

October 28, 2008

The Honorable Kevin Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Chairman Martin:

On behalf of the Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”), I present you with three recommendations that we believe will enhance the ability of minorities and women to participate in telecommunications and related industries. These recommendations came from our Subcommittees on Eligible Entities, Access to Capital, and Emerging Technologies, whose efforts in this regard are to be commended. At today’s meeting of the full Diversity Committee, each of the recommendations was approved.

Report and Recommendation on Eligible Entities

The Diversity Committee recommends that until the Commission can adopt a constitutionally sustainable socially and economically disadvantaged business (“SDB”) program, the Commission should substitute Full File Review (“FFR”) for the small business-based eligible entity paradigm it recently adopted.¹

The Diversity Committee prepared its Report and Recommendation on Eligible Entities in response to the Commission’s request for assistance in arriving at a constitutionally sustainable definition of eligible entities that would advance the Commission’s goals of promoting minority and female ownership.²

Our Eligible Entities Subcommittee reviewed the Commission’s designated entity and new entrant programs, both of which were designed to promote diversity of ownership. The Eligible Entities Subcommittee also interviewed seven subject matter

¹ See Promoting Diversification of Ownership in the Broadcasting Services (Report & Order and Third Further Notice of Proposed Rulemaking) (“Broadcast Diversity Order”), 23 FCC Rcd 5922, 5925-27 ¶¶6-9 (2008).

² Broadcast Diversity Order, 23 FCC Rcd at 5950-52 ¶¶80-86.

experts and examined diversity programs in other areas of government, including models for socially and economically disadvantaged businesses (“SDBs”) and Full File Review (“FFR”).³ The Diversity Committee believes that SDB and FFR are both workable models that can be designed into programs that fit current communications licensing paradigms. SDB-based programs have withstood judicial review in other industries when the government developed a record to examine the state of diversity in the industry and what accounts for the lack of diversity in that industry. The Commission’s latest research on diversity in ownership was conducted in 2000 and a constitutionally sustainable SDB-based program would need to be bolstered significantly by updated disparity studies, which should consider whether and how an applicant’s deal size, desire to serve diverse, underserved communities, and plans to incubate SDBs could be factors in an SDB-based eligible entity paradigm.

Because of its race-neutrality, an FFR-based program can be implemented in the short-term, without waiting for the Commission to update the disparity studies and other research necessary to sustain the constitutionality of an SDB-based program. The Commission could achieve this by issuing (1) a Second Report and Order, in the Broadcast Diversity docket (MB Docket No. 07-294), that adopts the legal and policy recommendations in the attached Report, and (2) a Media Bureau request for notice and comment on the administrative issues discussed in or identified in this Report. In the meantime, the Commission should act promptly to update existing disparity and other studies necessary to sustain an SDB-based program.

Recommendation on Application and Regulatory Fees

The Diversity Committee recommends that the Commission expeditiously develop new rules affording eligible entities a rebuttable presumption of eligibility for waivers, reductions or deferrals of the fees the Commission imposes on applicants and regulatees.⁴

Our Access to Capital Subcommittee reviewed the Commission’s statutory obligations and flexibility for collecting regulatory fees, as well as the impact of these fees on small businesses. The Commission has only specifically recognized financial hardship as a justification for waiver or deferral of an application or processing fee.⁵ However, there is no statutory bar from recognizing additional justifications, such as promoting ownership diversity, or providing public safety and security. A small business

³ The Commission sought comment on these paradigms in the Broadcast Diversity Order. Id. at 5950-51 ¶¶80-84 (SDBs); id. at 5951-52 ¶85 (FFR).

⁴ This recommendation emerged from the Commission’s En Banc Hearing on Communications Financing, held July 29, 2008 at the Schomburg Center for Research in Black Culture, New York, NY.

⁵ 47 C.F.R. §1.1117(c) (application and other processing fees); 47 C.F.R. §§1.1166(c)-(d) (regulatory fees).

must pay the same fee amounts as the amounts paid by a large company. Therefore, fees represent a much higher proportion of the income or assets of small businesses, which can impair the Commission's ability to fulfill Congress' direction to promote ownership diversity and lift market entry barriers.

In developing new rules, an eligible entity could be defined as an SDB,⁶ as an entity provided essential services to isolated populations, as an entity that incubates eligible entities,⁷ or as a small business that has individually faced and (where relevant) overcome disadvantages.⁸ Due to current economic conditions that threaten the economic viability of eligible entities (however defined), we recommend that such a rulemaking proceeding be expedited and the effective date for applicable fee relief should be retroactive to the date on which the NPRM was published in the Federal Register.

The NPRM should seek comment on (1) the classifications of entities whose members would be rebuttably presumed eligible for individual fee relief; (2) which types of fees should be subject to relief; (3) whether fee relief should be offered in the form of waivers, or reductions, or deferrals; (4) the aggregate extent to which fee waivers, reductions or deferrals could be offered without materially impairing the Commission's ability to generate financing for its own operations, inasmuch as the Commission's budget requirements may limit its flexibility in offering fee relief; and (5) the amounts of reductions of specific fees, and the lengths of deferrals of specific fees, that would be appropriate.

Recommendation on S-Class Television Licenses

Following consideration of the subject by our Emerging Technologies Subcommittee, the Diversity Committee recommends the issuance of a NPRM to consider the Media Access Project ("MAP") proposal for a new class of stations, "Class S" stations, which would share time with the original licensees of multiplexed, full power, commercial digital TV stations.

The Diversity Committee supports the leasing of DTV subchannels and regards the S-Class License proposal as an additional option available to a broadcaster. The concept of an S-Class License is that a DTV licensee could voluntarily assign the right to operate a DTV sub-channel to another entity, and thus essentially monetize the channel.

⁶ As the Commission sought comment on in the Broadcast Diversity Order. 23 FCC Rcd at 5950 ¶¶80-81.

⁷ Companies incubating eligible entities might also deserve relief when such incubation provides the "benefit of an incentive for eligible entity financing." Id. at 5943 ¶56.

⁸ Similar to the FFR system that the Commission sought comment on in the Broadcast Diversity Order. Id. 5951-52 ¶85.

MAP first proposed and developed this concept in 1992, and presented the issue again at the Commission's July 29, 2008 *En Banc* Hearing on Communications Financing.⁹

MAP's S-Class proposal refines the Diversity Committee's DTV share-time concept presented in 2007.¹⁰ In both formulations, the relationship between the DTV station and the sub-channel owner would be analogous to the relationship between the owner of a condominium building and the owners of condominium units in the building. The DTV sub-channel or HD channel licensee would control its channel's content, while its engineering would continue to be handled by the DTV or FM station licensee for a fee.

In conclusion, as Chair of the Diversity Committee, I want to thank all of its members for their efforts in developing these recommendations for consideration by the Commission. We are confident that Commission approval of the attached recommendations would advance the Commission's goal of promoting diversity of ownership by encouraging minorities and women to seek opportunities in FCC-regulated industries.

Sincerely,

Henry Rivera
Chair
Advisory Committee on Diversity for
Communications in the Digital Age

⁹ See Testimony of Andrew Jay Schwartzman, President and CEO of Media Access Project, FCC *En Banc Hearing* Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

¹⁰ See Recommendation on Leasing or Ownership of FM or DTV Sub-channels Under the Share-Time Rule (September 27, 2007).