

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| 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 |
| |) | |
| 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 Radio Broadcast Stations in Local Markets |) | MM Docket No. 01-317 |
| |) | |
| Definition of Radio Markets |) | MM Docket No. 00-244 |

**COMMENTS OF
PROMETHEUS RADIO PROJECT**

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October 23, 2006

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SUMMARY

Nothing in Section 202(h) of the 1996 Telecommunications Act or the Third Circuit's construction of it preclude the FCC from exercising its general powers to repeal or modify the UHF Discount.

The UHF Discount was adopted to reflect the actual difference in audience reach between UHF and VHF stations as of 1985. Subsequent developments have removed any possible continuing justification for any UHF discount. Because MVPD now reaches almost 90% of US homes, over-the-air TV stations now receive carriage on cable and DBS, and changes in FCC power limitations, UHF stations no longer face any meaningful disadvantage *visá vis* VHF stations. If the Commission were nonetheless disposed to retain any UHF discount, rational decisionmaking requires the Commission at the least to modify the size of the UHF Discount to reflect the penetration of MVPD services and the fact that UHF ratings are only slightly below VHF ratings. A two year transition period should be afforded to allow licensees to come into compliance with such changes in the UHF Discount as the Commission makes in this proceeding.

In considering how best to promote broadcast ownership by minorities and women, the Commission should follow the directive of *Metro Broadcasting*, which authorizes action to promote viewpoint diversity by incentivising minority and female ownership. While the subsequent *Adarand* case altered somewhat the standard of review, it did not disturb the basic findings upheld in *Metro*. The recent Supreme Court decisions in *Grutter* and *Gratz* reaffirm the Commission's power to adopt rules promoting diversity in ownership, and clearly resolve any remaining ambiguity as to the meaning of *Adarand* for the purposes of FCC ownership regulations. To the extent that the D.C. Circuit's *Lutheran Church* holding appears to be to the contrary, it is

superceded by the recent Supreme Court decisions.

The Commission should look at newly-generated evidence which shows that only race conscious measures can achieve the necessary racial diversity in broadcast ownership.

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**COMMENTS OF
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Prometheus Radio Project, by its counsel, Media Access Project, respectfully submits these comments to address two specific issues raised, albeit incompletely in one case, by the Commission’s *Further Notice of Proposed Rulemaking* in this proceeding.

As is set forth below, Prometheus calls for the repeal of the UHF Discount and sets forth an analysis of the proper legal standard to be employed in redressing the inadequacy of minority and female ownership in the broadcasting industry.

I. SINCE THE FCC HAS THE POWER TO REPEAL THE UHF DISCOUNT, AND THERE IS NO REMAINING FACTUAL JUSTIFICATION FOR THE UHF DISCOUNT, IT SHOULD BE REPEALED.

The Commission has asked for comment on whether the Third Circuit’s decision in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) was “ambiguous” with respect to the

UHF discount and whether the Commission has the authority in this proceeding to consider whether to retain, modify or eliminate the UHF discount. It has also sought comment on “the basis for our authority to take such action.”

Prometheus calls upon the Commission to eliminate the UHF discount immediately for all licensees, giving affected broadcasters two years to implement any necessary divestitures. If it chooses not to do so at this time, it should in any event eliminate the UHF discount (with a two year divestiture period) for all licensees as of February 17, 2009. In the event the Commission should nonetheless decide to retain any UHF discount, it must at the least, consider the appropriate level of the discount to take into account the fact that about 90% of U.S. TV households subscribe to either cable or DBS.

Prometheus respectfully submits that, while there is some ambiguity in the Third Circuit’s holding with respect to the UHF discount, this ambiguity extends only to the Commission’s power to address the UHF discount simultaneously with the review mandated by Section 202(h) of the 1996 Telecommunications Act, as amended. The best reading of that decision, and of the governing law, is that the Commission does, indeed, have the authority to consider in this docket whether to eliminate or modify the discount pursuant to its its general authority under the Communications Act of 1934, and that nothing in Section 202(h) or the Third Circuit’s construction of that provision precludes examination of whether to repeal or modify the UHF discount contemporaneously with the conduct of the current quadrennial review.

Since the Third Circuit decision and operative law is not ambiguous with respect to the Commission’s power to eliminate or modify the UHF discount under its general authority the Commission can and should invoke use such power to eliminate this provision. Indeed, in light of the

imminence of the February 17, 2009 digital TV transition date, it would be a gross abuse of discretion for the Commission to fail to take such action.

A. Neither the Statute Nor the Third Circuit’s Interpretation of It Preclude the Commission from Simultaneously Considering Whether to Repeal or Modify the UHF Discount.

Section 202(h) and the Third Circuit’s construction of it clearly permits the Commission to consider whether to modify or repeal the UHF discount as part of the current proceeding. As amended by the Consolidated Appropriations Act of 2004, Section 202(h) reads as follows:

(h) FURTHER COMMISSION REVIEW.--The Commission *shall* review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and *shall* determine whether any of such rules are necessary in the public interest as the result of competition. The Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

(Emphasis supplied.) The plain language of this directive is clear and unambiguous. Because “shall” is a mandatory term, the FCC must review its ownership rules every four years to determine whether each is necessary in the public interest, and it is to repeal or modify those rules accordingly. It does not have the discretion to forgo such a review.

Thus, Section 202(h) establishes what the Commission must do at a minimum. However, the first two sentences of Section 202(h) do not, by their terms, limit the FCC’s discretion to do more; in other words, they do not say what else the FCC “may” do at the same time.

The third sentence of Section 202(h) creates ambiguity, because it says that the mandate for quadrennial review “does not apply to any rules relating to the 39 percent national audience

reach limitation in subsection [202](c)(1)(B).” The cross-referenced section¹ implicitly refers to the UHF discount.² Therefore, it is at least conceivable that this sentence could be read as precluding consideration of the UHF discount in the current docket.

In *Prometheus*, the Third Circuit read this provision to mean that “Congress apparently intended to insulate the UHF discount from periodic review.” *Prometheus v. FCC*, 373 F.3d at 397. However, it then said that

Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h). ***The Commission is now considering its authority going forward to modify or eliminate the UHF discount and recently accepted public comment on this issue. 69 Fed.Reg. 9216-17 (Feb. 27, 2004).*** Barring congressional intervention, *see, e.g.*, S. 1264, 108th Cong. §12 (2003) (proposing phase-out and 2008 sunset of the UHF [Discount]), the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of §202(h).

Id. (Emphasis supplied.)

The italicized sentence makes plain that the Third Circuit did not read Section 202(h) as foreclosing simultaneous review of the UHF discount. The request for public comment referenced in that text was adopted in the same docket as the 2002 Biennial Review conducted under Section 202(h), *i.e.*, Docket 02-277. *Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap*, 19 FCCRcd 2599 (2004). Under the Court’s holding, any review of the national ownership cap was rendered moot for the

¹Section 202(c)(1)(B) directs the FCC to “modify its rules...by increasing the national audience reach limitation for television stations to 39 percent.”

²*See Prometheus v. FCC*, 373 F.3d at 397.

2004 appropriations enactment. *Prometheus v. FCC*, 372 F.3d at Thus, if the Third Circuit read Section 202(h) as precluding simultaneous consideration of the UHF discount, it would also have held that February 27, 2004 request for comment was moot and/or *ultra vires*. Instead, the Court allowed the Commission to go forward, leaving open only the question of what alternate authority the Commission might have to consider the repeal or modification of the UHF discount.

It might be argued that, by saying the Commission is free to reevaluate the UHF discount “outside the context of Section 202(h),” the Court was somehow forbidding inclusion of the UHF discount in any docket which also implements Section 202(h). Not only would that impute a very expansive and intrusive intent to the Court of Appeals, it would also be inconsistent with the Court’s clear statement that “Barring congressional intervention,...the Commission may decide, in the first instance, the scope of its authority.” *Prometheus v. FCC*, 373 F.2d at 397.

B. The Commission Clearly Has the Power To Repeal or Modify the UHF Discount.

Since nothing in Section 202(h) precludes consideration of the UHF discount in this docket, the only remaining question is whether the Commission has independent authority to consider the repeal or modification of the UHF discount. While the Third Circuit appropriately declined to address this question, *Prometheus v. FCC*, 373 F.3d at 397, it is not a hard one. The same general powers which the Commission invoked to adopt the UHF discount give it more than ample authority to repeal or modify the discount. *See Multiple Ownership of AM, FM and Television Broadcast Stations (Reconsideration)*, 100 FCC2d 74, 99 (1985) (citing Sections 4(i), 4(j), 301, 303, 308, 309 and 405 of the Communications Act). *See also* Sections 1 and 2(a) of the Communications Act.

Had Congress wished to limit the Commission's authority to consider the UHF discount, it would have done so expressly. As a general rule of statutory interpretation, Congress does not lightly alter the jurisdiction or authority of an administrative agency, and when it does so it uses explicit language. *See Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not hide "elephants in mouseholes"). In the past, Congress has not hesitated to use mandatory language where it has determined to withdraw traditional Commission authority. For example, prior to 1996, Congress required the Commission to maintain the cable/broadcast cross-ownership prohibition. *See Cable Communication Policy Act of 1984*, Pub. L. 98-549 (codifying broadcast cross-ownership in Section 613(a), 47 USC 533(a)). In 1996, Congress removed this statutory limit on cable/broadcast cross-ownership, restoring the Commission's authority to maintain, modify or eliminate the rule. *See Telecommunications Act of 1996*, Pub. L. 104-104 §202(I). *See also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1035 (D.C. Cir. 2002) (summarizing history of rule).

In modifying Section 202(h), Congress used language that conveys discretion rather than mandatory language. It is only the mandatory review of Section 202(h) that "does not apply" to the 39 percent ownership cap. To the extent that Congress sought to "insulate" the ownership limit, it did so only by giving the Commission discretion to refrain from including the ownership cap in its quadrennial review rather than by ordering the Commission to refrain.

C. The Commission Should Repeal the UHF Discount.

The Commission should repeal the UHF Discount because the justification for its creation has long since ceased to be operative, and there is no other valid basis for retaining it. This question is discussed at greater length in the September 4, 2003 *Petitions for Reconsideration* filed

in Docket 02-277 by Capitol Broadcasting Corporation and the Office of Communication of the United Church of Christ, Inc., *et al.* These *Petitions for Reconsideration* are incorporated into this proceeding. *See Further Notice of Proposed Rulemaking*, Appendix A, 21 FCCRcd 8834, 8852 (2006). *See also, id.* 21 FCCRcd at 8849, ¶36.

There is no longer any meaningful disparity between the reach of UHF and VHF television stations. The UHF Discount was created 21 years ago when there was, indeed, a genuine difference in their reach; the technological limitations of over-the-air transmission meant that UHF stations reached a far smaller proportion of TV homes.³ Thus, in adopting the UHF Discount, the Commission said

Consistent with the diversity objectives expressed in our ownership rules,... a[n]... appropriate indicator of the reach handicap of UHF stations is one that measures the actual coverage limitation inherent in the UHF signal. Therefore,... we believe that owners of UHF stations should be attributed with only 50% of...a market's theoretical audience reach to account for this disparity....Furthermore, the discount approach provides a measure of the actual voice handicap and is therefore consistent with our traditional diversity objectives.

Multiple Ownership of AM, FM and Television Broadcast Stations (Reconsideration), 100 FCC2d at 93-94. *See also, 1998 Biennial Review*, 15 FCCRcd 11058, 11068 (2000) (“attributing UHF stations with 50 percent of an ADI market’s audience reach was intended to address the fundamental disadvantage of UHF television in reaching viewers”)

As of 1985, cable reached approximately 30% of TV households. There was no DBS or other MVPD service available. The impact of the so-called “fin-syn” rules was just beginning to

³*See Multiple Ownership of AM, FM and Television Broadcast Stations (Reconsideration)*, 100 FCC2d at 93. *See also Comparability for UHF Television, Final Report*, September 1980 at 2.

create conditions that would give rise to a fourth major network. As a consequence, the Commission had a valid basis for concluding that there was a significant UHF disparity, if not for the essentially unexplained choice of 50% as the size of the UHF Discount.

The Commission's most recent report on the state of the video market indicates that, as of last year, some 86% of households now subscribe to cable, DBS or another MVPD service. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCCRcd 2503, 2506 (2006). UHF stations' penetration is now assured by the statutory benefits of cable must-carry and DBS carry one/carry all provisions. In addition, as Capitol Broadcasting showed in its May 29, 2003 *ex parte* letter in Docket 02-277, changes in FCC authorized power levels has substantially ameliorated differences in over-the-air reception between UHF and VHF. UHF/VHF parity is further borne out by Capitol's demonstration in the May 29, 2003 letter that the UHF/VHF ratings shortfall is now likely to be between 4 and 9 percent, not 50 percent.

The audience reach facts that justified a UHF discount in 1985 cannot possibly support retaining that provision today. Moreover, the fact that Congress has now set a "hard date" for the digital TV transition provides overwhelming additional reason to repeal the discount. Indeed, the Commission has essentially acknowledged just as much. In the *2002 Biennial Review Order*, the Commission stated that "[I]t is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized." *2002 Biennial Review*, 18 FCCRcd 13620, 13847 (2003).⁴

⁴Nor can the Commission justify the disparate treatment of UHF Discount versus other existing TV ownership rules. The local TV and TV/Newspaper cross-ownership rules do not distinguish between UHF and VHF stations.

Thus, even if the Commission were inclined to retain the UHF discount in any form, it should in any event eliminate the discount as of the “hard date” for the digital TV transition - February 17, 2009.

D. If the Commission Were to Retain the UHF Discount, it Must in Any Event Modify the Size of the Discount to Reflect Actual Conditions.

It is clear from the foregoing that, even if the Commission were to determine that a UHF Discount should be retained, there is absolutely no factual basis to support the 50% figure originally adopted in 1985. At the very least, the Commission must modify the UHF discount to reflect current conditions with respect to any claimed disparity between UHF and VHF stations. Given the fact that MVPD penetration is approaching 90 percent and ratings differentials are at most 10 percent, the highest discount the Commission could conceivably justify would be 10 percent.

E. The Commission Should Afford a Two Year Period Within Which to Come into Compliance with Any Revisions or Repeal of the Uhf Discount.

In light of the fact that there is no valid basis for any UHF Discount, Prometheus asks that the Commission repeal the UHF discount immediately. Recognizing that there is need for an orderly transition, Prometheus suggests that the Commission afford two years for any necessary divestitures necessary for obtaining full compliance with the new rules. This is a very generous time period when compared to the divestiture requirements the Commission has typically ordered through temporary waivers of the ownership rules. It is also consistent with the two year divestiture period mandated for the somewhat analogous circumstances described in Section 202(c)(3) of the 1996 Telecommunications Act as amended by the Consolidated Appropriations Act of 2004.⁵

⁵Under that provision, “A person...that exceeds the 39 percent national audience reach limitation...through grant, transfer, or assignment...shall have not more than 2 years...to come into

II. THE COMMISSION MUST CONSIDER HOW BEST TO USE THE OWNERSHIP RULES TO PROMOTE OWNERSHIP BY WOMEN AND MINORITIES.

Under the terms of the *Prometheus v. FCC* remand, the Commission is required to consider proposals to promote minority ownership. *Prometheus v. FCC*, 373 F.3d at 421 & n.59 (3d Cir. 2004). For reasons set forth in the Minority Media Telecommunications Coalition's August 23, 2006 *Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice*, Prometheus respectfully submits that the Commission has failed to comply with the remand of the Third Circuit, and that it must provide new and procedurally sufficient notice of various proposals to enhance minority and female ownership in the broadcasting industry.

Apart from the details of the Commission's policies, there is also an important issue as to the appropriate legal standard under which to review them. There is considerable confusion over the proper analysis for the permissibility of race-conscious and gender-conscious remedies.⁶ Specifically, does the Fifth Amendment even permit race-conscious means of promoting viewpoint diversity in broadcasting? *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). And, if so, what evidentiary record must the Commission have to support minority

compliance with such limitation.”

⁶For simplicity's sake, Commenters shall simply refer to “race-conscious” remedies. Whether gender-conscious means of promoting ownership require strict scrutiny or intermediate scrutiny remains an open question. Generally, the Supreme Court has held that gender distinctions are subject to intermediate, rather than heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515 (1996). In *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 16 (2001), however, the D.C. Circuit applied strict scrutiny to both the minority and gender oriented EEO rules. Because Commenters believe that the Commission has more than adequate authority to use race-conscious means of increasing diversity of views, the Commission need not address this question.

preferences?

A proper examination of the critical Supreme Court cases, *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and *Grutter v. Bollinger*, 539 U.S. 306 (2003) resolves these lingering doubts. Under the applicable case law, the Commission can use race-conscious means to promote diversity, but must apply the “strict scrutiny” standard of Constitutional review. As *Grutter* teaches, however, strict scrutiny is not “strict in theory, fatal in fact.” To the extent *Lutheran Church* and its progeny purport to hold to the contrary, *i.e.*, that promoting diversity of views is not a “compelling government interest” that survives strict scrutiny, 141 F.3d at 351-352, the Commission must treat the Supreme Court’s subsequent decision in *Grutter* to be controlling.

Based on the findings in *Metro Broadcasting*, which were unaltered by *Adarand*, and given the nature of the evidence the *Grutter* Court found sufficient to support the race-conscious means of promoting diversity in higher education, the Commission has more than sufficient evidence to adopt race-conscious remedies to promote diversity in broadcasting. Furthermore, in the years since the Commission suspended its efforts to promote minority ownership in the wake of *Adarand*, the Commission has conducted inquiries and studies into the status of minority ownership and the link between enhancing minority ownership and enhancing program diversity. *See, e.g.*, Release: FCC Office of the Chairman – Studies Indicate Need to Promote Wireless and Broadcast License Ownership by Small, Women, and Minority Owned Businesses, 2000 WL 1808326 (announcing results of five studies designed to determine whether measures to promote ownership by minorities and women meet strict scrutiny requirements of *Adarand*); *In re 1998 Biennial Review, Streamlining of Mass Media Applications, Rules and Procedures*, 13 FCCRcd 23056, 23097-98

(1998) (soliciting evidence on whether minority preferences can satisfy *Aderand* standard). When combined with the additional information on minority ownership submitted by others in this docket, the record clearly satisfies the strict scrutiny standard for promoting diversity based on *Bollinger*.

A. *Metro Broadcasting And The Relationship of Minority Ownership To Viewpoint Diversity.*

In *Metro Broadcasting*, the Court considered whether the Commission's policies promoting diversity of viewpoints through promoting minority ownership violated the Equal Protection clause. Of significance, the Court considered *two* questions. First, the Court determined the appropriate standard of review for race-conscious policies. Second, the Court applied the standard to the Commission's policies designed to promote ownership.

With regard to the first question, the Court held that race-conscious policies designed to further positive government ends, what the Court termed "beneficial" race-conscious policies, were subject to intermediate scrutiny rather than strict scrutiny. The Court also held that a more lenient standard applied to beneficial distinctions created by Congress than by state governments, as a consequence of Congress' power under Section 5 of the Fourteenth Amendment.

Next, the Court analyzed the Commission's minority "distress sale" policy under this standard. Commission interpreted the Communications Act as imposing an obligation to promote ownership of broadcast outlets by minorities and women. This obligation flowed not from an effort to remediate past discrimination, but from the obligation to promote diversity of views in programming. The Supreme Court found that Congress had explicitly endorsed the Commission's determination that all audiences -- minority and non-minority alike -- benefitted from exposure to a wider variety of views. Minority ownership, like local ownership, was one more factor that

created a greater likelihood of diverse programming choices. *Id.*, 539 U.S. at 553-555, 570-71. The efforts of Congress and the FCC to promote minority ownership as a means of promoting viewpoint diversity in broadcasting therefore extended back decades, during which time Congress and the FCC constantly reevaluated the impact of their efforts and whether the link between minority ownership and promoting diversity continued to exist. *Id.*, 539 U.S. at 555-558, 572-79.

As the Supreme Court stressed, this explicit consideration of race did not rest on “impermissible stereotyping” or on the assumption that all minority owners of the same race or ethnicity would express the same viewpoint or find the same programming appealing. *Id.*, 539 U.S. at 579-80. To the contrary, the Court described numerous empirical studies and the long experience of both Congress and the Commission in promoting diversity of views as providing evidence that minority ownership, like local ownership or any other factor that prevented broadcast owners from becoming a “homogeneous group,” increased the likelihood that broadcasting would reflect different perspectives and a wider array of programming choices and news coverage. *Id.*, 539 U.S. at 580-83.

Although applying a more lenient standard than strict scrutiny, the Court considered whether alternate, race neutral means could achieve the same level of diversity. *Id.*, 539 U.S. at 590-96. The Court concluded that other efforts to influence programming, such as mandating particular formats or types of programming, had been rejected by the Commission for a variety of reasons. *Id.* Accordingly, only efforts to promote minority ownership, such as the distress sale policy at issue, could provide this type of racial diversity in programming for all Americans. Finally, the Court concluded that the FCC’s modest steps to promote minority ownership did not unduly burden non-minorities or foreclose non-minorities from broadcast ownership. *Id.*, 539 U.S. at 598-600.

B. *Adarand* Altered the Standard of Review, But Not the Basic Findings of *Metro Broadcasting*, With Regard to the Connection Between Minority Ownership and Diversity of Views.

Five years later, in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), the Court revisited the question of the appropriate standard of review for race-conscious measures. In *Adarand*, the Court explicitly overruled the exceptions to strict scrutiny of race-conscious policies set forth in *Metro Broadcasting*. *i.e.*, that courts would use intermediate scrutiny to test “beneficial” race-conscious policies developed by Congress while courts reviewed all other race-conscious policies, including “beneficial” policies developed by states, under strict scrutiny. Under *Adarand*, strict scrutiny applies to all race-conscious government policies.

Of particular importance here, the *Adarand* emphasized that it overruled *Metro Broadcasting*, but *only* to the extent that *Metro Broadcasting* was “inconsistent” with this new standard of review. *Id.*, 515 U.S. at 227. The Court did not in any way alter the extensive findings made in *Metro Broadcasting* as to the relationship between minority ownership and viewpoint diversity, or determine whether the government’s interest in promoting diversity of views in broadcasting was sufficiently compelling to survive strict scrutiny.

To the contrary, the *Adarand* Court emphasized that “we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact,’” *id.*, 515 U.S. at 237, and that it made no determination on what constituted a compelling interest or what evidence it would require. *Cf.*, *id.*, 515 U.S. at 239 (opinion of Scalia, J.) (questioning whether remediation of past discrimination qualifies as a “compelling government interest”). Indeed, the *Adarand* Court did not even presume to determine whether the instant case would or would not survive strict scrutiny, preferring to remand the matter back to the district court to better develop the record. *Id.*, 515 U.S. at 237-38.

In his dissent, Justice Stevens emphasized the limited impact of *Adarand* on *Metro*

Broadcasting:

The majority today overrules *Metro Broadcasting* only insofar as it is “inconsistent with [the] holding” that strict scrutiny applies to “benign” racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court’s holding today – indeed, the question is not remotely presented in this case – and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

Id., 515 U.S. at 258 (Stevens, J., dissenting) (emphasis in original, citations omitted).

In response to the *Adarand* decision, the Commission suspended a number of its programs designed to promote minority ownership and initiated a study on whether race-conscious means of promoting minority ownership could survive strict scrutiny under *Adarand*. See, e.g., *In re Commission Regulations Governing Television Broadcasting*, 10 FCCRcd 12277 (1995). Although the Commission ultimately issued a number of reports and modified proceedings to avoid any direct reliance on race-conscious measures to promote minority ownership, see, e.g., *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCCRcd 11872 (1995), the Commission did not reach a determination on what ownership policies to adopt to promote minority ownership under the strict scrutiny standard set forth in *Adarand*.

In the 2002 *Biennial Review*, the Commission again considered whether to adopt mechanisms for promoting diversity of ownership and views *via* race-conscious and gender-conscious policies. 2003 *Biennial Review Order*, 18 FCCRcd at 13634-38. The 2003 *Order* acknowledged the FCC’s longstanding policy to encourage ownership by minorities and women, and affirmed that this remained an important element of the Commission’s ownership policy. The 2003 *Order* praised the “many creative proposals” the Commission received to promote minority ownership. The

Commission majority, however, determined that it needed “a more thorough exploration of these issues” to ensure that any rules adopted would survive judicial scrutiny. The *2003 Order* therefore did not adopt any particular rules designed to promote minority ownership, although the *Order* had considerable praise for twelve specific proposals crafted by the Minority Media Telecommunications Council. Instead, the Commission majority promised to initiate a separate rule-making to determine how best to promote minority ownership.

In its remand to the Commission, the *Prometheus* Court ordered the Commission to consider how to promote minority ownership as a means of promoting diversity of views as part of further consideration of the ownership rules. *Prometheus v. FCC*, 373 F.3d at 421. The *Prometheus* Court took the Commission majority to task for its failure to acknowledge the decline in minority ownership or to examine the impact of its decisions to relax ownership limits on minority ownership. Finally, the *Prometheus* Court ordered the Commission to consider on remand the MMTC proposals and other affirmative measures to increase minority ownership. *Id.* at n.59.

The Commission therefore finds itself confronting in this proceeding whether and to what extent the Commission may use race-conscious means to promote minority ownership, a question it has failed to answer in the more than ten years since the Supreme Court decided *Adarand*. Fortunately, following the adoption and release of the *2003 Order*, the Supreme Court decided two cases that provide the Commission with necessary guidance on how to resolve this question.

C. *Grutter and Gratz Resolve Any Ambiguity On the Limited Impact of Adarand On Metro Broadcasting.*

Since the Commission issued its *Biennial Review Order* on June 2, 2003, the Supreme Court decided two cases that both resolve the question as to whether viewpoint diversity is a sufficiently

compelling government interest, and the proper framework for race-conscious remedies to promote diversity. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court held that promoting diversity was a compelling government interest that, under proper conditions, could survive strict scrutiny. On the same day, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court ruled that a program using race-conscious means of increasing diversity must still provide sufficient flexibility for individual determinations.

In *Grutter*, the Court held in the context of higher education that the government had a compelling interest in sustaining a “critical mass” of visibly minority students for the express purpose of fostering diversity among future business and political leaders. *Grutter*, 539 U.S. at 330-33. “These benefits are not theoretical,” the Court held, “but real.” *Id.* 539 U.S. at 330. Specifically, “to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.*, 539 U.S. at 332. Further, the court considered it reasonable for institutions of higher education to consider that “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own unique experience of being a racial minority.” *Id.*, 539 U.S. at 333.

The interest in promoting exposure to diverse views and information in broadcast media is surely no less compelling than the interest of a state run university in promoting diversity of its student body. In the broadcasting context, the Supreme Court has found that the public has a “paramount” First Amendment right to exposure to diverse perspectives. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-91 (1969). In addition, the continued viability of *Metro Broadcasting* in its conclusions on the permissibility of the FCC’s efforts to promote minority ownership draws

support from its extensive reliance on the analysis of Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 311-313 (1978)(opinion of Powell, J.). *Metro Broadcasting*, 497 U.S. at 579-580. The *Grutter* Court explicitly embraced this approach in finding that the University of Michigan Law School had a compelling government interest in promoting diversity of its student body. Given that *Metro Broadcasting* applied the same analysis as *Grutter* to determine the compelling nature of the government's interest, and that the Supreme Court has determined that the viewing public has not merely an interest, but a paramount First Amendment right to diverse broadcast programming, no one can seriously question in the wake of *Grutter* that the government has a compelling interest in promoting diversity in broadcast ownership.

The logic of *Grutter* applies with even greater force to broadcast media than it does to higher education. In addition to the Supreme Court's determination in *Red Lion* that the public has a paramount First Amendment right to diverse programming, it is undisputed that television and radio remain among the most powerful influences on our national lives and personal expectations. Who we see and hear on television and the radio, as well as what they say and do, can either challenge our stereotypes or confirm them. If the state requires a critical mass of racially diverse students in a law school to provide visual confirmation of the openness and equality of our society, how much more so must the government ensure that all citizens – not merely future leaders – enjoy broad exposure to these same people, views and perspectives through the mass media? On this logic alone, regardless of the First Amendment right described in *Red Lion*, promoting diversity of ownership to ensure that a “critical mass” of these views becomes available to the public rises to the level of a compelling government purpose “of the highest order.” *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 663 (1997).

As the Supreme Court found in *Metro Broadcasting*, the conclusion that racial diversity of ownership, as much as geographic diversity or other factors, contributes to the diversity of programming rests on empirical evidence and long experience in administering broadcast licenses rather than on some stereotypical notion that all members of a minority group think or act the same. 497 U.S. at 579-583. Indeed, the empirical record cited by the Court in *Metro Broadcasting* exceeds the evidence relied upon in *Grutter*.

Furthermore, the Commission's ownership rules avoid the inflexibility and strict mathematical approach the Court found fatal in the companion case to *Grutter*, *Gratz v. Bollinger*. In *Gratz*, the Court held that consideration of race through a mechanistic process that did not also provide for unique consideration of applicants as individuals could not survive strict scrutiny.

Such a mechanistic approach is entirely prohibited by the requirement under Sections 307(a) and 310(d) of the Communications Act that the Commission make an affirmative determination that each license renewal, assignment or transfer serves the public interest, convenience, and necessity. As the Supreme Court has held since the earliest days of radio, while the Commission may create rules and policies to guide its determination of what best serves the public interest, each assignment or transfer still requires a unique determination on the merits of the individual case. *See, e.g., Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)(all applicants are entitled to a hearing and determination on whether application best serves the public interest); *Federal Radio Commission v. Nelson Bros.*, 289 U.S. 266 (1933)(Commission not bound by rigid quota, must make individual assignments based on public interest determination). The Commission may waive a rule and grant an application because to do so serves the public interest, or it may deny an application that conforms with the rules because the Commission determines that for other reasons grant of the

application would not serve the public interest. *See, e.g., United States v. Storer Broadcasting Co.*, (1956) (adoption of general rules does not deprive applicants of individualized consideration required under the Act), *Nelson Bros., supra* (Commission may refuse to renew a license even where licensee did not violate any Commission rules or policies, if the Commission determines that refusal to renew serves the public interest).

Accordingly, because each determination to grant an application for an initial license, a license renewal, or a license transfer rests on an individualized determination of all public interest factors similar to the determination made with regard to each admission in *Grutter*, rules designed to foster minority ownership fall into the permissible form of race-conscious consideration rather than the impermissible mechanistic formula rejected by *Gratz*. Particularly in the realm of rules encouraging sale of licenses to minorities, such as the proposals made by MMTC, the requirement for the Commission to make an individualized analysis based on all facts that could effect the public interest guarantees the individualized consideration necessitated by *Grutter* and *Gratz*.

Finally, such policies do not unduly burden non-minority license holders or non-minorities seeking to become license holders for the reasons found in *Metro Broadcasting*. Indeed, while the Commission may adopt policies that encourage existing licensees to sell to minorities, nothing prevents a licensee from accepting an offer from a non-minority. Nor would such a transaction be evaluated differently under Section 310(d) than a proposed transfer to a minority licensee.

D. To the Extent *Lutheran Church* Purports to Find That Diversity Is Not A “Compelling Interest,” It Is Overruled by *Grutter*.

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.) *petition for r’hg by panel denied* 154 F.3d 487, *petition for r’hg en banc denied* 154 F.3d 494 (1998), the United States

Court of Appeals for the District of Columbia Circuit struck down the FCC's equal employment opportunity rules as incompatible with the strict scrutiny requirement of *Adarand*. See also *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir.) petitions for r'hg by panel and en banc denied, 253 F.3d 732 (2001) (reversing revised EEO rules). In addition to casting doubt on the general validity of the Court's reasoning in *Metro Broadcasting*, the *Lutheran Church* Court held that *Metro Broadcasting* had merely found the diversity interest "important" rather than "compelling." *Lutheran Church*, 141 F.3d at 354. In *dicta* since proven wrong by *Grutter*, the *Lutheran Church* Court speculated that *Adarand* represented a move "away" from the very idea that race-conscious efforts to promote diversity could rise to the level of a compelling interest. *Id.* at 355. In what now can only be considered a rather ironic prediction in light of the holding of *Grutter*, the *Lutheran Church* panel went on to opinion that the *Aderand* decision presaged a new day in which consideration of race-conscious remedies to promote diversity would be considered "antithetical to the Constitution," as "encouraging" stereotypes about race based differences. *Cf. Grutter*, 539 U.S. at 330 (diversity promotes "cross-racial understanding" and help to "break down racial stereotypes").

To the extent *Lutheran Church* held that government's interest in diversity could *never* rise to the level of a "compelling" government interest and thus conflicts with *Grutter*, *Grutter* clearly controls the analysis here. Less clear is the applicability of *Lutheran Church's* holding, based on reasoning rendered highly suspect by *Grutter*, that *Metro Broadcasting* had failed to establish as a matter of law the compelling connection between promoting minority ownership and promoting diversity of voices in broadcasting.

As *Lutheran Church* itself noted, the government's interest in promoting diversity of views

is significantly stronger in the context of ownership than in the context of EEO outreach. *Lutheran Church*, 141 F.3d at 354-55. *Accord Metro Broadcasting* (Commission has traditionally promoted diversity through ownership rules and consideration of diverse factors in award of licenses). The Commission can avoid any conflict between *Lutheran Church* (and *MD/DC/ DE Broadcasters*) and *Grutter* by limiting *Lutheran Church* to the EEO policy at issue in that case.

A narrow construction of *Lutheran Church* limiting its now problematic holding to EEO rules also avoids a conflict with the explicit remand instructions of *Prometheus Radio*. The *Prometheus v. FCC* Court explicitly instructed the Commission to consider the impact of any changes in its ownership rules on minority ownership, and to consider positive measures to promote minority ownership. If *Lutheran Church* remains good law, and applies to ownership as well as EEO policies, the Commission faces an unresolvable conflict.

E. Additional New Evidence In This Proceeding Further Underscores the Need For Race-Conscious Means of Promoting Broadcast Diversity and Satisfies the Strict Scrutiny Standard Under *Grutter*.

However the Commission resolves the question of the applicability of *Lutheran Church* to this proceeding, it may feel an understandable reluctance in relying solely on the findings in *Metro Broadcasting*. *Accord Grutter* at 341-42 (requiring that race-conscious remedies undergo periodic reevaluation to determine if they remain necessary). Evidence introduced in the record of this proceeding, however, continues to affirm that only race-conscious measures can achieve the needed racial diversity in broadcasting.

Significantly, however, the Commission should not require participants in this proceeding to reestablish and rejustify the connection between minority ownership and increased diversity in programming. That connection was already well established by *Metro Broadcasting* and the studies

and experience to which the Court referred. Nor can *Grutter's* instruction to require occasional reevaluation of race-conscious policies be fairly understood as requiring a complete reexamination of every premise and conclusion that justified adoption of the policy in the first place. Rather, as explained by *Grutter*, the focus of such reevaluation is whether the need for a race-conscious remedy has finally come to an end. *Grutter*, 539 U.S. at 342.

Furthermore, in light of the abysmally low level of minority ownership as a consequence of consolidation and elimination of race-conscious efforts to promote minority ownership since *Adarand*, compiling significant empirical evidence could well prove difficult. Any such empirical studies would, of necessity, rely upon historic information from the period under consideration in *Metro Broadcasting*, when a greater number of minority owned outlets existed.

Therefore, in fulfilling *Grutter's* requirement to ascertain if a race-conscious remedy remains necessary, the Commission should look to the current level of minority ownership and accompanying diverse programming. As demonstrated by the submissions of numerous other parties, the need to promote minority ownership through race-conscious measures has become even greater since the Supreme Court affirmed their validity in *Metro Broadcasting*. Accordingly, applying the *Grutter* framework, the Commission should carefully consider what policies will best promote this compelling government interest in minority ownership and diverse programming.

CONCLUSION

Wherefore, Prometheus Radio Project asks that the Commission repeal the UHF Discount, that it apply the legal analysis set forth herein and grant all such other relief as may be just and proper.

Respectfully submitted,

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October 23, 2006