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June 24, 2016

Hon. Tom Wheeler
Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

RE: 2014 Quadrennial Review *et al.*, MB Dockets 14-50, 09-182 and 07-294

Dear Chairman Wheeler:

From the 24 MMTC minority ownership proposals at issue in *Prometheus Radio Project v. FCC*, Case No. 15-3863 (3d Cir., slip op., May 25, 2016) ("*Prometheus III*"), we are pleased to identify and describe five proposals that, we believe, are ideally suited for approval now. Moving forward on these five proposals¹ would demonstrate the steady and expeditious civil rights advancement that the Court has encouraged the Commission to pursue and that history and justice compel.²

The selection of these five proposals is the culmination of a series of meetings with three commissioners, members of your staff and each commissioner's staff, the Chief of the Media Bureau and members of his staff, members of the staff of the Office of General Counsel, and the Director of the Office of Communications Business Opportunities.³ We are deeply appreciative of the time and effort invested by these public officials in working through our long-pending proposals.

The numbering system used for the proposals is that used in the Supplemental Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, 2010 Quadrennial Review *et al.*, MB Docket Nos. 09-182 and 07-294 (filed April 3, 2012) ("Supplemental Comments").⁴ The history and substantive details of all of the proposals are

¹ See *Prometheus III* at 34-35 n. 11.

² Address of President John F. Kennedy, June 11, 1963 ("We are confronted primarily with a moral issue.... It is as old as the scriptures and is as clear as the American Constitution.... Now the time has come for this Nation to fulfill its promise.")

³ See *Ex Parte* letters in these dockets filed May 31, June 8, June 10, June 16 and June 17, 2016.

⁴ The Supplemental Comments may be accessed at <https://ecfsapi.fcc.gov/file/7021906605.pdf> (last visited June 23, 2016).

provided in the Supplemental Comments and the earlier source materials referenced in the Supplemental Comments.

Here are descriptions of the five proposals:

- **Proposal 5: Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings**

This proposal is 43 years old, having first been advanced by Citizens Communications Center in 1973 and by NABOB in 1990. The Commission's (former) Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") unanimously recommended it to the Commission in 2004. As described in the Supplemental Comments:

This proposal ... seeks to integrate civil rights into the FCC's institutional priorities, urging the Commission to consider the probable impact that each proceeding and transaction will have on minority ownership. This proposal contemplates that the Commission include a minority and female impact statement in all major rulemaking proceedings and transactions. Through minority and female impact statements, the Commission could navigate the unintended consequences of major actions on its diversity goals, while crafting informed policy decisions.⁵

The proposal seeks to ensure that at the earliest stages of major rulemakings – especially those not self-evidently addressing minority ownership – the question of minority ownership impact will have been thought through in advance. Then, if the rulemaking might bring about a material positive or adverse impact on minority ownership, the NPRM or NOI would include appropriate questions for the public to consider and answer.

Too often, minority ownership issues are overlooked in NPRMs. Due to the very small size of the civil rights and public interest FCC bar, these issues are often not raised in the proceedings at all. Even when they are flagged in comments, the Commission may be unable to incorporate minority protections in the ultimate regulations due to the difficulty in bootstrapping notice from a comment,⁶ or when faced with an argument that a final rule is not the logical outgrowth of the NPRM.⁷

To avoid this dilemma, the proposal seeks to ensure that minority ownership is "thought about and asked about" in advance. The proposal would impose no racial hierarchy; rather, it

⁵ See Supplemental Comments at 13 (footnotes omitted).

⁶ See, e.g., *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("notice necessarily must come, if at all, from the agency.")

⁷ *Id.* at 547.

appropriately encourages awareness of any racial impact of commission decisionmaking.⁸

The proposal is framed as applicable to all FCC general media rulemaking proceedings. In the interest of platform neutrality, and in recognition of platform convergence, the Commission should extend the relief sought by this proposal to all FCC general rulemaking proceedings including those handled by the media, wireline, wireless, international, enforcement, and PSHS bureaus.

We recommend that the current Commission state that it is adopting this proposal as its operating policy. Presuming that the policy proves to be successful in practice, the 2018 Commission should place this proposal before the public in the 2018 Quadrennial NPRM or a parallel NPRM.

- **Proposal 10: Extend the Cable Procurement Rule to Broadcasting**

This proposal seeks to extend to broadcasting the highly successful MVPD procurement rule⁹ – adopted by the Commission as a result of the 1992 Cable Act. MMTC requests that the Commission take this opportunity to extend the rule to all Commission regulatees – a step recommended in 2008 by the Commission’s (former) Diversity Committee and by MMTC in its 2011 minority ownership discussions with Chairman Genachowski’s Chief of Staff.¹⁰

The Supplemental Comments provided the history and benefits of this proposal:

This proposal highlights the importance of contracting opportunities to develop the experience and finances that could enable a contractor to transition into ownership.

For two decades, Congress has required cable operators to encourage the participation of minority and women entrepreneurs “with all parts of its operation” and analyze the results of their EEO programs. To that end, the Commission’s corresponding regulations envision “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” [citing 47 C.F.R. §76.75(e)(1)]

⁸ See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment (“a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”))

⁹ The rule actually covers MVPDs – *i.e.*, satellites as well as cable.

¹⁰ See *Seven Proposals on Broadcast Regulation*, August 1, 2011 (revised), available at <https://www.fcc.gov/ecfs/filing/6016834381/document/7021699781> (last visited June 23, 2016).

The legislative history of the cable procurement nondiscrimination requirement illustrates Congressional intent to bolster minority participation throughout the communications industry. The Cable Communications Policy Act of 1984 required the Commission to create rules 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.” This requirement “reflects the Committee’s commitment to ensuring increased opportunities for women and minorities in all aspects of the telecommunications marketplace.” As Congress prepared to address the state of the cable industry again in 1992, it found that “[t]he Cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.”

More than twenty years after the Cable Communications Policy Act and more than a decade after Congress found that consolidation in the cable industry created a market entry barrier for new entrants, the Diversity Committee found that “[t]ens of billions of dollars are spent annually by cable [...] and wireless carriers on capital expenditures – particularly engineering, furnishings, installations and construction, as well as programming and operating services. Disadvantaged businesses, including minority owned businesses, rarely are full partners in procurement.” Upon making this observation, the Diversity Committee recommended that the Commission issue a notice of proposed rulemaking to examine: (1) the Commission’s authority to extend procurement requirements to broadcasting and other regulated industries; (2) the current state of potential contacting opportunities in all regulated platforms; (3) entry and inclusion barriers; (4) methods to ensure compliance; and (5) the requirement to “analyze the results of its efforts” found in 47 U.S.C. §554(d)(2)(F) and whether to require public reporting on minority and female procurement contracts.¹¹

The MVPD procurement rule is one of the FCC’s long-term civil rights success stories. The information provided by MVPDs annually on Form 396-C (September 2003 edition) is not onerous or burdensome, and it raises no constitutional questions. Treating procurement as connected to EEO compliance, Form 396-C asks for yes or no answers to these two questions:

- To the extent possible, do you seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization?
- Do you analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory manner and use these results to evaluate and improve your EEO program?

In addition, each year, 20% of reporting units are asked to respond to FCC Form 396-C – Supplemental Investigation Sheet (September 2003 edition) (“SIS”), which asks this question:

¹¹ See Supplemental Comments at 21-23 (footnotes omitted).

- Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.¹²

Finally, 5% of units are subject to annual compliance audits aimed at backing up factual assertions with written documentation of claims.

These straightforward, easy to understand procedures ensure that each regulatee thinks about the issue, has a plan, maintains accurate records, and consciously avoids discriminatory practices that could inhibit minority and women owned companies from providing goods and services. The regulation delivers results with almost no litigation because the Form 396-C and SIS reports are available to the public and thus have the power of transparency behind them.

The MVPD procurement rule has contributed mightily to the economic success of scores of minority and women owned businesses engaged in banking, broker/dealer services, construction, fiber and satellite dish installation, programming, legal services, accounting, and much more. The rule has been a springboard for the migration of minority and women entrepreneurs into operating and ownership positions in the cable and satellite industries. It is highly efficient, effective civil rights regulation.

The communications ecosystem falling under FCC regulatory jurisdiction includes enterprises governed by Titles II, III and VI. An additional critical category of businesses impacting the communications business ecosystem is Title I information services, over which the agency has no direct regulatory authority. The abysmal minority business participation levels in Title I services¹³ have been dragging down opportunities for advancement in the Title II, III and VI – regulated industries, since they occupy the same communications business ecosystem as Title I firms. Consequently, it would be more reasonable for the Commission to ask the major information services firms to voluntarily provide the Form 396-C and SIS information that is provided annually by MVPDs. Should these Title I firms decline to provide this information, the Commission should ask the Government Accountability Office (GAO) to inquire into the effectiveness of federal agencies' and departments' enforcement of Executive Order 13170 (Increasing Opportunities and Access for Disadvantaged Businesses), Section 2, Subsection (v) (prime contractors' engagement of 8(a) and SDB subcontractors) in evaluating Title I firms' eligibility to serve as federal prime contractors.¹⁴

¹² To be sure, these instructions could be improved by describing with more specificity what is expected by an "analysis of the results of those efforts." However, over the years, MVPDs have informally come to know what the EEO staff expects of them.

¹³ See, e.g., Rebecca O. Bagley, Why We Need More Minority High-Tech Entrepreneurs, *Forbes*, November 1, 2013, available at <http://www.forbes.com/sites/rebeccabagley/2013/11/01/why-we-need-more-minority-tech-entrepreneurs/#55ff08255dc0> (last visited June 23, 2016) (reporting that only 4% of high tech businesses are minority owned).

¹⁴ Executive Order 13170 provides that each government agency and department "shall aggressively seek to ensure substantial 8(a), SDB, and MBE participation in procurements for

Extension of the highly successful MVPD procurement rule to all regulatees - and a request for compliance by Title I services backed up by a referral to the GAO – would be the single most powerful step the Wheeler Commission could take to establish its civil rights legacy for years to come.

- **Proposal 33: Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity**

MMTC submitted this proposal in response to Chairman Powell’s 2002 challenge to find an “HHI for Diversity” – a formula that would measure diversity the way HHI measures competition. Our goal was to arrive at a formula that would come much closer to quantifying diversity than the blunt instrument of simply counting the number of stations a licensee is allowed to own in a market – irrespective of market size, demographics, revenues, or the presence or viability of independently owned stations and their ability to provide informational programming that could contain diverse viewpoints.

The formulas MMTC filed for the Diversity and Competition Supporters (DCS) coalition of organizations approached the issue of viewpoint diversity from the vantage point of the independently owned stations – which often are minority owned – and consumers. As described in the Supplemental Comments:

DCS proposed two formulas for crafting and implementing diversity initiatives at the Commission. The “Tipping Point Formula” illustrates how the Commission could ensure that local radio markets could preserve independent owners and the “Source Diversity Formula” which expresses the consumer benefit derived from marginal increases in source diversity.

The “Tipping Point Formula” was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a tipping point in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market’s cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity....

The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale. This formula would require field-testing before it could be applied in practice to measure source diversity.¹⁵

and related to information technology, including procurements in the telecommunications industry.” *See* Increasing Opportunity and Access for Disadvantaged Businesses, Executive Order 13170, 65 Fed. Reg. 60825, 60829 (Oct. 12, 2000).

¹⁵ *See* Supplemental Comments at 69-70 (example and footnotes omitted).

These formulas would not be as simple as “counting stations”, but, like HHI, they are not so complex that only a rocket scientist could calculate them. They are no more complex than the engineering analysis required for radio broadcasting. In some markets, their use might result in a finding that more consolidation would not endanger diversity; in other markets, their use might result in a finding that no further consolidation should occur lest diversity be endangered. We believe that the greater accuracy of these formulas at measuring diversity would generally inure to the benefit of minority broadcasters and of consumers.¹⁶

The Commission probably lacks the resources to perform the economic modeling needed to refine and test these formulas. Therefore we request that the Commission issue an NOI at this time encouraging the public – and especially leaders in the academy – to evaluate the formulas and submit their findings to the Commission for consideration when the agency opens its 2018 Quadrennial proceeding.

- **Proposal 37: Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests**

This proposal, developed by the Diversity Committee in 2004, was aimed at transitioning from the Commission’s voice test regulations to a system based on market-based, tradable “Diversity Credits.” A market-based system would be analogous to the operation of carbon trading as a market-based means of reducing pollution. As explained in the Supplemental Comments:

A certain number of Diversity Credits would be given to SDBs [small disadvantaged businesses]. These credits would also be given to the seller at the close of a transaction so long as that transaction results in greater structural diversity. If a transaction would increase concentration, the buyer would be expected to return some of its Diversity Credits to the Commission at the close of the transaction. Companies could also buy or sell these credits to one another, thus providing a market-based source of access to capital for SDBs.

Diversity Credits would (1) incentivize diversity, (2) disincentivize consolidation, (3) place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation’s ill effects, (4) serve as a mechanism to provide access to capital to SDBs, (5) capture the measure of diversity more precisely than an inherently approximate voice test, and (6) allow for easier administration than a system of voice tests and waivers.¹⁷

For example, if two large media companies applied to merge today, they would spinoff or swap assets to comply with the structural rules, and perhaps negotiate additional conditions with Commission staff or with citizen groups. Approval theoretically takes 180 days but often takes much longer, necessitating cuts in staffing and public service, and disadvantaging small

¹⁶ It may be that these formulas should be either permitted to be used, or required to be used, as alternative diversity metrics to the traditional voice test formulation.

¹⁷ See Supplemental Comments at 75-76 (footnotes omitted).

businesses that seek asset spinoffs because they are unable to pay long-term pre-closing escrow carrying costs.

If market-based Diversity Credits were used instead, the merging companies would learn right away how many Diversity Credits they would need to deliver to the Commission. If they lacked sufficient Diversity Credits, they would buy them from small entities. Those purchases of Diversity Credits from small entities would serve as a source of access to capital. The transaction could proceed with much greater speed. While some conditions might still be needed, they would not be as extensive as such conditions sometimes are now.

As with Proposal 33 (Mathematical Touchstones), the Commission probably lacks the resources to perform the necessary economic modeling needed to test this approach to creating a market mechanism to promote diversity. Therefore we request that the Commission issue an NOI at this time encouraging the public – and especially leaders in the academy – to evaluate our approach and submit their findings to the Commission for consideration when the agency opens its 2018 Quadrennial proceeding.

- **Proposal 40: Create a New Civil Rights Branch of the Enforcement Bureau**

The Commission’s civil rights enforcement infrastructure profoundly impacts minority ownership opportunities. Owners do not parachute into broadcast stations from deep space: they learn the business as contractors and suppliers, as advertisers, as employees and managers, and as investors. The Commission’s four civil rights regulations: procurement (in cable and satellites), advertising (in broadcasting), EEO (in cable, satellites and common carriers) and transactions (in broadcasting) each do their part to create the business climate that facilitates minority ownership opportunity.

Thus MMTC has long recommended upgrading and consolidating civil rights enforcement in a single office¹⁸ in the Enforcement Bureau – covering all rules and across all regulated industries. Locating these functions in one place would promote consistency, efficiency and effectiveness. As described in the Supplemental Comments:

This recommendation was proposed to make certain that when civil rights measures are adopted, the Commission will marshal them in through an enforcement office with the skills, subject matter expertise, and resources necessary to ensure compliance. The new Civil Rights Branch of the Enforcement Bureau should encompass the Media Bureau’s Equal Employment Opportunity (“EEO”) staff and also include compliance officers for transactional and advertising nondiscrimination enforcement. In the spirit of platform neutrality, this new branch should apply civil rights regulations uniformly across every technology platform, including broadcasting, cable, satellite, wireless and wireline.¹⁹

¹⁸ Using current FCC organizational terminology, it could be denominated the “Office of Civil Rights” inasmuch as the term “branch” is no longer in use.

¹⁹ See Supplemental Comments at 80-81 (footnotes omitted).

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Finally, here is a list of the other 19 MMTC proposals figuring in *Prometheus III* at 34-35 n. 11, and the reasons we are not asking you to circulate them to the commissioners at this time:

- **Proposal 6: Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations.** The Chairman's authority to make such a designation is unclear. MMTC may consider refileing this proposal in a subsequent proceeding.
- **Proposal 7: Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters).** The Commission's budget may not support this proposal at this time. MMTC may consider refileing this proposal in a subsequent proceeding.
- **Proposal 9: Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees.** The broader question of whether a class of entities can be afforded a class-based presumption of eligibility for waivers of licensing or application fees is pending in the multilingual emergency broadcasting (Katrina) petition proceeding (EB Docket Nos. 04-296 and 06-119). MMTC, the lead petitioner in that proceeding, will pursue it there.
- **Proposal 27: Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process.** TV and FM auctions seldom present significant opportunities for new entrants any longer; consequently, unless circumstances change, MMTC will no longer pursue this proposal.
- **Proposal 29: Increase Broadcast Auction Discounts to New Entrants.** TV and FM auctions seldom present significant opportunities for new entrants any longer; consequently, unless circumstances change, MMTC will no longer pursue this proposal.
- **Proposal 30: Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments.** TV and FM auctions seldom present significant opportunities for new entrants any longer; consequently, unless circumstances change, MMTC will no longer pursue this proposal.
- **Proposal 31: Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid.** TV and FM auctions seldom present significant opportunities for new entrants any longer; consequently, unless circumstances change, MMTC will no longer pursue this proposal.
- **Proposal 32: Require Bidders to Specify an Intention to Bid Only on Channels With a Total Minimum Bid of Four Times Their Deposits.** TV and FM auctions seldom present significant opportunities for new entrants any longer; consequently, unless circumstances change, MMTC will no longer pursue this proposal.

- **Proposal 34: Must-Carry for Certain Class A Stations.** MMTC will await the results of the DTV incentive auction before considering whether to re-offer this proposal.
- **Proposal 35: Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences.** The Commission's budget may not support this proposal at this time. MMTC may consider refileing this proposal in a subsequent proceeding.
- **Proposal 36: Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts.** The Commission's budget may not support this proposal at this time. MMTC may consider refileing this proposal in a subsequent proceeding.
- **Proposal 39: Study the Feasibility of a New Radio Agreement With Cuba.** MMTC will take up this proposal with the State Department at the appropriate time.
- **Proposal 41: Legislative Recommendation to Expand the Telecommunications Development Fund (TDF) Under Section 614 and Finance TDF with Auction Proceeds.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.
- **Proposal 42: Legislative Recommendation to Amend Section 257 to Require the Commission to Annually Review and Remove or Affirmatively Prohibit Known Market Entry Barriers.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.
- **Proposal 43: Legislative Recommendation to Clarify Section 307(b) to Provide that Rules Adopted to Promote Localism are Presumed to be Invalid if They Significantly Inhibit Diversity.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.
- **Proposal 44: Legislative Recommendation to Amend the FTC Act (15 U.S.C. §§ 41-58) to Prohibit Racial Discrimination in Advertising Placement Terms and Advertising Sales Agreements.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.
- **Proposal 45: Legislative Recommendation to Amend Section 614 to Increase Access to Capital by Creating a Small and Minority Communications Loan Guarantee Program.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.
- **Proposal 46: Legislative Recommendation to Amend Section 614 to Create an Entity to Purchase Loans Made to Minority and Small Businesses in the Secondary Market.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.

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- **Proposal 47: Legislative Recommendation to Provide a Tax Credit for Companies that Donate Broadcast Stations to an Institution Whose Mission is or Includes Training Minorities and Women in Broadcasting.** MMTC may recommend this step to a future commission to include in its recommendations to Congress.

Please let us know if additional information is needed regarding any of the proposals.

Sincerely,

Kim Keenan

Kim Keenan
President and CEO

David Honig

David Honig
President Emeritus and Senior Advisor

cc: Hon. Mignon Clyburn
Hon. Ajit Pai
Hon. Michael O’Rielly
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