

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
2014 Quadrennial Regulatory Review –)	MB Docket No. 14-50
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2010 Quadrennial Regulatory Review –)	MB Docket No. 09-182
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	

**COMMENTS OF THE MULTICULTURAL
MEDIA, TELECOM AND INTERNET COUNCIL**

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully submits the following Comments on the Hispanic Television Study¹ in response to the Media Bureau’s Public Notice, DA 16-534 (rel. May 12, 2016) (“*Public Notice*”). While the Study’s methodology was unobjectionable,² it failed to address the key issues underlying diversity policy. Instead, it focused on dependent variables, such as audience ratings and entertainment programming, that are irrelevant to diversity policy. The Study ignores the metrics of viewpoint diversity.

¹ FCC, Office of Strategic Planning and Policy Analysis and Industry Analysis Division, Media Bureau, Hispanic Television Study (rel. May 6, 2016), available at https://www.fcc.gov/media/peer_review/peerreview (last visited May 20, 2016) (“Study”).

² The data set is of potentially great value to the public, and it should be made public. It is unclear why 2011 data was used rather than 2015 or even 2013 data.

None of the Dependent Variables Is Germane to Minority Ownership Policy

The Study was intended to explore “the nexus between ownership, programming, and viewing to expand the discussion and understanding of these interrelationships.”³ Upon its release, the Commission heralded the Study as “a milestone in the Commission’s long-standing efforts to examine and encourage diversity in broadcast ownership among new entrants, including women and minorities.”⁴ But, respectfully, the Study is no milestone. It is of no use in formulating minority ownership policy. In publishing the Study, the Commission continues to flail about ineffectually, failing year after year to properly research, much less cure, the stark minority ownership disparity it largely caused⁵ and over which it continues to preside.⁶

The study went astray by focusing on “the effect of Hispanic ownership on a station’s programming decisions and consequently on its *popularity* among the Hispanic TV audience”⁷ (emphasis supplied), although, as detailed at 3-6 *infra*, “popularity” bears no apparent relationship to the First Amendment values that drive FCC diversity policy. In particular, the Study concluded that Hispanic-owned stations:

are less likely to show telenovelas relative to other programming types, paid programming is strongly associated with Hispanic ownership, and Spanish-language programming and local programming are more likely to be shown on Hispanic-owned stations than other types of programming.

³ Study, ¶1.

⁴ *Public Notice* at 1.

⁵ See D. Honig, “How the FCC Helped Exclude Minorities from Ownership of the Airwaves,” McGannon Lecture on Communications Practices and Ethics, Fordham University, October 5, 2006, available at <http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf> (last visited May 20, 2016).

⁶ See *Prometheus Radio Project v. FCC*, Case No. 15-3863 (slip op.), rel. May 25, 2016) (“*Prometheus III*”) at 14-34.

⁷ Study ¶5.

We find some indication that Hispanic ownership is associated with higher ratings among Hispanics, and in particular among Hispanics viewing Spanish-language local programming, suggesting that the programming choices of Hispanic-owned stations may lead to increased viewership among Hispanics compared to their viewing of stations that are not Hispanic-owned, although these results are limited by sample size. In addition, while Hispanic ownership of stations seems to correspond with slightly higher ratings, the results largely indicate that viewing of Hispanic-owned stations is still dwarfed by viewing of the large Spanish-language networks such as Univision and Telemundo.⁸

These findings are answers to questions that have nothing to do with the reasons we have minority ownership policies. The relevance of ratings, paid programming and telenovela carriage to minority ownership policy is nowhere explained in the Study and is not otherwise readily apparent.

Never have we had minority ownership policies because television viewers need access to fewer telenovelas and more infomercials.⁹ Neither have we ever had minority ownership policies because Spanish language stations needed to earn higher ratings.¹⁰ Indeed, Congress and the Commission often seek to preserve programming – children’s educational shows, PEG channels, and almost everything on public TV and radio – because of their value to underserved populations and irrespective of their ratings.

Our minority ownership policies emerged from 43 years of caselaw. As shown below, clearly apparent from these cases is their remarkable consistency in holding that minority

⁸ Study ¶3-4.

⁹ With commendable understatement, the Study candidly acknowledged that “[o]ne would not generally consider more paid programming to be a benefit to Hispanic audiences.” *Id.* ¶87.

¹⁰ We would not have been surprised if the Study had found that minority owned stations had lower ratings. For decades it has been well established that minority broadcasters face barriers of lack of access to capital. *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC2d 849, 853 (1982) (citing the conclusion of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications that “financing has remained the single greatest obstacle” to minority entry into the telecommunications industry), and many subsequent authorities. Programming desired by large audiences is expensive. Further, minority owners often choose to serve underserved multicultural and multilingual sub-audiences that non-minority owners do not know how to serve or have no interest in serving. For these reasons, even when minority owned stations are not the winners of ratings wars, they can hardly be faulted for not serving the public interest.

ownership is a means by which the Commission can provide listeners and viewers with a wider range of voices and opinions, consistent with First Amendment values.

Minority ownership's Big Bang occurred in 1973 when the D.C. Circuit required the FCC to afford comparative consideration to the 7% minority ownership of an applicant for an Orlando, FL TV construction permit. In this case of first impression, *TV-9*, the D.C. Circuit held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."¹¹

After this judicial prodding, Chairman Wiley's Minority Ownership Task Force developed three new policies, including the tax certificate, that were adopted under Chairman Ferris' leadership. The *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979 (1978) declared that "[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the *diversified programming* which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.* at 981 (emphasis supplied); *see also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC2d at 849-50 (minority ownership is likely to "increas[e] the diversity in the control of the media and thus *diversity in the selection of available programming*, benefitting the public and serving the principle of the First Amendment") (emphasis supplied) and *Waters Broadcasting Co.*, 91 FCC2d 1260, 1264 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir.), *cert. denied*, 470 U.S. 1027 (1984) ("full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First

¹¹ *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert denied*, 418 U.S. 986 (1974).

Amendment.”)

The minority ownership issue reached the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990). The Court found that the FCC’s purpose in promoting minority ownership was to advance diversity in programming, holding that “[t]he FCC’s conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference.”¹² Justice Brennan’s majority opinion summarized “a host of empirical evidence suggesting that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented.” *Id.* at 580-81 and ns. 31-33. In addition, Justice Brennan’s opinion cited studies that “show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies.” *Id.* at 581-82 and n. 34.

Consistent with the law as it stood in 1990, *Metro Broadcasting* applied intermediate scrutiny. The test that must now be met is strict scrutiny.¹³ In performing the studies necessary under strict scrutiny, a good place to start would be the re-validation and updating of the studies that were summarized in *Metro Broadcasting*. In particular, the Commission should be asking whether minority owned stations, as compared to other stations:

¹² The *Metro Broadcasting* Court noted that “[t]he judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete ‘minority viewpoint’ on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled ‘minority programming’ or that programming that might be described as ‘minority’ does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.” *Id.* at 579.

¹³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

- Address controversial issues of public importance from diverse perspectives;
- Include diverse guests, and their viewpoints, when covering public issues;
- Air diverse local public affairs programming at times when it is likely to be viewed; and
- Employ, and train, minorities at all levels, including managers, sales executives, professionals, and technicians.¹⁴

These are the markers of the impact of broadcast ownership diversity. They operationalize the reasons the Commission, with the support and sometimes the prodding of the judiciary and Congress, has pursued minority ownership policies for over four decades. Future empirical research should use these and similar factors as dependent variables.

Conclusion

In 2007, when the Commission published several modest diversity studies, the studies' researchers, peer reviewers, and the Congressional Research Service all concluded that the Commission's minority ownership data set was woefully inadequate to support basic empirical research.¹⁵ Now, at last, the Commission has a reasonably useful data set. Unfortunately, in the Hispanic Television Study the Commission has used its new data set to examine dependent variables, such as ratings, paid programming and telenovela carriage, with no relevance to minority ownership policy.

In 2004, the *Prometheus I* Court directed the Commission to take the steps necessary to arrive at a meaningful eligible entity definition.¹⁶ Twelve years have elapsed and the Commission is no closer to reaching that objective. This delay has had profound consequences:

¹⁴ The Supreme Court has found that the FCC's EEO rules are intended to ensure that "its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n. 7 (1976) (*dictum*). This is the same purpose as that served by the minority ownership policies. *Metro Broadcasting*, 497 U.S. at 581-82.

¹⁵ *Prometheus Radio Project v. FCC*, 652 F.3d 451, 468 (3d Cir. 2011) ("*Prometheus II*").

¹⁶ *Prometheus Radio Project v. FCC*, 373 F.2d 372, 428 n. 70 (3d Cir. 2004) ("*Prometheus I*").

a new generation of Americans is being denied access to the diversity of voices that should have been their First Amendment birthright.¹⁷ One positive remedial step the Commission could take is to recharter its Diversity Committee, populate it with subject matter experts, and charge it with helping to design a research plan that will enable the Commission to produce the *Adarand* studies and arrive at a workable and effective eligible entity definition.

Respectfully submitted,

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June 2, 2016

¹⁷ Another consequence of the Commission's dilatory behavior is that low minority ownership levels produce low sample sizes in minority ownership studies such as this one. *See* Study, ¶5 ("our sample has only 23 Hispanic-owned stations compared to over 500 stations identified as not Hispanic-owned.") There would have been more Hispanic-owned stations if the promised *Adarand* studies had been performed. *See Prometheus II*, 652 F.3d at 471 n. 42 and *Prometheus III*, slip op. at 30-34. There would have been more Hispanic-owned stations if the Commission had given timely and serious consideration to the dozens of largely race-neutral and deregulatory minority ownership proposals placed at its feet by civil rights organizations *See, inter alia, Prometheus I*, 373 F.2d at 465 and *Prometheus III*, slip op. at 34-35 n. 11. Once the Commission takes these steps, the sample sizes of Hispanic-owned stations should increase naturally as capital and talent gravitate toward opportunity.