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

In the Matter of	)	
	)	
2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)))))	MB Docket No. 18-349

To The Commission

COMMENTS OF THE MULTICULTURAL
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Summary

The Multicultural Media, Telecom and Internet Council ("MMTC")[1] respectfully submits these Comments in response to the FCC's Notice of Proposed Rulemaking[2] ("2018 Quad NPRM").

In Section I, we set out the paucity of minority and women's broadcast ownership.

Section II explains that it was and continues to be "state action" by the FCC in the past that is reflected in the paucity of minority ownership today. For 50 years, and in some respects continuing to this day, the Commission deliberately and systematically kept minorities almost entirely out of broadcasting. Some of the Commission's actions continue to this day through its failure to remedy the lingering effects of its past history.

In Section III, we explain why the local radio ownership rules should not be relaxed. Relaxation at this time would discourage minority ownership, destroy the recently-adopted incubator plan, and visit great harm on minority broadcasters' heritage technology, AM radio.

Section IV addresses MMTC's proposal to extend the Cable Procurement Rule to broadcasting. We demonstrate that the extension of the Rule is authorized by statute, is without constitutional impediment, and has been profoundly beneficial to minority cable entrepreneurs as well as the cable industry itself. Further, we explain why the extension of the Rule is cost-

[1] These Comments and all subsequently filed supplements and reply comments reflect the institutional views of MMTC, and are not intended to represent the individual views of each of MMTC's officers, directors and members.

MMTC expresses its warm appreciation to former FCC General Counsel Henry Geller for his guidance on Sections II and IV of these Comments.

[2] *See* 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC 18-279 (Dec. 13, 2018) ("2018 Quad NPRM"). At the outset, we note that in this Quadrennial, unlike in earlier ones dating to 2008, Docket 07-294 (Diversification of Ownership) has been omitted from the caption without explanation. The NPRM does include several diversity-related items, so we flag this omission as a possible ministerial error to be addressed.

benefit justified, and why the ostensibly small size of the broadcasting industry does not justify further inaction.

Finally, Section V addresses three mathematical concepts for measuring and advancing diversity and competition: tradable diversity credits, the source diversity formula, and the tipping point formula. For 15 years, MMTC has had, before the Commission, a request to have the agency's economists consider these concepts. With the recent establishment of the Office of Economics and Analytics, the Commission is well-positioned to respond to our request.

The rudimentary methodology the Commission uses to measure competition and diversity is little more than "station counting." In presenting a challenge to create an "HHI for diversity" that would more accurately measure and incentivize diversity, Chairman Powell had the right approach. The Office of Economics and Analytics is the ideal entity to complete Chairman Powell's quest for innovation and analytical precision.

I. Minority And Women Broadcast Ownership Is Embarrassingly Low.

In 2015, the year for which the most recent Form 323 data is available, minority control (African American, Hispanic, Asian American and Native American) stood at 4.5% of the nation's full power commercial radio stations and 7.1% of the nation's full power commercial television stations.[3] The corresponding statistics for women were 8.4% for commercial radio and 7.4% for commercial television.[4] The levels of minority and women equity holdings are

[3] Media Bureau, Industry Analysis Division, Third Report on Ownership of Commercial Broadcast Stations: FCC Form 323 Ownership Data as of October 1, 2015 (May 2017) ("Third Ownership Report") at 3-4. Minorities constitute approximately 38.7% of the nation's population as of July 2016. *See* Quick Facts – Race and Hispanic Origin, United States Census Bureau (last accessed April 28, 2019).

[4] Third Ownership Report, supra n. 3. Women constituted approximately 50.8% of the nation's population as of July 2016. See https://www.census.gov/quickfacts/fact/table/US/SEX255217#SEX255217 (last acceessed April 28, 2019).

undoubtedly far lower, as are the percentages of industry asset value due to the relatively smaller size of most minority and women owned stations.

II. For 50 Years, The FCC's Own Actions Depressed Minority Ownership. Now The Time Has Come For The Agency To Correct Itself.

Minorities have never lacked the interest, entrepreneurial ability, or the media skill sets needed to enter the broadcasting industry. They lacked access to capital, which was largely a byproduct of two additional, scarce assets that were controlled by the FCC through its gatekeeper role in broadcast licensing: access to spectrum and access to opportunity. A 2018 law review article by MMTC President Emeritus David Honig outlines how the FCC, deliberately and systematically kept minorities almost entirely out of broadcasting for 50 years; some of the Commission's actions continue to this day through its failure to remedy the lingering effects of its past history. Here are some of the article's key findings:

> In the mid-1950s, it was no more difficult to publish a newspaper than to operate a radio station. Yet, by 1950, minorities owned zero radio stations but had owned, at various time intervals since the early 19th Century, over 3,000 (mostly weekly and a few daily) newspapers, as well as several magazines. That feat was made possible by the fact that there was no "Federal Newspaper Commission" acting as a gatekeeper to confer licenses on preferred customers and deny licenses to second-class citizens ….
>
> Here are the six specific devices the FCC used to maintain segregation of the airwaves:
>
> - The FCC and its predecessor, the Federal Radio Commission (FRC) outright refused to grant radio station licenses to African Americans and Jewish Americans because of their race and religion, until World War II;
> - The FCC used its licensing power to facilitate the schemes of segregated state university systems to exclude minorities from equal access to broadcast education;
> - The FCC licensed and relicensed open segregationists, thereby preventing minorities from gaining a foothold in commercial broadcast employment for generations;

- The FCC used absurdly stringent financial qualifications requirements to keep minorities out of the comparative licensing process; and applied broadcast experience, past broadcast record, and ownership of a daytime-only station as preferential licensing criteria sufficient to overcome minority status as comparative factors [prior broadcast experience being a suspect criterion when the FCC had refused to grant broadcast licenses to minorities];

- The FCC repeatedly ignored a court decision that required it to take minority ownership impact into account when considering technical radio allotment and allocation issues; and

- The FCC adopted a broadcast equal employment opportunity rule, but then failed to meaningfully enforce it[5] or even measure whether it has had any impact.[6]

The Third Circuit has thrice warned the FCC to stop refusing to consider remedial steps that could help eliminate the present effects of past (and sometimes present) discrimination.[7] Thus, the agency risks that the Court—like the Supreme Court in *Green v. New Kent County Board of Education*[8]—will declare that judicial supervision of the agency must be maintained until some equivalent of the education policy's "unitary status" is achieved – *i.e.*, until any disparities no longer owe their existence to state action.[9]

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[5] A recent bright spot was the Commission's 2018 decision to grant MMTC's proposal to relocate broadcast EEO enforcement from the Media Bureau to the Enforcement Bureau. *See Equal Employment Opportunity Audit and Enforcement Team Deployment*, Order, FCC 18-103 (rel. July 24, 2018).

[6] David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage it Caused*, 12 SOUTHERN JOURNAL OF POLICY AND JUSTICE 44, 45-48 (2018) (footnotes omitted).

[7] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*"), *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*"), and *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) ("*Prometheus III*").

[8] 391 U.S. 430 (1968) ("*Green*").

[9] *See Green*, 391 U.S. at 440 (stating that "school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system'").

III. The Local Radio Ownership Rule Should Not Undergo Major Changes.

A. New voices—not increased consolidation, less new entry, and less minority ownership—are the answers to local advertising competition from Facebook and Google.

The 2018 Quad NPRM asks several questions regarding consolidation, caps and subcaps. These included (partly paraphrased):

- [H]ave subcaps promoted market entry?
- Are subcaps still necessary given the Commission's efforts to revitalize AM radio? In other words, has the disparity between the FM and AM services been narrowed to an extent that [the Commission] could consider relaxing or eliminating the subcaps?
- Since its 2010/2014 ownership review, the Commission has granted over 1,000 applications to acquire and relocate FM translators to rebroadcast AM stations. Should the expanded and improved coverage of those AM stations affect our analysis of subcaps?
- What would be the likely effects of removing FM limits in most markets? What would be the likely effects of allowing unlimited AM ownership across all markets? Would such action, on balance, promote competition by enabling owners to increase their assets, or would it harm competition and/or ownership diversity by driving smaller broadcasters, including minority and women owners, from the marketplace?[10]

Lifting the local ownership caps or subcaps would benefit only a tiny handful of broadcasters which, over the years, have been able to acquire enough stations in a market to bump up against the local ownership cap or the FM subcaps. Table 1, below, sets out the numbers of radio groups bumping up against the eight-station cap and five-station subcaps (or that are only one station away from bumping up against the caps or subcaps) in the top 10 markets.[11] As can be seen, in these large markets where the need for new voices is the greatest, there are only 19 groups bumping up against the five-station FM subcap, two groups bumping up against the five-station AM subcap, and two groups bumping up against the eight-station cap:

[10] 2018 Quad NPRM at 6-17 ¶¶9-39.

[11] Data was drawn from BIA, Investing in Radio 2018 (First Edition). *See* 47 CFR §73.3555(a)(1)(i) (8 station cap and 5 station subcaps).

Table 1: Cap and Subcap Attainment by Radio Groups in the Top 10 Markets (2018)

Nielsen Rank (2018)	Market	Groups at the 8 Station Cap	Groups at 7 Stations (1 below Cap)	Groups at the 5 Station FM Subcap	Groups at 4 FM Stations (1 below Subcap)	Groups at the 5 Station AM Subcap	Groups at 4 AM Stations (1 below Subcap)
1	New York	0	1	1	3	0	0
2	Los Angeles	1	0	2	3	1	0
3	Chicago	0	3	3	1	0	1
4	San Francisco	0	3	2	2	0	2
5	Dallas – Ft. Worth	0	1	2	3	0	0
6	Houston – Galveston	0	0	0	3	0	0
7	Washington, D.C.	0	0	2	1	0	0
8	Atlanta	0	1	1	3	1	0
9	Philadelphia	0	1	1	2	0	0
10	Boston	1	0	3	0	0	0
Total	**---**	**2**	**10**	**19**	**24**	**2**	**3**

A benefit for these few companies would come entirely at the expense of others who entered the industry late or have yet to enter—including nearly all of the nation's minority, women, and aspiring broadcasters.

The industry urgently needs a steady influx of new entrants with programming skills tailored to meet the needs of our rapidly growing and diversifying population.[12] Greater consolidation would suppress the development of the new voices the industry needs the most for its survival in the face of new competition. Although broadcasters have correctly recognized that

[12] *See, e.g.,* Ernesto Aguilar, Community Broadcaster, Diversity Later, Radio World, June 22, 2018), available at https://www.radioworld.com/columns-and-views/community-broadcaster-diversity-later (last accessed April 20, 2019).

these platforms are competing with radio for advertising dollars,[13] the solution is not more consolidation. The solution is more diversity, more new entry by innovators, and more new voices. As the publisher of Radio Ink Magazine and the CEO of iHeartMedia have pointed out, huge edge companies do not care whether radio stations in a market are owned by one company or by 100 companies. As the 2018 Quad NPRM notes:

> The Chairman of Radio Ink Magazine [explains] that allowing radio broadcasters to buy more stations would not affect their ability to compete with Internet services like Google and Facebook. He claims that advertisers do not view radio and Internet services as comparable outlets because their approaches to advertising are "so utterly different." He attributes any loss in radio revenues to the failure of station owners to persuade advertisers that the distinctive benefits of radio advertising can enhance and supplement online advertising campaigns. Likewise, iHeartMedia Inc. asserts that "the size of individual station portfolios has little, if any, relationship to the total dollars that an advertiser allocates to free, over-the-air broadcast radio." iHeartMedia touts the resilience of the broadcast radio industry and observes that radio remains the preferred audio medium for entertainment and local news and information because "its focus is local and its impact is personal."[14]

MMTC agrees with iHeartMedia, and with Radio Ink Chairman Eric Rhoads, that the *successful* answer to the competitive challenge presented by online media must be found in innovation and local service—not in more consolidation. As the Commission has long recognized, the "most potent sources of innovation often arise not from incumbents but from new entrants."[15]

A recent Radio World commentary by African American broadcaster Glenn Cherry and Latino broadcaster Ronald Gordon laid out the stakes about subcaps:

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[13] *See, e.g., Ex Parte* Letter of Connoisseur Media, LLC and Townsquare Media, Inc., November 13, 2018 ("digital competitors like Google and Facebook have significantly affected the local advertising markets, capturing significant shares of local advertising dollars in every radio market.")

[14] 2018 Quad NPRM at 10 ¶19.

[15] *2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, *Report and Order and Notice of Proposed Rulemaking,* 18 FCC Rcd 13620, 13632 ¶40 (2003), *aff'd in part and remanded in part, Prometheus I*, 373 F.3d at 372.

In radio, getting rid of the caps and the FM subcap would drive out the "mom and pop" owner/operators who are the lifeblood of our industry. The minorities and women who broadcast to those hungriest for radio. The foreign language and religious broadcasters. The AM specialists we rely on for local news and information, especially during storms. The folk who embody hyper-local service: our industry's strongest response as we compete against newer, globally programmed, flavor-of-the-day technologies.

Both of us are lifetime minority broadcasters and AM specialists and we would want to see the next generation follow behind us – to have the opportunity to get into the industry and prove their mettle.

Horizontal deregulation – greater FM ownership – would make that dream all but impossible. It would do that by eviscerating AM stations' asset value and marketability, and even repair-ability. And this at a time when access to capital for small and minority broadcasters is at its lowest ebb in years: no tax certificate, no incubator program, no functional distress sale policy anymore. . . .

How would buying an additional four or five radio stations in a market allow a broadcaster to take on Google or Facebook? Individually, these big tech companies dwarf the annual revenues of the entire radio industry combined. How exactly would gutting the radio ownership rules drive advertising money away from tech and into radio's pocket? To the advertiser, what difference does it make who owns the station? Horizontal deregulation just shuffles the deck in favor of the big guys; it does nothing to improve radio's ability to compete with big tech.

This doesn't mean that there is <u>no</u> deregulation that can help the industry. Just not <u>horizontal</u> consolidation.

<u>Vertical</u> deregulation might be a good thing. Done thoughtfully, it could help consumers, help the industry, and not harm diversity of voices and ownership. For example, the radio-TV crossownership rule and the radio-newspaper crossownership rule are probably gone, subject only to an appeal in the Third Circuit. Few will notice.

Finally, thoughtful, careful engineering deregulation could improve our coverage without degrading each others' signals. The FCC can facilitate move-ins by getting rid of the rural radio rule. It can adopt geo-targeting, which allows a station to broadcast different program streams directionally from the same antenna, thus allowing a station to serve different audiences. It is already considering the Wesolowsky-MMTC "C4 Petition," which would allow hundreds of Class A FMs to double their power. And, perhaps, it should consider allowing translators to originate programming. Also, if AM associated translators were allowed to have HD channels, they could broadcast multiple channels like other FM stations are capable of doing.

> These are the kinds of creative solutions we need to be thinking about that could really rejuvenate our industry and give it more listenable, competitive signals to serve the racially and language-diverse populations that are hungry for radio.[16]

B. Relaxing the local ownership caps or the AM or FM subcaps would spell the end of the incubator program before it has a chance to succeed.

The industry's vitality and growth depend greatly on the maintenance of a regulatory environment that brings new voices to the airwaves. One especially promising source of these new voices could be the Commission's incipient incubator program.

This program, the brainchild of the National Association of Black Owned Broadcasters (NABOB) in 1990, was adopted by the Commission on August 3, 2018[17] in a mostly promising form.[18]

The incentive driving incubation will be the opportunity for the incubating entity to secure a waiver of the local ownership caps or subcaps. The program will generate incubators as long as the basic premise of the program remains operative—*i.e.*, that companies wishing to create incubators are bumping up against the cap or subcaps. The Incubator Order notes that "[t]he reward for successfully incubating a radio station under the Commission's recently

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[16] Glenn Cherry and Ronald Gordon, The Three Types of Radio Deregulation, Radio World, July 25, 2018, available at https://www.radioworld.com/columns-and-views/the-three-types-of-radio-deregulation (last visited April 22, 2018). Ronald Gordon is the Chairman and CEO of ZGS Communications, which owned AM stations in Tampa, FL and Laurel, MD. In 2017, the company sold all of its AM stations to minority owner/operators. Glenn Cherry is the Chairman and CEO of Redemption Strategies Broadcasting, which owns AM stations in Greenville, SC and Daytona Beach, FL.

[17] *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Service,* Report and Order, 33 FCC Rcd 7911 (2018) ("Incubator Order").

[18] One major error is being litigated in the Third Circuit. *See Multicultural Media, Telecom and Internet Council and National Association of Black Owned Broadcasters v. FCC*, No. 18-3335 (consolidated with *Prometheus Radio Project v. FCC*, No. 17-1107 *et al.* (3d Cir., briefing in progress)) (raising the question of whether the "comparable markets" definition was rational and properly noticed). The matter is now fully briefed. Assuming that the Court directs the Commission to correct its error, the program appears likely to bring about the creation of well-trained, well-financed new entrants, including minority and women owned ventures, in major markets.

adopted program is a waiver to exceed the applicable ownership limit by one radio station, and participants may use no more than one reward waiver per market."[19]

Consequently, an increase in the subcaps, or caps, would immediately remove *any* incentive for a broadcaster to create an incubator program. As can be seen from Table 1 (p. 6 above), if the cap were increased from eight to nine stations in large markets, or if the subcaps were increased from five to six stations, it could be quite some time before any radio group would be likely to bump up against the new cap or subcap. For years, there would be virtually no incentive for incubation.

MMTC's brokerage (MMTC Media and Telecom Brokers) has received 12 inquiries from companies wishing to be incubated, but only two inquiries from companies wishing to incubate others. Each of those two companies have indicated that they would incubate *only* if they need and could secure FM subcap waivers. If the caps or subcaps were raised, we know of no company that would create a single incubator.

What this means is that lifting the caps or subcaps will effectively kill the incubator program just at the time when the industry needs the incubator program the most for revitalization and diversification, and just at the time when the Commission is relying on that program as its preferred method for meeting its responsibility to advance diversity in broadcast ownership.

C. Relaxing or eliminating the subcaps, or reliance on translators to supplement AM stations' coverage, would disadvantage minority broadcasters.

In 2017, the Commission laudably arranged for AM station licensees to secure FM translators to supplement their AM coverage. Today nearly 2,000 AM stations have

[19] Incubator Order, 33 FCC Rcd at 7937-39 ¶66 and 7941 ¶70.

translators.[20] Yet over 2,000 more AM stations still need a translator, since AM listenership is increasingly undervalued by radio audiences.[21] Presently, most media brokers (such as MMTC Media and Telecom Brokers) would value a typical AM station without cash flow at or below $0.40 per pop within its 0.5 mV/m contour, whereas a good Class A FM is valued at $2.00 per pop within its FCC-defined 60 dbu contour. This huge disparity speaks to the way the marketplace regards AM and FM stations' values.

Thus, at least until virtually all AM stations have translators, it will be premature for the Commission to rely on translator coverage to save AM stations if the caps or subcaps were lifted.

Further, if the subcaps were lifted, group owners would unload their AM stations and gather up as many FMs as are allowed. Therefore we agree with Salem Media Group that elimination of the subcaps would be devastating for AM radio, because the immediate result would be the migration of much of the dominant radio groups' programming to the FM band, after which "AM traffic will greatly diminish and the value of AM radio will collapse."[22] *See also* Comments of CRC Broadcasting Company, Inc. ("relaxing the subcaps as contemplated in the *2018 NPRM* would undo all the advances that the FCC has made in the *AM Revitalization* proceeding to enable AM broadcasters to better compete in their radio markets.")[23]

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[20] FCC Press Release, Final FM Translator Window for AM Station Closes (February 2, 2018), available at https://www.fcc.gov/document/final-fm-translator-window-am-stations-closes (last visited April 25, 2019).

[21] Letter of NABOB to Hon. Ajit Pai, MB Docket 14-50 *et al.* (April 7, 2017) at 3 – 5 ("NABOB Letter").

[22] *Ex Parte* Letter of Salem Media Group, MB Docket 18-249, June 29, 2018. It should not go unnoticed that the AM band is the bedrock technology for minority new entrants *and* for religious broadcasters. The interests of these two often-overlapping constituencies are closely aligned. They sought entry at about the same time in history, each for the purpose of public service to underserved communities, and they faced similar technical obstacles. Our constituencies speak in unison in this proceeding.

[23] Comments of CRC Broadcasting Company, Inc., MB Docket 18-349 (February 7, 2019) at 3–4.

Finally, we agree with NABOB that:

> Elimination of the rule is not supported in the record, would undermine the Commission's efforts to revitalize AM radio, and would have a disproportionately negative competitive impact on African American and other minority owned AM radio stations . . . .
>
> [A]s you [Chairman Pai] and the Commission have recognized in the *AM Revitalization* proceeding, AM continues to be in distress . . . .
>
> Nothing has changed with respect to the technological and marketplace differences that disadvantage AM radio with respect to FM radio . . . .
>
> Elimination of the Subcap rule would undermine all of the Commission's efforts to revitalize AM radio. The requests to eliminate that rule must be denied.[24]

IV. The Cable Procurement Rule Should Be Extended To Broadcasting

In the 1992 Cable Act, Congress adopted the cable procurement requirement to "encourage minority and female entrepreneurs to conduct business with all parts of its operation; and . . . analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program."[25] To implement this statutory requirement, the Commission adopted the Cable Procurement Rule in 1993. It provides that a cable system must "[e]ncourage minority and female entrepreneurs to conduct business with all parts of its operation." The Rule explains that "[f]or example, this requirement may be met by: (1) Recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests."[26]

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[24] NABOB Letter at 1- 5.

[25] 47 U.S.C. §554(d)(2)(E)-(F).

[26] 47 CFR §76.75(e).

Thus, the Cable Procurement Rule does for cable procurement essentially what the cable and broadcast EEO Rules do for employment: it provides for recruitment and transparency of opportunities broad enough so that qualified minorities and women will *learn of them*. Compliance with the Cable Procurement Rule can be accomplished with online postings and community-group opt-in e-mails—the same way compliance is accomplished under the broadcast and cable EEO Rules.

The 2018 Quad NPRM asks several questions about MMTC's proposal to extend the Cable Procurement Rule to broadcasting. We will address each question below.

A. Is the Commission authorized to extend the rule to broadcasting albeit the statute only addresses cable?

47 U.S.C. §§154(i), 303(f), (g) and (r), 307, 308, 309(d), (e), and (k), and 310[27] each provide ample authority for procurement obligations for broadcasters, for the same reasons that rules barring and preventing discrimination in radio employment,[28] broadcast advertising nondiscrimination,[29] and broadcast transactional nondiscrimination[30] are authorized, albeit none is specifically mentioned in the statute. For example, EEO for radio is authorized by 47 CFR §73.2080 *et seq.,* even though 47 U.S.C. §§334 and 554(d)(22)(E) only specifically mention television and cable EEO.

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[27] *Compare, e.g., Nondiscrimination in the Employment Practices of Broadcast Licensees,* Report and Order*,* 18 FCC2d 240, 245 ¶10 (setting out jurisdictional provisions in the Act).

[28] *See id.* 18 FCC2d at 240-44 ¶¶1-9.

[29] *See Diversification of Ownership In the Broadcasting Services, 2006 Quadrennial Regulatory Review*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5941-42 ¶¶49-50, *erratum,* 25 FCC Rcd. 3489 (2008) (not subsequently codified in the CFR) (banning racial discrimination in the placement of broadcast advertising).

[30] *See id., 23 FCC Rcd at* 5939-40 ¶¶40-42 (codified at 47 CFR §73.2090) (banning racial discrimination in broadcast transactions).

B. Does strict scrutiny apply?

The statute does not classify or treat minorities or women differently than others; nor does the Commission's implementation of the statute do so. Thus the statute and its implementation are reviewable under the "rational basis" test. All the statute and the Cable Rule do is put an end to the historic *exclusion* of minorities and women from procurement opportunities by ensuring that procurement outreach is broad enough to reach all qualified potential applicants, including minorities and women. That can be done, for example, through widely accessible online postings of procurement opportunities—as is the case for employment vacancies—and by inviting community groups, including but not limited to groups serving minorities and women, to be added to the company's procurement e-mail list. These steps—long embraced unanimously by the Commission in the EEO context, and opposed by no one—do not require a broadcaster to *prefer* minorities and women, *e.g.*, through a quota or carve-out, or by no longer informing non-minority men of procurement opportunities. This type of race-neutral initiative appears to be what Justice Scalia had in mind in his 1989 opinion in *City of Richmond v. Croson*.[31]

C. Is there data showing the impact of the Cable Procurement Rule on minority and women procurement in cable?

There is no precise quantitative data, because the Commission, which oversees compliance with the Rule, never undertook to gather the data. Fortunately, in this instance, precise data is unnecessary since the evidence is overwhelming that the benefits far outweigh the costs. We provide that in the attached declarations of former Congressman Edolphus Towns,

[31] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Statement of Justice Antonin Scalia ("[a] State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race . . . .Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.")

one of the co-authors of the Cable Procurement Rule, and Michael Dennis, the CEO of a minority-owned small business that has been a beneficiary of the Rule. As these witnesses demonstrate, before the Cable Procurement Rule went into effect in 1993, cable procurement was largely a "good old boy" scheme. Few minority or women owned companies got work digging up streets, installing satellite dishes, or operating call centers. That changed dramatically after 1993. Congressman Towns explains:

> One of my greatest concerns throughout the 1970's and 1980's was the then-growing cable industry's almost complete failure to engage minority and women owned small businesses in the construction, operation, and maintenance of cable facilities such as satellite dishes and fiber networks. Several diverse companies throughout the nation had the capability of serving the industry competitively by providing these services. However, far too often, cable system operators bid out their contracts on a single-source basis to their friends in the "old boy network." These practices were not only discriminatory, they were anti-competitive because they tended to drive up the prices of services – a cost that was then passed on to cable customers.
>
> Respected civil rights organizations, including the Minority Media and Telecommunications Council (MMTC – now the Multicultural Media, Telecom and Internet Council), the NAACP, and the National Urban League asked my colleague on the Communications Subcommittee, Representative Bobby Rush of Chicago, and me, if something could be done to ensure that minority and women small businesses could be made aware of contracting opportunities in cable as those opportunities arose.
>
> When the 1992 Cable Act was being written, Congressman Rush and I saw an opportunity. We were successful in writing into the legislation four lines of text requiring cable companies to "encourage minority and female entrepreneurs to conduct business with all parts of its operation[.]" This language, the Cable Procurement Requirement, is codified at 47 U.S.C. §554(d)(2)(E)-(F). Since it is not self-executing, in 1993 the FCC adopted regulations implementing its language; those regulations are now known as the Cable Procurement Rule and are codified at 47 CFR §76.75(e).
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> In the years after 1993, I have been heartened to meet the principals of several minority and women owned small businesses that had learned of cable contracts thanks to the Cable Procurement Requirement, and had submitted successful bids. Our four lines of legislative text generated tens and probably hundreds of millions of dollars for the payrolls of minority and women small businesses, thereby building the middle class, reducing the cost of cable operations, reducing cable bills, and enhancing the competitiveness of the cable industry.

> I am hopeful that the FCC will use the ample authority, which Congress has provided in the Communications Act, to adapt the Cable Procurement Rule to broadcasting and all other FCC-regulated technologies.

And as telecom and cable contractor Big Green Group's CEO, Michael Dennis, reports:

> Every year BGG does between $2M and $4M in contracting with cable MSOs. We are able to do this much business with the cable industry because of the FCC's Cable Procurement Rule. Adopted in 1993, the Rule requires cable systems to publicize major contracting opportunities widely enough to enable qualified contractors, such as our company, to learn about them and bid for the contracts on an equal opportunity, competitive basis. Before 1993, companies like mine seldom had these opportunities to bid, compete, and grow.
>
> If the FCC adapts the Rule so that it also applies to broadcasting, our company would look forward to learning of opportunities to bid on such broadcast contracts as tower construction and tower and satellite dish installation and maintenance.

The main benefit of extending the Cable Procurement Rule to broadcasting is that minority and women owned service providers in the broadcasting industry would then be able to participate in a marketplace that is much less likely to be tainted with the stench of discrimination.

While we are on the benefits side of the cost-benefit equation, there are two other benefits that should be taken into account:

First, the cable company would pay less for goods and services when they are put out for bidding by a wider universe of potential bidders. When there are more bids, including bids from new entrants hungry for work and willing to underbid incumbents, the winning contractor will deliver greater value at a lower price. This benefits the cable company, and ultimately its customers.

Second, by providing opportunity on a nondiscriminatory basis, the Commission would avoid contributing to the well-documented and enormous cost to society imposed by the discrimination that brings about the underutilization of minorities' and women's entrepreneurial mettle and employment capabilities.[32]

D. What would be the cost of extending the Cable Procurement Rule to broadcasting?[33]

The cost of extending the Rule to broadcasting would be virtually negligible:

First, the expense incurred by the minority or woman owned contractor to apply for contracts that she learns about is likely to be far outweighed by the business opportunity it creates.

Second, the cost to the broadcaster of posting a procurement opportunity online, and e-mailing it to community groups is no greater than the cost of sending the same notice only to a restricted "old-boy" network of existing contacts and relationships. Thus the marginal cost of compliance is zero.

Third, to be sure, there is a cost to the FCC associated with regulation. But in this instance it is negligible. The cable procurement forms are easily adaptable to broadcasters and (as is already done for cable) they can be transmitted in tandem with EEO transmissions to

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[32] When qualified minorities are unable to fully deploy their innovative and entrepreneurial capital in the marketplace, the national economy suffers. *See* Danielle Davis, The Economic Cost of Discrimination, MMTC (2018), available at https://www.mmtconline.org/wp-content/uploads/2019/04/Andrew-Brimmer-and-the-Economic-Costs-of-Discrimination-042619.pdf (last visited April 26, 2019) (providing citations documenting the economic cost to society of racial discrimination in employment). In 1995, former Federal Reserve Board Member Andrew Brimmer famously estimated the cost of discrimination against African Americans to represent 2.15% of GNP. *See* Andrew F. Brimmer, THE ECONOMIC COST OF DISCRIMINATION AGAINST BLACK AMERICANS 11-29 (1995).

[33] Although we are responding to the Commission's request for a cost-benefit analysis (CBA) analysis here, there are other factors to consider given broadcasters' licensed use of the public airways. For example, when Congress, in 1964, tried to weigh the costs and benefits of adopting Title II of the 1964 Civil Rights Act (public accommodations), Title VI (school and other governmental program desegregation), and Title VII (employment), there were disputes among economists on both sides. But ultimately it wasn't about the costs and the benefits, it was about right and the wrong, and the nation's values. That's the case here too. Broadcasters enjoy the protected use of the public airwaves and should be required to "do the right thing" by broadly disseminating contracting opportunities.

licensees. There will be a modest initial fixed cost associated with explaining the new rule to the broadcasting industry. Perhaps one new fulltime staff equivalent would be necessary to administer this new rule. A high five-figure or low six-figure line item in the FCC's budget is *worth it* to ensure that America's most influential industry practices nondiscrimination in procurement.[34]

E. What is the "feasibility and utility" of extending the Cable Procurement Rule to broadcast procurement?

The Commission asserts that:

> [T]here are significant differences between the cable industry and the broadcast industry, and we seek comment on the feasibility—and utility—of imposing a Section 76.75(e)-type requirement on the broadcast industry. For example, the cable industry requires the construction and maintenance of a significant physical plant, unlike that required for broadcasting. As such, the cable industry purchases goods and services on a much larger scale than the broadcast industry, as cable operators continuously build and upgrade their distribution network.[35]

The Commission seems to question whether it should adopt a procurement nondiscrimination program for broadcasters on the basis that America's broadcasting industry's contracting portfolio is so small that such a program might not be "feasible."[36] Broadcasters

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[34] *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices*, MO&O and NPRM, 13 FCC2d 766, 770-71 (July 3, 1968) (adopting the original EEO rule; declaring that "[a] refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public", and citing a statement by Assistant Attorney General and Chief of the Civil Rights Division Stephen J. Pollak (the "Pollak Letter", in Appx A, p. 4), which concluded that "[b]ecause of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.")

[35] 2018 Quad NPRM at 38 ¶100.

[36] In 1975, under Chairman Wiley's leadership, the Commission unanimously designated for hearing a broadcaster's renewal applications in part because the licensee, in its EEO program, promised to conduct broad outreach only for positions it deemed "suitable" or "feasible" for minority applicants. *Rust Communications Group, Inc. (WHAM and WHFM(FM), Rochester, NY)* (MO&O), 53 FCC2d 355, 363 ¶40 (1975).

outsource such things as tower construction and maintenance, satellite dish installation and maintenance, advertising, promotion, accounting, legal services, grounds-keeping, and creative content development. Thus, broadcasters engage in meaningful procurement worthy of addressing barriers to racial and gender equity. And the fact that broadcasters are licensed by the FCC suggests that the FCC should have a greater interest in ensuring diversity in broadcast procurement.

In 1964, the Supreme Court made clear its distaste for the argument that there are but "insignificant" impacts on interstate commerce flowing from racial discrimination in public accommodations at a restaurant.[37] These "insignificant" impacts add up. If discrimination is ever to be eliminated, each industry, however large or small, must do its part. Certainly broadcasting, whose influence on society is magnified far beyond its immediate size, has a responsibility to lead other industries.[38]

V. Tradable Diversity Credits, The Source Diversity Formula, And The Tipping Point Formula Should Be Considered By The Office Of Economics And Analytics For Measuring And Advancing Diversity And Competition.

Before the Commission for its consideration are three mathematical formulas that MMTC and others proposed approximately 15 years ago for the purpose measuring and advancing diversity and competition: tradable diversity credits, the source diversity formula, and the tipping point formula. These three formulas are:

1. **Tradable Diversity Credits**, which MMTC put forward as a state-of-the-art method of advancing diversity through the operation of market forces. This

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[37] *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (quoting *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942), stating "[t]hat [the] appellee's own contribution to the demand for wheat may be trivial by itself, [but it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.")

[38] *See* Pollack Letter, discussed at n. 34 *supra.*

system of "coins" would foster ownership diversity in a manner somewhat similar to the method by which pollution credits foster clean air.

2. **The Source Diversity Formula**, which attempts to measure the level of consumer welfare derived from viewpoint diversity in the broadcast market.

3. **The Tipping Point Formula**, which identifies transactions whose consummation would result in irreversible consolidation irrespective of whether the transaction complies with the numerical "station counting" tests in the local ownership rules.[39]

As the Commission recognizes,[40] the threshold issue of race-consciousness would need to be addressed at the outset. While the Commission would be on safe grounds constitutionally in measuring and thus being aware of these concepts' impact on minority ownership,[41] the concepts' implementation would need to employ race-neutral definitions and measurements, much as the radio incubator program did in defining eligible entities.[42]

But as the agency's first step, our three basic concepts do not lend themselves to development in a notice-and-comment rulemaking. What these concepts need at the outset is not legal analysis but economic analysis, because each concept immediately presents questions of

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[39] The history and purposes of these formulae are given in the 2018 Quad NPRM at 38-45 ¶¶101-121.

[40] *Id.* at 40 ¶105 (expressing concern that it could be difficult to demonstrate that minority status qualifies as a factor in determining whether an entity is socially and economically disadvantaged.)

[41] *See Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 706 (2007) (Kennedy, J.) (suggesting that a school district may pursue its diversity goals without race-based classifications through methods that include "tracking enrollments, performance and other statistics by race.")

[42] *See* Incubator Order, 33 FCC Rcd at 7917-25 ¶¶16-34.

economic policy whose answers are the predicates to whether its formula, or some other formula, is the best one.[43]

Those familiar with the *Prometheus* line of cases, and these Quadrennials, know that the Commission's rudimentary methods of measuring competition and diversity are, at best, sub-optimal, and imprecise - analogous to defining pi as 3.0. The local and national media ownership limitations in 47 C.F.R. §73.3555 are little more than raw station or pop counts. Seldom are they tethered to demographic and economic factors that may change rapidly over time. Such coarse metrics as station counts are unconnected to stations' respective economic values or even to stations' audience reaches. The rules themselves – even when they accidentally happen to "work" – are sometimes little more than the product of political compromises, bereft of rigorous economic analysis. Seldom, if ever, do they take diversity into account except as an afterthought.

Chairman Powell realized this, and in 2003 famously offered a prize to whoever could come up with a formula for an "HHI for Diversity."[44] MMTC set out to compete for that prize; hence these formulas.

[43] MMTC's formulae are not the only ones floating about. Another meritorious attempt at creating a granular measuring tool for diversity and competition in broadcasting is Mark Lloyd and Phil Napoli, Local Media Diversity Matters, Center for American Progress (January 22, 2007), available at https://cdn.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/media_diversity.pdf (last accessed April 22, 2019) (presenting a new metric based on voices rather than outlets and calibrating for reach rather than strength).

[44] *See* Edmund Sanders, FCC Eyes an Index for Media Mergers, Los Angeles Times, February 3, 2003 ("[a]s part of an ongoing review of the FCC's media-ownership rules, Chairman Michael K. Powell is offering a reward to the first FCC economist who can bring him an objective scientific formula that will accurately measure the diversity of media voices in a local market"), available at https://www.latimes.com/archives/la-xpm-2003-feb-10-fi-formula10-story.html (last visited April 28, 2019).

Now, at last, after 15 years, we have this NPRM. Therein the Commission asks many of the right questions. But first it should be asking these questions of its own world-class economists.

Consequently, MMTC reiterates that the best approach to these mathematical formulas for measuring competition and diversity would be to refer them to the new Office of Economics and Analytics with a mandate to do what citizen groups like MMTC, and broadcasters, are ill suited to do: perform state-of-the-art economic analysis of the concepts, and report on what are the optimal mathematical models to use going forward. MMTC would be happy to cooperate with such a project, which is exactly the sort of undertaking for which the new Office was created.[45]

Conclusion

It is time for the Commission to take bold steps to bring about steady and dramatic growth of minority and women's broadcast ownership. We remain steadfast in our dedication to work with the Commission to devise the most effective methods to increase diverse participation in one of the nation's most influential industries.

[45] *See* FCC, Office of Economics and Analytics Home Page, available at https://www.fcc.gov/economics-and-analytics (last visited April 22, 2019) ("OEA is responsible for expanding and deepening the use of economic analysis into Commission policy making, for enhancing the development and use of auctions, and for implementing consistent and effective agency-wide data practices and policies. OEA achieves those goals by (a) providing economic analysis, including cost-benefit analysis, for rulemakings, transactions, adjudications, and other Commission actions; (b) managing FCC auctions in support of and in coordination with FCC Bureaus and Offices; (c) developing policies and strategies to help manage FCC data resources and establishing best practices for data use throughout the FCC in coordination with FCC Bureaus and Offices; and (d) conducting long-term research on ways to improve the Commission's policies and processes in each of these areas.")

Respectfully submitted,

Maurita Coley
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President Emeritus and Senior Advisor

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April 28, 2019

STATEMENT OF HON. EDOLPHUS TOWNS

1. My name is Edolphus Towns. I served as a Member of Congress, representing a district in Brooklyn, NY, from 1983-2013. Throughout most of that time I was a member of what is now the Committee on Energy and Commerce and of what is now the Subcommittee on Communications and Technology.

2. One of my greatest concerns throughout the 1970's and 1980's was the then-growing cable industry's almost complete failure to engage minority and women owned small businesses in the construction, operation, and maintenance of cable facilities such as satellite dishes and fiber networks. Several diverse companies throughout the nation had the capability of serving the industry competitively by providing these services. However, far too often, cable system operators bid out their contracts on a single-source basis to their friends in the "old boy network." These practices were not only discriminatory, they were anti-competitive because they tended to drive up the prices of services – a cost that was then passed on to cable customers.

3. Respected civil rights organizations, including the Minority Media and Telecommunications Council (MMTC – now the Multicultural Media, Telecom and Internet Council), the NAACP, and the National Urban League asked my colleague on the Communications Subcommittee, Representative Bobby Rush of Chicago, and me, if something could be done to ensure that minority and women small businesses could be made aware of contracting opportunities in cable as those opportunities arose.

4. When the 1992 Cable Act was being written, Congressman Rush and I saw an opportunity. We were successful in writing into the legislation four lines of text requiring cable companies to "encourage minority and female entrepreneurs to conduct business with all parts of its operation[.]" This language, the Cable Procurement Requirement, is codified at 47 U.S.C. §554(d)(2)(E)-(F). Since it is not self-executing, in 1993 the FCC adopted regulations implementing its language; those regulations are now known as the Cable Procurement Rule and are codified at 47 CFR §76.75(e).

5. In the years after 1993, I have been heartened to meet the principals of several minority and women owned small businesses that had learned of cable contracts thanks to the Cable Procurement Requirement, and had submitted successful bids. Our four lines of legislative text generated tens and probably hundreds of millions of dollars for the payrolls of minority and women small businesses, thereby building the middle class, reducing the cost of cable operations, reducing cable bills, and enhancing the competitiveness of the cable industry.

6. I am hopeful that the FCC will use the ample authority, which Congress has provided in the Communications Act, to adapt the Cable Procurement Rule to broadcasting and all other FCC-regulated technologies.

I declare under penalty of perjury under the laws of the United States of America that the foregoing Statement is true and correct to the best of my knowledge and belief.

Executed April 23, 2019. /ss/

Edolphus Towns
Member of Congress (1983-2013)

STATEMENT OF MICHAEL A. DENNIS

1. My name is Michael A. Dennis. I am the President and CEO of Big Green Group LLC ("BGG"), which I founded in 2010. BGG is among the largest African American owned contractors serving the broadband and cable industries in the United States.

2. BGG provides a full range of construction and maintenance services for cell towers and DAS networks; engineering, construction, program management and maintenance for broadband networks; commercial and governmental network and system design, implementation, managed services and maintenance; and HVAC services. We are headquartered in New Jersey and provide services nationwide. BBC is certified as a Small Business under U.S. Small Business Administration guidelines.

3. Every year BGG does between $2M and $4M in contracting with cable MSOs. We are able to do this much business with the cable industry because of the FCC's Cable Procurement Rule. Adopted in 1993, the Rule requires cable systems to publicize major contracting opportunities widely enough to enable qualified contractors, such as our company, to learn about them and bid for the contracts on an equal opportunity, competitive basis. Before 1993, companies like mine seldom had these opportunities to bid, compete, and grow.

4. If the FCC adapts the Rule so that it also applies to broadcasting, our company would look forward to learning of opportunities to bid on such broadcast contracts as tower construction and tower and satellite dish installation and maintenance.

I declare under penalty of perjury under the laws of the United States of America that the foregoing Statement is true and correct to the best of my knowledge and belief.

Executed April 18, 2019.

/ss/

Michael A. Dennis
President and CEO
Big Green Group LLC
95 W. Main Street, #5-330
Chester, NJ 07930