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

In the Matter of	)	
	)	MB Docket No. 14-50
2014 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. 09-182
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 No. 07-294
Promoting Diversification of Ownership In the Broadcasting Services	)	
	)	MB Docket No. 04-256
Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets	)	

To: The Media Bureau

REPLY COMMENTS OF NATIVE PUBLIC MEDIA AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS

Native Public Media ("NPM") and the National Congress of American Indians ("NCAI") respectfully submits these reply comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") adopted by the Federal Communications Commission's ("FCC" or "Commission") on March 31, 2014, in the above-captioned proceeding.[1]

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[1] *In the matter of 2014 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*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 29 FCC Rcd 4371 (2014) ("FNPRM"). *See also In the matter of 2014 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*, Order, DA 14-525 (released June 27, 2014) (extending the reply comment deadline to September 8, 2014.)

Native Public Media is a national non-profit organization whose mission is to promote healthy, engaged and independent Native Communities through media access, control and ownership. NPM represents the interests of over 50 noncommercial radio stations that serve Native Nations and actively encourages Native people across the United States to participate in all forms of media. The National Congress of American Indians is the largest and oldest representative organization of American Indian and Alaska Native tribal governments. Since 1944, NCAI has represented the interests of tribal nations and their citizens to advance and promote the advancement of tribal sovereignty and self-determination.

NPM and NCAI have been active in FCC rulemaking proceedings, in which it has advocated policies that foster diversity and the delivery of all forms of communications services to historically underserved Native communities. While NPM and NCAI generally support all Commission efforts to foster diversity in media ownership, these comments are limited to the definition of an "eligible entity" and to the use of that concept for diversifying ownership of broadcast media.[2]

I. The FNPRM Reinstates a Revenue-Based Definition of Eligible Entity.

In 2008, the FCC released the Diversity Order, which attempted to "facilitate ownership diversity and new entry in the broadcasting industry."[3] As part of that effort, the Diversity Order defined a class of "eligible entities" and modified the existing FCC ownership rules to provide certain benefits to eligible entities.[4] The Diversity Order defined an eligible entity as "any entity that qualifies as a small business under the Small Business Administration's ("SBA") size

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[2] *See Id.* at p. 4479, ¶ 244 (seeking "comment on specific measures… that may provide further opportunities for minorities and women to own and operate broadcast outlets").
[3] *Programming Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 2925 (2008) ("Diversity Order").
[4] *Id.* at 5925.

standards for its industry grouping."[5] The SBA standard is based on maximum annual receipts of $13 million for television and $6.5 million for radio broadcasting entities.[6] The benefits available to eligible entities adopted in the Diversity Order included permitting the assignment of expiring construction permits to eligible entities that pledged to complete construction of the authorized facility within the greater of the time remaining on the original permit or 18 months.[7] A revenue-based definition was "race- and gender-neutral" in order to avoid potential constitutional challenge.[8]

In 2011, however, the Third Circuit found that the revenue-based definition of eligible entity lacked "a sufficient analytical connection to the primary issue [i.e. to 'facilitate ownership diversity and new entry in the broadcasting industry'] that the Order intended to address."[9] Accordingly, the Court remanded provisions of the Diversity Order that relied on the revenue-based definition of eligible entity and instructed the FCC to conduct further studies and collect relevant data concerning the benefits of a racial or gender based definition.[10] The FCC immediately suspended its use of the previous "eligible entity" rules.

In section IV of the FNPRM, the Commission now proposes to reinstate the revenue-based definition, remanded in *Prometheus II*, despite the Commission's admission that it "do[es] not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership."[11] The FNPRM also again declines to propose a gender or race-based definition of an eligible entity because of concerns that such a definition could not

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[5] *Id.*; *see also* 47 C.F.R. 73.3598(a).
[6] *Id.* at 5925-5926.
[7] *Id.* at 5930.
[8] *Id.* at 5927.
[9] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470 (3d Cir. 2011) ("*Prometheus II*")
[10] *Id.* at 471.
[11] FNPRM at 4489, ¶ 267.

survive strict scrutiny review under *Adarand*.[12] Although the FNPRM also seeks comments "on specific measures, in addition to those that we tentatively conclude should be reinstated, that may provide further opportunities for minorities and women to own and operate broadcast outlets," it does not make any proposal designed to provide those opportunities.[13]

II. Commenters Argue that the FCC has Failed to Propose Policies that would Promote Minority or Women Ownership.

Several commenters note, if only in passing, that the Commission's proposal to retain a revenue-based definition without adding a race or gender component constitutes a failure to comply with the Third Circuit's mandate in *Prometheus II*.[14] Three commenters, the Minority Media and Telecommunications Council ("MMTC"), the United Church of Christ, et al. ("UCC"), and by the National Association of Black Owned Broadcasters ("NABOB"), offer a more substantive analysis regarding the eligible entity definition.

MMTC argues that the Commission has failed to propose a meaningful definition of an eligible entity that would further diversity goals.[15] MMTC criticizes the FCC for retaining a revenue-based definition with "little regard for whether it will effectively promote minority media ownership."[16] MMTC further argues that the FCC improperly discounted proposals that would advance minority ownership, such as those presented by the Commission's own Federal Advisory Committee on Diversity for Communications in the Digital Age.[17] MMTC states that the FCC mischaracterized the Diversity Committee's Overcoming Disadvantages Preference as

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[12] *Id.* p. 4479, ¶ 244.
[13] *Id.*
[14] *See eg.* Comments of Free Press, page 2 (Aug. 6, 2014) ("If the Commission again fails to study the impact of its rules on diverse ownership or relaxes its rules before doing so, it will again disregard the court's explicit mandate").
[15] Comments of Minority Media and Telecommunications Council, DA 14-50, page 4 (Aug. 6, 2014) ("MMTC Comments").
[16] *Id.* at 5.
[17] *Id.* at 5.

being subject to strict scrutiny, even though it focused on eight categories, none of which is race or gender based.[18] MMTC concludes that the Commission has missed an opportunity to adopt a definition of eligible entity that directly facilitates diversity in broadcast ownership.[19]

Similarly, UCC contends that the Commission "ignored the Third Circuit's clear instructions on remand" by retaining the revenue-based SBA definition without assessing whether such a definition "had any effect on station ownership by minorities and women."[20] UCC argues that the failure of the Commission to "cite any evidence" that the revenue-based definition would promote racial and gender diversity "confirms the Court's conclusion that the definition... lacks a sufficient analytical connection to the goal of racial and gender diversity."[21]

NABOB's comments also criticize the Commission's failure to incorporate race or gender in its proposed definition of an eligible entity.[22] By retaining the revenue-based definition, NABOB states that the Commission is "preparing to issue a report and order… that accomplishes nothing the Court directed it to achieve with respect to the promotion of minority ownership."[23] NABOB requests that the Commission delay issuing any order in this proceeding until it has "initiated all of the studies necessary to meet the strict scrutiny standard of the *Adarand* decision and has adopted a definition of 'eligible entity' that can be used to… promote minority ownership of broadcast facilities."[24]

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[18] *Id.* at 5-6.
[19] *Id.*
[20] *See* Comments of Communication, Inc. of United Church of Christ, Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, Media Council Hawai'I, Prometheus Radio Project, Media Mobilizing Project., DA 14-50, page i (Aug. 6, 2014) ("UCC Comments").
[21] *Id.* at 18.
[22] *See* Comments of the National Association of Black Owned Broadcasters, DA 14-50 (Aug. 6, 2014) ("NABOB Comments").
[23] *Id.* at 11.
[24] *Id.* at iii.

III. The FCC Should Not Reinstate the Definition of Eligible Entity that *Prometheus II* found Inadequate.

NPM and NCAI agree with the commenters summarized in the preceding section. By proposing merely to retain its revenue-based definition of an eligible entity, the Commission has failed to satisfy the *Prometheus II* remand and has thus failed to take any action that would promote diversity in broadcast station ownership. As the Commission itself admits, the connection between the revenue-based definition and minority ownership remains speculative: "we do not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership."[25] The Commission's unwillingness to propose a definition of an eligible entity that would more directly advance the interests of women or minorities is based on its fear that such a definition would not survive strict scrutiny.[26]

IV. The FCC Can Further Its Diversity Goals By Redefining Eligible Entity to Include Native Nations.

Although the FCC is committed to gathering evidence to support a race and gender conscious definition that would diversify ownership in radio, this record is not likely to be completed in the immediate future. Until a record that would support a race and gender inclusive definition is established, NPM and NCAI urge the Commission, in this proceeding, to expand the definition of eligible entity to include Tribes and Tribal Applicants.[27]

The Commission could promote "ownership opportunities and diversity ownership in broadcast media" by expanding the definition of eligible entity definition to include Native Nations.[28] Although the FCC has adopted new measures for increasing Native American

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[25] FNPRM at 4489, ¶ 267.
[26] *Id; see also Prometheus II,* at 471, n. 42 ("stating that the task is difficult in light of *Adarand* does not constitute "considering" proposals… If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies).
[27] *See* 47 C.F.R § 73.7000 (adopting definitions for Tribe and Tribal Applicant).
[28] FNPRM. p. 4479, ¶ 244.

broadcasting ownership, Native Americans remain critically underrepresented. The FCC can take another significant step towards overcoming this underrepresentation by expanding the definition of eligible entity to include Native Nations. No further studies are necessary to implement this definition. The FCC has already determined that a designation based on the status of an entity as a "Tribe" or "Tribal Applicant" does not trigger a strict scrutiny analysis. Therefore, the Commission could immediately alter the definition of eligible entities to be: "any Tribe or Tribal Applicant as defined by 47 C.F.R. § 73.7000."[29] NPM and NCAI do not propose this definition in lieu of a definition that would directly further the ownership interests of women and minorities in broadcasting, but they do propose the definition as a step that the Commission can take now, while it conducts further studies upon which a broader definition could be based.

The FCC has already examined the Constitutional arguments around adopting a tribal priority and determined that strict scrutiny does not apply.[30] In the Rulemaking Procedure adopting a priority for Tribes, the FCC found that under *Morton v. Mancari,* a classification based on Tribes or Tribal Members would not trigger strict scrutiny because such classification was "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion."[31] Accordingly, the FCC determined that "the priority established herein for the benefit of federally recognized Tribes is not constitutionally suspect because it is based on 'the unique legal status of Indian tribes under federal law.'"[32] Similarly, an expansion of the eligible entity definition to include Tribes and Tribal Applicants would not be "constitutionally suspect."[33]

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[29] *See*47 C.F.R. § 73.7000 (adopting definitions for Tribe and Tribal Applicant).
[30] *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd. 1583, 1590 (Feb. 3, 2010).
[31] *Id.* at 1591 (citing *Morton v. Mancari*, 47 U.S. 535 (1974)).
[32] *Id.*
[33] *Id.*

As NPM noted in its recent comments regarding the Online Public File Obligations to Cable and Satellite TV Operators, tribal radio already plays a crucial role in Indian Country.[34] Because Tribal Lands often do not have access to reliable cell service or broadband Internet and some Native communities depend on radio not only to provide cultural information, but also to disseminate news, public safety and health announcements. Despite the critical role played by Tribal radio in Indian Country, many Tribal Applicants have struggled to enter the radio market. As the FCC's Report on Ownership of Commercial Broadcast Stations points out, American Indian, Alaska Native, Native Hawaiian and Other Pacific Islanders combined only own 85 broadcast stations nationwide.[35] The majority of those stations are noncommercial. Allowing Tribes and Tribal Applicants to take advantage of the benefits available to eligible entities would provide significant incentives for an increase in Tribal broadcast ownership of both commercial and noncommercial stations.

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[34] *See* Comments of Native Public Media, MB Docket No. 14-127 (Aug. 28, 2014).

[35] *See In the matter of 2014 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*, Report on Ownership of Commercial Broadcast Stations, MB Docket Nos. 14-50, 09-182, 07-294; DA 14-924 (June 27, 2014).

Basing a definition of eligible entities on Tribes and Tribal Applicants would not only further the Commission's goal of promoting diversity to broadcast ownership, it would also facilitate a necessary acceleration in the number of Tribal owners without triggering strict scrutiny. Therefore, NPM and NCAI respectfully urge the Commission to expand the definition of eligible entities to include Tribes and Tribal Applicants.

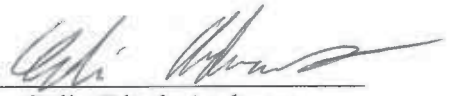
Respectfully submitted,

NATIONAL CONGRESS OF AMERICAN INDIANS

By: /s/
Jacqueline Pata
Executive Director
1516 P Street NW
Washington, DC 20005
(202) 466-7767

NATIVE PUBLIC MEDIA

By: /s/
Loris Ann Taylor
President
P.O. Box 3955
Flagstaff, AZ 86003
(928) 853-2430

By: 
Colin Black Andrews
John Crigler
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007
(202) 965-7880
Attorneys for Native Public Media

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