threat of war or other national crisis. Since 1963, neither EAS nor EBS has ever been activated on the presidential level.

Today, EAS is an active tool for relaying critical weather and other emergency information at the state and local levels. All broadcast television and radio stations, satellite radio operators and cable television stations are required to participate in presidential alerts, while state and local level participation is voluntary.

However, EAS only provides emergency alerts (e.g. “a storm is coming”) and does not require broadcasters to provide emergency information (e.g. “go to the stadium by 2 PM for emergency shelter and bus transportation out of town.”) Broadcasters often provide this vital information, but when the only station broadcasting in a widely spoken language other than English is disabled in an emergency, or if there was no such station in the first place, enormous multilingual populations are left highly vulnerable. For members of these populations, an emergency can amount to a death sentence for not learning English instantaneously.

According to Census 2000 figures, more than 17% of households with residents over the age of five speak a language other than English at home. Over ten million

residents surveyed, including large numbers of native Spanish and Chinese language speakers, categorize their English-speaking ability as “not well” or “not at all.”

In August 2008, Hurricane Katrina disabled the only Spanish language full service station in New Orleans, with devastating results. Shortly afterward, the Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc. and MMTC asked the FCC to require broadcasters in each radio market to adopt a system under which “designated hitter” stations would broadcast emergency alerts and emergency information in a widely spoken language if, during an emergency, no full service station in that language is on the air.

This proposal, now denoted Universal Emergency Broadcasting (“UEB”), was developed by MMTC and other stakeholders in the hope of undertaking a test during the 2008 hurricane season in hurricane-prone radio markets in the Gulf Coast and South Atlantic states. The UEB test markets would be those having at least one “Covered Language” (such as Spanish or Chinese) spoken by at least 50,000 people or over five percent of the market population. Selected markets would also have fewer than two radio stations that broadcast twenty-four hours a day in a Covered Language. A Local Primary Multilingual (“LPM”) station would be designated to transmit EAS warnings in that test market’s Covered Language. If the LPM goes off the air during an emergency, a pre-selected Designated Hitter station (“DH”) would transmit EAS warnings and other vital information in the Covered Language. Public Service Announcements would run in Covered Languages to advise residents where to turn in the event of an emergency. UEB recommendations would be forwarded to the FCC after completion of the test period.

Such a UEB test would disclose any operational needs of broadcasters to coordinate with one another across languages, and it would identify the cost of sustaining a UEB program and applying it nationwide. These costs should not be very great, but to the cash-strapped radio industry any new costs are significant. Since UEB is a lifesaving technology, Congress should appropriate the modest sum – most likely in the range of a few million dollars – to enable the broadcasting industry to implement UEB in all markets.

## **F. Reinstate the Telecommunications Opportunity Program**

The Telecommunications Opportunities Program (“TOP”), administered by the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”), provided grants to organizations and initiatives that promoted the widespread use and availability of digital network technology in the nonprofit and public sectors. According to the NTIA website’s 2006 report on the TOP program, from 1994-2004 TOP awarded 610 grants, throughout the U.S., totaling \$233.5 million, and

leveraged \$313.7 million in local matching funds on behalf of local and tribal governments, healthcare providers, schools, libraries, police departments and community based non-profit organizations. TOP-funded projects were geared towards improving the quality of and the public's access to education, healthcare, public safety and other community-related initiatives. TOP was integral for providing underserved communities with networking equipment, software, videoconferencing systems, computers, training and a variety of other technological necessities.

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

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

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

TOP is also essential to the United States' ability to compete internationally. According to a December 2007 study, *Broadband Penetration and Density*, published by the Organization for Economic Cooperation and Development, the United States ranks fifteenth worldwide in its ratio of broadband penetration to population density.

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

### **III. FCC Rules And Policies**

#### **A. Expediently Approve Key Pending Proposals in the Broadcast Diversity Order**

Included in the Broadcast Diversity Order is a Third Further Notice of Proposed Rulemaking that seeks comment on twelve diversity proposals. All of them deserve adoption. Some of the most far-reaching proposals are described below.

##### **1. Share-Time Proposals, Especially for HD Radio and DTV Sub-Channels**

The “share-time rule” (47 C.F.R. §73.1715) permits licensees to share an ownership interest in spectrum, subject to certain limitations. Permitting radio and television licensees to share portions of their multiplexed HD and DTV program feeds for the transmission of programming by unaffiliated entities, such as minority- and women-owned businesses, would afford entrepreneurs with a route to entry that closely resembles traditional broadcast ownership. Leases are almost impossible to finance, but investors and lenders understand and will finance ownership.

##### **2. Structural Rule Waivers for Creating Incubator Programs**

MMTC supports the waiver of structural rules for a broadcast company that establishes programs that substantially promote ownership by disadvantaged businesses. Examples of programs that could trigger structural rule waivers include guaranteeing the financing of a transaction, creating a broadcast business planning center at an Historically Black College of University (“HBCU”) or Hispanic Serving Institution (“HSI”) and underwriting a fund to invest in disadvantaged broadcast companies. The key to an effective incubator program is a concrete, definitive and verifiable commitment by the applicant of sufficient financial magnitude and permanence to justify a waiver.

##### **3. Opening FM Spectrum to Promote Move-Ins**

The Commission’s rules that restrict radio station move-ins undermine diversity and localism by preventing large metropolitan areas from having enough stations to serve their growing and diverse populations (see §I(B)(1) supra). These rules result in inferior service to minorities, who often are confined by segregation and wealth disparities to central cities. Further, move-in restrictions ratify and validate the present effects of past discrimination in broadcast ownership that has resulted in minority ownership of inferior and often distant facilities. Relaxing the anti-move-in rules would permit stations to relocate closer to their audiences, which would add considerably to the asset values of minority-owned stations. A move-in should be expedited when the proponent

underwrites the construction and operation of a “backfilled” LPFM station in the station’s former community of license.

#### **4. Must-Carry for Some Class A Television Stations**

Unlike full-power TV stations, low power television (“LPTV”) stations do not enjoy comprehensive mandatory cable carriage rights. Most LPTV stations do not offer unique or local programming service, but the nation’s approximately 600 Class A LPTV stations are required to originate local programming and many Class A stations provide extraordinary local service. Approximately 15% of Class A stations are minority-owned and many of these stations provide multilingual and multicultural service unavailable from full power stations.

Blanket authorization of must-carry for all Class A stations could have the unintended effect of limiting the availability of cable channel space for other diverse programming. However, must-carry rights should be available to a subset of Class A stations, such as those providing regular daily local programming and serving underserved viewers. The implementation of must-carry rules for this subset of Class A stations would provide these broadcast outlets, many of which provide diverse programming, with instant access to about 60% of TV homes in a typical market.

#### **5. Reallocation of TV Channels 5 and 6 for FM Service**

This extraordinary proposal, advanced in 2007 by Mullaney Engineering, Inc., (the “Mullaney Plan”) would reassign TV channels 5 and 6 for FM service after completion of the DTV transition. Such a move would result in more than 2000 new or improved FM facilities. In the Broadcast Diversity Order, the Commission agreed that this proposal “could yield tremendous opportunities for new entrants.” Reallocation of these TV channels should also allow ample space for AM stations, including minority and women owned AM stations, to be reassigned to operate on new FM frequencies.

The Mullaney Plan is race-neutral but it would dramatically enhance minority access to spectrum, access to capital and access to opportunity. Two thirds of minority-owned radio stations are licensed to AM band service, and minority-owned AM stations typically have weak signals that do not allow these stations to garner a wide audience. Moving AM stations to the FM band would allow for stronger and clearer signals, with HD channels and greater potential to reach a wider audience. MMTC has estimated that adoption of the Mullaney Plan could triple the overall asset values of minority-owned radio companies.

To be sure, full implementation of the Mullaney Plan would have to await completion of the DTV transaction and clearing of the spectrum. Yet more than any other proposal, it offers a real opportunity to rescue a distressed terrestrial radio industry

– an industry that has been minority entrepreneurs’ traditional gateway to media and telecom ownership.

#### **6. Examine Applications and Proposed Rules to Discern Their Potential Impact on Minority and Female Ownership**

This proposal, originally advanced in 1973 by the Citizens Communications Center and currently championed by NABOB and the Rainbow/PUSH Coalition, would incorporate a Minority/Female Impact Statement into large merger proceedings and general rulemaking proceedings except individual FM or TV allotment proceedings. A model for such an impact statement can be found in the Regulatory Flexibility Act statements that accompany the adoption of Commission rules of general applicability.

While an agency is permitted to adopt rules, otherwise justified, that have the unintended effect of burdening minority groups and women, an agency is also permitted and encouraged to make itself aware of the impact of its policies on minorities and women. In 2006, the Commission sought comment on the impact of media consolidation on minorities and women, and should make this a standard practice in rulemaking proceedings.

Minority/Female Impact Statements would enable the Commission to make policy with better insight into the effects of its actions on minority and female access to spectrum, access to capital and access to opportunity. Although most of what the Commission does has a substantial impact on minority and female entrepreneurship, that impact is typically not recognized until years later. Minority/Female Impact Statements would very likely eliminate the unintended consequences of many Commission rules and thereby promote diversity while flagging and avoiding unseen threats to diversity.

#### **7. Develop a Constitutionally Sustainable, Race-Conscious Eligible Entity Definition**

The Commission should establish a constitutionally permissible yet non-dilute method of defining the class of entities eligible to benefit from pro-diversity policies. Consistent with recent Supreme Court precedent, an applicant’s race would be one of numerous factors considered when the Commission reviews a license application. This could be accomplished through the Small Business Administration’s (“SBA”) socially and economically disadvantaged business (“SDB”) definitions, which allow for a rebuttable presumption that minorities qualify as SDBs. In addition, this definition allows non-minorities to show that they are disadvantaged and qualify for the program as well.

All race-conscious government action is analyzed under strict scrutiny, and therefore must be narrowly tailored to further a compelling government interest. The

Supreme Court has recognized compelling government interests in remedying the effects of past discrimination and promoting diversity in higher education, and D.C. Circuit precedent suggests that promoting competition may also be a compelling government interest.

The task of developing a record that would satisfy strict scrutiny will need to be restarted because the Commission lacks current, accurate data to support a race-conscious definition. Further, before turning to race-conscious remedies, the agency must attempt in good faith a variety of race-neutral remedies, a process the Commission recently began in the Broadcast Diversity Order.

Once the Commission has obtained current, accurate data to support an SDB definition, such data would be periodically assessed to ensure that the program is meeting the diversity and competition goals it was designed to produce. In accordance with Supreme Court precedent, the SDB program should consider all qualities that an applicant can lend to diversity. Thus, for example, a narrowly-tailored SDB program designed to promote diversity and competition and to remedy the present effects of past discrimination in broadcasting may contain race-conscious classifications, provided that the program is flexible enough to allow non-minorities to qualify and to disqualify minority-owned businesses that are not truly disadvantaged. Finally, under a “full file review” approach similar to that used in university admissions, an SDB program could incorporate race-neutral factors predictive of success as an entrepreneur, such as an applicant’s success in overcoming any of several types of disadvantages.

## **B. Extend all EEO, Procurement, Advertising Nondiscrimination and Transactional Nondiscrimination Rules to Broadcasters, MVPDs and Telecom Carriers**

“Platform neutrality” is a signature regulatory goal – the concept that regulations designed for one type of media or telecom service should apply equally to competing services. However, the FCC’s civil rights regulations do not follow the model of platform neutrality. Since 1976, EEO rules have covered all FCC-regulated industries but there has never been a common carrier EEO enforcement program. The rule to promote minority procurement, imposed by a 1993 congressional mandate, applies only to cable systems and those rules have never been implemented. Rules to ban racial discrimination in advertising and transactions were adopted in the Broadcast Diversity Order and there are no current plans to extend those rules beyond broadcasting.

Discriminatory practices do not respect competitive boundaries or platforms. With the exception of a handful of broadcast, cable and satellite firms, no industry except

wireline telephony has done a respectable job addressing all forms of racial discrimination in its operations.

The anti-discrimination standards enunciated in the Broadcast Diversity Order and in the broadcast EEO and cable procurement rules ought to apply across the full range of services that are subject to the Commission's jurisdiction.

### **C. Firmly Reject A La Carte Cable Channel Mandates**

Currently, consumers must pay for cable services in large "tiered" packages such as "basic" and "expanded." The goal of a la carte ("ALC") is to allow consumers the option to pick and choose – and pay for – only the individual channels or a much smaller, select group of channels they wish to view. When first proposed in 2004, ALC struck an eclectic coalition of constituencies as an excellent solution for the problems of cost and "indecentcy," or generally fleeting exposure to offensive programming. However, while it appears intuitively straightforward to some, many studies demonstrate that ALC's ultimate impact will be greater costs and decreased diversity of cable programming goals that are important, not just for their own sake, but for the sake of fostering racial diversity as well as greater dialogue, civic participation and tolerance.

ALC would compound and increase the difficulties that independent and niche networks, cable programmers, content providers including religious broadcasters, minority-focused channels and multilingual channels (collectively "Niche Networks"), face in launching or maintaining their presence on cable systems. Niche Networks rely on tier provisioning to increase viewership and gain advertisers. These networks traditionally have gained exposure and won loyal viewers as a result of channel surfing. Marketing tactics are based on this ancillary exposure and it is the method by which Niche Networks justify their advertising rates and earn revenue. ALC would cause a profound increase in Niche Networks' marketing expenses since, under ALC, they will no longer be able to rely on ancillary exposure to reach new viewers. Unless constrained by regulation, these increased costs would likely be passed on to subscribers, resulting in higher subscription fees on a per channel basis. Money used to pay for additional marketing to gain viewers under a mandatory ALC regime would reduce funding available to Niche Networks acquiring or producing quality programming. A dearth of quality programming will diminish subscribers and, consequently, advertisers, leading to the ultimate demise of Niche Networks. Therefore, ALC would also lead to a loss of diverse content and viewpoints.

The diminished presence of Niche Networks as a result of ALC would protect homogenized programming at the expense of programming that reflects the lives, viewpoints and experiences of women, minorities, immigrants and ethnic groups to which mainstream media outlets routinely give short shrift.



While tier provisioning has its flaws, it remains the best solution for delivering content to American consumers and for fostering a non-discriminatory, competitive market with opportunities for emerging and Niche Networks.

#### **D. Conduct a Top to Bottom Reform of the Designated Entity Program**

As discussed above (see §I(B)(2) *supra*), the current DE rules have allowed the nation's largest wireless incumbents to dominate the auction process since the FCC's adoption of new rules that have severely hampered the ability of DEs, especially new entrant DEs, to raise capital and compete effectively in the auction process. As a result, virtually no minorities won spectrum in the two most recent omnibus wireless auctions. Therefore, MMTC has requested that the Commission modernize its competitive bidding rules and procedures. The Commission should take the following steps to ensure that the DE program will assist small, minority- and women-owned businesses, as mandated by Congress:

- Define "Large Incumbent Service Provider" based on subscriber information and the types of "Material Relationships" that constitute fraud under the DE program, based on the old CMRS Spectrum Cap Attribution rules.
- Conduct, before an auction, a comprehensive review of the qualifications of an entity seeking designated entity status, and conduct regular random audits of DE Applicants' qualifications.
- Increase the amount of bidding credits to enhance their value to DEs seeking access to capital.
- Restore the previous long-standing Five-Year Hold Rule for DEs in place of the debilitating and unreasonable Ten-Year Hold Rule, which has cut off almost all access to capital from new entrant minority- owned DEs.
- Relax (but do not entirely eliminate) the restrictions on DEs' ability to lease, resell or wholesale their licenses post-auction that effectively deprive DEs of their bidding credits.

#### **E. Make the Collection and Publication of Accurate Data the Touchstone of Regulatory Policy and Enforcement**

The Commission's thorough common carrier service reports demonstrate the agency's ability to produce accurate metrics on a longitudinal basis. Comprehensive industry-wide data, broken down by company except in the rare instance where a trade

secrets privilege applies, allows the public to judge a company's performance relative to industry norms when selecting which company or service provider to patronize.

Presently, no data is being aggregated or disseminated concerning EEO, procurement, transactions, or advertising. The Commission's ownership database is a shambles, and it includes no information on access to capital or on the impact of the rules the Commission relies on to promote diversity and localism. Further, the Commission does not systematically gather evidence, anecdotal or otherwise, in any field touching on civil rights.

While legislation mandating data collection benchmarks would ensure that longitudinal data streams are not interrupted by a future commission (see §I(F) supra), the present Commission should not wait for Congress to act. It should begin now to collect statistical and anecdotal data annually on EEO, procurement, transactions and advertising to provide real-time feedback on the impact of rule and policy changes.

#### **IV. FCC Investigations And Enforcement**

##### **A. Restore Effective EEO Enforcement, Focused on Sanctioning Excessive Use of Word of Mouth Recruitment from Homogeneous Workplaces**

Over the years, the Commission's EEO enforcement program has dwindled to a shadow of its former self. MMTC's examination of all 300 of the Commission's broadcasts audits in 2003 and 2004 found that only 12% of the recruitment sources were minority-targeted while 36% of the job notices still did not contain an "EOE" tag line. Yet, every one of the stations passed its audit.

While current enforcement efforts feature much higher forfeitures in particular cases than those issued a decade ago, the size of the Commission's EEO docket is down 96% (from 251 cases in 1994-1997 to 10 cases from 2004-2007), and the total forfeiture amounts imposed annually have also decreased 96% (from \$312,250 in 1994-1997 to \$12,125 in 2004-2007).

A failing enforcement program has consequences. RTDNA found that only 3.6% of non-Hispanic television stations had minority general managers in 2007. Even more telling, minority employment in radio news declined from 14.7% to 6.2% between 1995 and 2007. MMTC has calculated that minority employment at non-minority owned, English language radio news operations is about 0.4%, or statistically zero, which is about where it stood in 1950. It is evident that minorities have been purged from radio news – a profession that is vital to the promise of the First Amendment.

The University of Georgia's Cox Center 2006 Annual Survey of Journalism and Mass Communications graduates found that "students who are members of minority groups had a harder time finding a job." The minority recruitment shortfall is not due to a lack of qualified minority candidates looking for jobs. The problem is that information about job opportunities is not making its way to the minority job candidates. Word of mouth recruitment by broadcast stations is a major cause of the collapse in minority employment. The Commission has long recognized that excessive word of mouth recruitment from a homogeneous workplace is inherently discriminatory. When a homogenous group of employees conducts word of mouth recruitment, the result is primarily a homogeneous candidate supply. As a result, diversity in the employment rosters suffers. The Commission has disabled itself from prosecuting this most common and invidious form of employment discrimination by choosing not to collect or publish Form 395 EEO data. The FCC has no reason not to release station-by-station Form 395 data, which neutrally reports employment information for all races and both genders and thus neither contains nor implies a preference for one race or gender.

To restore the health of the Commission's EEO enforcement program, the agency should promptly restore transparent EEO data collection and meaningful enforcement of its EEO regime, focusing especially on the practice of excessive use of word of mouth recruitment from homogeneous workplaces. Form 395 data should be made available to the public with the understanding that the data will not be used for any improper purpose (such as imposing racial quotas). At the same time, the Commission should use this data for the vital and proper purpose of determining whether a licensee has engaged in discrimination by relying excessively on word of mouth recruitment from homogeneous workplaces. The Commission should also revamp and vastly expand the scope and seriousness of its audit program, eliminate rubber-stamp audit closures, and designate evidentiary hearings in instances of discrimination.

## **B. Open an Expedited, Fact-Finding Section 403 Inquiry on Audience Measurement**

The FCC's Advisory Committee on Diversity for Communications in the Digital Age is considering a resolution that would request the FCC to conduct a fact-finding inquiry on the impact of the Portable People Meter ("PPM") technology on the measurement of minority radio listenership.

MMTC supports this resolution. It has been responsibly alleged that the PPM technology, among other things, under-samples minorities so deeply that stratification would introduce extensive volatility and instability to the resulting survey reports. In addition, unlike the traditional diary method it is replacing, PPM contains no implicit or explicit specific measure of listener loyalty to particular stations – a critical oversight since minority consumers tend to be considerably more brand loyal than other consumers.

The importance of PPM's impact cannot be overstated. Ratings are the only currency that is used to buy and sell advertising time. MMTC has calculated that absent corrective measures, the nationwide rollout of PPM would decrease minority radio stations' annual revenues by as much as \$500,000,000 – an amount that dwarfs the positive impact of the new rules the Commission adopted in its recent Broadcast Diversity Order. It would constitute the greatest loss of value in the history of minorities in broadcasting.

The Commission's designation of an Administrative Law Judge ("ALJ") to conduct such an inquiry would be crucial to developing a path beyond the debate, which thus far has featured a great deal of heat. An ALJ can review sensitive materials in camera, evaluate the credibility of witnesses, and provide case-specific and best practice recommendations in a manner that would be fair to all parties. The ALJ's report would be received by the industry with great deference and respect.

### **C. Appoint Fulltime Compliance Officers Responsible for Advertising Nondiscrimination and for Minority Procurement**

The most promising new civil rights regulation adopted by the Commission in over a generation is the Broadcast Advertising Nondiscrimination Rule, which took effect on July 15, 2008. Civil rights and industry associations have joined together to eliminate "no urban dictates" ("NUDs") and "no Spanish dictates" ("NSDs") and minimize the possibility that litigation will be necessary to ensure compliance. MMTC estimates that full compliance with the Rule would restore to minority broadcasters about \$200,000,000 in annual revenues that they earn but never collect.

The Commission should now take the next logical step and extend its nondiscrimination efforts to the cable, wireless and wireline industries. The Commission's Advisory Committee on Diversity for Communications in the Digital Age recently reported that billions of dollars are spent by cable, wireless and wireline companies on procurement of a wide range of services through contractors and subcontractors including engineering, furnishings, installation and construction, as well as programming and operating services. Although the Commission adopted its Cable Supplier Diversity Rule in 1993, it has not monitored the extent to which minority-owned subcontractors are able to do business with cable MSOs.

The Commission can ensure compliance with, and enforcement of these important nondiscrimination mandates by designating responsible and visible civil rights officials to serve as compliance officers. These experienced individuals can lead the agency's efforts to secure industry-wide compliance with the Broadcast Advertising Nondiscrimination Rule and the Cable Supplier Diversity Rule.

## **V. Executive Orders And Personnel Management**

### **A. Strengthen the Federal Advertising Diversity Initiative**

In 2000, President Clinton signed Executive Order 13170, which requires federal departments and agencies that use broadcast advertising to “take an aggressive role” to ensure that federal government advertising be placed on television and radio stations owned by minorities (65 Fed. Reg. 60827, 60829 §4 (2000)). The Executive Order also requires federal agencies to pay fair market rates for such advertising.

A 2007 GAO study found that in 2005, federal spending on advertising totaled over \$4 billion and that five federal departments or agencies made up over 90 percent of this spending from 2001 to 2005. Those agencies were the Departments of Defense, Treasury, Health and Human Services Interior and the National Aeronautics and Space Administration. This made the federal government one of the top 50 advertisers in the nation.

The GAO study also found that, over the five-year period, the Department of Defense (“DOD”), which is the largest federal agency advertiser, accounted for more than 50 percent of these advertising-related obligations. Over the period of the study, DOD awarded on average less than two percent of its advertising dollars to minority-owned broadcasters.

More focus and vigorous enforcement of the Executive Order 13170 is required in order for the federal government to live up to this Presidential mandate. The advertising industry has traditionally had an abysmal track record related to advertising on minority-owned broadcast stations. The African American and Hispanic communities are burgeoning consumer markets; yet many companies irrationally refuse to spend their advertising dollars with minority-owned broadcasters who serve these markets. As discussed above, advertising discrimination is estimated to cost minority broadcasters over \$200,000,000 annually in lost revenues (see §I(C) supra).

The next administration should reissue Executive Order 13170 and include specific targets, monitoring and compliance provisions to ensure that the goals of the Executive Order are achieved.

### **B. Direct FEMA, NWS and NOAA to Provide Multilingual Emergency Services**

No one should die in an emergency because he or she doesn't speak English fluently. Therefore MMTC has recommended that Congress appropriate sufficient funds

to enable broadcasters to rapidly implement a comprehensive multilingual emergency broadcasting plan (see §II(D) supra).

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

Thus, each of the federal entities responsible for providing emergency warnings should also be specifically directed to employ multilingual staff members, and to transmit warnings and substantive emergency information in all widely spoken languages. Funding and instructions for multilingual emergency communications should specifically be directed to the Federal Emergency Management Agency (“FEMA”), the National Weather Service (“NWS”) and the National Oceanographic and Atmospheric Administration (“NOAA”). Of these, the most immediate need is at the NWS, which initiates approximately 85% of all Emergency Alert System (“EAS”) alerts. NWS provides no local weather warnings in Spanish because it employs no Spanish speaking staff in the relevant office.

### **C. Select a Diverse Array of FCC Commissioners and Senior Telecom Policy Officials**

The FCC oversees industries representing a sixth of our economy – industries that are the stewards of the First Amendment and the custodians of our culture and our democratic values. Thus the FCC, perhaps more than any other federal agency, should look like America. Before 1972, when President Nixon chose Benjamin Hooks to serve on the FCC, no people of color served as FCC commissioners. Thereafter, people of color served on the FCC continuously until 2005.

To Chairman Martin’s credit, the FCC’s executive staff manifests considerable racial and gender diversity. Nonetheless, when vacancies arise, the time will come to re-integrate the ranks of the commissioners themselves.

Besides the FCC, telecommunications policy is made in several venues, including NTIA, the White House Domestic Policy Council, the House Committee on Energy and Commerce, and the Senate Committee on Commerce, Science and Transportation. The senior staff of these bodies, too, should look like America. MMTC’s Policy Committee has established a Task Force on Federal Staffing to collect and review the resumes of highly qualified candidates for senior telecommunications policy positions that may become available in the forthcoming administration.

## **VI. Government Responsiveness To Civil Rights Priorities In Telecommunications**

### **Establish a Blue Ribbon Commission to Consider How Minority Ownership and Participation in FCC-Regulated Industries could be Advanced by Operational Reforms at the FCC and by the Creation of a Cabinet-Level Department of Telecommunications**

On July 15, 2008, the FCC's prohibition on racial discrimination in broadcast advertising placement and terms took effect – twenty-four years after the FCC held an en banc hearing to consider specific examples of no-urban dictates in advertising placement. Consider that it only took ten years from Brown v. Board of Education (347 U.S. 483 (1954)) to secure passage of the 1964 Civil Rights Act.

The FCC often appears to take forever to focus on civil rights, primarily because the FCC receives relatively little oversight from the White House, the Congress and the mainstream press. Although the FCC and NTIA oversee one sixth of the economy, they often operate well below the political and policy radar screen.

The higher one climbs the mountain of government organization, the more difficult it becomes for administrators to brush civil rights under the rug. Cabinet status is the gold standard for civil rights protection. The heightened congressional, executive and journalistic oversight accompanying cabinet status ensures that relatively powerless and sparsely funded civil rights and public interest organizations cannot be ignored.

Civil rights is hardly the only reason to reconsider the structure of telecom policymaking. Certainly telecommunications is as vital to our democracy, culture, trade balance and economic growth as agriculture, energy and transportation – all of which are quite properly overseen at the cabinet level. If there were a Department of Telecommunications, it would be more difficult for any administration not to have a coherent, effective and globally competitive national broadband policy. Furthermore, merger review could be performed in a single venue much faster and with more consistency, thus removing disincentives for efficiency-producing mergers and enhancing the likelihood of more spinoffs of assets to minorities, while also providing higher visibility and thus discouraging anticompetitive mergers.

A single, high-level administrator for telecom policy was famously proposed by Henry Geller in 1989 in his Benton Foundation White Paper “The Federal Structure for Communications Policy” and by Harry M. “Chip” Shooshan in his 1998 article “A Modest Proposal for Restructuring the Federal Communications Commission” (50 Fed.

Comm. L.J. 637). Both scholars recognized that to ensure the insulation of First Amendment policy from political pressure, a streamlined FCC focusing on matters affecting content should continue to operate. Geller suggests the model of an independent FCC within an administrator's office, much as the Federal Energy Regulatory Commission ("FERC") operates within the Department of Energy.

Several blue-ribbon commissions have examined telecom policy structure and FCC operations. In living memory, the most thorough top-to-bottom reviews were conducted by the 1949 Landis Commission and the 1971 Ash Council. Certainly the nation's evolution since 1971 from an industrial to an information economy justifies a comparable top-to-bottom examination of telecom policymaking, including the optimal locus of policy creation and policy implementation.

Even if the structure of government remains as it is now, much could be done to reform the way the FCC formulates telecom policy and ensure that the agency's decisions are expeditious, are respected by courts of appeals, and are attentive to often-overlooked interests such as minority and female ownership diversity. Thus, a Blue Ribbon Commission on Telecom Policymaking could consider these questions about the FCC and its operations:

What are the optimal:

- Number of FCC commissioners
- Number of legal assistants to each commissioner, and their specializations
- Length of a commissioner's term
- Length of post-commissionership preclusion from employment in communications

Which of the following internal reforms are desirable and realistic:

- Revision of the Sunshine Act preclusion on discussions among the commissioners by allowing intra-commission dialogue subject to transparency
- Strengthening of requirements for the level of detail provided in lobbyists' ex parte letters
- Imposing shot clocks for action on petitions for rulemaking
- Minority/Female Impact Statements attendant to most notices of proposed rulemaking ("NPRMs") and final reports and orders ("R&Os") (see §III(A)(6) supra)



- More frequent use of Section 403 for fact-finding on critical matters
- Holding trial-type formal hearings before commissioners or ALJs, including oral arguments in rulemaking proceedings
- Having commission decisions assigned to and prepared by a commissioner
- Holding commission meetings at which cases are argued by advocates, and discussion is had among the commissioners
- Public discussion and voting by the commissioners on non-ministerial decisions, rather than voting on “circulation.”

These are only a few of the questions that should be on the agenda of a Blue Ribbon Commission on Telecom Policymaking. The next administration should empanel such a Commission immediately after the November election.

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## About MMTC

The Minority Media and Telecommunications Council is a nonprofit membership organization, founded in 1986 to promote and preserve equal opportunity and civil rights in the mass media and telecommunications industries. As the nation's leading advocate for minority advancement in communications, MMTC serves the public interest by participating in rulemaking proceedings before the Federal Communications Commission and in communications policy cases in the federal courts of appeal and the U.S. Supreme Court. MMTC has represented 62 national organizations *pro bono* in selected cases and proceedings. MMTC also trains minority lawyers and law students in FCC practice through its Earle K. Moore and John W. Jones Legal Fellowship Programs. Since 1997, MMTC has operated the nation's only full-service, minority-owned media brokerage.

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