The Leadership Conference on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

Officers
Chair
Judith L. Lichtman
National Partnership for Women & Families
Secretary
Barry Rand
AARP
Treasurer
Lee A. Saunders
American Federation of State, County & Municipal Employees

Executive Committee
Debo P. Adegbile
NAACP Legal Defense and Educational Fund, Inc.
Barbara Arnwine
Lawyers' Committee for Civil Rights Under Law
Arlene Holt Baker
AFL-CIO
Warren David
American-Arab Anti-Discrimination Committee
Marcia D. Greenberger
National Women's Law Center
Chad Griffin
Human Rights Campaign
Linda D. Hallman
American Association of University Women
Mary Kay Henry
Service Employees International Union
Benjamin Jealous
NAACP
Michael B. Keegan
People for the American Way
Bob King
International Union, United Automobile Workers of America
Elisabeth MacNamara
League of Women Voters of the United States
Marc Morial
National Urban League
Mee Moua
Asian American Justice Center
Janet Murguía
National Council of La Raza
Debra Ness
National Partnership for Women & Families
Priscilla Ouchida
Japanese American Citizens League
Terry O'Neill
National Organization for Women
Jacqueline Johnson Pata
National Congress of American Indians
Mark Perriello
American Association of People with Disabilities
Dennis Van Roekel
National Education Association
Anthony Romero
American Civil Liberties Union
David Saperstein
Religious Action Center of Reform Judaism
Shanna Smith
National Fair Housing Alliance
Thomas A. Saenz
Mexican American Legal Defense & Educational Fund
Randi Weingarten
American Federation of Teachers AFL-CIO

Interim Compliance/Enforcement Committee Chair
Karen K. Narasaki
President & CEO
Wade J. Henderson
Executive Vice President & COO
Karen McGill Lawson

December 26, 2012

Chairman Julius Genachowski
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

Re: MB Docket No. 09-182, 2010 Quadrennial Review

Dear Chairman Genachowski and Commissioners:

On behalf of the undersigned civil rights organizations, we write to offer our views with respect to the ownership data released by the Federal Communications Commission on November 14.

At the outset, we note that the expansion of minority and female ownership in media is an important goal for the civil rights community because of the powerful role the media plays in the democratic process, as well as in shaping perceptions about who we are as individuals and as a nation.

As we explain in detail below, the current abbreviated comment cycle does not address the omissions in the record, the newly-released ownership diversity data confirms that ownership rates by women and people of color are abysmal, and the Commission has not started, let alone completed, the studies necessary adopt rules that would address low ownership rates and pass Supreme Court muster. **The Commission should not move ahead with any changes until a credible, objective and data-based analysis of the impact of such changes on ownership by women and people of color is completed.**

<u>The Current Comment Cycle is Inadequate</u>

Minority and women ownership data is critical because without good data, the Commission cannot understand how changes to its media ownership rules impact its goal of promoting ownership by women and people of color.[1] The burden of proof lies with the Commission to justify changes to the media ownership rules,[2] as well as

to demonstrate that its media ownership rules promote ownership by women and people of color.[3]

Despite this fact, the Commission's recent notice seeks comment on raw data that provides no analysis explaining what impact the proposed rule changes in the 2010 Quadrennial Review docket will have on ownership rates by women and people of color. Thus, this extremely brief comment period fails to provide a full opportunity to understand, analyze, and offer comment on the ownership data, and leaves the Commission open to challenge before the courts because it is self-evidently insufficient. **As such, this comment cycle does nothing to address the concerns that Leadership Conference members have raised with the Commission individually and collectively during this proceeding.**

The Newly-Collected Data Demonstrate Ownership Diversity in Crisis

The data released by the Commission show that the state of women and minority ownership of broadcast stations is in crisis. The following charts show a comparison of the radio and television ownership levels from 2007 to 2011.[4] The Commission's most accurate data confirm low minority and women ownership levels of full power TV and FM radio stations. The data also confirm that ownership of AM radio stations and low power TV stations, which are more affordable opportunities for minority communities to enter broadcasting, are also at depressing levels.

Full power TV station ownership										
Study	Women		Latinos		African Americans		Native Americans		Asians	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Free Press 2007	80	5.87	17	1.25	8	0.59	5	0.37	13	0.95
FCC 2009	66	5.6	30	2.5	12	1	8	0.7	9	0.8
FCC 2011	91	6.8	39	2.9	10	0.7	12	0.9	6	0.5

Commercial FM Radio station ownership										
Study	Women		Latinos		African Americans		Native Americans		Asians	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Free Press 2007	329	5.54	118	1.93	167	2.8	16	0.27	16	0.27
FCC 2009	325	6.2	141	2.7	63	1.2	16	0.3	20	0.4
FCC 2011	323	5.8	151	2.7	93	1.7	28	0.5	45	0.8

The Leadership Conference

Commercial AM Radio station ownership										
Study	Women		Latinos		African Americans		Native Americans		Asians	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Free Press 2007	280	6.63	171	4.15	179	4.35	74	1.73	14	0.33
FCC 2009	267	7	174	4.6	89	2.3	7	0.2	97	2.5
FCC 2011	300	7.8	172	4.5	106	2.8	16	0.4	100	2.6

Class A TV station ownership										
Study	Women		Latinos		African Americans		Native Americans		Asians	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FCC 2009	33	8.3	25	6.3	9	2.3	3	0.8	8	2
FCC 2011	35	8.6	31	7.6	6	1.5	4	1	8	2

Low Power TV station ownership										
Study	Women		Latinos		African Americans		Native Americans		Asians	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FCC 2009	156	15.1	85	8.2	7	0.7	1	0.1	34	3.3
FCC 2011	185	14.8	120	9.6	16	1.3	4	0.3	28	2.2

Because the data do not permit trend analysis, it is impossible for commenters to determine whether these numbers show a decline or increase, or whether the low levels are merely maintenance of the unacceptable *status quo*. Further time would be required to more completely determine the cause for these numbers and where they represent declines or increases in ownership, or merely a difference in data collection.

Further, the FCC is about to hold incentive auctions and it could also have an impact on minority ownership through acquisitions and divestitures of television stations. Media have already reported on how the upcoming auctions are affecting media ownership.[5] The newly-released data does not supply the Commission a record adequate to its obligation.

<u>The Commission Must Conduct High-Quality Studies Meeting Supreme Court Guidelines</u>

The civil rights community has repeatedly emphasized on the record our concern with regard to the composition of the industry at large, and has expressed our extreme disappointment with the Commission's failure to undertake the required analysis to create a set of rules that advance minority ownership and comply with the Supreme Court's guidelines.[6] Now is the time, using the 2010 Quadrennial Review as the vehicle, for the Commission to reach solutions to advance

minority ownership across the industry at large. The Commission must not let this opportunity again pass without implementing the process necessary to achieve this goal.

To be clear, we are asking the Commission to take the following methodical steps, and through that, arrive at solutions that promote diverse ownership by women and people of color that comply with the Supreme Court's guidelines, including those set forth in *Adarand Constructors, Inc. v. Peña*:

- First, appropriately fund and commence analysis at a quality needed to meet the dual goals of promoting diverse ownership and adhering to Supreme Court guidelines.
- Second, utilize that analysis to design creative solutions to promote diverse ownership that satisfy the Supreme Court guidelines.
- Third, implement those solutions as quickly as possible and in a manner that promotes diverse ownership.
- Fourth, apply an inclusive public comment process for each of the above steps.

In the 2008 Diversity Order, the Commission justified its narrow revenue-based solutions to promote minority ownership on the grounds that it did not have sufficient data to satisfy Supreme Court guidelines. Now in 2012, the Commission is offering the same rationale, despite a court order that such a response is inadequate. The Commission must implement the steps that we have identified through the 2010 Quadrennial Review to ensure that by the time of the next review, we are not at the same place again.

Additional Issues Must Be Analyzed

Finally, through conversations with Commission staff, we understand that the Commission might be retreating from its previous conclusions about the importance of ownership diversity, the connection between ownership diversity and viewpoint diversity, and the adequacy of the record with regard to strict or intermediate scrutiny. None of this analysis has been proffered for public comment in this proceeding. We believe that minority ownership is critical to ensure viewpoint diversity on our airwaves.[7] However, it is impossible for us to comment meaningfully on the Commission's possible action without adequate notice.[8]

We will be requesting meetings with Commission leaders and Commission staff in the new year and hope that further discussion will provide an opportunity to find common ground and proceed

The Leadership Conference

accordingly. Please contact Leadership Conference Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, UCC Office of Communication, Inc., at 202-841-6033, or Gabriel Rottman, ACLU, at 202-675-2325, or Corrine Yu, Leadership Conference Managing Policy Director at 202-466-5670, if you would like to discuss the above issues or any other issues of importance to The Leadership Conference.

Sincerely,

American Civil Liberties Union
Asian American Justice Center, member of Asian American Center for Advancing Justice
Common Cause
Communications Workers of America
The Leadership Conference on Civil and Human Rights
National Council of La Raza
National Consumer Law Center, on behalf of its low-income clients
National Hispanic Media Coalition
National Organization for Women Foundation
National Urban League
NAACP
United Church of Christ, Office of Communication, Inc.

---

[1] The Commission is under a court mandate to consider the impact of media ownership rules on women and people of color before making changes to those rules. *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3rd Cir. 2011) (*Prometheus II*).

[2] The media ownership review occurs pursuant to the Communications Act's quadrennial review provision, which was interpreted by the Third Circuit in 2004. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (rejecting a presumption in favor of deregulation and adopting the "ordinary" public interest and administrative law standards).

[3] *See* 2010 Quadrennial Review, Notice of Proposed Rulemaking at ¶ 158 (rel. Dec. 22, 2011) (acknowledging limitations of the record with regard to court mandate regarding diversity of ownership).

[4] This data cannot be used to assess trends, because the underlying reporting obligations changed between 2007 and 2009, and the data collected in 2009 was substantially less complete than that collected in 2011. These tables are for the purpose of comparison. The 2007 data is from S. Derek Turner, Free Press, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (2007), http://www.freepress.net/files/off_the_dial.pdf.

[5] *See* Chris Nolter, Investors circle TV stations with spectrum to sell, (July 18, 2012), http://www.thedeal.com/content/tmt/investors-circle-tv-stations-with-spectrum-to-sell.php; Harry A. Jessell, NRJ TV Snags WGCB Harrisburg For $9M, (Sep. 20, 2012), http://www.tvnewscheck.com/article/62316/nrj-tv-snags-wgcb-harrisburg-for-9m ("NRJ . . . has been buying TV stations in or near major markets in hopes of flipping them at a profit in the FCC's planned "incentive auction" of TV spectrum."); *see also* NRJ TV To Acquire Asian-Language KSCI (Mar. 27, 2012), http://www.tvnewscheck.com/article/58343/nrj-tv-to-acquire-asianlanguage-ksci?ref=search.

[6] Letter from Leadership Conference on Civil and Human Rights members, American Civil Liberties Union *et al.*, to FCC Chairman Julius Genachowski et al, (March 5, 2012) (NPRM fails to take into account proposal's impact on ownership diversity; noting FCC-commissioned studies in 2010 did not address race and gender); Comments of United Church of Christ, OC Inc., National Organization for Women, Communications Workers of America, *et al*., Docket No. 09-182 (filed March 5, 2012) (outlining studies the FCC has still not completed with regard to

ownership diversity); Reply Comments of the United Church of Christ, OC Inc. et al, Docket No. 09-182 (filed April 17, 2012) (conducting preliminary analysis with incomplete television ownership data demonstrating need for further analysis and study); 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); 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).

[7] Ownership diversity is especially for minority and linguistically isolated communities where the identity of the owner is correlated with producing relevant content for these communities. For example, a study by Free Press using 2007 data found that minority-owned radio stations were significantly more likely to air Spanish, Religion, Urban, and Ethnic formats. Turner, *supra*, at 44. A 2009 study by Professor Catherine Sandoval also found that 72.5%, or 591 of 815, minority-owned radio stations aired minority-oriented formats. Catherine J. K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* 20-21 (2009), http://www.radiodailynews.com/mmtcreport.pdf.

[8] *See Prometheus II*, 652 F.3d at 449-50 (notice "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based" and "the opportunity for comment must be a meaningful opportunity") (citations omitted).