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

In the Matter of:	
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	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	MM Docket No. 01-317
Definition of Radio Markets	MM Docket No. 00-244

TO THE COMMISSION

REPLY COMMENTS OF DIVERSITY AND COMPETITION SUPPORTERS

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TABLE OF CONTENTS */

Page

Summary 1

I. A Public Hearing On Minority Ownership Will Yield A Complete Record On This Most Critical Of Issues 5

II. Consolidated And Independent Operations Each Offer Benefits For Consumers 10

III. We Present An "HHI For Diversity" Which Can Be Validated And Applied As Part Of A Staged Implementation Plan 17

IV. Opportunities To Protect Consumers And Advance Minority Ownership Through This Proceeding Are Substantial And Achievable 24

A. Staged Implementation, As Proposed By The Diversity And Competition Supporters And By Paxson Communications, Provides The Best Hope For Protecting Diversity, Competition, Localism And Minority Ownership 25

B. The Commission Should End "Flagging" And Expedite The Processing Of Assignment And Transfer Applications 32

C. The Commission Should Explore The Concept Of A Private Market For "Diversity Credits," Analogous To Pollution Credits But Without Their Anti-Consumer Attributes 34

D. Section 202(h) Was A Mistake And The Commission Should Seek Its Repeal 38

Conclusion 40

The Diversity and Competition Supporters[1] respectfully submit these Reply Comments in response to the Omnibus NPRM.[2] The organizations included in the Diversity and Competition Supporters collectively represent the interests of the nation's minority media consumers.

SUMMARY

The commenting parties have supplied extensive data on minority ownership and its value in promoting diversity and competition. Since the Omnibus NPRM's tepidly-worded request for comments on minority ownership did not draw out the views of nonminority broadcasters, an en banc hearing should be held to

[1] The Diversity and Competition Supporters are:

American Hispanic Owned Radio Association
Civil Rights Forum on Communications Policy
League of United Latin American Citizens
Minority Business Enterprise Legal Defense and Education Fund
Minority Media and Telecommunications Council
National Asian American Telecommunications Association
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Council of Churches
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Urban League
Native American Public Telecommunications, Inc.
PRLDEF-Institute for Puerto Rican Policy
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

The views expressed in these Reply Comments are the institutional views of the Diversity and Competition Supporters, and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

[2] Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NPRM), 17 FCC Rcd 18503 (2002) ("Omnibus NPRM").

fill out the record. Such a hearing would commemorate the 25th anniversary of the original minority ownership policies.

The polar opposite views of many parties' initial comments are idealized positions. The truth lies toward the middle, as one of the few truly neutral commenters, Professor Eli Noam of Columbia University, illustrates using objective HHI data. Dr. Noam's calculations show that the electronic mass media is only "moderately concentrated" now, although it will become "highly concentrated" in a couple of years if current trends continue. Another party, the Communications Workers of America (CWA), has offered a superb and creative solution to the dangers posed by duopolies -- application of the newspaper Joint Operating Agreement ("JOA") model, under which two media outlets share costs of back-office operations while producing their own news and public affairs. This is far superior to duopolies, which too often are sham operations virtually, if not entirely controlled by the duopolizing party. Over the next few years, duopolies should be phased out, and in their place two-station JOAs should be permitted without restriction.

We offer -- without endorsement, but in the hope that the idea can be developed further -- another paradigm for compromise which we call "Diversity Credits." Modeled after the EPA's greenhouse-gas credits program but designed to avoid that programs' flaws, Diversity Credits would be awarded to socially and economically disadvantaged businesses ("SDBs") and to companies selling stations to SDBs or incubating SDBs. Diversity Credits could also be privately traded among licensees. Using this approach, the Commission could incentivize pro-diversity transactions, disincentivize consolidating transactions, and improve access to capital for socially and economically disadvantaged businesses, while at the same time providing a market-based alternative to some of the traditional command-and-control, voice-based regulatory restrictions.

Chairman Powell has offered a reward for a formula expressing an "HHI for Diversity." Such a formula, like HHI itself, could be used to measure consumer welfare derived from viewpoint diversity. We offer that formula here and shall donate our prize to the "Committee to Repeal Section 202(h)." Quite seriously, we urge the Commission to recommend that Congress relieve the agency of the impossible burden of biennially considering whether to repeal each of its structural rules. Review every two years makes business planning by new entrants impossible, since institutional investors typically require five year projections. These projections embed the assumption that critical market conditions, such as structural regulations, will not unexpectedly change.

Our Initial Comments presented six proposals that would advance minority ownership. The key to their success is our Staged Implementation Plan, under which the Commission, to the extent that it deregulates, does so carefully, in five steps over a ten year period, with the opportunity to make mid-course corrections or apply the brakes if diversity, competition, localism or minority ownership are threatened. Impressed upon this schedule would be initiatives that promote ownership by socially and economically disadvantaged businesses, including minorities. Paxson Communications also came up with the idea of ten year biennial staged implementation with brakes, and Paxson deserves credit for putting the good of the country above its own short-term private interest. Staged implementation can be undertaken in harmony with Section 202(h), as the Diversity and Competition Supporters and Paxson have each demonstrated.

As many commenters, including Bonneville and Clear Channel, have observed, the Commission practice known as "flagging" has imposed very long waiting times on Form 314 or Form 315 transactions. These parties contend that flagging, and case-by-case review generally, should be replaced by bright-line regulations. We agree wholeheartedly. Small businesses are especially in need of certitude and expedition in their dealings with the Commission; they seldom possess the capital reserves, staff, and multiple income streams sufficient to weather long regulatory delays.

Only four months remain before either the balm of diversity or the bomb of sudden, overwhelming consolidation drops on the nation. During those four months, the Commission should spare no effort to lead the warring parties to the table of conciliation. Thereupon it should encourage the parties to stop shouting at one another, and it should work with them to craft creative remedies that will afford consumers the variety and efficiency benefits of large ownership clusters as well as the diversity and competition inherent in strong independent operations.

* * * * *

I. A Public Hearing On Minority Ownership Would Yield A Complete Record On This Most Critical Of Issues

Two weeks ago, the Census Bureau announced that Hispanic Americans are now the largest minority group in the nation.[3] Consider this shocking fact, then: this year, thirty years after the first minority owned television station received its permit,[4] there is one -- one! -- Hispanic owned television station still in operation. Since local television deregulation in 1999, minority television ownership dropped from 33 to 20 stations, and many of those are endangered. There have been no minority television acquisitions since 2000. That is unacceptable in a pluralistic society, and it should be the Commission's first obligation in this proceeding to heal this disease in the body of American broadcasting. Never should the Commission allow its structural rules to cause the airwaves to resegregate themselves.

The earmark of successful rulemaking is a full record on all material issues. Minority ownership is among the most material of

[3] Bureau of the Census, "Resident Population Estimates of the United States by Race and Hispanic or Latino Origin, July 1, 2001 and April 1, 2000, Release CB03-16 (January 21, 2003).

[4] See WGPR, Inc., 54 FCC2d 297 (1975) (Commissioners Quello and Hooks dissenting in part because the Commission refused to waive the regulatory fee as a gesture of support for minority ownership). In 1973, when Detroit's WGPR-TV received its construction permit, the structural ownership rules certainly provided for diversity of voices. However, there were all of eleven minority owned stations on the air. Only about 6% of broadcast employees (including secretaries and janitors) were minorities, and virtually no minorities were ever interviewed on the air, except about civil rights. Between 1978 and 1995, the tax certificate policy promoted minority ownership, but its success was limited by the consequences of other commission decisions that restricted spectrum access while fostering consolidation. See Initial Comments of Diversity and Competition Supporters, filed January 2, 2003 ("Initial Comments"), pp. 24-31.

issues in this proceeding. We have done our best to provide an ample justification for the development of initiatives aimed at advancing minority ownership,[5] and we have proposed a long menu of potential initiatives to promote minority ownership.[6]

Regrettably, however, the Omnibus NPRM's cursory discussion of minority ownership[7] did not inspire a single nonminority owned company to address this issue.[8]

This spring marks the 25th anniversary of the decision that made it possible for most of today's minority owned broadcasters to get their start.[9] The 1978 Minority Ownership Policy Statement also challenged new generations of participants in communications policy to file "petitions for rulemaking or other submissions...as to other actions we might take to reach our objectives."[10]

It is self-evidently imperative for the Commission to ensure access to the radiofrequency spectrum for all Americans. That

[5] Id., pp. 61-72.

[6] Id., pp. 82-141.

[7] Omnibus NPRM, 17 FCC Rcd at 18521 ¶50.

[8] Understandably, the short deadlines and 179 questions to be answered necessarily compelled most parties to focus only on their immediate short-term objectives rather than on what is best for the country. There were exceptions; see "Media Concentration Trends in America: Just the Facts," by Dr. Eli Noam, filed January 2, 2003 ("Eli Noam Comments") discussed at 11-12 infra, and Comments of Paxson Communications, filed January 2, 2003 ("Paxson Communications Comments"), discussed at 25-32 infra.

[9] Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978) ("1978 Minority Ownership Policy Statement"). See discussion in Initial Comments, pp. 7-16.

[10] 1978 Minority Ownership Policy Statement, 68 FCC2d at 984.

goal has been almost universally accepted since 1978.[11] The criticality of this objective must not be lost amidst the numerosity, magnitude and amplitude of comments on other subjects of this proceeding. Recently-released broadcast ownership data underscores how deep the underinclusion of minorities continues to be.[12] Ownership exclusion has consequences for consumers, as the National Association of Hispanic Journalists ("NAHJ") explained by documenting the continuing and abject failure of the nonminority media to offer frequent and nonstereotypical presentations of minorities.[13]

[11] Id. at 983 (noting that the tax certificate policy had been advanced by the NAB and endorsed by the Carter Administration, the American Broadcasting Companies, and General Electric Broadcasting Company); id. (noting that the distress sale policy had originated in the Congressional Black Caucus). See also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) ("1982 Minority Ownership Policy Statement"), which expanded the tax certificate policy; these initiatives were developed by the blue-ribbon Rivera Commission, chaired by Commissioner Henry Rivera and including representation from a wide spectrum of industry and public interest organizations.

[12] NOW and AWRT each urged the Commission to compile data supplied on Form 323 by race and gender of owners. See Comments of American Women in Radio and Television, filed January 2, 2003, p. 6 n. 6. We commend the Commission for making this data available on its website. This data is incomplete: out of over 14,000 stations, only 8,751 filed Form 323 in 2001. Of those responding, only 303 stations (3.5%) were minority owned.

[13] Although Latinos are 12.5% of the population "they make up just 6.1 percent of all newsroom employees working at local English-language TV stations, 2.4 percent of all newsroom personnel working at radio stations, and 3.8 percent of all newsroom employees working at daily newspapers." Questions Submitted by the National Association of Hispanic Journalists, filed January 2, 2003, p. 7. Furthermore, "less than one percent of all news stories on the network evening newscasts of ABC, CBS, NBC and CNN were about Latinos. In these stories, Latinos tend to be portrayed stereotypically as illegal immigrants overrunning the

[n. 13 continued on p. 8]

While ownership diversity among nonminorities is laudable, it is no answer at all to the underinclusion of minorities in the ownership pool.[14] Indeed, the record in this proceeding overwhelmingly demonstrates the value of minority owners in

[13] [continued from p. 7]

border and people who were prone to violence." Id., p. 7. NAHJ also cites a June, 2002 study, by Fairness and Accuracy in Reporting (FAIR), which found that of all U.S. news sources interviewed on the nightly newscasts of ABC, CBS and NBC in 2001, only 0.6% were Latino. Id. Additional examples of how the nonminority media outlets disserve, under-report and stereotype minorities are collected in the Comments of EEO Supporters (Volume I) in MM Docket No. 98-204 (Broadcast and Cable EEO), filed March 5, 1999, pp. 159-66.

[14] To appreciate the value of minority ownership apart from classic "source diversity," consider this hypothetical: suppose gold is struck in uninhabited rural northwestern Alaska, and a diverse population of 100,000 settlers arrives there in a year and builds a gold-rush town. Initially, the town has no broadcast stations but it has 40 allotments, all of which are to be distributed to new licensees. Under one scenario, every station will be owned by a different nonminority owned company, one station for each of 40 licensees. Under another scenario, two nonminority companies would each own 20 stations. Which scenario is better for minorities (and better for nonminorities who need to hear minority viewpoints; see Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984))? The answer, in either scenario, depends on whether any of the nonminority licensees elect to include minority viewpoints. And that is the point: in either scenario, minorities would have no control over the message, and in each scenario minorities would be completely dependent on the beneficence and charity of nonminorities.

Now suppose, instead, that these 40 allotments are distributed at random, and through a quirk of fate, the first 35 of them go to minorities. Should the FCC ensure that some of the last five allotments go to nonminorities? Would the nation tolerate a scenario in which all of the views of nonminorities have to be filtered through the prism of minorities? See William Raspberry, "Affirmative Action: Goal vs. Issue," The Washington Post, January 27, 2003, p. A19 (giving the hypothetical of what a law firm would do if all of the top applicants were Black, in which case, owing to such matters as "client confidence" and "public perception" of course they wouldn't all be hired.)

providing programming and viewpoints that differ substantially from those offered by other broadcast owners.[15]

At no time has the issue of minority ownership faced the Commission more directly than now -- with massive deregulation having been promised or threatened, depending on one's point of view. The introduction on January 30 of the Telecommunications Ownership Diversification Act of 2003[16] is profoundly laudable, but it was never intended as a cure-all. Many more initiatives are needed. The insufficiency of any one of them is not a reason to reject it, nor is the good potential of one initiative a reason to reject other ones.[17]

Just as the robust exchange of viewpoints inside a broadcast station yields the consensus and shared understandings necessary for a democracy, so too does the robust exchange of viewpoints among stakeholders in a rulemaking yield consensus and shared

[15] Research studies establishing this nexus are cited in our Initial Comments, pp. 69-71; in the Supplemental Comments of Diversity and Competition Supporters, filed January 27, 2003, Exhibit 1, Karin L. Stanford and Valerie C. Johnson, "Survey of Recent Literature on Minority Media Ownership," Minority Media and Telecommunications Council, January, 2003; in the Comments of Consumer Federation of America, filed January 2, 2003 ("Consumer Federation of America Comments"), p. 62 n. 120; in the Comments of the AFL-CIO, filed January 2, 2003 ("AFL-CIO Comments"), p. 23 n.□30; and in the Comments of the Information Policy Institute, filed January 2, 2003, p. 57 n. 47.

[16] Telecommunications Ownership Diversification Act of 2003, S.____ (introduced January 30, 2003 by Senator John McCain).

[17] See Initial Comments, pp. 73-74 n. 141, giving examples of how the Commission repeatedly invoked the existence of the tax certificate and distress sale policies as reasons not to do more to promote minority ownership.

understanding necessary for policymaking. En banc hearings on civil rights issues have proven their usefulness.[18]

Consequently, the Diversity and Competition Supporters respectfully renew our call for an en banc hearing in commemoration of the 1978 Minority Ownership Policy Statement, and we pledge with enthusiasm to assist the Commission in making such a hearing a success.

II. Consolidated And Independent Operations Each Offer Benefits For Consumers

The greatest obstacle to reaching consensus on a minority ownership plan seems to be securing the attention of the warring parties, most of whom, understandably, are preoccupied with the right and wrong of media concentration and consolidation.

An African proverb holds that "when the elephants fight, it is the grass that suffers." In this docket, elephants are waging war on a scale never before seen in a broadcast rulemaking proceeding. There are thousands of comments. Several parties have each submitted hundreds of pages of analysis and research. The urban legend that the Commission weighs the paper to determine who wins a rulemaking proceeding doesn't apply here because the paper would break the scale.

The rhetoric on both sides of this great debate has become so hyperventilated that a collective catching-of-breath is called

[18] Examples include the November 12, 1973 en banc hearing on minority participation in broadcasting, the December 12, 2000 en banc hearing on market entry barriers, and the June 24, 2002 en banc hearing on equal employment opportunity.

for. Although we are among those who generally favor retention of most of the existing rules, intellectual honesty and practical necessity require that we take a hard look at some of the claims made by both sides.

The most evenhanded analysis appears in the Comments of Professor Eli Noam.[19/] Dr. Noam answers the question "[h]ave American media become more concentrated?" with objective HHI data on concentration in several industries, from which he concludes:

> Despite much conventional wisdom and books based on anecdotes rather than data, the answer is not an obvious "yes." And despite the hand-waving of market doctrinaires, the answer is not an obvious "no", either. There have been, obviously, many media mergers and expansions. But while the fish in the pond have grown in size, the pond did grow, too, and there have been new fish and new ponds. Conversely, it is equally near-sighted to ignore the growth of large, vertically integrated, and globally ubiquitous media firms. [20/]

Dr. Noam's analysis discloses that

> national concentration in Mass Media has been fairly flat and low in the 80s and early 90s. It has increased since 1996. But it is still in the unconcentrated range of the DOJ guidelines. Thus, while it is true that on the whole mass media has become more concentrated in the past 6 years, the data does not indicate, based on a national market definition, a high level of national concentration. [21/]

It appears from Dr. Noam's Figure 2.4 ("Concentration of All Mass Media Industries," on p. 14 of his Comments) that the "total

[19/] Dr. Noam's Comments are especially noteworthy because of their unpretentiousness and neutrality: "I present the trend data without much interpretation and comment, leaving it to others to analyze and draw policy implications....The study has been conducted without any pre-conception as to where the data will lead, and with no attempt to prove a point or advocate a position." Eli Noam Comments, p. 3.

[20/] Id., p. 2.

[21/] Id., p. 14.

electronic mass media" level of concentration in 2001 was about 1,400, which is "moderately concentrated," and at its current rate of increase will exceed 1,800 by 2005 and thereafter be "highly concentrated."[22/] In sum, concentration is not presently at crisis levels, but it will be soon unless something is done to promote diversity and competition.

We respectfully differ with those who seek deregulation simply because it will make them rich(er).[23/] Even if (as some

[22/] These findings apply DOJ's concentration criteria, under which a market is "moderately concentrated" if HHI is between 1,000 and 1,800, and "highly concentrated" if HHI is above 1,800.

[23/] See, e.g., Comments of Sinclair Broadcast Group, filed January 2, 2003, p. 17, contending that because duopolies provide greater cash flow to the duopolists, they are a "socially beneficial arrangement." As the AFL-CIO points out, consolidation often produces "synergies" but "[o]ften this results in multiple media outlets of a community (which were previously independent) receiving news and public affairs programming from *one* assignment desk, under the management of *one* general manager, *one* news or program director, and essentially, *one* overall editorial viewpoint." AFL-CIO Comments, p. 47 (emphasis in original). NABOB is also correct in concluding that:

> Only ownership diversity can provide the type of meaningful diversity that will promote the First Amendment policies of the Commission. A single entity owning stations broadcasting in a variety of entertainment formats does not provide the type of diversity that the Commission's ownership rules are designed to promote. The ownership rules are primarily intended to promote opinion diversity, and only secondarily entertainment diversity. The local ownership rule is intended to ensure that one person or entity does not have an inordinate ability to control the free flow of ideas and to control public discourse on important issues. One owner controlling many entertainment formats is positioned to exercise exactly the inordinate control over public discourse the local ownership rule is designed to prevent. Thus, consolidation can never promote true diversity.

Comments of the National Association of Black Owned Broadcasters, filed January 2, 2003, pp. 14-15.

maintain) the word “necessary” in Section 202(h) of the Telecommunications Act means “essential,” any analysis of what is “necessary” must take into account all of the commands Congress expects the Commission to follow in evaluating what is “necessary.” For example, Section 151 of the Communications Act, as amended in 1996, requires the Commission to administer the spectrum resource so as to prevent race and gender discrimination.[24/] Further, Section 257 of the Communications Act establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity."[25/] Structural regulations that preserve minority ownership, then, are “necessary” in the modest sense of the word, as well as “essential.” Indeed, they are ”indispensable” since there are no longer any other ways to promote minority ownership.

[24/] 47 U.S.C. §151 (1996) provides that the Commission was created, inter alia, “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service....” (language added in 1996 underscored).

[25/] 47 U.S.C. §257(b) (1996). Congresswoman Cardiss Collins, a sponsor of Section 257 referred to the “well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.” 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (Statement of Rep. Collins).

Just as the claims of deregulation supporters do not always withstand critical scrutiny, so too must it be acknowledged those residing on the public interest side of the policy fence have not always perfectly stated the case for maintaining regulations. Fairness requires that three points be made:

First, some forms of deregulation would be less onerous than others. The case for more duopolies or more national television ownership is very weak, but the equities on newspaper crossownership are a closer call.[26] To be sure, newspaper crossownership would tie up a formerly independent voice, but all too often that "voice" (especially in the case of radio) wasn't saying very much to begin with.[27] Further, no one doubts that the daily newspaper business is in a state of economic crisis. Crossownership may be necessary to save or revitalize many newspapers.[28]

[26] See Initial Comments, pp. 42-43.

[27] Id., p. 66 n. 118, and see Comments of MMTC in MM Docket No. 01-317 (Local Radio Ownership), filed March 19, 2002, pp. 16–19 (documenting the paucity of informational programming, particularly on radio stations, in the wake of the deregulation of program content in the early 1980s).

[28] Help-wanted advertising is gravitating to the Internet, and it is unlikely to return to the printed page. The number of daily newspapers has been in decline for years, and in most large cities the availability of joint operating agreements ("JOAs") cannot save failing newspapers because there are no other local daily papers with which to join in a JOA anymore. A troubled newspaper cannot save itself by buying a widget factory, but it can save itself by buying and operating a business in which it can deploy the skill sets it has acquired over the years. One such business is broadcasting. We offer this observation not to unqualifiedly endorse newspaper/broadcast crossownership, but rather to point out that there are shades of gray in these matters.

Second, with respect to at least one of the structural rules -- television duopoly -- there is a deregulatory approach that offers hope for viewpoint diversity. That approach is the replacement of the duopoly model, under which one company programs two stations, with the newspaper JOA model, under which two companies share back-office costs but each station produces its own local news and public affairs independently of the other station. The Communications Workers of America (CWA) came up with this proposal,[29] and a broadcast company, Sinclair, has used the underlying business model in practice.[30] It is an excellent idea. Duopolists typically provide but a thin veneer of

[29] See Comments of the Communications Workers of America, filed January 2, 2003 ("CWA Comments"), pp. 4-5 and 48; see also Consumer Federation of America Comments, p. 9. JOAs were created by the Newspaper Preservation Act of 1970, adopted by Congress to preserve two newspapers in a community where one is failing. It allows joint operation of business and printing functions, but requires that "there shall be no merger, combination, or amalgamation of editorial or reportorial staffs and that editorial policies be independently determined." 15 U.S.C. §§1801-1804, Sec. 3(2). CWA proposes, wisely, that "where the rule would permit a combination in an unconcentrated market, the commonly owned media outlets must maintain separate newsrooms and editorial staff in order to preserve and promote viewpoint diversity." CWA Comments, p. 48 (emphasis in original).

[30] A broadcast JOA operates in Tallahassee, and another operates in Nashville. In each case, the lead party is Sinclair. The Nashville operation involves a third station atop a duopoly, and thus it is extremely problematic. However, the Tallahassee operation seems to be legitimate, and it is far preferable to a duopoly. Both of the stations in the Tallahassee JOA are programmed independently. They share back-office functions and thereby reduce their respective operating costs with no loss to the public in viewpoint diversity. Indeed, by helping sustain the two stations' operations in a fairly small market, the arrangement benefits consumers in exactly the way a newspaper JOA benefits consumers. Sinclair deserves credit for trying out this idea in Tallahassee, even though it should not be immune from scrutiny of its operation in Nashville.

independent operations, and many duopolies are little more than sham operations secretly controlled by the duopolizer. JOAs are a far better business model from a public interest standpoint. While viewpoint diversity would profoundly suffer if additional duopolies are authorized, there is no logical reason why two stations in any market should not be allowed to enter into a JOA, if the JOA is structured to preserve the strict independence of each station's news and public affairs operations. It would be a great boost for viewpoint diversity and for deregulation if the Commission allowed such JOAs in all markets, and also required all duopolies to convert to JOAs within a reasonable time, such as three years.[31]

Third, sometimes deregulation can be structured so as to advance minority ownership. As we documented in our Initial Comments, carefully planned deregulation can be designed to incentivize minority ownership.[32]

Irrespective of which side has the better of the arguments in this proceeding, all options should be on the table and all efforts should be made to reach common ground.

[31] The National Association of Broadcasters has offered a "10–10" Plan for modest extension of duopolies to small markets. See Comments of the National Association of Broadcasters, filed January 2, 2003, pp. 79-84 (proposing that the Commission allow new duopolies between stations that each have less than 10% audience shares). The NAB's plan is a well-intended effort at moderation. CWA's model, however, offers even more deregulation than the NAB's plan while both preserving and (through cost-saving synergies) increasing diversity. CWA's plan trumps everything else offered on the subject of duopolies. It is as close to a perfect "win-win" for industry and the public as one ever sees in a rulemaking proceeding.

[32] See Initial Comments, pp. 82-141.

III. We Present An "HHI For Diversity" Which Can Be Validated And Applied As Part Of A Staged Implementation Plan

In his opening address at the January 16, 2003 Columbia University Law School symposium on these regulations, Chairman Powell remarked that the agency would give a reward to anyone who derived a formula that provides an "HHI for Diversity." We have derived the formula, and will donate our prize to the "Committee to Repeal Section 202(h)."[33]

The Herfindahl-Hirschman Index ("HHI") is based on the number of firms participating in an industry and the market shares of each such firm:

$$HHI = \sum_{i+1}^{f} S_i^2$$

where f = the number of firms participating in an industry, S_i = each firm's market share, and i= a firm in a given industry.

It was possible to derive this sublimely straightforward formula to measure economic concentration because advertisers' behavior is pecuniary and predictable according to well established economic principles. Advertisers are rational maximizers of their own utility, and they have, if not full knowledge, then at least very good knowledge of the markets in which they operate. Further, unlike individual media consumers, advertisers have bargaining power with media outlets. An advertiser buys time according to an "objective function" -- that is, she knows what she wants, e.g., a maximum cost per point for specific demographic groups. Moreover, the price paid for the

[33] See pp. 38-39 infra.

airtime, and the sales results attributable to the airtime, are quantifiable, and they are known to the advertisers. These rational, predictable, verifiable and objective market attributes made it possible for theoretical economists to derive the HHI formula. Even so, DOJ's generally-accepted criteria establishing when a market is "moderately concentrated" or "highly concentrated" are inherently, albeit unavoidably, subjective.

Not one of the above-mentioned attributes of advertiser behavior applies to individual media consumers' behavior in securing the fruits of viewpoint diversity. First, viewpoint diversity is usually not an economic good to an individual media consumer, except to the extent that having different viewpoints available on economic issues might make her a more proficient investor. Consumers value viewpoint diversity for the same reason they value democracy -- it is a nonpecuniary enhancement of one's quality of life, an intangible that helps define why it is good to live in America rather than somewhere else. Second, consumers' media consumptive behavior is seldom deliberate and rational in the economic sense. Consumers frequently watch television randomly (even "channel surfing"), and thus they often absorb different viewpoints by happenstance or fortuity. Sometimes consumers are not consciously aware that they are absorbing viewpoints, as when they watch an entertainment program that has a subtle substantive message. Third, an individual consumer has virtually no bargaining power with the media, apart from the lucky person who writes so compelling a letter to a broadcaster that it results in a slight change in program offerings.

It follows that an "HHI for Diversity" cannot be expressed, like HHI, as a relationship that equates an aspect of consumer welfare directly with the degree of concentration, irrespective of social factors unique to consumer behavior. As noted above, consumers' access to and absorption of viewpoint diversity does not follow economic principles whose mathematical properties are well known. Consequently, an "HHI for Diversity" must account for actual consumer behavior. It must be based primarily upon the commodity consumers devote to media consumption -- their time.

In deriving an "HHI for Diversity," we first recognized that time, standing alone, is not an accurate measurement of consumer welfare derived from viewpoint diversity. More precisely, the incremental hours a media consumer spends listening or viewing inaccurately reflects the consequent increase her consumer welfare. Specifically, time spent viewing or listening is subject to varying levels of attentiveness, which reaches its heights when the program is compelling to the consumer, and reaches its lows when the consumer uses the program as background noise.

Furthermore, we took viewpoint diversity -- in the sense that it adds to consumer welfare -- to mean that the information received by consumers emanates from different sources. Even if consumers are not always fully aware of the ultimate company-of-origin of the information they receive, or of whether certain channels are commonly owned by the same company, the consumers' actual welfare is increased when they receive information from multiple independent sources. It is consumers' knowing or unknowing opportunity to receive viewpoints from diverse sources (*e.g.*, even when channel surfing), and consumers' expenditures of time taking advantage of this opportunity, from which flows consumer welfare derived to viewpoint diversity. A close analog of this principle is the two-source rule in journalism, which holds that information is more credible when it is independently verified by two unrelated entities.

We also recognized that not every independent source has equal value to consumers. A□low power, parttime, poor quality or single-channel source adds less value to consumer welfare than a high power, fulltime, high quality and multichannel set of outlets owned by the same source.

Finally, our "HHI for Diversity" took into account the fact that as additional independent sources are made available to consumers, each such source does not contribute quite as much to consumer welfare as did each of the previous sources. The first few independent sources contribute exponentially to consumer welfare, but additional sources each contribute less until the added value from the "nth" source ultimately adds only linearly to consumer welfare.[34] Thus, the added value of each additional

[34] However, for minority consumers, it may be the 10th or 20th source that has by far the greatest value. *See, e.g.*, Joel Waldfogel, "Who Benefits Whom in Local Television Markets?", November, 2001. This attribute of media economics underscores the need to measure the health of minority ownership, apart from metrics like HHI that measure competition and our "HHI for Diversity." Fortunately, the Commission is now measuring minority ownership. *See* *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (R&O)*, 13 FCC Rcd 23056, 23095-98 ¶¶96 (1998), *recon. denied on this issue (and granted in part on other issues)*, 14 FCC Rcd 17525, 17530 ¶17 (1999) (emphasis supplied). *See* p. 7 n. 12 *supra* (noting that this data is now on the Commission's website).

source would be approximately reflected by an exponent whose value begins at 2 and decreases to 1 as additional sources are added.

Applying these considerations, the variables in a formula for an "HHI for Diversity" can be expressed as follows:

X = consumer welfare derived from viewpoint diversity

p = a program, from a particular source, that is consumed

g = the number of programs from a particular source that are available for consumption

C = the number of consumers consuming a particular program

T = consumers' mean media consumption time devoted to the absorption of viewpoints in a particular program

Z = consumers' mean attentiveness to a particular program (no pun intended)

m = a source (including all outlets owned by that source)

n = number of differently-owned sources offering programs which are consumed.

Thus, consumer welfare derived from viewpoint diversity -- the "HHI for Diversity" -- is given by this formula:

$$X = n^{1+(1/n)} \overset{n}{\underset{m=1}{\square}} \left(\overset{g}{\underset{p=1}{\square}} CTZ \right)$$

This is not a perfect formula. As with any formula that attempts to quantify the consequences of human behavior, it must be tested and validated. Further, it does not reflect the long-term consequences on consumer behavior of a prolonged lack of diversity, which could deaden the senses, reduce consumer expectations of the media and lead ultimately to consumers' escape from the realm of ideas. Nonetheless, this formula at least approximately relates source diversity to consumer welfare.

Measuring the values assumed by each variable in the formula, particularly T (consumers' mean media consumption time devoted to the absorption of viewpoints in a particular program) and Z (consumers' mean attentiveness to a particular program) are not difficult tasks.

Although these measurements cannot be completed before the Commission must rule in this proceeding, they can be completed in time to be used to measure the health of media diversity as part of the Staged Implementation Plan we have proposed.[35/] Our proposal contemplates five stages, implemented in odd-numbered years, with measurements of diversity, competition, localism and minority ownership occurring in the even-numbered years, and with the brakes applied if two successive biannual measurements show that consolidation is endangering the health of one or more of these factors.[36/] The metric for competition could be HHI, and our "HHI for Diversity" could be another metric.[37/]

[35/] See Initial Comments, pp. 82-101, and further discussion in these Reply Comments at pp. 25-32 infra.

[36/] See Initial Comments, pp. 82-90. Statistical measurements are often imprecise, and anomalies arise; therefore, healthy market measurements should be supplemented with anecdotal evidence. Id., pp. 86-87.

[37/] Minority ownership continues at an extremely unhealthy level. Fortunately, the Commission is now measuring minority ownership through its Form 323 data; see p. 7 n. 12 supra. The health evaluation of minority ownership as part of Staged Implementation should be whether deregulation has materially exacerbated or improved its exceedingly poor health. We leave to others the task of developing a metric for localism. In light of Bechtel v. FCC, 10F.3d 875 (D.C. Cir. 1992), such a metric will probably have to emphasize local program content rather than local ownership.

HHI, and our "HHI for Diversity," are thermometers, useful to take the temperature of markets every two years. The interpretation of these temperatures requires consensus on what temperature level reflects poor health. DOJ's generally-accepted guidelines for HHI might answer that question for competition, and the Commission would need to establish comparable healthy-markets guidelines for diversity. Specifically, when does a reading of our "HHI for Diversity" for a national or local market manifest strong diversity, moderate diversity, or slight diversity?

The job of answering that question is well suited to a negotiated rulemaking that the Commission could convene this summer. Ultimately, the tasks of deriving and refining the appropriate metrics, and establishing the temperature levels that reflect poor health, may exceed the capacity of persons working in any agency in four months. Consequently, as we have suggested, the Commission should render, now, its global decisions on whether (and what) to deregulate. Promptly thereafter, it should convene a negotiated rulemaking at which all affected stakeholders can work together to recommend the timetable for implementation, the metrics, and the healthy-temperature levels that will guide the implementation process.[38] Such formulas, geared to market

[38] Our proposal for such a negotiated rulemaking may be found in our Initial Comments, pp. 145-147. Securing consensus on the temperature levels that reflects poor health will require skill and patience. An indication of how daunting this task might become may be gleaned by recalling the history of the Commission's efforts to define the simple term "substantial service" in the comparative renewal context. A finding that an incumbent had provided "substantial service" triggered a "renewal expectancy"

[n. 38 continued on p. 24]

realities and consumer behavior, are far preferable to guesswork in establishing the number of voices needed to maximize consumer welfare.[39]

IV. Opportunities To Protect Consumers And Advance Minority Ownership Through This Proceeding Are Substantial And Achievable

As we have noted, there are a variety of ways in which the Commission can promote minority ownership in this proceeding,[40] or through additional proceedings that can be initiated in its wake.[41] For example, the Commission can incentivize sales of stations to socially and economically disadvantaged businesses

[38] [continued from p. 23]

that effectively eliminated from contention any renewal overfiler that could not prove that the incumbent should be disqualified entirely. See Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984) (giving history of this policy). The process of creating the definition of "substantial service" was contentious, and the Commission probably got the answer wrong -- but the important thing is that the definition was in fact produced and, for what it was worth, it was applied successfully in practice and (incredibly) it survived judicial review. See Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

[39] Other metrics can be applied for more limited purposes. For example, in the local radio ownership proceeding, MMTC presented a formula that it offered as a substitute for the "50/70" flagging criteria. MMTC's formula, designed to prevent a consolidating market from "tipping" into oligopoly and thus eliminating all independent voices, was crafted to ensure that there is sufficient revenue in a consolidating radio market to enable independent stations to survive and offer independent programming. See Reply Comments of MMTC in MM Docket No. 01-317 (Local Radio Ownership), May 8, 2002, pp. 22-27.

[40] See Initial Comments, pp. 82-141.

[41] Id., pp. 128-141 (proposing steps to create new FM allotments).

("SDBs"). Still, an SDB's opportunity to acquire more stations is meaningless if consolidation leaves the SDB with nothing to buy and without the ability to compete. Therefore, the earmark of a deregulatory plan should be careful, thoughtful implementation, as described in our Initial Comments[42] and as amplified below.

A. Staged Implementation, As Proposed By The Diversity And Competition Supporters And By Paxson Communications, Provides The Best Hope For Protecting Diversity, Competition, Localism And Minority Ownership

A central point of our comments was that the Commission should focus not only on whether to deregulate, but, if it deregulates, to go about it in carefully measured stages, retaining the ability to apply the brakes if diversity, competition, localism or minority ownership are endangered. We supplied examples of how such a Staged Implementation Plan might operate in practice.[43] Naturally, we were delighted that another party independently made exactly the same point:

> the Commission's ownership rules have been the fundamental reality of the broadcast industry and the rules have shaped the businesses and plans of every industry participant. It would be unwise to rashly discard any of the existing ownership rules or to attempt to replace them with an as yet undetermined single ownership rule based on an as yet unexplained market/voice standard. [44]

Paxson urged immediately increasing the national cap to 50%, but:

[42] Id., pp. 82-101.

[43] Id., p. 84 (Figures 1 and 2).

[44] Paxson Communications Comments, p. 6.

> Paxson believes that the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects. 45/

While maintaining that "[s]uch ill effects are unlikely" Paxson urged that:

> the Commission should immediately increase the ownership cap to 50%, which will accommodate all existing broadcast combinations and give some additional room for growth. The Commission should also establish a presumption that it will increase the cap by at least 2.5% on a biennial basis until the cap reaches 60%. As part of each biennial review proceeding, the Commission should evaluate developments in the television broadcast and greater media markets and determine whether it should increase the cap more quickly or slowly. Once the cap reaches 60%, the Commission should continue to monitor conditions in the broadcast industry, but without a presumption that additional relaxation of the cap will occur. If conditions remain as strongly competitive as they are now, further relaxation may be in order. 46/

Paxson's deregulation schedule and our plan[47/] are compared below.

Figure 1: National Coverage-Based Deregulation Plans

Stage	Year	Paxson Communications Plan	Diversity & Competition Supporters Plan
0	Current	35.0%	35.0%
1	2003	50.0%	36.0%
2	2005	52.5%	37.0%
3	2007	55.0%	38.0%
4	2009	57.5%	39.0%
5	2011	60.0%	40.0%

Certainly, Paxson contemplates much faster deregulation than we believe would be prudent -- particularly with its proposal for

45/ Id., p. 14.

46/ Id.

47/ See Initial Comments, p. 84.

an immediate and dramatic leap to 50% national coverage. Indeed, we would much prefer no deregulation of the national cap at all. But conceptually, Paxson has the *process* right, and the company deserves credit for putting the good of the country above its own short-term private interest.

Staged implementation is profoundly sensible, as the Commission's history[48] and the nation's history have illustrated.[49] The continued economic health of the industry

[48] Parallels for staged implementation abound. For example, ILECs' entry into the long distance market is conditioned on their completion of a fourteen-step checklist. Analog television service will go away only after an 85% DTV service level is attained. Imagine the consequences if the Commission had been told in 1996 to immediately open the doors to unlimited ILEC entry into long distance, or if the Commission had been told to abandon analog service as soon as the first DTV station signs on the air.

[49] It would be repugnant to equate media structural deregulation with school integration as a public good; at best, only some aspects of media structural deregulation might benefit the public, while virtually everything about school integration benefitted the public. Still, the *history* of school integration sheds light on the value of staged implementation. In 1954, the Supreme Court declared that in the public schools, "separate" was inherently "unequal." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("*Brown I*"). Massive resistance immediately arose. Difficulties with implementation were invoked, usually as pretexts for inaction. For example, it suddenly became a priority to rehabilitate the physical structures in which millions of Black children were educated, since White parents would not allow their children to be sent to these dilapidated institutions. Black teachers had to be fired, Black principals had to be demoted, and White teachers had to be trained to teach in an integrated setting. Private "segregation academies" had to be funded and constructed. Citing some of this, the Court in 1955 directed that desegregation must proceed "with all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 299 (1955) ("*Brown II*"). Inevitably, that command was misread by segregationists to mean "all deliberate absence of speed." In 1968, the Court made it clear that *Brown II* required whatever steps were necessary to convert a dual-school system into a "unitary system in which racial discrimination would be eliminated root and branch" through

[n. 49 continued on p. 28]

cannot be maintained if deregulation is implemented too suddenly. A seismic shock to the system would produce dangerous side effects that Congress expects the agency to avoid. Small businesses are particularly vulnerable to the economic consequences of sudden changes in settled expectations. They do not have huge staffs of MBAs available to recraft established business plans, or to craft alternate plans that take into account every potential disruptive regulatory event. Lacking vertical or horizontal integration, they cannot sail along on several economic engines, confident that if one engine develops trouble, the ship can still plow ahead.

What is contemplated in this proceeding is major surgery, and a good surgeon follows the Hippocratic Oath to "do no harm." She monitors her patient's health, and works in several stages over time when undertaking a potentially dangerous operation. Likewise, the Commission should monitor the market's health and

49/ [continued from p. 27]

plans that promise "meaningful and immediate progress toward dis-establishing state-imposed segregation." Green v. County School Board of New Kent County, 391 U.S. 430, 437-48 (1968) ("Green"). Thereafter, desegregation proceeded under the supervision of federal district judges using a form of staged implementation based upon six "Green factors," including pupil placement, faculty placement, and equalization of facilities. These staged implementation plans gave school districts the flexibility to address genuine concerns (budgets, training, teacher recruitment and new school construction) over reasonable periods of time, while giving no credence to pretexts flowing from a desire to maintain segregation. A school district's equalization of each of the Green factors would signal the end of discrimination as a cause of segregation. A federal judge could then declare that a district had attained "unitary status," whereupon court supervision would end. To say the least, this process was flawed, but things would have been much worse if "all deliberate absence of speed" had remained the rule instead of the staged implementation approach mandated by Green.

proceed in several stages over time while performing potentially dangerous surgery on the media industry.[50]

Staged implementation is consistent with Section 202(h) of the Telecommunications Act. In our Initial Comments, we stated:

> As codified at 47 U.S.C.□§161, this provision requires the Commission to review, biennially, regulations such as those being considered in this proceeding. It directs that the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and it instructs the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest." ....
>
> First, as we have presented it, the Staged Implementation Plan paradigm would enable the Commission, upon the issuance on its *2003 Omnibus First R&O*, to effectuate the First Stage immediately. Thus, if the words "repeal or modify" are read to imply action that begins immediately, the Staged Implementation Plan would satisfy that requirement.
>
> Second, if a rule is found not "necessary in the public" or "no longer in the public interest," and the Commission reads that language to mean it must "repeal or modify" the rule, nothing in the words "repeal or modify" (particularly the more moderate term "modify") suggests that the Commission's deregulatory action must occur all at once. The statute is silent on this question, thereby implicitly leaving it to the Commission's routine discretion on how to craft the remedy. On that subject, the Commission's discretion is very broad.
>
> At most, then, Congress has said that if the agency finds it no longer "necessary" for the rules to remain in one place, the Commission must choose a better destination, point its public interest vehicle in that direction, and drive it there. Section 202(h) does not disallow the Commission from observing the road and being ready to apply the brakes promptly if danger is observed. Specifically, the Commission is permitted -- indeed, it is expected -- to conduct further biennial reviews to determine whether further "modifications" are needed. Such biennial reviews are designed in to our model of a Staged Implementation Plan.

[50] *See* Initial Comments, pp. 92-93 (describing the potentially disruptive impact of too-sudden deregulation on media markets, and noting that the resulting speculation and uncertainty could endanger the industry's economic health.)

> Consequently, a Staged Implementation Plan could be fully consistent with Section 202(h), irrespective of how the Commission defines the terms “necessary in the public interest” and “no longer in the public interest.” 51/

Paxson agrees that staged implementation is consistent with Section 202(h):

> because it would embody the Commission’s judgment that the current cap is not necessary in the public interest, but that immediately eliminating any cap also is not in the public interest. For the last 60 years, broadcasters have calibrated their business activity against the background of national ownership limitations. They should now be given the opportunity to adjust those plans over time to accommodate the potential changes that unlimited national ownership could bring. Moreover, there are enough potential dangers in relaxing the cap to justify a go-slow approach. Paxson reiterates that it expects increases in the cap to have no ill effects on diversity, competition, or localism. Section 202(h) does not, however, require the Commission to ignore concerns about possible market distortions that could be caused by increased consolidation simply because it cannot demonstrate with certainty that those effects will occur. The course Paxson proposes steers a middle course that is firmly deregulatory, but that will leave the Commission with options if market distortions occur (fn. omitted). 52/

We are confident that Section 202(h) does not preclude, and indeed affirmatively contemplates staged implementation. Staged implementation is contemplated by Section 202(h)’s use of the words “repeal or modify.” “Modify,” in this context, is a nonsuperfluous word. There are three ways one can “modify” something by way of reducing it: one can relax it immediately, one can relax it over time, or one can phase it out over time. There is no indication that Congress intended the Commission to suspend its good judgment, or ignore the fruits of its own expertise, on the question of whether the instantaneous imposition

51/ Id., pp. 99-101 (fns. omitted).

52/ Paxson Communications Comments, pp. 14-15.

of seismic changes in the marketplace would do harm to the pro-competitive goals Congress sought to achieve in the 1996 legislation.

To be sure, in 2004-2005 the Commission would still need to conduct a Section 202(h) biennial review of those regulations that it does not schedule for relaxation or repeal in this proceeding. Furthermore, Section 202(h) could require the Commission to revisit its staged implementation schedule de novo every two years -- since that schedule would itself be a rule. However, that de novo review could occur coterminously with each stage of the Staged Implementation Plan, using the same metrics for diversity, competition, localism and minority ownership that the Commission would use in the Staged Implementation Plan. The new "Staged Implementation Rule" would be like any other rule affected by Section 202(h). The Commission would review the Staged Implementation Rule biennially, at which time the Commission would determine whether it is "necessary in the public interest" for the Commission to retain the ability to apply the brakes if unhealthy conditions manifest themselves in practice, and to resume deregulation once those conditions are corrected.

Such a Staged Implementation Rule, reflecting the Commission's desire to maintain the health of the marketplace, would be likely to pass any of the tests of "necessity" offered by the parties to this proceeding. Indeed, such a procedural rule should be regarded as indispensable, since it would implement Congress' expectation that the agency use its expertise to "modify" rather than just "repeal" a substantive regulation.

It follows, then, that there are no legal impediments to the adoption of staged implementation. The concept should be embraced as a model for compromise on the merits, as a method of preventing harm to markets and consumers, and as a template upon which initiatives that promote minority ownership can be impressed.

B. The Commission Should End "Flagging" And Expedite The Processing Of Assignment And Transfer Applications

The Bureau does a superb job of quickly processing non-flagged and uncontested assignment and transfer applications. Nonetheless, if the Commission adopts some deregulation, the Bureau could be deluged with Form 314 and Form 315 applications that present a host of questions of first impression. To avoid such a quagmire, the Commission should adopt bright-line rules, abandon flagging, and (to the extent humanly possibly) eschew case-by-case review of uncontested applications.

In the local radio ownership proceeding, MMTC explained why flagging is so disruptive to small businesses:

> Irrespective of the outcome, a flag generates unanticipated delay. For a small entrant, that delay can be crippling or fatal. Small entities that raise the capital for an acquisition often must encumber their other assets in order to secure the equity or debt needed to complete the acquisition. During the time the deal is pending, these other assets cannot be used as security for any other transactions. Cash in hand, pledged or escrowed, cannot be used productively. Nor can a small company buy something else while its deal is pending, as a large company could do.
>
> Thus, we agree with industry commenters who want the Commission to eliminate the screen. The screen was a good concept, but it suffered from the Commission's insufficient resources and consequent long delays. A bright line rule is preferable. 53/

53/ Reply Comments of MMTC in MM Docket No. 01-317 (Local Radio Ownership), May 8, 2002, p. 22.

Small businesses are especially in need of certitude and expedition in their dealings with the Commission. They seldom possess the capital reserves, staff, and multiple income streams sufficient to weather long regulatory delays. New entrants buying stations urgently need to be able to deliver to the seller, their investors, and their staffs a rapid grant of an uncontested application. Unlike a going concern, a new entrant has no other resources to sustain itself while it is waiting for a grant. It will have studio space leases, tower leases, and network affiliation contracts lined up -- the loss of any of which can kill a deal. Investors will be concerned about when they will begin to see income being generated. Often, the principals will have mortgaged their houses, and key staff have left their jobs to prepare for the acquisition. Investment or loan commitment terms may change, or investments and loans may disappear entirely.

These considerations also apply to incumbents, but they are potentially devastating to new entrants. Moreover, while a company's first deal, or one of its first deals, is pending, the company cannot compete for and may lose subsequent deals.

To cure this problem, the Commission should adopt bright-line standards, eliminate "flagging" and, to the extent possible, eschew case-by-case review. As Bonneville accurately contended, case-by-case review

> is indefinite and lacks the certainty required in the media marketplace to effectively plan financial transactions.... such an approach will necessarily result in a substantial drain on Commission resources, lengthy processing delays for applicants, and significant transaction costs as the marketplace will have no certainty regarding FCC treatment of potential transactions. 54/

D. The Commission Should Explore The Concept Of A Private Market For "Diversity Credits," Analogous To Pollution Credits But Without Their Anti-Consumer Attributes

We close with a new idea that we propound here for consideration and debate. We have no position on it, and are not prepared to offer it as a proposal. Instead, we offer it because it is at least theoretically capable of forming the basis for a market-based compromise that would satisfy the competing objectives of the parties while, at the same time, providing direct incentives for small and independent media outlets.

In the environmental field, the concept of "pollution credits" has taken hold. Under this concept, in theory, a company would be required to avoid exceeding certain pollution thresholds. If it operates below that threshold, it receives a "pollution credit" which it can sell in the private marketplace to another

54/ Comments of Bonneville International Corporation, filed January 2, 2003, p. 9. See also Comments of Clear Channel Communications, filed January 2, 2003, p. 8. n. 21 (offering several rather troubling examples of decisions that required several months and that applied inconsistent metrics among comparable applications).

company that did not meet that threshold.[55]

This concept has not been without its critics, since if ineffectively applied it could retard the restoration of clean air. In the electronic media context, however, the Commission would be writing on a blank slate. Starting with the EPA's paradigm, the FCC could develop a system of marketplace incentives that could serve as a substitute for a good deal of structural regulation, while at the same time incentivizing diversity, including ownership by socially and economically disadvantaged businesses ("SDBs"). Here is how the concept could work:

1. SDBs would be given a certain number of Diversity Credits, commensurate with the extent of their social and economic disadvantages. [56]

[55] See Peter Behr and Eric Pianin, "Firms Start Trading Program for Greenhouse-Gas Emissions," Washington Post, January 17, 2003, p. A14 (reporting that the Chicago Climate Exchange, patterned after commodity exchanges, has been created by major corporations for "trades of credits earned by firms that exceed emission-reduction goals." Among the 14 initial members are DuPont Co., Ford Motor Co., Motorola Inc. and the City of Chicago. Each exchange member agrees to reduce average greenhouse-gas levels from 1998 to 2001 by four percent over the next four years, and "[c]ompanies that exceed reduction goals could sell excess reductions to other members that were falling behind their targets. The price would be set by bids on the exchange. Members that failed to meet the 4 percent target would be disciplined at that time by the exchange" and would face sanctions.

[56] This feature of a Diversity Credit plan is logically similar to the Commission's decision to award bidding credits to new entrants in auctions. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (First R&O), 13 FCC Rcd 15920, 15993-15996, ¶¶186-190 (1998).

2. A pre-established number of Diversity Credits would be given by the Commission to the seller at the closing of a transaction that would result in greater structural diversity, including transactions in which the buyer is an SDB. The Commission would also award Diversity Credits to companies establishing incubators for SDBs.□[57]

3. A pre-established number of Diversity Credits would be returned to the Commission by the buyer at the closing of a transaction that would result in additional consolidation.

4. Companies could buy or sell Diversity Credits to one other in private transactions. A private market for Diversity Credits would enhance the value of Diversity Credits, thereby benefitting those (like many SDBs) that do not participate in these inter-company transactions. This market in Diversity Credits would also permit a company that anticipates the need to complete a consolidation-producing transaction to bank enough Diversity Credits to allow it to rapidly complete the transaction when it occurs. If such a company needs more Diversity Credits, it could earn them by selling properties to or incubating SDBs (as noted above), or it could buy more of them from SDBs -- thereby providing the SDBs with additional capital.

Such an approach could have several advantages:

First, it would establish a voluntary market mechanism that incentives diversity and disincentivizes consolidation.

Second, it would immediately deliver to SDBs an asset convertible into capital, thereby helping solve the greatest single barrier to entry faced by SDBs.[58]

[57] In principle, this feature of Diversity Credits would operate much like the tax deferral mechanism in Senator McCain's Telecommunications Ownership Diversification Act of 2003, S.____ (introduced January□30, 2003). Upon a qualified sale, the seller would receive a tangible reward.

[58] See, e.g., National Telecommunications and Information Administration, U.S. Department of Commerce, "Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States" (December, 2000) at 45-46 (describing the impact of minorities' lack of access to capital).

Third, it would incentivize sales of stations to SDBs, thereby creating new diversity-producing opportunities.

Fourth, it would help ameliorate SDBs' competitive disadvantages when they compete for opportunities at market-aggregation (e.g. creating clusters or crossownerships).

Fifth, it would reduce the need for regulatory oversight, including many bright line rules, flags being thrown, and waivers being sought and justified.

The Commission has authority to issue Diversity Credits under Section 303(f) of the Communications Act, which provides that the Commission may "[m]ake such regulations not inconsistent with law as it may deem necessary to...carry out the provisions of this Act",[59] and by Section 303)(g) of the Communications Act, which authorizes the Commission to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest[.]" Thus, the Commission could attach Diversity Credits to broadcast licenses.[60]

[59] See also Section 303(r) of the Communications Act, authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...." Two "provisions of this Act" the Commission would "carry out" by awarding Diversity Credits are Sections 151 and 257. See discussion at p. 13 supra. Authority to award Diversity Credits is also available under Section 303(i), which authorizes the Commission to "make special regulations applicable to radio stations engaged in chain broadcasting[.]"

[60] This procedure also opens the door for the use of Diversity Credits to be removed from the license in the event of serious EEO violations, or to be added to the license when EEO recruitment and outreach efforts far exceed the minimum expected by the regulations.

We offer this concept in the hope that other parties will attempt to design a market-based Diversity Credit program that would serve the public interest and bring some measure of harmony and closure to this proceeding.

D. Section 202(h) Was A Mistake And The Commission Should Seek Its Repeal

Appearing on C-SPAN on January 27, 2003, Chairman Powell characterized the biennial review requirement in Section 202(h) as "destabilizing." He is correct. Reason #1 why Section 202(h) was a mistake is the devastating impact on small and disadvantaged firms of the two-year review cycle in the statute. Small firms, particularly new entrants, depend upon institutional investors who do not operate in two-year cycles. Investors expect from new entrants a five-year cycle of purchase, return, and trade-up, grounded in reliable assumptions that regulatory conditions will not unexpectedly change to their detriment. Those investing in new entrants are unavoidably risk-averse, and their risk-aversion is heightened when regulatory conditions are unpredictable. Thus, the two-year review cycle in Section 202(h) imposes an additional cost of capital on new entrants and those who invest in them, further exacerbating the well-known access-to-capital impediments facing small and especially minority entrepreneurs.[61]

Reason #2 to repeal Section 202(h) is that the Commission depends on the public interest and civil rights communities for balance in developing a full record in structural rulemakings. Nonprofit organizations seldom possess the resources to match the

[61] See p. 36 n. 58 supra.

corporate world as equals in these proceedings, and they certainly lack the strength to endure another of these proceedings in 2004-2005, 2006-2007, 2008-2009, and beyond.

Reason #3 is obvious: how can anyone know if a structural regulation has served its purpose in just two years?

We have presented a Staged Implementation Plan which comports with Section 202(h).[62/] That plan, if adopted, would cure some of the problem of permanentized rule review seemingly contemplated by Section 202(h). Nonetheless, Section 202(h) would require the Commission to review, again in 2004-2005 and *ad infinitum*, those rules *not* relaxed this year. What possible public purpose is served by this?

There is nothing wrong with periodic and systemic review of Commission regulations, and the Commission should commit itself to undertaking such review upon reasonable intervals. Nonetheless, the Commission should not hesitate to include in its legislative recommendations a proposal that Congress repeal Section 202(h).

[62/] *See* pp. 99-101 *supra*.

Conclusion

Most of the initial comments staked out polar opposite positions. No one should be faulted for that, given the time constraints relative to the magnitude of the task. But certainly the time will soon arrive for consensus-building. All stakeholders ought to focus in the weeks ahead on the greater good, and on the moral values that the industry stands for.

The Commission is certainly hearing from parties who are coming in, one by one, to present their views. It might also be a good idea for the Commission's staff (or for individual commissioners) to invite small groups of opposing parties to visit simultaneously -- not to debate, but to think collegially about whether common ground exists for the achievement of some of their reasonable objectives.

Respectfully submitted,[63]

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