

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
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 In)	MB Docket No. 07-294
the Broadcasting Services)	

**COMMENTS OF
NATIONAL HISPANIC MEDIA COALITION (NHMC)**

The National Hispanic Media Coalition (“NHMC”) respectfully submits this brief comment in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment on its recently released report on the ownership of commercial broadcast stations (“Ownership Report”).¹ The curiously abbreviated time period allotted for comment does not afford NHMC adequate opportunity to conduct thorough analysis of the Commission’s Ownership Report. Instead, NHMC files this comment to illuminate that mere release of the Ownership Report does not sufficiently respond to the Third Circuit’s mandate in *Prometheus Radio Project v. FCC*, that the FCC “act with diligence to synthesize and release existing data such that *studies will be available for public review in time* for the completion of the 2010 Quadrennial Review.”² Per *Prometheus I* and *II*, the Commission must not relax *any*

¹ *Commission Seeks Comment on Broadcast Ownership Report*, MB Docket Nos. 09-182, 07-294, Public Notice (rel. Dec. 3, 2012) [hereinafter *Public Notice*].

² *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) (emphasis added) [hereinafter *Prometheus II*].

media ownership limits without first “consider[ing] the effects of its rules on minority and female ownership.”³

I. THE THIRD CIRCUIT SPECIFICALLY INSTRUCTED THE FCC TO CONSIDER THE EFFECT OF ITS MEDIA OWNERSHIP RULES ON OWNERSHIP DIVERSITY

In *Prometheus I*, the Third Circuit remanded the FCC’s decision in the 2002 Quadrennial Review to repeal the failed station solicitation rule while also noting that the FCC also “fail[ed] to consider the effects of its *other* rules on minority and female ownership more broadly.”⁴ The court concluded that “[r]epealing the only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make broadcast spectrum available to all people ‘without discrimination on the basis of race.’”⁵ The *Prometheus I* opinion also directed the FCC to develop a socially disadvantaged business (“SDB”) definition to use for advancement of diversity objectives.⁶ The *Prometheus II* opinion reiterated this point, citing the relevant portion of the *Prometheus I* decision:

We anticipate, however, that by the next [2006] quadrennial review that the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission’s diversity objectives [compared to the revenue-based definition of eligible entities being used].⁷

In the 2006 Quadrennial Review, once again the Commission attempted to relax certain of its media ownership limits, namely the newspaper-broadcast cross-ownership ban (“NBCO

³ *Prometheus II* at 471.

⁴ *Prometheus II* at 465 (interpreting its own decision in *Prometheus I*) (emphasis added).

⁵ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421, n.58 (3rd Cir. 2004) (citing 47 U.S.C. §151) [hereinafter *Prometheus I*].

⁶ *Prometheus I* at 428.

⁷ *Prometheus II* at 466 (citing *Prometheus I* at 428, n.70).

Rule”).⁸ In the context of that proceeding, the FCC commissioned a series of studies, some of which attempted to address issues related to diversity and ownership by women and people of color.⁹ Upon completion of the 2006 Review, the Third Circuit responded in *Prometheus II*:

Several of the FCC-commissioned economic research studies on media ownership, discussed above in regard to notice of the NBCO rule, attempted to address minority and female ownership issues. However, as the Congressional Research Service (“CRS”) concluded, “all the researchers (and the peer reviewers) agree that the FCC’s databases on minority and female ownership are inaccurate and incomplete and their use for policy analysis would be fraught with risk.” The CRS Report noted that the FCC would have difficulty complying with our remand with its existing data. “In its *Prometheus* decision, the Third Circuit instructed the FCC to consider the impact of changes in its ownership rules on minority ownership. Without accurate data on minority (and female) ownership, it is impossible to perform such analysis.”¹⁰

...

[The CRS Report] also noted that “[t]he same problem arises with respect to the impact of each and every media ownership rule on minority and female ownership,” which makes all of the FCC’s media ownership rules vulnerable to being overturned “until the Commission has developed a minority ownership database of sufficient accuracy to allow for reliable testing of the impact of the rules on minority ownership.”¹¹

In a separate “Diversity Order” issued at the same time as the 2006 Quadrennial Review Order, the FCC deferred consideration of proposed SDB definitions. The Third Circuit concluded that the “FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions” and remanded it to do so “before it completes its 2010 Quadrennial

⁸ 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008).

⁹ FCC’s Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic Studies for 2006 Quadrennial Regulatory Review of Commission’s Media Ownership Rules, MB Docket No. 06-121, Public Notice (rel. Sept. 5, 2007).

¹⁰ *Prometheus II* at 468 (internal citations omitted).

¹¹ *Prometheus II* at 468, n.37 (emphasis added and internal citations omitted).

Review.”¹² The court was very specific, urging the FCC to gather the data so that it may conduct *Adarand* studies and to “act with diligence to synthesize and release existing data such that studies will be available for public review in time for completion of the 2010 Quadrennial Review.”¹³

In remanding the Commission’s decision, the Third Circuit emphasized its displeasure with the Commission’s failure to examine the effect of its rule on ownership diversity:

Despite our prior remand requiring the Commission to consider the effects of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the Commission has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the Commission relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.¹⁴

II. THE FCC’S RELEASE OF THE BROADCAST OWNERSHIP REPORT DOES NOT SATISFY THE THIRD CIRCUIT’S MANDATE

In vacating and remanding the FCC’s relaxation of the NBCO Rule and the FCC’s approach in the Diversity Order, the Third Circuit laid out a clear five-step process by which the FCC was to proceed: 1) develop a “minority” ownership database; 2) ensure that database is accurate enough to be reliable for testing the impact of the rules on minority ownership; 3) conduct studies to evaluate the impact of the rules on minority ownership; 4) allow the public to review the studies; and 5) develop a workable SDB definition – *all in time for* completion of the Commission’s 2010 Quadrennial Review.

With the release of the Ownership Report, the Commission has completed only the first step of this process. NHMC applauds the Commission for “synthesizing and releasing”

¹² *Prometheus II* at 471.

¹³ *Prometheus II* at 471, n.42.

¹⁴ *Prometheus II* at 471-472.

ownership data, however, this alone does not respond to the Third Circuit’s order. Nor does gathering and reporting data adequately address the Commission’s statutory mandate to “promote” ownership diversity.¹⁵ The Commission must take the last four steps listed above to properly address the court order.

Now that it has released minority ownership data, it must next “develop[] a minority ownership database of sufficient accuracy to allow for reliable testing of the impact of the rules on minority ownership.”¹⁶ According to researchers from Howard University, the media ownership database is, in its current form, is a “total mess.”¹⁷ Even with the Ownership Report synthesis, NHMC, and surely many other interested parties, will not have time to assess the accuracy of the data given the inexplicably brief comment window. And indeed, in the Ownership Report, the FCC itself acknowledges that trend analysis based on the data “could be somewhat misleading” due to missing data.¹⁸

Once the Commission establishes an accurate, reliable and workable database, the Commission must use it to conduct studies to evaluate the impact of the rules on minority

¹⁵ 47 U.S.C. § 309(j) (2012); 47 U.S.C. §151 (2012).

¹⁶ *Prometheus II* at 468, n.37 (citing a CRS Report).

¹⁷ Comment of Howard University Media Group, *Standardizing Programming Reporting Requirements for Broadcast Licensees*, MB Docket No. 11-189 (Feb. 9, 2012) at 3 (stating that “we insist on a data file available at the FCC website which is in a commonly used software, that its fields of information be fully identified, and that it be easy to open and download”).

¹⁸ *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket Nos. 09-182, 07-294, Report on Ownership of Commercial Broadcast Stations at 5, n.10 (rel. Nov. 14, 2012) [hereinafter *2012 Ownership Report*] (“While this section and the tables provide a basis for trend analysis over the biennial reporting periods from 2009 to 2011, several factors counsel caution in such analysis. First, while 85 percent of all full power commercial television stations filed biennial ownership reports as required in 2009, fifteen percent of stations either submitted insufficient data to identify ownership or failed to file ... Changes in gender, ethnicity, and race of the owners of stations between 2009 and 2011 listed in subsection A(1) could therefore be somewhat misleading because of the missing 2009 data. Additional data points will be provided by future biennial filings, and trend analysis should become increasingly reliable.”).

ownership. To date, no such studies have been completed. In 2010 and in 2007, the Commission contracted for a number of studies to evaluate the media marketplace, however, these studies took place long before the Ownership Report was available and any analysis of ownership diversity based on pre-Ownership Report data would, in the Third Circuit’s words, “have difficulty complying with our remand.”¹⁹ The court is unlikely to look favorably upon the FCC’s apparent decision to defer such analysis to the 2014 Quadrennial Review, especially as the FCC is trying to relax long-standing ownership limits without examining how allowing further consolidation could squeeze out opportunities for women and people of color to own broadcast stations. It is difficult to imagine that the Third Circuit would not see this as yet another FCC attempt to “side-step” or “punt” on diversity – a long standing principle behind the media ownership limits. Such a balk would be particularly troubling given the astoundingly low number of diverse broadcast stations owners described in the Ownership Report.²⁰

As the next step in the five-step process, the court’s mandate directs the FCC to ensure “that studies will be available for public review in time for completion of the 2010 Quadrennial Review.”²¹ Yet now, as the Commission is seemingly rushing to close this proceeding, it has issued no studies based on the Ownership Report; it has offered no analysis whatsoever to the public to help explain “the effects of its rules on minority and female ownership;”²² it has not even allowed ample time for the public to examine the Ownership Report and provide meaningful analysis of the data points therein; and the Commission itself has expressed doubt as to whether such analysis is even possible with the current data.

¹⁹ *Prometheus II* at 468, n.37.

²⁰ *See, e.g., 2012 Ownership Report* at 3-4 (reporting that, in 2011, Latinos only owned 39 out of 1,348 full power commercial television stations, a mere 2.9 percent. Latinos owned only 2.7 percent of FM radio outlets and 4.5 percent of AM radio outlets.).

²¹ *Prometheus II* at 471, n.42.

²² *Prometheus II* at 471-472.

Finally, before completing the 2010 Quadrennial Review the Commission must develop a workable SDB definition. The court has been expecting such action since its first opinion in 2004,²³ and it renewed that expectation in its 2011 opinion.²⁴

In sum, the FCC has taken a first important step towards responding to the Third Circuit's mandate. Before completing the 2010 Quadrennial Review, the court expects four more steps to occur. Moving forward while failing to complete this process will almost assuredly result in the FCC being vacated and remanded for the third straight time by the same Third Circuit panel. Moreover, proceeding without assessing how relaxation of the rules will impact ownership opportunities for women and people of color would be a disastrous decision with potentially long-term effects on ownership diversity.²⁵

III. THE COMMISSION'S PROCESS WITH RELATION TO RELEASE OF THE OWNERSHIP REPORT LEAVES MUCH TO BE DESIRED

In addition to failing to comply with the Third Circuit's very specific mandate to consider the impact of media ownership rules on ownership diversity prior to issuing the 2010 Quadrennial Review Order, the Commission's procedure in seeking comment on the Ownership Report has significant shortcomings. The Commission released the Ownership Report to the public on November 14, 2012, seemingly without the intent to seek public comment on its contents.²⁶ That same day, press began reporting that the Chairman had already circulated a draft of the 2010 Quadrennial Review Order on the Eighth Floor, proposing to relax certain media

²³ *Prometheus I* at 428, n.70.

²⁴ *Prometheus II* at 466, 471.

²⁵ See S. Derek Turner & Mark Cooper, *Out Of The Picture: Minority And Female TV Station Ownership In The United States* at 36 (2006), available at http://www.freepress.net/files/out_of_the_picture.pdf; S. Derek Turner, *Off The Dial: Female And Minority Radio Station Ownership In The United States* at 9 (2007), available at http://www.freepress.net/sites/default/files/resources/off_the_dial.pdf.

²⁶ See *2012 Ownership Report*.

ownership limits.²⁷ Indeed, the FCC's web-site lists the 2010 Quadrennial Review Order as one of the items on circulation as of November 14.²⁸ By all accounts, the Chairman appeared poised to vote on this item behind closed doors, without providing any opportunity for the public to comment on the data, and without any FCC effort to use the data to analyze how its proposed relaxation of certain ownership limits might impact ownership opportunities for females and people of color to own broadcast stations.²⁹

NHMC joined calls from various members of Congress, and other media advocacy and civil rights organizations, urging the Commission to allow time for public comment on the Ownership Report and for the Commission to conduct *Adarand* studies based on the underlying data in the Report.³⁰ Specifically, parties requested that the Commission use the Ownership Report data in its analysis of how media ownership limits impact ownership diversity.

²⁷ See Sarah Portlock, "FCC Chairman Considers Loosening Media-Ownership Rules Among Radio, Television, Newspapers," *The Wall Street Journal*, Nov. 14, 2012, available at <http://online.wsj.com/article/BT-CO-20121114-718249.html>; Katy Bachman, "FCC's Genachowski Circulates Media Ownership Order, Details of proposal unclear, but likely to resemble 2007 rules," *AdWeek*, Nov. 14, 2012, available at <http://www.adweek.com/news/television/fccs-genachowski-circulates-media-ownership-order-145194>; John Eggerton, "FCC Proposes Loosening TV/Newspaper Cross-Ownership Ban...Again," *Broadcasting & Cable*, Nov. 14, 2012, available at http://www.broadcastingcable.com/article/490405-FCC_Proposes_Loosening_TV_Newspaper_Cross_Ownership_Ban_Again.php.

²⁸ FCC Items on Circulation, http://transition.fcc.gov/fcc-bin/circ_items.cgi.

²⁹ Katy Bachman, "Senate Dems Blast FCC Draft to Relax Media Ownership Rules, Letters follow outcry from public interest groups," *AdWeek*, Nov. 30, 2012, available at www.adweek.com/news/press/senate-dems-blast-fcc-draft-relax-media-ownership-rules-145571.

³⁰ See e.g., Letter from Wade Henderson and Nancy Zirkin, to FCC Chairman Julius Genachowski *et al.* (November 9, 2012) (Commission should not act on ownership rules without public opportunity to sift data and engage in substantive debate); Letter from Leadership Conference members, American Civil Liberties Union *et al.*, to FCC Chairman Julius Genachowski *et al.*, (November 20, 2012) (request delay in consideration of media ownership rules because released report does not include "any synthesis of the data, analysis of trends, discussion of causation, or forecasts"); Letter from Wade Henderson and Nancy Zirkin, Leadership Conference, to FCC Chairman Julius Genachowski, *et al.* (December 5, 2012) (complete analysis of 2010 quadrennial proposal on ownership diversity required before action);

In response, on December 3, 2012, the Commission issued a Public Notice seeking comment on the Ownership Report.³¹ The comment deadline was set for the day after Christmas, December 26, affording the public sixteen working days (counting Christmas Eve) to digest and comment on the 101-page Report. The reply comment deadline was set for January 4th, providing the public with six working days (including New Year's Eve) to review and respond to any comments filed in the docket. The Public Notice seemed to suggest that parties already had ample opportunity to comment on the Ownership Report, stating that “this proceeding has provided numerous opportunities for public input and participation.”³² As it pertains to the Ownership Report, this is untrue. The Ownership Report was only made available on November 14 and the FCC did not invite comment on the Report until December 3.

CONCLUSION

The Commission must examine the impact of media ownership limits on broadcast ownership diversity prior to issuing its decision in the 2010 Quadrennial Review. The Ownership Report demonstrates pitifully low levels of ownership by women and people of color. The Commission should do everything in its power to reverse this. Included in those efforts should be the preservation of media ownership limits insofar as they are a race-neutral way to promote ownership opportunities for women and people of color. The FCC has the burden to demonstrate otherwise, and until it can, it must maintain the current media ownership limits.

Letter from Marc Morial, National Urban League, *et al.*, to FCC Chairman Julius Genachowski, *et al.* (December 6, 2012) (no action on NBCO acceptable until “a credible, objective and data-based analysis” of impact is completed and emphasizing need for *Adarand* studies).

³¹ *Public Notice*.

³² *Public Notice* at 2.

Respectfully Submitted,

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